UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	**)**	
	)	
Norco Corporation,	**)**	**Docket No. CAA-09-2024-0025**
	)	
Respondent.	**)**	

ORDER ON MOTIONS

Both parties have filed a dispositive motion. As there is a genuine issue of material fact, both motions are **DENIED**.

I. PROCEDURAL HISTORY

This matter commenced on December 21, 2023, when the Director of the Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency ("EPA"), Region IX ("Complainant" or "Agency"), filed a Complaint and Notice of Opportunity for Hearing ("Complaint") against Norco Corporation ("Respondent" or "Norco"), pursuant to section 113(a)(1) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7413(a)(1). The Complaint alleges in one count that, between January 1, 2018, and May 20, 2021, Respondent committed 77 violations of section 2025(x)(2) of California's Regulation to Reduce Emissions of Diesel Particulate Matter, Oxides of Nitrogen and Other Pollutants, from In-Use Heavy-Duty Diesel-Fueled Vehicles, Cal. Code Regs. tit. 13, § 2025, part of the State Implementation Plan complying with the CAA and enforceable by EPA. Specifically, the Agency alleges that Respondent did not "verify" that each vehicle it hired and dispatched to California in that time period was in compliance with the California regulation.

Respondent, pro se, answered the Complaint in a document filed on January 18, 2024 ("Answer").[1] The Answer denied the violations and requested a hearing. The undersigned was designated to preside over this matter and on January 31, 2024, issued a Prehearing Order. In response to that Order, Complainant filed its Initial Prehearing Exchange on February 28, 2024;

[1] Respondent's President, A.G. Hollenstein, signed the document filed in answer to the Complaint and other pleadings filed on Respondent's behalf in this matter. Answer 1.

Respondent filed its Prehearing Exchange on April 17, 2024; and Complainant filed its Rebuttal Prehearing Exchange on May 2, 2024.[2]

On May 7, 2024, Respondent filed a Motion for Dismissal ("Motion"), supported by two exhibits. Complainant's Opposition to Respondent's Motion to Dismiss and Complainant's Motion for Partial Accelerated Decision on Liability ("Complainant's Opposition/Motion") was filed on May 22, 2023. On June 1, 2024, Respondent's Reply in Support of Motion to Dismiss ("Reply") was filed along with three additional supporting exhibits. Five days later, on June 6, 2024, Respondent's Opposition to Complainant's Motion for Partial Accelerated Decision on Liability ("Respondent's Opposition") was filed, along with one additional exhibit. On June 14, 2024, Complainant filed a Reply in Support of its Partial Motion for Accelerated Decision on Liability.[3]

II. RELEVANT SUBSTANTIVE LAW

The CAA, 42 U.S.C. §§7401-7671q, initially enacted in 1963 and intermittently amended since, "was intended comprehensively to regulate, through guidelines and controls, the complexities of restraining and curtailing modern day air pollution." *Bunker Hill Co. Lead & Zinc Smelter v. EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981) (citing *United States v. Stauffer Chem. Co*., 511 F. Supp. 744 (M.D.Tenn.1981), *rev'd*, 684 F.2d 1174 (6th Cir. 1982)); 42 U.S.C. § 7401(c) ("A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.").

The Act gives each state the primary responsibility for creating its own "state implementation plan" ("SIP") specifying the manner in which it will achieve and maintain compliance with national ambient air quality standards set by EPA.[4] 42 U.S.C. § 7407(a); 42 U.S.C. § 7410 (a); *see also* CX 37 (40 C.F.R. § 81.305 (California Attainment Status Designations)).

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[2] Complainant produced a total of 50 exhibits ("CX") with its Prehearing Exchange filings, identifying two of those documents (CX 44 and CX 47) as containing material claimed to be confidential business information pursuant to 40 C.F.R. § 2.203(b) (codified at 5 U.S.C. § 552a). Respondent produced a total of four exhibits ("RX") with its Prehearing Exchange.

[3] Also on June 14, 2024, Respondent filed a Corrected Motion for Dismissal. The Corrected Motion is identical to the original Motion, except that it renames the attached exhibits from "RX 1" and "RX 2" to "RX 7" and "RX 8." The two numbered exhibits Respondent filed with its Motion are identified herein as "RX 7" and "RX 8". The three exhibits Respondent submitted with its Reply were labeled upon filing by Respondent as "corrected exhibits" numbers 2, 4 and 5. For the sake of clarity those documents are cited herein as "Reply Exhibits" 2, 4 and 5. The exhibit Respondent filed with its Opposition is identified therein and here as "Respondent's Exhibit 6."

