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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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June 21, 2012

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LAWRENCE J. BRADY
STAFF DIRECTOR

The Honorable Gina McCarthy
Assistant Administrator for the Office of Air and Radiation
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Ms. McCarthy:

The Committee on Oversight and Government Reform has been examining the process by which the Administration established fuel economy/greenhouse gas emissions regulations for both light-duty and heavy-duty vehicles. As a part of this inquiry, we write to request that you clarify the role of the California Air Resources Board (CARB) in setting heavy-duty truck regulations.

On September 15, 2011, the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) published a joint final rule regulating fuel economy and greenhouse gas emissions for medium- and heavy-duty vehicles.¹ In fashioning this rule, EPA and NHTSA drew from the EPA SmartWay program to identify technologies and operational approaches designed to reduce emissions.² The rulemaking acknowledged the work of the “large and diverse group of stakeholders,” including the State of California, in developing the rule.³ It stated:

[I]t is our expectation based on our ongoing work with the State of California that the California ARB will be able to adopt regulations equivalent in practice to those of this HD National Program, just as it has done for past EPA regulation of heavy-duty trucks and engines. NHTSA and EPA have been working with California ARB to enable that outcome.⁴

According to CARB, “California has regulated heavy-duty truck emissions for decades.”⁵ In December 2008, CARB adopted a resolution to regulate heavy-duty tractors and 53-foot box

¹ See Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57,106 (Sept. 15, 2011).

² *Id.* at 57,113.

³ *Id.* at 57,109.

⁴ *Id.* at 57,109-10.

⁵ Letter from Mary D. Nichols, Cal. Air Resources Bd., to Darrell E. Issa, H. Comm. on Oversight & Gov’t Reform, att. 1 at 5 (Nov. 23, 2011).

trailers.⁶ The regulation required all tractors and 53-foot box trailers to be SmartWay certified or equipped with SmartWay-approved technologies, with the goal to reduce greenhouse gas emissions.⁷ These regulations, which were amended in December 2010, became effective in December 2011.⁸ Yet, information given to the Committee by CARB shows that EPA has not granted a Clean Air Act waiver for California's regulation of medium- and heavy-duty vehicles, and that EPA has not made a determination that the regulation is within the scope of a previously granted waiver.⁹ EPA, however, recently approved the heavy-duty regulation as a revision to the California State Implementation Plan.¹⁰

During your transcribed interview with Committee staff on December 22, 2011, you were asked directly about California's role in establishing the heavy-duty rule. Your testimony failed to directly answer the question posed:

Q So the first question is simply to characterize CARB's role in the development of the heavy-duty truck rule, to your knowledge.

A I don't have any direct knowledge of CARB's interaction on this rule.

Q Okay. Do you know maybe more abstractly if they were involved in any way comparable to the way they were involved in the other two rulemakings? Were they participants to meetings, or did they submit kind of the same level of technical information? . . .

A Certainly I think I've explained my involvement in certainly the light-duty vehicle 2017 to 2025. I was not involved in any comparable process for the heavy-duty vehicles.

Q What is the ongoing work that you have with the State of California with regard to heavy-duty truck regulations?

A I am – I have never been engaged in that discussion with the State of California, so those discussions have been happening at different parts of my office or the Agency.

⁶ See Cal. Air Resources Bd., Resolution 08-43 (Dec. 12, 2008).

⁷ Cal. Air Resources Bd., Staff Report: Initial Statement of Reasons for Proposed Rulemaking ES2-3 (Oct. 2008).

⁸ Cal. Air Resources Bd., Exec. Order R-11-009 (Sept. 19, 2011); Cal. Air Resources Bd., Resolution 10-44 (Dec. 17, 2010); Cal. Air Resources Bd., Truck and Bus 2010, <http://www.arb.ca.gov/regact/2010/truckbus10/truckbus10.htm> (last visited June 8, 2012).

⁹ See Letter from Mary D. Nichols, Cal. Air Resources Bd., to Darrell E. Issa, H. Comm. on Oversight & Gov't Reform 2, (Jan. 19, 2012); *id.* att. 1 (revised Jan. 31, 2012).

¹⁰ See Approval and Promulgation of Implementation Plans; California Air Resources Board – In-Use Heavy-Duty Diesel-Fueled Truck and Bus Regulation, and Drayage Truck Regulation, 77 Fed. Reg. 20,308 (Apr. 4, 2012).

A Could I just offer a clarification of my earlier comment?

Q Yes, absolutely.

