UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

NOV 25 2014

CERTIFIED MAIL NO. 7009 0080 0001 2086 8388
RETURN RECEIPT REQUESTED

Tracy Rosser
Senior Vice President
Wal-Mart Transportation, LLC
702 SW 8th Street
Bentonville, Arkansas 72716-6209

Dear Mr. Rosser:

Pursuant to its authority under section 114 of the Clean Air Act, 42 U.S.C. §7414, Region IX of the U.S. Environmental Protection Agency (the "EPA") issued an information collection request letter dated June 16, 2014 to Wal-Mart Transportation, LLC to determine Wal-Mart Transportation's compliance with California's "Regulation to Reduce Emissions of Diesel Particulate Matter, Oxides of Nitrogen and Other Criteria Pollutants from In-Use Heavy-Duty Diesel-Fueled Vehicles" (the "Truck and Bus Regulation"), 13 California Code of Regulations ("CCR") § 2025, as approved into the federally-approved and federally-enforceable California State Implementation Plan ("SIP").[1] Wal-Mart Transportation's response, dated August 29, 2014, asserts that section 2025(x)(2) does not apply to its operations when it hires third party motor carriers and that it is "not otherwise subject to the requirements of section 2025(x)(2) for non-Wal-Mart Transportation trucks."[2] Pursuant to its authority under section 114 of the Clean Air Act, EPA is issuing this follow-up letter to determine Wal-Mart Transportation's compliance with the Truck and Bus Regulation.

As a preliminary matter, EPA disagrees with Wal-Mart Transportation's interpretation of section 2025(x)(2). EPA notes that section 2025(x)(1) imposes an obligation on vehicle owners to comply with the requirements of section 2025. Section 2025(x)(2) imposes a

[1] 77 FR 20308 (April 4, 2012).
[2] Section 2025(x)(2) provides: "Any in-state or out-of-state motor carrier, California broker, or any California resident who operates or directs the operation of any vehicle subject to this regulation shall verify that each hired or dispatched vehicle is in compliance with the regulation and comply with the record keeping requirements of Section 2025(s)(4)." The full text of the Truck and Bus Regulation is available on the CARB website at http://www.arb.ca.gov/msprog/onrdiesel/documents/TBFinalReg.pdf.

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different obligation on motor carriers (as well as brokers and California residents) with respect to vehicles that they do not necessarily own. Specifically, section 2025(x)(2) requires motor carriers to verify compliance with section 2025 of all vehicles that they hire or dispatch and to comply with section 2025(s)(4)'s recordkeeping requirements for these vehicles.

By its own acknowledgement, Wal-Mart Transportation is a "motor carrier" with respect to the vehicles in its own private fleet. EPA's view is that Wal-Mart Transportation's status as a motor carrier renders it subject to section 2025(x)(2)'s obligation to verify the compliance of vehicles that it hires and to maintain the records specified in section 2025(s)(4). EPA disagrees with Wal-Mart's assertion that it is merely a "shipper or consignee" with respect to vehicles owned or leased by third parties. Wal-Mart retains its status as a motor carrier as long as it meets the definitions in section 2025(d)(42) and section 408 of the California Vehicle Code. Its decision to hire third parties to transport freight does not alter this fact or affect its obligations as a motor carrier. Therefore, as a motor carrier, Wal-Mart is required by section 2025(x)(2) to verify the compliance of the trucks it hires and to comply with section 2025(s)(4)'s recordkeeping requirements.

EPA's interpretation is consistent with CARB's statements regarding compliance obligations for motor carriers even with regard to vehicles they do not own or lease. For example, a 2008 CARB summary of the compliance obligation for motor carriers stated that the provision "[r]equires motor carriers and brokers to verify that any vehicle hired or dispatched complies with the requirement of the regulation."[3]

In addition, CARB has issued fact sheets and other guidance regarding the obligations of motor carriers and brokers that hire or dispatch fleets. For example, CARB's Fact Sheet, "Truck and Bus Regulation – How to Verify if Hired Fleets Comply" (dated June 27, 2014) states, "Anyone who operates or directs the operation of any vehicle subject to the Truck and Bus regulation needs to verify that each hired company is either in compliance with the regulation or has reported compliance to the Air Resources Board (ARB). This requirement applies to any in-state or out-of-state motor carrier . . . ."[4] This Fact Sheet also explains how non-owners can verify compliance of hired fleets by obtaining copies of compliance certificates issued by ARB or by checking ARB's website where it identifies fleets that have reported compliance.

