ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUCK TRAILER MANUFACTURERS ASSOCIATION, INC., *et al.*, *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents*.	Consolidated Case Nos. 16-1430, 16-1447

INTERVENOR PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATIONS' OPPOSITION TO MOTION FOR STAY

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INTRODUCTION

Under the Clean Air Act, EPA must set standards for greenhouse gas emissions from motor vehicles. Tractor-trailers are motor vehicles that emit massive quantities of greenhouse gases. And low-cost measures applicable to trailers—the load carrying half of the tractor-trailer—can provide up to one-third of the emissions reductions from tractor-trailers. Consequently, in its most recent, second-generation standards for heavy-duty vehicles (the "Final Rule"), EPA included trailer standards—ensuring that trailers install aerodynamic equipment and use more efficient tires—that the agency concluded would substantially reduce greenhouse gas emissions from tractor-trailers, while saving fuel and money.

Petitioner Truck Trailer Manufacturers Association ("TTMA") does not fundamentally disagree with the foregoing, and appears to concede that EPA has authority to require the improvements contained in the Final Rule. Rather, while admitting that the entire purpose of trailers is to be pulled by tractors so that tractor-trailers may transport goods, TTMA attempts to artificially divide the tractor from the trailer to claim that TTMA's members cannot be regulated *directly* because they are not manufacturers of motor vehicles. That formalistic and impractical view runs counter to the plain language and purpose of the Clean Air Act, and TTMA has not come close to establishing a likelihood of success on the merits.

TTMA has likewise failed to demonstrate that its members will be irreparably harmed absent a stay of standards that simply require manufacturers to equip more of their trailers with widely-used technologies that deliver fuel savings. TTMA's presentation of its alleged irreparable harm is littered with contradictions and belied by its remarkable eleven-month delay in seeking a judicial stay. The speculative assertions in its motion fall well short of "certain and great" harm required to support an extraordinary stay, and at most amount to claims that TTMA's members would prefer not to comply with a standard that is being reconsidered. The Clean Air Act directs otherwise: reconsideration or judicial review "shall not postpone the effectiveness" of final rules. 42 U.S.C. § 7607(b)(1), (d)(7)(B).[1] This direction is wholly consistent with the public interest. EPA's rule reduces harmful greenhouse gases through common-sense requirements that pay for themselves within two years.

BACKGROUND

The transportation sector recently surpassed the power sector as the largest emitter of greenhouse gases in the United States, and medium- and heavy-duty

[1] EPA does not confess error, but also does not oppose a stay. ECF 1698457. But even if EPA had confessed error, "EPA's consent is not alone a sufficient basis for [this Court] to stay or vacate a rule." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015). Indeed, the Clean Air Act requires the opposite, providing only limited and circumscribed authority (not applicable here) for EPA to stay a promulgated rule pending reconsideration. *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017).

vehicles account for almost a quarter of the sector's emissions. A33-34.[2] Tractor-trailers account for 60 percent of medium- and heavy-duty emissions. *Id.*; 81 Fed. Reg. 73,478, 73,480 (Oct. 25, 2016).

Because trailers contribute significantly to tractor-trailers' overall greenhouse gas emissions, EPA's latest standards include trailer-specific requirements premised on the use of widely-available technologies that phase in gradually, with only modest improvements required in 2018. *Id.* at 73,504, 73,662; A29-31, 52-53. These technologies, like aerodynamic side skirts and low-rolling-resistance tires, improve the efficiency of trailers, reducing emissions. As the picture below depicts, the technologies necessary for compliance in 2018 are "bolt-on"—they do not entail any redesign—and they are low-cost, representing a very small percent of the cost of a finished trailer. 81 Fed. Reg. at 73,662, 73,668; A48-50.

Aerodynamic Side Skirt

[2] "A" cites refer to Intervenor's paginated Appendix, filed with this opposition.