A I apologize for having to do this, but I'm not recollecting conversations with California on the heavy-duty vehicle rule. It may be possible that I've had a discussion. I don't recall it, though, and that would probably have been a more accurate way to phrase it.¹¹

Subsequent to your interview, the Committee has obtained documents from CARB that demonstrate that CARB played a significant role in developing the national heavy-duty standards. Though you allege to have had no personal contact with CARB about the heavy-duty regulations, it is evident from these documents that EPA staffers in your office had substantial communications with CARB.

An internal CARB email with the subject line, "EPA has been given marching orders for a mandatory [*sic*] SmartWay program," written on January 12, 2009, recounts a discussion between CARB and EPA about implementing a nationwide mandatory SmartWay program:

Last Friday, Mike [Carter] sat in a conf call with EPA (Bob [Cross] and Tom [Cackette] were also in the call). Obama team want to make headway in reducing GHG emissions and is directing more resources towards making a mandatory SmartWay program. Byron Bunker has been tapped to lead this effort. Mitch and Cheryl will be working with Byron. I've worked with Byron and he is very good at getting things done. Tom asked if they can put the SmartWay tractor requirement as a priority given the Boards [*sic*] direction on our rule.¹²

A subsequent email from Byron Bunker of EPA to Tom Cackette of CARB in June 2009 indicates the extent of CARB's involvement in the development of the heavy-duty truck regulations and the close collaboration between EPA and CARB:

Hi Tom,

Following are the key points regarding heavy-duty GHG controls as we understand them from California. I will be giving you call [*sic*] to make sure that we have these right.

- Heavy-duty vehicles are very important to California's efforts to reduce GHGs. California has already taken the first step to reduce GHGs from trucks and trailers.

¹¹ Transcribed Interview of Regina McCarthy, Assistant Administrator for the Office of Air and Radiation, U.S. Evtl. Prot. Agency, in Wash., D.C. (Dec. 22, 2011).

¹² Email from Stephan Lemieux, Cal. Air Resources Bd., to David Chen et al., Cal. Air Resources Bd. (Jan. 12, 2009).

- CARB has already begun initial discussions with EPA staff on how a national HD GHG program could work, and we are convinced there is an opportunity to build a comprehensive program to address GHGs with EPA.
- We have a long history working with the Agency on HD and nonroad diesel issues. Based on that successful history, we look forward to continuing to work collaboratively with EPA to address HD GHG emissions.
- This is a great opportunity to start from day one with a 50-state program supported by all parties. California would welcome a strong federal program that accomplishes this goal.
- However, we have our own obligations and will be forced to move forward independently if there is not timely EPA action.
- While stand-alone California action would not be our first choice, we've already begun to address HD GHG emissions by mandating the use of SmartWay trucks and trailers in California, and we're prepared to continue on that path if a comprehensive national program isn't put forward in the near term.¹³

Taken together, these documents suggest that CARB was heavily invested and highly involved in the development of the nationwide heavy-duty standards. Indeed, it appears that CARB helped to initiate and then substantially dictated the discussions that culminated in the national heavy-duty truck standards. It is not clear to the Committee, however, why CARB exercised such outsized influence in this process, with apparently more input into the development of the rule than other nonfederal entities.

To assist the Committee in better understanding the complete role of CARB in developing the national heavy-duty fuel economy and greenhouse gas emissions regulations, we ask that you answer the following questions:

1. In light of the documents obtained by the Committee, please clarify your answer about the role of CARB in the development of the heavy-duty truck rule.
 - a. Did any individual within the Office of Air and Radiation, or its component parts, discuss national heavy-duty regulations with any individual with CARB? Please identify and describe the nature of these communications.
 - b. Did CARB's rulemaking on heavy-duty emissions regulations influence the structure, content, or timing of EPA's rulemaking? Please explain.
 - c. At the time of your transcribed interview, were you aware that EPA officials had had contact with CARB regarding the heavy-duty truck rule? If so, why did you choose to limit your answer to your direct knowledge and not inform the Committee of the entirety of EPA's interaction with CARB?

¹³ Email from Byron Bunker, U.S. Env'tl. Prot. Agency, to Tom Cackette, Cal. Air Resources Bd. (June 8, 2009).

