

BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
DEPARTMENT OF TRANSPORTATION

COMMENTS OF THE
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.
IN RESPONSE TO NOTICE OF AVAILABILITY AND REQUEST FOR COMMENTS

DOCKET NO. FMCSA-2011-0097

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On July 12, 2011, the Federal Motor Carrier Safety Administration (“FMCSA” or “Agency”), published a Notice of Availability (“Notice”) in Docket No. FMCSA-2011-0097 requesting comments on a Draft Environmental Assessment (“DEA”) issued in conjunction with the United States/Mexico cross-border long-haul trucking pilot program (“Pilot Program”) proposed by FMCSA earlier this year at 76 Fed. Reg. 20807 (April 13, 2011) (“Pilot Program Proposal”). *See* 76 Fed. Reg. 40980 (July 12, 2011). Although FMCSA has in its Notice requested “comments on environmental concerns that you may have related to the DEA,” the timing of the Notice raises serious questions about FMCSA’s true intent here. About a week before the Notice was issued, the U.S. Department of Transportation entered into an agreement with Mexico, in the form of a Memorandum of Understanding effective July 6, 2011 (“MOU”), confirming its intent to implement the Pilot Program and setting out the terms of that program. *See* Memorandum of Understanding on International Freight Cross-Border Trucking Service (July 6, 2011), Docket No. FMCSA-2011-0097-2145. Also, before the Notice was issued, in FMCSA’s response to public comments (“Pilot Program Response”), FMCSA announced its intent to proceed with the Pilot Program and estimated that Mexico-domiciled motor carriers might receive provisional operating authority in the first weeks of August 2011, which is before comments on this Notice are even due. *See* 76 Fed. Reg. 40420, 40439 (July 8, 2011). Thus, it appears that the Pilot Program plan has already been finalized and this Notice seeking public input regarding environmental concerns is merely a hoop that FMCSA is

jumping through because it is required to do so by law. It is not a meaningful opportunity for the public to assist FMCSA in dealing with environmental issues and the comments received will not be used by the Agency to correct any noted deficiencies.

Nevertheless, the Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) submits these comments because of the relevance of the Mexican cross-border Pilot Program to its members’ operations. OOIDA is a not-for-profit corporation incorporated in 1973 in Missouri with its principal place of business located at 1 NW OOIDA Drive, Grain Valley, Missouri 64029. The more than 152,000 members of OOIDA are independent owner-operators, small-business motor carriers, and professional truck drivers (“small-business truckers”) located in all 50 states and Canada. These groups have a significant presence in the trucking industry: One-truck motor carriers represent nearly half the total number of active motor carriers operating in the United States while approximately 93 percent of active motor carriers operate 20 or fewer trucks.

OOIDA is the largest international trade association representing small-business truckers. The Association actively promotes their views through its interaction with state, provincial and federal government agencies; legislatures; courts; other trade associations; and private businesses. OOIDA also actively represents the positions of this group on all aspects of highway safety and transportation policy in numerous committees and various forums on the local, state, national, and international level.

OOIDA’s members are not only subject to FMCSA’s safety regulations, but must operate in full compliance with the various environment-related restrictions placed upon their trucking operations by the U.S. Environmental Protection Agency (“U.S. EPA”) and State environmental agencies. Accordingly, they are quite concerned about the possible ramifications for their operations

and for the public at large if Mexico-domiciled motor carriers, operating in the United States under the Pilot Program, are not held to the same environmental standards.