These same technologies have, for well over a decade, formed the basis of EPA's SmartWay Program, a voluntary partnership to reduce greenhouse gas emissions and conserve fuel, and have likewise been required by fleet-wide standards in California since 2008. 81 Fed. Reg. at 73,487-88; A23. More than seven years ago, in EPA's proposed first-generation truck standards, the agency expressed its intent to adopt standards for trailers, but ultimately decided to delay adoption to allow more time to collect information and develop a test protocol. 76 Fed. Reg. 57,106, 57,362 (Sept. 15, 2011); A26-28. The trailer standards at issue here represent the consummation of this extensive process, and are carefully designed to apply to trailers *only* where they will result in greenhouse gas reductions. A26, 28.

TTMA filed the instant petition for review on December 22, 2016. ECF 1652784. On January 23, 2017, the Court issued a scheduling order, specifying that procedural motions were due by February 22, 2017. ECF 1656961. No party filed a procedural motion by that deadline. In April, when EPA sought its first 90-day abeyance, TTMA represented to the Court that compliance obligations were "imminent" and that the tasks necessary to prepare for compliance could not be "compressed into a three-to-four-month period later this Fall." ECF 1672207 at 2-4 ("Partial Abeyance Opp."). Although the Rule remained in effect, TTMA did not oppose two subsequent abeyance requests, and did not file the instant motion

until September 25, 2017, eleven months after the Final Rule was promulgated, seven months after the deadline for filing procedural motions, and just over three months before the compliance date.

STANDARD OF REVIEW

"On a motion for stay, it is the movant's obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985). A party seeking a preliminary injunction "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Nken v. Holder,* 556 U.S. 418, 434 (2009); *see also* D.C. Cir. R. 18(a)(1). "[T]he requirement for substantial proof is … high[]," *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); a preliminary injunction "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

ARGUMENT

I. TTMA's Motion Should Be Rejected as Untimely.

Under this Court's internal procedures, procedural motions, including "motions for stay," must be filed by a specific deadline established by Court order. *See* D.C. Cir. Handbook of Practice and Internal Procedures ("Handbook") § VII.A

at 28; *see also id.* § VIIII.A. at 32. On January 23, the Court established this "important time limit[]," *id.* § VII.A at 28, ordering that procedural motions be filed by February 22, 2017. ECF 1656961.

TTMA's motion comes seven months late. Under this Court's Rules, a party must seek leave to file a motion out of time; if it fails to do so more than five days in advance, leave "will be denied, absent exceptional circumstances." D.C. Cir. R. 27(h)(1); Handbook § VIIA at 30. Here, TTMA did not seek leave to file its stay motion after the deadline—let alone demonstrate that its untimeliness is justified by "exceptional circumstances."

TTMA appears to suggest that it delayed filing its motion so that EPA could consider its administrative stay request. Mot. 2, 5. But TTMA did not make that administrative request until April 21, 2017, well *after* the deadline for procedural motions. And it allowed its petition to linger for six months at EPA, despite acknowledging back in April that a 90-day abeyance "effectively ensures that TTMA could not obtain relief from this Court by the time TTMA members" had to expend resources to comply. Partial Abeyance Opp. 2-4. TTMA's motion should be denied for this reason alone.

II. TTMA Is Unlikely to Succeed on the Merits.

The Clean Air Act requires the Administrator to issue "standards applicable to the emission of any air pollutant from any class of new motor vehicles …, which

in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a). In 2009, EPA concluded that greenhouse gases endanger public health and welfare. 74 Fed. Reg. 66,496 (Dec. 15, 2009). And in 2015, after long considering standards for trailers, *supra* at 4, EPA found that "trailers indisputably contribute to the motor vehicle's [greenhouse gas] emissions … and [that] these emissions can be reduced through various means," and proposed specific requirements for trailers. 80 Fed. Reg. 40,138, 40,170 (July 13, 2015). EPA concluded that the final trailer requirements would "significantly reduce [greenhouse gas emissions] and fuel consumption from combination tractor-trailers." 81 Fed. Reg. at 73,504.

TTMA now argues that its members may not be regulated because trailers are not "motor vehicles"—a term expressly defined under the Clean Air Act based on their intended use as "any self-propelled vehicle designed for transporting persons or property on a street or highway." 42 U.S.C § 7550(2). TTMA's argument misses the mark because *tractor-trailers* are plainly "self-propelled vehicle[s] designed for transporting … property" and TTMA's members are manufacturers of *tractor-trailers* and accordingly subject to EPA's standards.