CAA section 114(a) provides EPA with broad authority to request information "[f]or the purpose…of determining whether any person is in violation of any such standard or any requirement of such a (state implementation) plan." In addition, EPA has broad authority to

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[3] http://www.arb.ca.gov/regact/2008/truckbus08/appa1.pdf (page 12 of the pdf; October 2008) (emphasis added).
[4] Available at: http://www.arb.ca.gov/msprog/onrdiesel/documents/faqverify.pdf

request records, reports and "such other information as the Administrator may reasonably require." 42 U.S.C. § 7414(a)(1). Accordingly, Wal-Mart Transportation is under a legal obligation to respond to information requests EPA may reasonably require to evaluate compliance with the Clean Air Act. In responding to this request, Wal-Mart Transportation shall use the instructions provided in Enclosure 1.

Provide your response to requests 1 through 5 below within *thirty (30) calendar days* after receipt of this letter.

1. For each motor carrier hired by Wal-Mart Transportation to move freight into, out of, or within California, at any time between January 1, 2012 and the date of this letter, provide the following:

   a) Name and business address;
   b) Total number of bills of lading issued by, for, and/or between the entity and Wal-Mart Transportation during each of the calendar years ("CY") 2012, 2013 and 2014 (to date of this letter);[5] and
   c) A representative example of a bill of lading.

2. For entities identified in response to request 1 above, state whether Wal-Mart Transportation verified compliance with the California Truck and Bus Regulation during each of the CY 2012, 2013, and 2014.

3. For entities identified in response to request 1 above, produce copies of documents establishing compliance such as a Certificate of Reported Compliance or a written statement or contract reflecting compliance verification with the Truck and Bus Regulation during each of the CY 2012, 2013, and 2014.

4. For each transportation management system ("TMS") that Wal-Mart Transportation uses, in whole or in part, to manage freight transported by the entities identified in response to request 1, please provide the name and vendor of the TMS and identify and describe each data field included by each of the TMSs.

5. Provide annual miles operated in California during each of the CY 2012, 2013, and 2014 (to date of this letter) for the following vehicle identification numbers ("VINs"): 11VA812E3YA000372, 11VA812E71A000543, 11VA812E01A000545, 11VA812E04A000517, 11VA812E24A000518.[6]

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[5] Please exclude bills of lading for freight originating from or destined for the ports and intermodal rail yards listed at http://www.arb.ca.gov/msprog/onroad/porttruck/facilitylist.htm.

[6] Wal-Mart's response dated September 19, 2014 listed these VINs but omitted data on the number of miles operated in California during CY 2012-2014.

If Wal-Mart Transportation seeks to withhold any document(s) based on a claim of attorney-client communications privilege or the attorney work product doctrine in its response to this information request, Wal-Mart Transportation shall provide with its response a privilege log for each document containing the following information: (i) the date, author(s), every individual to whom the document was originally sent, every individual who subsequently acquired the document, the purpose for which the document was sent to or obtained by those individuals, and the employment titles of the authors and recipients; (ii) the subject matter of the document; (iii) the privilege claimed for the document and all facts supporting the claim of privilege; (iv) the primary purpose(s), including the business purposes, for which the document was made; (v) the question(s) in this information request to which the document is responsive to; and (vi) all facts contained in the document that are responsive to a question in this information request.

The responsive information shall be accompanied by a cover letter sent via certified mail with return receipt requested to the following address:

Ms. Kathleen H. Johnson
Director, Enforcement Division
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Attn: Cyntia Steiner (ENF-2-1)

Please be advised that under section 113(a) of the Act, 42 U.S.C. § 7413(a), failure to provide the information and documents required by this letter may result in an order requiring compliance, an order assessing an administrative penalty, or a civil action for appropriate relief. Section 113(b) of the Act, 42 U.S.C. § 7413(b), provides for the assessment of a civil penalty, which has been adjusted for inflation to $37,500 per day, for each violation of the Act. See 40 C.F.R. § 19.4 (for penalties effective after January 12, 2009). In addition, section 113(c) of the Act, 42 U.S.C. § 7413(c), provides criminal penalties for knowingly making any false material statement in, or omitting material information from, any report required under the Act. The information provided by Wal-Mart Transportation may be used by the United States in administrative, civil, or criminal proceedings.

You may, if you desire, assert a confidential business information ("CBI") claim on behalf of Wal-Mart Transportation covering part or all of the information provided to EPA in response to this letter. Any such CBI claim must conform to the requirements set forth in 40 C.F.R. Part 2, particularly 40 C.F.R. § 2.203, and contain supporting documentary evidence. In addition, any such claim must be substantiated in accordance with 40 C.F.R. § 2.204(e)(4).