DISCUSSION

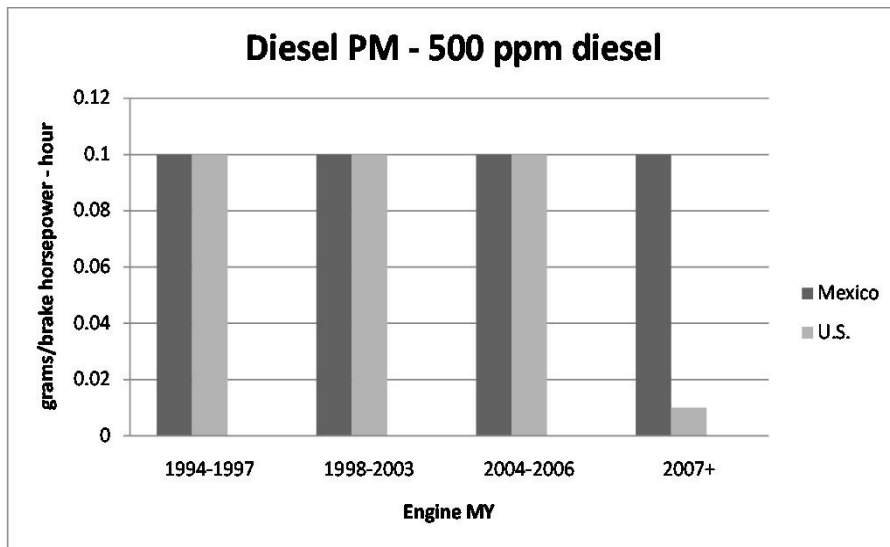
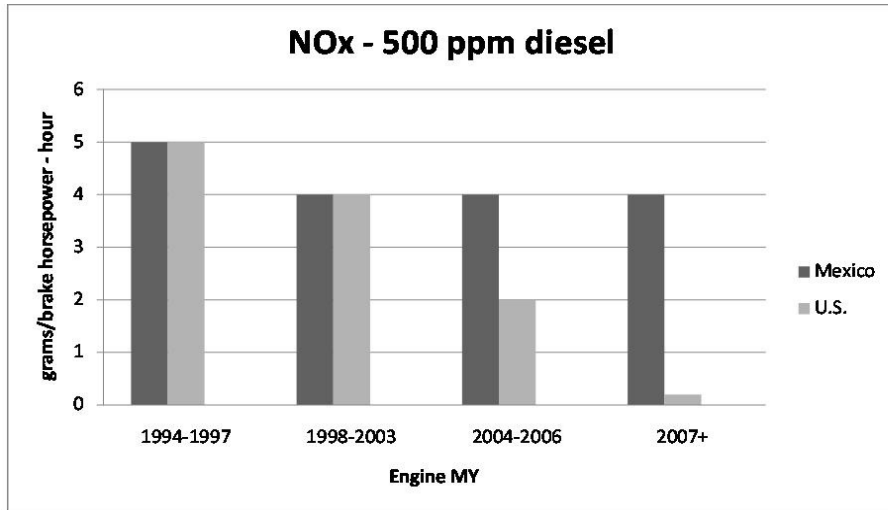
I. Mexican trucks have higher overall emissions than U.S. trucks.

OOIDA's primary environmental concerns related to the DEA revolve around the very real and significant differences between the environmental impacts associated with emissions of harmful pollutants from Mexico-domiciled trucks as compared to U.S.-domiciled trucks. Specifically, Mexican emission standards for diesel-powered truck engines are only aligned with U.S. EPA emissions standards for six criteria pollutants through the 2003 model year.¹ This means that newer engines for Mexican trucks need not comply with the more stringent U.S. emissions standards for non-methane hydrocarbons ("NMHC") and nitrogen oxides ("NOx") that are applicable to 2004-2006 model year diesel engines or the even more stringent NMHC, NOx, and particulate matter ("PM") standards applicable to 2007 and newer model year diesel engines manufactured in the United States. Indeed, under Mexico's current plan, Mexican trucks need not meet the 2007 emissions standards until 2016, well after the completion of the Pilot Program.

While FMCSA is limiting participation in the Pilot Program to trucks equipped with an engine certified to at least the 1998 U.S. EPA emissions standards, the emissions from various MY engines is dramatically higher for Mexico-domiciled trucks compared to U.S. domiciled trucks. The

¹ Under the Clean Air Act, the U.S. EPA establishes National Ambient Air Quality Standards for six pollutants found to be harmful to human health. These are carbon monoxide, lead, nitrogen dioxide, two sizes of particulate matter, ozone, and sulphur dioxide. Of these, the three principal pollutants from diesel emissions are nitrogen dioxide, particulate matter, and ozone. Nitrogen oxides as well as hydrocarbons are a precursor for ground-level ozone, which is formed when the nitrogen oxides and other pollutants combine together in sunlight.

following graphs illustrate the emissions differences for specific model year engines based on using diesel fuel that has a sulphur content of 500 ppm. The variance is even greater when comparing U.S. domiciled trucks using fuel with a sulphur content of 15 ppm.



Since Mexico has not aligned its diesel engine emissions standards to U.S. EPA 2004 standards, the differences can be stark - as much as 20 times the NOx and 10 times the PM, based on using diesel

fuel with a sulphur content of 500 ppm.

