



December 3, 2010

Ray LaHood  
Secretary of Transportation  
U.S. Department of Transportation  
1200 New Jersey Avenue, S.E.  
Washington, DC 20590

Re: Petition Seeking a Determination that Drayage Truck Registries  
Established by Port Authorities or State Environmental Agencies Are Pre-  
empted by Federal Law

Dear Secretary LaHood:

The Owner-Operator Independent Drivers Association, New Jersey Motor Truck Association, and Port Drivers Federation 18 (jointly "Petitioners") hereby petition the Department of Transportation ("DOT") for a determination that mandatory drayage truck registries implemented by various ports and the California Air Resources Board ("CARB") are preempted by Section 209(c) of the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c). Further, because truck owners typically are required to place some type of identification on their trucks to evidence registration, Petitioners also request a determination that additional identification requirements imposed through the use of registries are prohibited by Section 4306 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), 49 U.S.C. § 14506(a).

#### Petitioners

The Owner-Operator Independent Drivers Association is a non-profit trade association representing approximately 153,000 owner-operators, small-business motor carriers, and professional truck drivers who operate more than 200,000 trucks in all 50 states and Canada, on all issues affecting their operations. Such small-business motor carriers have a significant presence in the trucking industry. Indeed, one-truck motor carriers represent nearly half of all active motor carriers operating in the United States while approximately 96 percent of active motor carriers operate 20 or fewer trucks.

The New Jersey Motor Truck Association (NJMTA) was founded in 1914 to protect and promote the interests of the New Jersey trucking industry. The association represents

more than 500 fleets operating in New Jersey that employ well over 40,000 people, as well as, 200 Allied Members that serve the trucking industry. Our mission is to foster and promote sound economical and efficient service by motor carrier transportation; to promote safety and courtesy in highway transportation; to foster and support beneficial laws and regulations affecting the motor carrier industry; and to engage in any and all activities that will advance the interests of highway transportation and highway users generally.

The Port Drivers Federation 18 is a non-profit trade association representing the interests of approximately 1,000 members, independent owner-operators who primarily lease their trucks to motor carriers operating on and off the property of the Port Authority of New York and New Jersey.

In sum, each of the Petitioners has members that transport freight, on a regular or intermittent basis, via heavy-duty trucks to and from the nation's ports and/or rail yards. Accordingly, these increasing numbers of truck registries and the associated identification requirements have a significant and burdensome effect upon their members' operations. Those operations are defined as interstate commerce.

## DISCUSSION

### I. The Involved Drayage Truck Registries.

The Petitioners recognize that it is important for the United States, acting through various governmental entities, to take steps to reduce the levels of harmful emissions from all motor vehicles, including heavy-duty diesel trucks and engines (jointly "heavy-duty trucks" or "trucks"). They support the use of inspections and other common enforcement mechanisms that might help ferret out non-compliant trucks. Thus, the sole objection raised here by Petitioners is to the proliferation of mandatory state or port-specific truck registries and associated credentialing requirements that are being imposed to facilitate the legitimate components of state/port emission reduction programs.

Emissions-related drayage truck registries originated in California in 2007. Although all heavy-duty trucks entering California must eventually comply with emission standards set forth in other CARB regulations, standards that are stricter than the federal standards imposed by EPA,<sup>1</sup> CARB implemented a drayage truck registry ("DTR") imposing even

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<sup>1</sup> Under the Clean Air Act, the EPA sets national emissions standards for new motor vehicles and motor vehicle engines. 42 U.S.C. § 7521. However, because California already had such emission standards in place when EPA stepped into this arena, that state, acting through the CARB, can and has applied for waivers that have allowed California to adopt and enforce more stringent emission standards. 42 U.S.C. § 7543(b). While other states may not adopt their own unique emission standards, a state with an EPA-approved state implementation plan (SIP) is permitted to adopt either the EPA or California standards. 42 U.S.C. § 7507.

stricter emissions limitations on the subset of heavy-duty trucks serving California's intermodal freight facilities, including ports and rail yards. See Exhibit A, Cal. Code Regs., Title 13, § 2027. The stricter emissions standards apply to trucks serving ports or intermodal rail yards, whether the trucks are based inside or outside of California, and whether they serve those facilities regularly or on a very infrequent and irregular basis.