[4] The CAA requires EPA to set national ambient air quality standards, i.e. limits, for six "criteria" air pollutants - ozone (O_3), carbon monoxide (CO), nitrogen dioxide (NO_2), sulfur dioxide (SO_2), lead (Pb) and particle matter (PM)) which can be harmful to public health and the environment. 42 U.S.C. § 7409(a)(1); 40 C.F.R. § 50.1 et seq.

SIPs are required to include "enforceable emission limitations and other control measures, means, or techniques . . . for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter." 42 U.S.C. § 7410(2)(A). The CAA authorizes EPA to seek information regarding compliance with SIP provisions and, upon expiration of 30 days' notice, to initiate administrative penalty proceedings against "any person [who] has violated or is in violation of any requirement or prohibition of an applicable implementation plan."[5] 42 U.S.C. §§ 7414(a), 7543(a); *Cal. Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 503 (9th Cir. 2015) ("Approved SIPs may be enforced 'by either the State, the EPA, or via citizen suits.'") (citing *Bayview Hunters Point Cmty. Advocs. v. Metro. Transp. Comm'n*, 366 F.3d 692, 695 (9th Cir. 2004), *as amended on denial of reh'g and reh'g en banc* (June 2, 2004)).

In 2008, the California Air Resources Board ("CARB"),[6] part of the State Environmental Protection Agency, first approved for adoption a "Regulation to Reduce Emissions of Diesel Particulate Matter, Oxides of Nitrogen and Other Criteria Pollutants, from In-Use Heavy-Duty Diesel-Fueled Vehicles," otherwise known as its "Truck and Bus Regulation" ("TBR"), codified at Cal. Code Regs. tit. 13, § 2025 (eff. Jan. 2010) ("Section 2025"). Rulemaking to Consider the Adoption of a Proposed Regulation for In-Use Off-Road Diesel Vehicles, https://www.arb.ca.gov/regact/2007/ordiesl07/ordiesl07.htm (last visited Jun. 10, 2024); California Air Resources Board—In-Use Heavy-Duty Diesel-Fueled Truck and Bus Regulation, Drayage Truck Regulation and Ocean-Going Vessels Clean Fuels Regulation, 76 Fed. Reg. 40652-01 (Jul. 11, 2011); CX 9 (Amendment to the Regulation to Reduce Emissions of Diesel Particulate Matter, Oxides of Nitrogen and Other Criteria Pollutants from In-Use On-Road Diesel-Fueled Vehicles).

In May 2011, CARB submitted the then-enacted TBR to EPA for inclusion in California's SIP. California Air Resources Board—In-Use Heavy-Duty Diesel-Fueled Truck and Bus Regulation, Drayage Truck Regulation and Ocean-Going Vessels Clean Fuels Regulation, 76 Fed. Reg. 40652-01 (Jul. 11, 2011); CX 9. On April 4, 2012, EPA approved the revision of California's SIP to incorporate the TBR, making the State regulation federally enforceable. CX 11 (Approval and Promulgation of Implementations Plans; California Air Resources Board—In-Use Heavy-Duty

[5] Under the CAA, EPA's authority to institute an administrative action is "limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action." 42 U.S.C. § 7413 (d)(1). By letter dated July 6, 2023, the U.S. Department of Justice issued EPA a waiver of the 12-month limitation to initiate this administrative action under section 42 U.S.C. § 7413(d). CX 19.

[6] CARB is the State entity "charged with protecting the public from the harmful effects of air pollution." See generally, https://ww2.arb.ca.gov/about.

Diesel-Fueled Truck and Bus Regulation, and Drayage Truck Regulation, 77 Fed. Reg. 20308 (Apr. 4, 2012)); 40 C.F.R. § 52.220(b)(410)(i)(A).