Additionally, since December of 2010, all refiners and importers of diesel fuel in the U.S. have been required to produce ultra-low sulphur diesel fuel (15 ppm) (“ULSD”) for highway use and U.S.-domiciled trucks have been required to use this more costly ULSD fuel. 40 C.F.R. §§ 80.500, 80.520. This is a significant reduction from the 500 ppm of sulphur that was previously mandated. Substantial penalties up to \$32,500 per violation per day can be assessed for non-compliance with these ULSD fuel standards. 42 U.S.C. § 7545; 40 C.F.R § 80.5; 40 C.F.R. § 19.4 (inflation adjustment). There is no comparable requirement for Mexican trucks, which typically use fuel meeting the old U.S. 500 ppm of sulphur standard. Indeed, ULSD is hard to find in Mexico, with availability limited to the large cities and towns along the border.

Sulphur totally impedes the operation of the newest advanced emission reduction technologies to such a degree that engine manufacturers would not be able to produce cleaner engines meeting the very stringent 2007 emission standards without minimizing its presence through the use of ULSD fuel. ULSD also has a salutary effect even when used in conjunction with trucks having model year 2006 and older engines, because it allows the emissions control equipment on those trucks to function more efficiently and results in significant reductions in harmful emissions.

Thus, Mexican carriers operating under the Pilot Program will not only be allowed to drive trucks that may not comply with the U.S. emissions standards applicable to their engines but will also be able to fuel their vehicles with substantially less expensive and environmentally-inferior diesel fuel in Mexico before entering the United States. Equipment can be, and likely will be, outfitted with supplemental saddle mount fuel tanks – either on the tractor and/or slung under the trailer – that provide additional fuel capacity. Because of the significant cost difference, Mexican-

domiciled motor carriers will have a strong economic incentive to carry as much Mexican-produced 500 ppm diesel fuel as practicable, thus extending their operational ranges enough to potentially avoid the use of U.S. ULSD altogether.

These emissions differences will reintroduce much of the air pollution that U.S. EPA and State environmental agencies have worked so hard to eliminate, pollution with adverse health effects that should not be dismissed lightly. Indeed, research has shown a well-documented correlation between the principal pollutants from diesel emissions and serious illness and even premature death. Further, the more a person is exposed the greater the risk. Indeed, most EPA literature on this topic contains a variation of the following:

Diesel exhaust contains tiny particles known as fine particulate matter. These tiny or “fine” particles are so small that several thousand of them could fit in the period at the end of this sentence. Diesel engines are one of the largest sources of fine particulate matter, other than natural causes such as forest fires. Diesel exhaust also contains ozone forming nitrogen oxides and toxic air pollutants. Fine particles and ozone pose serious public health problems. Exposure to these pollutants causes lung damage and aggravates existing respiratory diseases such as asthma. Nationwide, particulate matter - especially the fine particles such as those in diesel exhaust - cause 15,000 premature deaths every year. Diesel exhaust is thought to be a likely human carcinogen and people with existing heart or lung disease, asthma, or other respiratory problems are most sensitive to the health effects of fine particles. Most affected are children and the elderly. Children are especially sensitive to air pollution because they breath 50 percent more air per pound of body weight than do adults.

See www.epa.gov/cleandiesel/documents/420f03022.pdf. In California alone, it has been estimated that diesel PM contributes to an annual estimated 2,900 premature deaths, 3,600 hospital admissions, 240,000 asthma attacks and respiratory symptoms and 600,000 lost workdays. *See* www.arb.ca.gov/diesel/factsheets/dieselpfms.pdf. The risk of health problems caused by Mexican trucks crossing the border is exacerbated by the fact that eight U.S. counties along the U.S.-Mexico border – including the entire California and Arizona borders, Dona Ana County in New Mexico, and

El Paso county in Texas – are in non-attainment areas for one or more of the six criteria pollutants. *The Green Book Nonattainment Areas for Criteria Pollutants*, at www.epa.gov/oaqps001/greenbk/; *Analysis of Diesel Emission in the U.S.-Mexico Border Region*, at 51-52, prepared by Industrial Economics, Inc. for U.S. EPA (March 9, 2007). These counties encompass all but one of the major border crossings, making it inevitable that Mexico-domiciled trucks participating in the Pilot Program will travel into these more polluted areas. *Id.*

II. The DEA fails entirely to consider these health-related environmental impacts.

FMCSA’s regulation governing pilot programs identifies six elements that must be included in any approved pilot program.² 49 C.F.R. § 381.505(b). Especially pertinent here is element 5 which requires the Agency to ensure that any pilot program plan contains “Adequate safeguards to protect the health and safety of study participants and the general public.” *Id.* at § 381.505(b)(5). Obviously, in the motor vehicle context, the primary impact on public health flows directly from the air pollutants contained in the exhaust emissions generated by those vehicles. Accordingly, FMCSA has a regulatory obligation here to consider the impact of such emissions from participating Mexican trucks on the public health.