CARB chose to implement its stricter drayage truck standards through a mandatory requirement that heavy-duty trucks must register in order to serve the state's ports and rail yards.<sup>2</sup> *Id.* at § 2027(d) (5) (A) 3 & (e) (1) (A)&(B). However, certain older model engines as well as trucks that have not been retrofitted with specified emissions control equipment are prohibited from registering and, accordingly, cannot be dispatched to those facilities.<sup>3</sup> *Id.* at § 2027(d)(5) (A)2&3. Further, CARB makes labels evidencing registration available to registrants.<sup>4</sup> See CARB's DTR fact sheet (5/13/09), at [www.arb.ca.gov/msprog/onroad/porttruck/dtrfactsheet.pdf](http://www.arb.ca.gov/msprog/onroad/porttruck/dtrfactsheet.pdf). Thus, the registry is not used simply to keep track of trucks serving ports or rail yards. Rather, it is a tool created and used primarily to prevent whole classes of trucks equipped with engines that otherwise comply with federal or even California's own statewide emission standards for heavy-duty trucks from entering these facilities.

The Ports of Los Angeles and Long Beach have created their own drayage truck registry ("PDTR"). Port of Los Angeles Tariff No. 4, Items 2025; Port of Long Beach Tariff No. 4, Rule 34-J, Item 1025. See Exhibit B. With limited exceptions, these two ports have required truckers serving these particular ports to register and then affix a radio frequency identification device ("RFID") or individually numbered compliance labels to their trucks. Port of Los Angeles Tariff No. 4, Items 2005-2020; Port of Long Beach Tariff No. 4, Rule 34-J, Item 1000; see also: [www.portoflosangeles.org/ctp/ctp\\_non\\_container.asp](http://www.portoflosangeles.org/ctp/ctp_non_container.asp); [www.polb.com/civica/filebank/blobload.asp?BlobID=6444](http://www.polb.com/civica/filebank/blobload.asp?BlobID=6444); [www.polb.com/news/displaynews.asp?NewsID=660&TargetID=24](http://www.polb.com/news/displaynews.asp?NewsID=660&TargetID=24). As with the statewide registry, these localized port registries implement a progressive ban on older trucks equipped with non-compliant engines or trucks without suitable retrofits for emissions purposes.

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<sup>2</sup> Violations of the emission standards are also enforceable through field inspections and audits of drayage activity and dispatch reports, and violations are punishable by civil and criminal penalties. *Id.* at § 2027(d) (5)5,(e)(3),(g),(h).

<sup>3</sup> All trucks older than 1994, plus 1994-2003 trucks that have not been retrofitted with specified emissions control equipment, are not allowed to register. *Id.* at § 2027(d) (1). Model year 2004 through 2006 trucks must be retrofitted at future dates to maintain their registration, and trucks must meet 2007 engine emission standards to be registered after the end of 2013. *Id.* at § 2027(d)(1)&(2).

<sup>4</sup> When CARB tried to incorporate a mandatory label requirement into the state-wide DTR, OOIDA informed them of the legal problems with such a requirement and CARB eventually backed away from mandating the unique credential.

Ports in other states have begun emulating the truck registration systems originating in California. For example, the Port Authority of New York and New Jersey (“PANYNJ”) has recently incorporated a DTR requirement into its tariff. See Exhibit C, Section G of the Port Authority Marine Terminal Tariff FMC NO. PA10, Oct.15, 2010 (“NY/NJ DTR”). This plan too phases out older trucks by requiring all trucks intending to serve those ports to register and prohibiting certain classes of trucks from registering based upon their model year of engine. *Id.* at Subrule 34-1100 & 34-1130. Similarly, the PANYNJ issues what it calls “Voluntary Compliance Stickers,” which allow registrants to enter, travel through, and exit the port facilities without the burdensome and time-consuming compliance inspections that would otherwise be conducted by Port Authority Police to determine compliance. *Id.* at Subrule 34-1090 & 34-1110. The Port of Seattle too has created a similar registry (“Seattle DTR”). See Exhibit D, Port of Seattle Tariff No. 5, Item 9000. However, at this port the posting of a “Green Gateway” sticker identifying a vehicle as being registered and qualified to enter a port terminal is mandatory. See: [www.portseattle.org/downloads/seaport/DTR\\_Flyer\\_20100827.pdf](http://www.portseattle.org/downloads/seaport/DTR_Flyer_20100827.pdf). Port authorities throughout the country have faced considerable political pressure to emulate registry programs that originated in California.