As EPA concluded, "[t]here is no question that EPA is authorized to establish emissions standards … for complete new motor vehicles, and thus can promulgate emission standards for air pollutants emitted by *tractor-trailers*." 81

Fed. Reg. at 73,513 (emphasis added); *see* 80 Fed. Reg. at 40,170 ("Connected together, a tractor and trailer constitute 'a self-propelled vehicle designed for transporting … property on a street or highway'"). Trailers are "an essential part of the tractor-trailer," whose "sole purpose is to serve as the cargo-hauling part of the vehicle." 80 Fed. Reg. at 40,170. The trailer has no commercial use *except when* attached to the tractor. A39. Likewise, a tractor is not like a horse, which has many independent uses. *Contra* Mot. 10. "[O]perating a tractor without a trailer is inefficient, costly, and potentially dangerous, and companies endeavor to eliminate any such operation[,]" A39-40, because "[w]ithout the tractor, the trailer cannot transport property" and the "motor vehicle needs both … to accomplish its intended use." 80 Fed. Reg. at 40,170.

Indeed, the two are inextricably linked: "From a design, engineering, and operational standpoint, heavy-duty tractors and trailers function as an integrated vehicle, designed to haul cargo together." A39; *see* 76 Fed. Reg. at 57,138-39 (tractor's engine size optimized to haul cargo-loaded trailer, height of tractor designed to correspond to height of trailer). Even TTMA agrees (as it must) that trailers are intended to be used in "combination" with tractors. Mot. 20.

So the critical question is not whether a tractor-trailer is a motor vehicle (it is), or whether EPA may require the improvements contained in the Final Rule (it can). The critical question is whether trailer manufacturers are manufacturers of

the tractor-trailer, and thus subject to compliance obligations. *See* 81 Fed. Reg. at 73,516 n. 90 ("Consequently, the essential issue here is not whether EPA can issue and implement emission standards for trailers, but at what point in the implementation process these standards apply.").[3]

Trailer manufacturers are plainly manufacturers of the tractor-trailer under the Act. As EPA explained, the Clean Air Act contemplates that a motor vehicle can have more than one manufacturer (here, both the tractor manufacturer and the trailer manufacturer). 81 Fed. Reg. at 73,515-16. "Manufacturer" is defined in the Act as "any person engaged in the manufacturing *or* assembling of new motor vehicles, new motor vehicle engines … *or* importing such vehicles or engines for resale, *or* who acts for and is under the control of any such person …." 42 U.S.C. § 7550(9) (emphasis added). Congress's use of multiple conjunctives indicates that multiple entities can be treated as a manufacturer under the Act.

The definition also refers broadly to "*any* person" who meets these terms. *See Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) (observing that "'any' … has an expansive meaning that is, one or some indiscriminately of

[3] TTMA does not appear to disagree. It concedes that "regulation of a 'motor vehicle' may *impact* components of that vehicle, or even necessitate adding new ones." Mot. 9. TTMA simply does not think its members should be responsible for certifying compliance with the trailer standards—in its comments on EPA's proposal, TTMA suggested that "the party that joined the trailer to the tractor should be responsible for certifying compliance with the trailer standards." 81 Fed. Reg. at 73,512.

whatever kind"); *see also* 81 Fed. Reg. at 73,516 n. 87 (citing cases). "Engaged" too has an expansive meaning, including "involved in an activity." *Engaged,* Merriam Webster Dictionary (11th ed. 2013). EPA was thus correct when it concluded: "It appears plain that this definition was not intended to restrict the definition of 'manufacturer' to a single person per vehicle." 81 Fed. Reg. at 73,515.