This mandate to consider the health of the general public, not only the health of program participants, is not simply an Agency invention. To the contrary, it was taken directly from The Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, the 1998 legislation that authorized DOT to conduct pilot programs and established guidelines for the grant of regulatory

² The cross-border trucking program initiated in 2007 was identified as a “demonstration project” that seems not to have been subjected to all the specific rules governing pilot programs.

exemptions and waivers in connection with such programs. *See* 49 U.S.C. § 31315(c)(2)(E).³ The importance of protecting the public when designing and implementing pilot programs was also emphasized in the TEA-21 Conference Report. *See* H.R. Rep. No. 105-550, 105th Cong., 2d Sess. 491 (May 22, 1998).

Entirely consistent with this statutory and regulatory obligation, when Presidential George W. Bush lifted the moratorium on the issuance of long-haul operating authority to Mexico-domiciled motor carriers, he stated very plainly that:

Motor carriers domiciled in Mexico operating in the United States will be subject to the same Federal and State laws, regulations, and procedures that apply to carriers domiciled in the United States. These include safety regulations. . .; and other applicable laws and regulations, including those administered by the United States Customs Service, the Immigration and Naturalization Service, the Department of Labor, and **Federal and State environmental agencies**.

67 Fed. Reg. 71795 (Dec. 2, 2002)(emphasis added). This clear and unambiguous requirement was made expressly applicable to Pilot Program participants with the following language included in FMCSA’s Pilot Program Proposal:

Mexico-domiciled motor carriers participating in the pilot program are required to comply with all applicable Federal and State laws and regulations including, but not limited to, vehicle size and weight, environmental, tax, and vehicle registration requirements.

76 Fed. Reg. at 20812. The identical sentiment was again reiterated by the Agency in its Pilot Program Response. 76 Fed. Reg. at 40423, 40433.⁴

³ The only difference between the regulatory and statutory language is that Congress required “adequate countermeasures” instead of “adequate safeguards” to protect public health. *See* 49 U.S.C. § 31315(c)(2)(E).

⁴ *See also* Application to Register Mexican Carriers for Motor Carrier Authority to Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border, Form OP-1MX, at Section VIII-Compliance Certifications.

Notwithstanding this recognition that the application of environmental standards to Mexican carriers is imperative, however, the FMCSA has never indicated any attempts by the Agency to consider how the Pilot Program Proposal could be modified to minimize the adverse health implications tied directly to Mexico's more-relaxed diesel emissions and fuel standards. Instead, FMCSA passed the buck, stating in the Pilot Program Response that "FMCSA has no reason to doubt that its sister Federal and State agencies will enforce their laws and regulations as they apply to long-haul Mexico-domiciled motor carriers, just as they have done for years with respect to the border commercial zone motor carriers as well as U.S. - and Canada -domiciled motor carriers." 76 Fed. Reg. at 40433. The analogy to border commercial zones is especially interesting since there are no emissions-related limitations placed on Mexican trucks used in those zones and, consequently, there is no enforcement of environmental laws and regulations taking place in those areas.

In essence then FMCSA's Pilot Program plan would let Mexican trucks authorized by FMCSA to participate in the Pilot Program enter the United States even though their engines may not comply with U.S. EPA or stricter State emissions standards for the particular model year and even though they most likely will not be using the ULSD fuel required of U.S.-domiciled trucks, and will then expect Federal and State environmental agencies to penalize them for non-compliance with the environmental regulations the Agency has ignored. Having one government agency authorize actions which are certain to be deemed illegal and penalized by other agencies that also regulate the same parties not only defies logic, but is not an efficient or appropriate means of regulation. To the contrary, as recently explained by President Obama in Executive Order 13563 issued January 18, 2011, addressing Improving Regulation and Regulatory Review, an agency choosing a regulatory approach should use the "least burdensome tools for achieving regulatory ends. . .[and] select those

that “maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). 76 Fed. Reg. 3821 (Jan. 21, 2011). To minimize the burden and maximize the benefits from the Pilot Program, FMCSA should coordinate and engage in strategic planning with EPA to eliminate the inconsistencies and regulatory burden that could otherwise exist where, as here, the two agencies regulate different aspects of the same operations.