Petitioners believe that the mandatory drayage truck registry systems adopted by the various ports and CARB with the associated identification requirements are pre-empted by federal law. More specifically, the progressive bans on certain groups of trucks equipped with older engines results in a regulatory regime that impacts the “price, route, or service” offered by motor carriers in violation of the FAAAA. The associated truck RFID or labeling requirements are essentially credentialing requirements violating the SAFETEA-LU’s prohibition on the adoption or enforcement of any state or local provision that requires motor carriers to display any form of identification other than those specifically required by the Federal Motor Carrier Safety Regulations.

II. State/Port Drayage Truck Registries That Contain Progressive Truck Bans Are Preempted by the Federal Aviation Administration Authorization Act.

In their zeal to reduce pollution at port facilities, both the ports and CARB have run afoul of the FAAAA, codified at 49 U.S.C. § 14501(c). The FAAAA provides in clear and unequivocal terms that a state, political subdivision of a state, or political authority of two or more states,<sup>5</sup>

*may not enact or enforce a law, regulation, or other provision having the force and effect of law, related to a price, route, or service of any motor carrier. . .with respect to the transportation of property.*

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<sup>5</sup> A port authority is a special-district governmental or quasi-governmental public authority that owns and/or controls the land and activities at a port. As such, the involved ports are subject to the FAAAA as political subdivisions of a state or, in the case of the PANYNJ, a political authority of two states

Congress enacted the FAAAA's motor carrier pre-emption provision to ensure that the substantial deregulation of the trucking industry accomplished through reduced federal government intervention in interstate trucking was not replaced by a patchwork of inconsistent state laws and regulations. Such a plethora of laws would not only place an undue burden on motor carriers engaged in interstate commerce, but would also prevent competitive market forces from shaping the offerings of motor carriers.

To keep states from getting around this pre-emption with carefully worded, less direct legal pronouncements, the FAAAA's pre-emption provision has been broadly interpreted to go beyond purely economic regulations to include any provisions that have a "connection with, or reference to" motor carrier pricing, routes, or services. See *Rowe v. New Hampshire Motor Transport Ass'n.*, 552 U.S. 364 (2008) citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). There need only be "more than an indirect, remote, or tenuous effect" on prices, routes, or services for preemption to arise. *ATA v Los Angeles*, 559 F.3d 1046 (9<sup>th</sup> Cir. 2009), citing *Tocher v. Santa Ana*, 219 F.3d 1040 (9<sup>th</sup> Cir. 2000). As explained by President Clinton in his statement accompanying the signing of this law, the provision pre-empts any state "controls on who can enter the trucking industry within a State, what they can carry and **where they can carry it**, and whether competitors can sit down and arrange among themselves how much to charge shippers and consumers." (Aug. 23, 1994) (emphasis added).

The proliferation of drayage truck registries with the associated progressive truck/engine bans is precisely the type of state and local interference with trucking that the FAAAA was meant to eliminate, because such registries have a significant direct impact on motor carrier pricing, routes, or services. First, such registries directly impact the "service" provided by motor carriers to the extent that they prevent carriers from serving a particular port absent registration with that port. The need to register all trucks and keep that registration up to date as trucks join and leave fleets places a real paperwork burden on all carriers, even regional or local motor carriers that regularly serve only a limited geographic area surrounding a particular port. The burden is especially troublesome for motor carriers whose trucks travel throughout the entire country on irregular routes. Those motor carriers will have to register with each and every mandated registry just to be certain that they will be able to accept cargo to and from those locations. Additionally, carriers operating trucks that are too old to be registered will have to entirely stop serving ports that condition access upon registration. It is difficult to imagine a greater and more direct impact on the "service" provided. The same progressive ban on registration will also force motor carriers whose trucks are now, or in the future will become, non-compliant to avoid any "route" that includes those same ports.