In the Final Rule, EPA properly applied Congress' expansive definition to the realities of the heavy-duty trucking industry, where most vehicles are manufactured and assembled by multiple entities. *Id.* at 73,515-16. The trailer manufacturer is heavily "engaged" in manufacturing the tractor-trailer, determining all of the design specifications affecting the tractor-trailer's ability to carry load, including specifications that affect the tractor-trailer's greenhouse gas emissions. *See id.* ("With respect to the trailer, the trailer manufacturer is analogous to the manufacturer of the light duty vehicle, specifying, controlling, and assembling all aspects of the product from inception to completion."). EPA thus correctly (and realistically) determined that "it appears to be consistent with the facts and the Act to consider trailer manufacturers as persons engaged in the manufacture of a motor vehicle." *Id.*

Those "facts" include that trailer manufacturers are the entities with control over the manufacture of the trailer. Consistent with its longstanding practice, EPA

determined that the manufacturer subject to certification responsibilities is the one with the "most control over the particular vehicle segment" it manufactures. *See* 81 Fed. Reg. at 73,515 & n. 86 (documenting other instances involving multiple manufacturers). By contrast, TTMA's suggestion that the assembler certify compliance, *supra* n. 3, is wholly impractical and unworkable.

TTMA's argument that a trailer cannot be directly regulated also runs counter to EPA's long-standing interpretation that section 7521(a) authorizes regulation of "incomplete vehicles"—motor vehicles not designed as complete systems. *See* 80 Fed. Reg. at 40,170 (explaining that EPA's analysis is consistent with existing regulatory definitions in which "a heavy-duty vehicle 'that has the primary load carrying device or container attached' is referred to as a '[c]omplete heavy-duty vehicle,'" while one that does not is referred to as an "'[i]ncomplete truck.'") (citing 40 C.F.R. 86.1803-01). Accordingly, EPA regulations have long contained provisions allocating certification responsibilities for incomplete vehicles where multiple manufacturers are involved, and the Rule at issue here simply follows suit.

Nor is EPA's interpretation open-ended. *Contra* Mot. 11-12. The Act itself draws a line between a motor vehicle manufacturer and a motor vehicle *part* manufacturer. 42 U.S.C. § 7550(1), (9); *see* 81 Fed. Reg. at 73,515-16. A "motor vehicle ... part manufacturer" is "any person engaged in the manufacturing,

assembling, or rebuilding of any device, system, part, component or element of design which is installed in or on a motor vehicle." 42 U.S.C. § 7550(9). A trailer is not "installed on a motor vehicle," unlike a tire or aerodynamic device. *See* 81 Fed. Reg. at 73,515. Rather, the trailer is an essential half of the tractor-trailer that enables the vehicle to fulfill its defined purpose of "transporting … property," 42 U.S.C. § 7550(2), and a substantial contributor to the tractor-trailer's greenhouse gas emissions. 81 Fed. Reg. at 73,516 & n. 89 (concluding that trailer improvements can account for approximately one-third of the total achievable reduction for a tractor-trailer).

TTMA's assertion that federal criminal, property, and other statutes far afield from the Clean Air Act provide more specific authority for regulating vehicles "drawn by mechanical power," Mot. 8-9, tells us nothing about what Congress intended in the Clean Air Act.[4] TTMA also makes the (unsupported) assertion that "Congress omitted language like 'drawn by mechanical power' in the Clean Air Act because it intended to cabin EPA's authority to engines and vehicles

[4] TTMA tries to expand the negative implication doctrine sometimes recognized by courts well past its usefulness. Mot. 8-9. In *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485, 488 (1996), the Court looked at two "analogous" statutes regarding hazardous waste cleanup to support its rejection of a sought-after, but not-provided-for remedy against the background principle that courts should be "chary" of creating remedies. Here, TTMA looks to non-analogous statutes to curtail agency authority under a statute aimed at protecting public health and welfare, a situation in which the Supreme Court has explicitly rejected negative-implication-type arguments. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222, 244-45 (2009) (rejecting negative implication within the *same* statute).

that generate power and emit pollutants," *id.*, ignoring both that without a trailer a tractor cannot fulfill its defined purpose as a motor vehicle and that trailers cause significant emissions of pollutants.