III. FMCSA did not consider all reasonable alternatives as required by NEPA.

In the FMCSA’s Pilot Program Proposal, the Agency stated that it would prepare an Environmental Assessment for the program and seek comments on that assessment in accordance with the National Environmental Policy Act (“NEPA”). 76 Fed. Reg. at 20811. NEPA requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. §4332(2)(E). The consideration of alternatives is mandatory for both an environmental assessment (“EA”) of the type prepared here as well as for the more comprehensive environmental impact statement (“EIS”) that is sometimes required. *North Idaho Community Action Network v. DOT*, 545 F.3d 1147, 1153 (9th Cir. 2008); *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 343 (6th Cir. 2006); *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1245 (9th Cir. 2005); *Davis v. Mineta*, 302 F.3d 1104, 1110, 1119 (10th Cir. 2002). While an agency can have a preferred alternative in mind when it considers alternatives, it can not use the EA or EIS simply to rationalize a decision already made. *Forest Guardians v. U.S. Fish and Wildlife Serv.*, 611 F.3d 692, 712-713 (10th Cir. 2010). To the contrary, an agency must give full and meaningful consideration to all reasonable alternatives. *Id.* Further,

while the discussion of each alternative in an EA may be shorter and less detailed than the rigorous discussion and objective evaluation of each alternative that is at the “heart” of an EIS, 40 C.F.R. §1502.14, each alternative must nevertheless be addressed in some manner. 40 C.F.R. § 1508.8(b); *see also North Idaho, supra; Save Our Cumberland Mountains, supra; Native Ecosystems Council, supra; Davis, supra*. The agency cannot limit its consideration exclusively to two alternatives presenting an all-or-nothing situation without risking a finding that it acted in an arbitrary and capricious manner in violation of the Administrative Procedures Act. *See Save Our Cumberland Mountains, supra*, at 345; *Allegheny Defense Project, Inc. v. U.S. Forest Serv.*, 423 F.2d 215, fn.15 (3d Cir. 2005); *Davis, supra*, at 1118-1119.

Yet that is precisely what FMCSA has done in the DEA – identify only two alternatives. The first is the “Proposed Action” alternative, which is the finalized Pilot Program agreed to in the MOU and described in FMCSA’s Pilot Program Response. *See* DEA, Pages 7-10. The second is the “No Action” alternative, which means that there would not be any pilot program. *See* DEA, Page 10. In fact, there is only one alternative considered because the maintenance of the status quo that would occur if the prohibition on cross-border traffic moving beyond the border commercial zones is maintained is not a “reasonable alternative” under NEPA since it would effectively impose a blanket ban (i.e., a moratorium) on Mexican trucks, the course of conduct deemed unacceptable under *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).⁵ *See also* DEA, Page 3.

⁵ Indeed, OOIDA questions whether even the “Proposed Action” alternative is a viable alternative. OOIDA has, in its comments on the Program, Docket No. FMCSA-2011-0097-1906, and in a Petition for Review and Motion for Stay filed with the U.S. Court of Appeals for the District of Columbia, Case No. 11-1251 (July 26, 2011), challenged FMCSA’s legal authority, under the guise of the pilot program, to issue either provisional or permanent operating authority to Mexican carriers who do not meet all the criteria for operating authority.

Rather, it is only, as described in the DEA, “a baseline scenario against which environmental impacts associated with the Proposed Action Alternative are compared.” DEA, Page 10.

There is no discussion in the DEA of any other alternatives. Indeed, it is unclear whether FMCSA, when developing the Pilot Program, even considered possible modifications to the pilot that could minimize environmental effects without impinging upon the accomplishment of the Agency’s purported objective, “to test the ability of Mexico-based motor carriers to operate safely in the United States beyond the municipalities and commercial zones along the United States-Mexico border.” 76 Fed. Reg. at 20807.

FMCSA does not specifically explain its failure to consider other alternatives in the DEA. However, it justifies the limited scope of the DEA in general terms by reference to the *Public Citizen* decision which it notes held that the Agency lacked discretion to prevent cross-border operation of long-haul Mexican trucks and accordingly need not under NEPA or the Clean Air Act (CAA) fully evaluate the environmental effects of such operations. DEA, Page 5. If, in fact, FMCSA thinks that *Public Citizen* relieved the Agency of the need to consider other alternatives to the proposed action that would allow Mexican trucks to enter the country, but at the same time mitigate the harmful environmental effects, then the Agency reads too much into that decision.