Of course, carriers can avoid these service and route limitations by retrofitting older trucks or purchasing newer trucks. But retrofits and new trucks cost money that in the current economic climate with low (or no) profit margins is difficult to generate. Thus, any

increased operational costs from these mandates will undoubtedly be passed through to shippers, increasing the “price” of transportation. Also, the number of in-use trucks qualified to serve these types of public facilities will be substantially reduced as a result of the truck bans. While it cannot be determined exactly how many trucks will be affected over time by the truck bans, it is clear that the number will be significant. According to the statistics recently gathered by the Port of Seattle, approximately 25 percent of the truck fleet serving that port predates 1994. Statistics compiled by the PANYNJ show approximately 15 percent of the trucks serving those ports predate 1994. *See A Clean Air Strategy* report (dated Oct. 21, 2009), at Figure 2 & Table 4. *Age Analysis of Drayage Trucks Operating at the Port of Seattle* (Aug. 2007), at Tables 1&2. Unless there is now a surfeit of trucks serving these ports, the impact of such a reduction in qualified trucks will be felt immediately.

The long-term effect is a bit more speculative, as it is uncertain what percentage of trucks will be retrofitted or replaced before the long-term bans eliminating trucks with engines that do not meet the 2007 model year standards are adopted (2014 at California ports, 80 percent by 2015 and 100% by 2017 at Seattle, and 2017 at the NY/NJ Port). It is likely, however, that the percentages of trucks being disqualified from serving those ports will be much higher. We say this because, if trucks currently serving the PANYNJ or Port of Seattle regularly that are more than 10 years old were banned, which is the time-frame for the 2017 ban of pre-2007 trucks, 60 percent of all trucks now serving that port would be denied entry. *See id.*

Importantly, these CARB or port-imposed registration requirements cannot escape pre-emption simply because they are meant to promote legitimate public health concerns. To the contrary, in *Rowe v. New Hampshire, supra*, even though the Supreme Court acknowledged the state’s valid public health interest in preventing underage smoking, the Court held that a state law adopted in an attempt to stop the delivery and sale of cigarettes to minors was pre-empted by the FAAAA because it was directed at “services” offered by motor carriers. As noted by the Court in reaching this conclusion, the FAAAA expressly excludes certain matters such as vehicle safety, liability insurance requirements, and local route controls from the scope of preemption, but does not contain a public health exception. *Id.*; *see also* 49 U.S.C. § 14501(c) (2) (exceptions to preemption); *cf. ATA v. Los Angeles, supra* (exception covers regulations that are genuinely responsive to safety concerns).

III. Truck Identification Requirements Associated With Truck Registries Are Credentialing Requirements Preempted by SAFETEA-LU.

As described above, each of the DTR programs implemented by ports incorporate some form of identification to be placed on the truck that evidences compliance with the relevant emission standards and registration requirements. Several ports make the use of

RFID devices or identifying stickers mandatory. Other ports make some type of credential (usually compliance stickers) available to registrants to be used at their option. In those cases, however, the use of that identifier makes entry onto and travel around the port facilities substantially easier than it would be without the credential. Uncredentialed trucks, even if not totally banned, will be subject to inspections or other burdensome administrative procedures not required of registered and credentialed trucks. The difficulties encountered in the absence of the stickers, as a practical matter, makes their use mandatory. Accordingly, all of these identification requirements are pre-empted by Section 4306 of the SAFETEA-LU, codified at 49 U.S.C. § 14506. That provision prohibits states, local governments, and agencies of two or more states, from enacting or enforcing any provision having the force of law requiring motor carriers “to display any form of identification on or in a commercial motor vehicle. . . other than forms of identification required by the Secretary of Transportation under section 390.21 of title 49, Code of Federal Regulations.” 49 U.S.C. § 14506(a).<sup>6</sup>

There are five statutory exceptions to this broad prohibition. 49 U.S.C. § 14506(b). Four of them are tied to credentials permitted by other statutory schemes, e.g., the International Registration Plan under 49 U.S.C. § 31704; the International Fuel Tax Agreement under 49 U.S.C. § 31705; hazardous materials transportation requirements under 49 U.S.C. § 5103; and federal vehicle inspection standards under 49 U.S.C. § 31136. Clearly, none of those exceptions apply here.

The remaining exception, and the only one that could conceivably apply to the RFID, sticker, or comparable identification requirements at issue here, without any statutory citation excepts “a State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate.” What “other displays” might be deemed “appropriate” is not further explained. Since this discretionary authority is not stated as a separate sixth exception to pre-emption, however, but is instead included as an add-on to this particular exception related to motor vehicle license plates, basic rules of statutory construction would lead to the conclusion that other appropriate displays must be in the nature of or related to motor vehicle license plates. Indeed, this wording calls for the application of the maxim *ejusdem generis*, the statutory canon that “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001), *citing* 2A N.