Similarly, TTMA points to decisions from criminal cases holding persons responsible separately for the theft of a tractor and a trailer. Mot. 11. But criminal statutes and environmental statutes have very different purposes. Criminal statutes may be concerned with the value of the tractor and trailer individually, *see Bernard v. United States*, 872 F.2d 376, 377 (11th Cir. 1989) (stealing both the tractor and the trailer "involves a larger misdeed than dealing with a single trailer"); *United States v. Kidding*, 560 F.2d 1303, 1308-09 (7th Cir. 1977) (same), but the Clean Air Act is concerned with reducing the emissions that are produced from operation of the tractor-trailer unit. *See Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2441 (2014) ("[T]he presumption of consistent usage readily yields to context.") (internal quotation marks omitted).

TTMA's formalistic and impractical view here would undermine the goals of the Clean Air Act—reducing air pollution from freight vehicles that endangers human health and welfare—by holding that EPA is not authorized to regulate the main load-carrying half of a major source of dangerous greenhouse gas emissions, a half that is indispensable to the motor vehicle's ability to "transport property." 42 U.S.C. §§ 7521(a), 7550(2). Or at least it would lead to the result that EPA may

not require the party that entirely controls the manufacture of the trailer to certify compliance. That conclusion would be at odds with both the plain language and purpose of the statute, and even if it were not, EPA's interpretation in the Final Rule is plainly reasonable.[5] Accordingly, TTMA has failed to make a "clear showing" that it is likely to succeed on the merits, and its motion should be denied.

III. TTMA's Alleged Injuries Are Minor and Do Not Satisfy this Court's Demanding Standards for Irreparable Harm.

The standard for demonstrating irreparable harm is demanding: the harm must be "certain, great, actual 'and not theoretical.'" *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

A petitioner seeking to enjoin an agency regulation must make "a strong showing that the economic loss would significantly damage its business above and beyond a simple diminution in profits." *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 43 (D.D.C. 2000). "The fact that economic losses may be

[5] TTMA is wrong to assert that EPA's interpretation in the Final Rule does not merit *Chevron* deference. The case TTMA cites, *Global Tel*Link v. Federal Communications Commission*, 866 F.3d 397, 417 (D.C. Cir. 2017) (amended upon rehearing) regarded a different situation—one where the agency expressly declined to defend its earlier interpretation, not merely stated that it was reconsidering it—and this Court declined to decide the deference question even in that situation.

unrecoverable does not absolve the movant from its considerable burden of proving that those losses are certain, great and actual." *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 52 (D.D.C. 2011). Indeed, a contrary conclusion cannot be correct under this Court's precedent, which requires that irreparable harm be "great," because such a rule would effectively eliminate the irreparable harm requirement in all challenges to government regulations. "Any time a corporation complies with a government regulation … it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction." *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527-28 (3d Cir. 1976).[6]

"The loss of … customer goodwill [is] typically considered to be [an] economic harm," and is not considered irreparable unless it threatens the existence of the business. *Air Transp. Ass'n of Am. v. Export-Import Bank of the U.S.*, 840 F. Supp. 2d 327, 335 (D.D.C. 2012) (collecting cases).[7] In alleging loss of

[6] The cases TTMA cites, Mot. 18, do not prove the opposite. In *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016), the Fifth Circuit concluded that the alleged harms, "including unemployment and the permanent closure of plants," "threaten[ed] the very existence of some of Petitioners' businesses." Likewise, this Court's decision in *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011) is inapposite because there this Court concluded that EPA had failed to give adequate notice of an aspect of its regulation and would be "receiving comments for the first time," and only then essentially granted the usual remedy of vacatur.

[7] Once again, the cases TTMA cites, Mot. 15, are not to the contrary. For example, in *Reuters Ltd. v. UPI, Inc.*, 903 F.2d 904, 908 (2d Cir. 1990), the court concluded

customers or reputational damage, as with all forms of irreparable injury, the claim cannot be "vague and speculative;" the movant should offer "concrete estimates regarding lost revenues, customers, or market share." *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 212-13 (D.D.C. 2012).

TTMA alleges that, absent a stay, its members will lose customers and market share and will be forced to spend money to comply with the Final Rule. These allegations lack the requisite specificity, are wholly speculative, and do not come close to meeting the demanding standard to demonstrate irreparable harm.