As expressly stated by the Court in the *Public Citizen* decision, before it addressed the substantive legal issues presented by the parties, “this case does *not* involve. . .any challenge to the EA due to its failure properly to consider possible alternatives to the proposed action. . .” because “[n]one of the respondents identified in their comments any rulemaking alternatives beyond those evaluated in the EA, and none urged FMCSA to consider alternatives.” 541 U.S. at 764-765 (emphasis in original). The Court further stated that the failure to consider alternatives to the

issuance of the challenged rules was “not properly before us.” *Id.* at 764. Thus, the decision absolutely did not relieve FMCSA of its obligation, in addressing under NEPA environmental concerns connected to the Pilot Program, of the need to “study, develop, and describe appropriate alternatives to recommended courses of action...,” because that issue was not addressed by the Court.

IV. There are reasonable and less environmentally-harmful alternatives.

The Pilot Program Proposal requires participating Mexico-domiciled motor carriers to designate the vehicles that will be used in the Pilot Program, and designated vehicles must be individually approved by FMCSA for participation. 76 Fed. Reg. at 20811-20813. In order to be approved, the vehicle must not only meet applicable safety standards, but must demonstrate conformity with U.S. EPA emissions standards applicable to 1998 or later model year engines, either through an EPA emission control label or other documentation from the engine manufacturer. *Id.* These emissions restrictions show that, while FMCSA’s primary focus in this Pilot Program is safety, it is well within the scope of the Agency’s authority to condition truck participation upon compliance with specified environmental standards. Accordingly, FMCSA should under NEPA have considered and explained in the DEA alternatives that require more exacting conformity with emissions limitations applicable to U.S.-domiciled carriers. Two such alternatives are briefly discussed below.

The first alternative that should have been considered is a requirement that trucks designated for participation in the Pilot Program be limited to trucks that meet the U.S. EPA model year emissions standards for the year in which the engine was manufactured. That is the only way that FMCSA can ensure compliance with the oft-repeated condition that participants must comply with “**all**” applicable Federal and State environmental laws and regulations, and it only requires a slight

modification to the current requirement for compliance with the U.S. EPA 1998 emissions standards. While such a limitation might not be workable for all Mexican carriers given Mexico's lack of regulations requiring conformity to the 2004 and newer U.S. EPA emissions standards, it should be realistic in light of the FMCSA's estimated need for only 31 Mexican carriers in order to compile accurate statistical data on most key metrics plus the assumption that those carriers will, on average, have only two trucks involved in the Pilot Program. 76 Fed. Reg. at 20817-20818.

Another less burdensome alternative to be considered is one that would reduce the significant gap in emissions between U.S. and participating Mexico-domiciled trucks, while leaving the current 1998 model year engine emissions standard compliance requirement intact. This option would require Mexican trucks either to enter the U.S. with ULSD fuel purchased in Mexico or with a fuel tank that is less than 1/4 full (and without supplemental full tanks), an amount that is more than sufficient to allow the truck to reach a service station in this country that sells ULSD fuel. Compliance with such a condition could easily be checked at existing inspection stations on the U.S. side of the border.

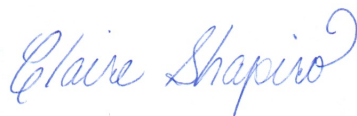
Each of these options require only one modification to the current Pilot Program Proposal. However, these simple changes would equalize or come closer to equalizing the treatment of U.S. and Mexico-domiciled carriers, which is all that is required by NAFTA. At the same time, either alternative would substantially reduce the level of harmful emissions from participating Mexican trucks, without interfering with FMCSA's ability to test the safety performance of Mexican carriers.

CONCLUSION

As discussed above, the Mexico-domiciled carriers participating in the Pilot Program have been required to comply with all Federal and State environmental laws. However, the terms of the

proposed Pilot Program allow any Mexican truck meeting the 1998 U.S. EPA emissions standards to be approved to traverse the United States even though it may fail to meet the U.S. EPA emissions standards applicable to the model year engine in that truck. Mexican trucks participating in the Pilot Program may also traverse the country without using the cleaner ULSD fuel that U.S.-domiciled trucks are required to use. As a result, these trucks will be emitting pollutants that can have a serious adverse effect on the health of the general public far more than their U.S. counterparts. This discrepancy can easily be remedied by minor changes to Pilot Program Proposal that should have been considered among the alternatives discussed by FMCSA when it performed the environmental analysis of the Pilot Program set forth in the DEA as required by NEPA. The failure to consider them now, after specifically being urged to do so by commenters, would be arbitrary and capricious agency action under the Administrative Procedures Act.

Respectfully submitted,



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