2. In light of the documents obtained by the Committee, please clarify your answer about the “ongoing work” noted in the rulemaking that EPA has with the State of California with regard to heavy-duty truck regulations.
3. Is the state of California presently regulating fuel economy and/or greenhouse gas emissions of heavy-duty vehicles? Please explain.
 - a. Under what federal statutory authority is California regulating fuel economy and/or greenhouse gas emissions of heavy-duty vehicles?
 - b. Has EPA granted California a Clean Air Act waiver or determined that California’s heavy-duty vehicle standards are within the scope of a previously granted waiver?
 - c. Given that the Clean Air Act prohibits state regulation of motor vehicle emissions unless EPA affirmatively grants a waiver for a particular set of standards,¹⁴ is CARB in violation of the Clean Air Act with respect to its heavy-duty vehicle standards? If not, please explain why not.
 - d. Why has EPA allowed California to independently regulate fuel economy and greenhouse gas emissions of heavy-duty vehicles without a Clean Air Act waiver or a formal within-the-scope determination?
 - e. Given that California’s regulation is more stringent than the national heavy-duty regulation in that it requires mandatory retrofitting with SmartWay technologies,¹⁵ please explain how the California regulation is consistent with the national heavy-duty regulation.
4. Why did EPA engage CARB on proposed nationwide heavy-duty regulations outside of the traditional notice and comment procedures? Were any other nonfederal stakeholders similarly engaged during the development of the heavy-duty regulations? Please explain.
5. Please provide a full and complete explanation of the “marching orders” given to EPA on a mandatory SmartWay program, as referenced in the January 12, 2009, email above. In your response, please be sure to include the nature, source, and timing of these policy directives.
6. Why did EPA share its policy directives for a mandatory SmartWay program – its so-called “marching orders” – with CARB officials? Were any other nonfederal entities privy to EPA’s “marching orders”?

¹⁴ 42 U.S.C. § 7543.

¹⁵ See Avery Vise, *CARB Approves “SmartWay,” Diesel Retrofit Rules*, Commercial Carrier J., Dec. 17, 2008.

7. Please provide a full and complete explanation of how CARB could “move forward independently” on heavy-duty rules, as referenced in the June 8, 2009, email above, if California had not been granted a Clean Air Act waiver for heavy-duty vehicle regulations.
8. The June 8, 2009, email indicated that CARB would “be forced to move forward independently [on heavy-duty standards] if there is not timely EPA action.”¹⁶ It further noted that CARB was “prepared to continue on that [stand-alone] path if a comprehensive national program isn’t put forward in the near term.”¹⁷
 - a. Did EPA take seriously CARB’s threat to “move forward independently” on heavy-duty standards? Please explain.
 - b. Did CARB’s threat to “move forward independently” influence EPA’s and NHTSA’s heavy-duty rulemaking in any way?
 - c. Did EPA use the prospect of a stand-alone California SmartWay program as leverage to obtain support for the nationwide heavy-duty rulemaking? Please explain.
9. Does EPA believe that California’s adoption of the SmartWay program as a mandatory condition on trucking within the state infringes on the ability of some out-of-state truckers to conduct business in California? If not, please explain why not.
10. At a hearing of the Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending in October 2011, independent trucker Scott Grenerth testified that the heavy-duty rule is a “one-size-fits-all regulation” that benefits large truckers over smaller competitors.¹⁸
 - a. Given that the heavy-duty rule incorporates the SmartWay program, does EPA believe that the SmartWay program offers equal opportunity for truckers of all sizes to participate? Please explain.
 - b. Can a trucker who is not SmartWay certified or equipped with SmartWay-approved technologies meet the standards of the heavy-duty regulation? Please explain.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at “any time” investigate “any matter” as set

¹⁶ Email from Byron Bunker, U.S. Env’tl. Prot. Agency, to Tom Cackette, Cal. Air Resources Bd. (June 8, 2009).

¹⁷ *Id.*

¹⁸ “*Running on Empty: How the Obama Administration’s Green Energy Gamble Will Impact Small Businesses & Consumers*”: *Hearing of the Subcomm. on Reg. Affairs, Stimulus Oversight & Gov’t Spending of the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. (2011) (testimony of Scott Grenerth).

The Honorable Gina McCarthy

June 21, 2012

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forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

We request that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on **July 5**. Please directly respond to each question and request as numbered herein, and label the responses accordingly. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions, please contact Kristina Moore or David Brewer of the Committee staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman



Jim Jordan
Chairman
Subcommittee on Regulatory Affairs,
Stimulus Oversight, and Government
Spending

Attachment

cc: The Honorable Elijah E. Cummings, Ranking Minority Member
Committee on Oversight and Government Reform

The Honorable Dennis Kucinich, Ranking Member
Subcommittee on Regulatory Affairs, Stimulus Oversight, and Government Spending

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

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Minority (202) 225-5051

Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.