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<sup>6</sup>The referenced section 390.21 of the Federal Motor Carrier Safety Regulations precisely describes the size, shape, and location for the following required markings which must be placed on the truck: the motor carrier’s name as listed on the motor carrier identification report (Form MCS-150), the identification number issued by FMCSA preceded by the letters “USDOT,” and if the operating carrier is different than the owner, that carrier’s name and identification number preceded by the words “operated by.”

Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991); *Washington Dep't of Social Servs. v. Keffeler*, 537 U.S. 371, 384 (2003).

Narrowing the scope of the discretionary authority in this manner would also appear warranted given the origin of this pre-emption provision. Subtitle C of SAFETEA-LU, where this provision is located, is the Unified Carrier Registration Act, the legislation that put an end to the single state registration system (SSRS) and the myriad of related credentialing requirements imposed upon motor carriers by various states (e.g., multiple license plates and fuel tax decals). Since Congress's intent was to get rid of the state requirements that had previously interfered with the free flow of goods between the states and burdened interstate operations with paperwork requirements that could drive up transportation costs, it seems improbable that it meant to give the Secretary unbridled authority to approve any credentialing "displays." On the other hand, limiting the discretion to approval of other forms of identification that serve the same function as motor vehicle license plates is consistent with and furthers the legislative intent.

Importantly, the motor vehicle license plates exception has been read narrowly by the DOT's Federal Motor Carrier Safety Administration ("FMCSA"), when confronted with industry credentialing challenges. Only last month, the FMCSA found that tax-related license plates, certificates, stamps, and window stickers, required by various states, all violated the prohibition on unique forms of identification. 75 Fed. Reg. 64779 (Oct. 20, 2010). Similarly, several years earlier, the FMCSA found that paper cab cards required by Oregon to facilitate reporting and payment of the state's weight-mile tax were precisely the type of display that 14506 was trying to eliminate. 72 Fed. Reg. 9996 (March 6, 2007). Directly applicable here, in arriving at its conclusion the agency recognized as a general matter that such credentials "should be authorized only when absolutely necessary," and that there was no necessity where the same data could be obtained through other means. *Id.* at 9998.

The data that the ports expect to obtain from stickers or RFID tags placed on heavy-duty trucks could be obtained by other means. Vehicle registrations can be checked upon entry to ports. This can be combined with spot-enforcement techniques. Similar random checks used for roadside interdiction are well established and are used successfully by enforcement agencies across the country to ensure compliance with a multitude of safety-related laws and regulations. Thus, the stickers or other forms of identification evidencing compliance with the registration requirements are not necessary for the regulatory scheme imposed by these registries.

#### CONCLUSION

For the reasons discussed above, the Petitioners request that DOT issue a determination that prohibits any state or port from mandating that motor carriers engaged in interstate

commerce must comply with requirements to participate in any drayage truck registry. Petitioners further request that DOT issue a determination prohibiting any port from requiring the placement on or in trucks of stickers or other forms of identification evidencing registration, or even from giving preferential treatment to those who voluntarily use such forms of identification.

Petitioners would point out that such drayage truck registries are neither a necessary or effective tool for reducing harmful emissions. With respect to necessity, these drayage trucks are already subject to the same emissions limitations and enforcement procedures as other heavy-duty trucks. With respect to effectiveness, the overall improvement in air quality from these registries is minimal. Trucks banned from one port can and will continue to serve other ports as well as the geographic areas immediately surrounding the ports. Further, trucks currently serving the ports compose only a small portion of the heavy-duty diesel trucks operating in the port vicinity. As conceded by PANYNJ in its *Clean Air Strategy* report, *supra*, "Port trucks make up less than 4% of all trucks and less than 1% of all vehicles on the regional roadways."

Since all of the state/port registries are imposed for environmental purposes and capture in their data-bases virtually every truck that "may" enter a port or rail yard facility during the course of a year, the burden on interstate commerce is significant.

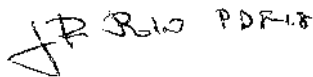
Respectfully submitted,



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