Specify by page, paragraph and sentence when identifying information from a document where you make a CBI claim. Where your claim does not include all information on a page, please attach a copy of each such page with brackets around the text you claim to be CBI. If a page, document, or group or class of documents claimed by you to be CBI contains a significant amount of information which our Regional Counsel determines is not CBI, your CBI claim regarding that page, document, or group or class of documents may be denied.

You are advised that certain information may be made available to the public pursuant to section 114(c) of the Act, 42 U.S.C. § 7414(c), and 40 C.F.R. § 2.301, notwithstanding a claim that such information is entitled to confidential treatment. Please note that emission data provided pursuant to section 114 of the Act, 42 U.S.C. § 7414, is not entitled to confidential treatment under 40 C.F.R. Part 2, Subpart B. Emission data is defined at 40 C.F.R. §§ 2.301(a)(2). If no claim of confidentiality is received with your reply, the information may be made available to the public without notice to Wal-Mart Transportation.

This information request is not subject to review by the Office of Management and Budget under the Paperwork Reduction Act because it is not a "collection of information" within the meaning of 44 U.S.C §§ 3502(3) and 3518(c)(1), since it is being issued during the conduct of an investigation involving the EPA against specific individuals or entities. See also 5 C.F.R. § 1320.4.

Wal-Mart Transportation shall submit its response no later than thirty (30) calendar days after receipt of this letter. All information submitted in response to this request must be certified in a signed, separate statement as true, correct, accurate, and complete, to the best of his/her knowledge, by an individual with sufficient knowledge and authority to make such representations on behalf of Wal-Mart Transportation. On the last page of your response to this information request, include the certification contained in Enclosure 2.

If Wal-Mart Transportation anticipates that it will not be able to respond fully to this request within the time period specified, Wal-Mart Transportation must submit a sworn declaration by a responsible corporate official within ten (10) calendar days after receipt of this letter specifying what information will be provided by the allotted deadline, describing the efforts that have been/are being undertaken to obtain the remaining other responsive information, and providing a detailed schedule of when such other responsive information will be provided. Upon receipt and based upon such declaration, EPA may extend the time in which to respond to this information request. Also, please contact EPA if Wal-Mart Transportation determines that a full response to a particular request for information would require the submission of an extremely large number of documents or data files. Based upon such notification, EPA may modify the scope of the documents required to be produced.

If you have any questions regarding this request, please contact Cyntia Steiner of my staff at (415) 947-4112; or your attorney can contact Daniel Reich, Office of Regional Counsel, at (415) 972-3911. Thank you for your cooperation in this matter.

Sincerely,

Kathleen H. Johnson
Director, Enforcement Division

Enclosures

cc: James Ryden, California Air Resources Board
Ilana Saltzbart, Kirkland and Ellis

ENCLOSURE 1: Instructions

1) Prepare a cover letter that includes a written response to all requests referencing the request number to which each answer or document pertains. In addition, attach to the cover letter the signed certification provided in Enclosure 2.

2) To the extent that Wal-Mart Transportation has no responsive information or documents for any particular request, this must be explicitly stated in the response.

3) Where documents or information necessary for a response are neither in your possession nor available to you, indicate in your response why such documents or information is not available or in your possession and identify any source that either possesses or is likely to possess such information.

4) To the extent that a document is responsive to more than one request, this must be so indicated and only one copy of the document need be provided.

5) Please include data in response to this information request in spreadsheet format (e.g., Excel format). Provide in an electronic format rather than as images.

6) All responsive documents must be:
   a) provided as an accurate and legible copy in a searchable PDF file format;
   b) submitted on a disk (CD or DVD media); and
   c) number stamped in sequential order (e.g. BATES stamped).

ENCLOSURE 2: Statement of Certification

[This Certification is for signature by the president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or another executive with authority to perform similar policy or decision-making functions of the corporation.]

Wal-Mart Transportation LLC is submitting the enclosed documents in response to the U.S. Environmental Protection Agency's ("EPA's") request for information, issued pursuant to Section 114(a) of the Clean Air Act, to determine whether the facility is in compliance with the Clean Air Act, including the federally-approved California Truck and Bus Regulation.

I certify that I am fully authorized by Wal-Mart Transportation LLC to provide the above information on its behalf to EPA.

I certify under penalty of law that I have personally examined and am familiar with the statements and information submitted in the enclosed documents, including all attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are, to the best of my knowledge and belief, true, correct, accurate and complete. I am aware that there are significant penalties for submitting false statements and information, or omitting required statements and information, including the possibility of fines and imprisonment for knowing violations.

Date: _____

Name (Printed): _____

Signature: _____

Title: _____