A. TTMA fails to demonstrate irreparable harm based on market impact.

While claiming that its members sell ninety percent of the trailers in the United States (a virtual monopoly), Mot. 1, TTMA nonetheless alleges that they will lose customers and market share. TTMA's allegation is factually unsubstantiated and legally inadequate. As a threshold matter, TTMA fails to explain how it can lose market share in a market its members nearly entirely control. Even so, TTMA provides no "concrete estimates regarding lost revenues, customers, or market share," *Cardinal Health*, 846 F. Supp. 2d at 213, likely because it cannot.

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that the alleged harm "threaten[ed]" the movant's "continued viability." And many of the cases cited regard instances where an appellate court simply found that a district court "did not abuse its discretion" in finding (or not finding) irreparable harm with little or no discussion of the facts. *E.g.*, *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 67 (2d Cir. 2007).

Market data indicates that the standards have had—and will have—no impact on sales. The number of trailers built in the first quarter of 2018 is estimated to increase ten percent compared with the first quarter of 2017, and "cancellations, a leading indicator of fleet retrenchment, continue to be a non-issue." A59, 61-62. Orders, builds, and shipments of new trailers have all experienced growth in 2017 despite the fact that, as TTMA explained, Mot. 13, trailer orders are made "months in advance." A59. Wabash, a TTMA declarant, has projected strong sales in 2018, and has identified regulations as "key drivers of trailer demand." A62-63. This data is consistent with the fact that the major fleets that purchase trailers, and their customers, have expressed a desire for more efficient trailers, along with their support for the trailer standards due to the fuel savings the standards will deliver. A13, 75-77.

TTMA also argues that individual TTMA members (large manufacturers) may lose sales to other TTMA members (small manufacturers) because of the one-year exemption for small manufacturers, but fails to support that proposition with any actual evidence. It strains credulity to suggest that small manufacturers could ramp up production of non-compliant trailers sufficiently during 2018 to provide large manufacturers with any real competition.[8] Over eighty percent of trailer

[8] Notably, one of TTMA's declarants, George Gauntt, represents a manufacturer, Kentucky Trailer, which, with only 12 employees, is not subject to the standards

manufacturers meet the definition of a small business, yet EPA found that these manufacturers make less than fifteen percent of the cumulative annual box trailer production. 81 Fed. Reg. at 73,677. Those 147 small businesses account for fewer trailer sales combined than a single TTMA declarant, Wabash, whose annual revenue of over $1 billion is almost 100 times greater than the $16 million average annual revenue of small manufacturers. A67-68. Accordingly, EPA reasonably determined that small businesses, with significantly less revenue and manufacturing capabilities, would not take market share from larger manufacturers in the limited, one-year period before they too must comply with the standards. 81 Fed. Reg. at 73,677.

B. TTMA fails to demonstrate irreparable harm based on compliance costs.

The compliance costs asserted by TTMA—that members will have to hire new employees to install aerodynamic equipment and comply with reporting requirements, and incur costs to store the equipment, Mot. 2, 17—likewise do not satisfy TTMA's burden. "[O]rdinary compliance costs are typically insufficient to constitute irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury resulting from attempted compliance with government regulation

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until 2019, 81 Fed Reg. at 73,646, and—under TTMA's theory—would stand to benefit from the Final Rule during 2018. A69.

ordinarily is not irreparable harm."). The loss of a small amount of a company's overall revenue to comply with a regulation is not considered irreparable. *See, e.g.*, *Coal. for Common Sense in Gov't Procurement v. United States*, 576 F. Supp. 2d 162 (D.D.C. 2008) (loss of less than one percent of annual revenues, despite being millions of dollars in absolute terms, was not sufficiently grave to constitute irreparable harm). Indeed, even if the costs TTMA alleges are accurate, all of these costs fall below one percent of these large companies' annual revenues. A71-72. Moreover, much of the asserted costs that TTMA actually quantifies are allegedly for storing aerodynamic components, but TTMA fails to explain why its members cannot avoid or minimize these costs, which EPA estimated to be much lower, by, for example, entering into agreements with component manufacturers for "just-in-time" delivery of equipment or leasing space to avoid capital expenditures. *See* A70-71.[9]

Notably, TTMA only briefly mentions the cost of the tires and aerodynamic devices themselves. And for good reason: the cost of compliance for a 2018 trailer

[9] Surely, the fact that one manufacturer (Hyundai Translead, Inc.) has sought—and EPA has allegedly agreed to—a special exemption from the Final Rule allowing it to build now and supply in 2018 2,500 non-compliant trailers, thereby entailing the need for additional storage, Mot. 14, cannot constitute irreparable harm. "The case law is well-settled that a preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted." *Lee v. Christian Coal. of Am., Inc.*, 160 F. Supp. 2d 14, 33 (D.D.C. 2001) (citation omitted).

ranges from $231 to $1,441, which represents only a very small percent of the costs of a finished trailer. A48-50; *contra* Mot. 14, Gauntt Decl. ¶ 6. Indeed, EPA specifically designed these standards, after extensive engagement with the trailer manufacturing industry, A29, to utilize widely-available, cost-effective, "bolt-on" technologies that do not entail redesign of the trailers. 81 Fed. Reg. at 73,668; A23-27, 44-45. Moreover, these costs are ultimately passed onto customers, who recover the costs within six months to two years. 81 Fed. Reg. at 73,483, 73,510; A13, 70-71. Indeed, TTMA readily concedes that many of its members—and surely the large manufacturers who manufacture the vast majority of trailers—are already providing this equipment as part of their regular business. Mot. 13; *see* A22, 25, 75-77.[10]

Ultimately, based upon TTMA's own representations, most of its members who must comply in 2018 must have already taken many, if not most, of the steps necessary to do so. Partial Abeyance Opp. 2-4 (explaining that compliance

[10] TTMA also complains about component availability, but once again, its assertions are contradicted by readily-available public information. Between the SmartWay program (in effect since 2004), California's trailer regulation (in effect since 2008) and fleets' corporate sustainability policies, there is no question that the industry has already been producing and supplying compliant trailers to major parts of the market for some time, and that component manufacturers are prepared to supply the necessary equipment. A24-26, 47, 56-57, 75-77, 79. Moreover, the Final Rule provides flexibilities that permit manufacturers to exempt a certain number of trailers from compliance, which might be used, for example, for a customer with a "unique wheel size," Mot. 14. 81 Fed. Reg. at 73,674-75.

preparations could not be compressed into 3-4 months in the Fall). *See Am. Hosp. Ass'n*, 625 F.2d at 1331 (no preliminary injunction where "many of the complained of costs should already have been incurred prior to the hearing on the preliminary injunction if the member hospitals hoped to be in compliance"). And, despite TTMA's suggestions to the contrary, the trailer industry continues to grow and see strong demand with the Final Rule in effect. A58-64.

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What TTMA really seeks is a break from the minor costs of continuing to comply with a duly-promulgated standard because "EPA itself might withdraw" the Final Rule and manufacturers allegedly "should be asked to bear the ramp-up costs to comply … only after agency reconsideration and any litigation are complete." Mot. 18-19. But the Clean Air Act is explicit that promulgated regulations remain effective (i.e., shall *not* be stayed) even though those regulations might be changed through reconsideration or even vacated upon judicial review. 42 U.S.C. § 7607(b)(1), (d)(7)(B). Absent a clear showing of irreparable harm (not made here) this Court should not stay the Final Rule merely because EPA has decided to reconsider it and may, at some future date, revise it.

IV. The Balance of Equities and Public Interest Weigh Decisively in Favor of Denying TTMA's Stay.

For the reasons stated by State Intervenors in their opposition to TTMA's stay motion, including the significant climate disruption and associated harms, A5-

9, as well as the benefits to consumers of reducing the cost of goods, A12-13, the balance of equities and public interest factors weigh decisively in favor of denying TTMA's stay.

CONCLUSION

For the foregoing reasons, Intervenors urge this Court to deny TTMA's motion for a stay.

DATED: October 12, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing **Intervenor Public Health and Environmental Organizations' Opposition to Motion for Stay** was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 5,163 words.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **Intervenor Public Health and Environmental Organizations' Opposition to Motion for Stay** on all parties through the Court's electronic case filing (ECF) system.

DATED: Oct. 12, 2017

/s/ *Susannah L. Weaver*

Susannah L. Weaver