The purpose of the TBR is "to reduce emissions of diesel particulate matter (PM)[7], oxides of nitrogen (NOx) and other criteria pollutants from in-use diesel-fueled vehicles." Cal. Code Regs. tit. 13, § 2025(a). The regulation "applies to any person,[8] business, . . . that owns or operates, leases, or rents, affected vehicles that operate in California." Cal. Code Regs. tit. 13, § 2025(b). "Affected vehicles are those that operate on diesel-fuel, dual-fuel, or alternative diesel-fuel that are registered to be driven on public highways . . . and have a gross vehicle weight rating (GVWR) greater than 14,000 pounds."[9] *Id.*

The TBR basically requires that, on a phased-in basis between 2015 and 2023, the engines of older heavy trucks, be upgraded or retrofitted to meet specific emission performance limitations, i.e. those equivalent to a 2010 model year engine, and that records of compliance with this requirement be maintained. Cal. Code Regs. tit. 13, § 2025(e)-(g). More specifically, section 2025(g) of the TBR requires "fleet owners"[10] of vehicles above 26,000 pounds GVWR to install a diesel particulate filter "(DPF")[11] for all 1996 through 1999 model year engines by January 1, 2012, all 2000 through 2004 model year engines by January 1, 2013, and all 2005 and newer model year engines by January 1, 2014, and to also upgrade to a 2010 model year emissions equivalent engine for all 1993 and older model year engines by January 1, 2015, all 1994 and 1995 model year engines by January 1, 2016, all 1996 through 1999 models by January 1, 2020, all 2000 through 2004 models by January 1, 2021, all 2005 and 2006 models by

[7] The TBR defines "Diesel Particulate Matter (PM)" as "the particles found in the exhaust of diesel-fueled compression ignition engines . . . ." Cal. Code Regs. tit. 13, § 2025(d)(18)

[8] Section 2025(d)(47) of the TBR defines "Person" as "an individual, corporation, business trust, estate, trust, partnership, Limited Liability Company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity." Cal. Code Regs. tit. 13, § 2025(d)(47)

[9] "The gross vehicle weight rating (GVWR) is assigned by the vehicle manufacturer and represents the maximum weight of the vehicle and what it can carry when fully loaded." CX 20 (CARB Guide to California's Clean Air Regulations for Heavy-Duty Diesel Vehicles) at 15; Cal. Veh. Code § 350(a) ("Gross vehicle weight rating" (GVWR) means the weight specified by the manufacturer as the loaded weight of a single vehicle.").

[10] Under the TBR a "Fleet Owner" is defined as "either the person registered as the owner or lessee of a vehicle by the California Department of Motor Vehicles (DMV), or its equivalent in another state, province, or country; as evidenced on the vehicle registration document carried in the vehicle." Cal. Code Regs. tit. 13, § 2025(d)(28).

[11] The TBR defines "Diesel Particulate Filter" ("DPF") as "an emission control technology that reduces diesel particulate matter emissions by directing the exhaust through a filter that physically captures particles but permits gases to flow through." Cal. Code Regs. tit. 13, § 2025(d)(17).

January 1, 2022 and all 2007 and newer models by January 1, 2023.[12] Cal. Code Regs. tit. 13, § 2025(e)-(g); *see also* CX 20 at 5.

The burden of upgrading vehicles in compliance with the TBR's requirements is on the vehicle's owner. Cal. Code Regs. tit. 13, § 2025(x)(1) ("The vehicle owner shall comply with all applicable requirements and compliance schedules set forth in this regulation."). However, relevant to the violations alleged here, TBR subsection (x) requires that –

> (2) Any in-state or out-of-state motor carrier, . . . 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).[13]
>
> (3) Compliance ***may be*** accomplished by keeping at the business location, a copy of the Certificate of Reported Compliance with the In-Use On-Road Diesel Vehicle Regulation for each fleet, or in the vehicle.[14]

Cal. Code Regs. tit. 13, § 2025(x)(2), (3) (emphasis added).

The TBR states that the meaning of the term "motor carrier" under it is the same as that defined in California Vehicle Code section 408 for fleets other than those that are comprised entirely of school buses. Cal. Code Regs. tit. 13, § 2025(d)(42). Section 408 of the California Vehicle Code defines a "motor carrier" as "the registered owner, lessee, licensee, or bailee of any vehicle set forth in Section 34500, who operates or directs the operation of any such vehicle on either a for-hire or not-for-hire basis." Cal. Veh. Code § 408. Section 34500, in turn, defines vehicles as including motortrucks, truck tractors, trailers, tractor-trailers, and

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[12] "The Truck and Bus Regulation is based on the model year of the engine. Generally, the model year of an engine is one year older than the vehicle model year. For example, a 2007 truck is likely to have a 2006 engine model year." CX 20 at 15.

[13] Section 2025(s)(4) requires that a motor carrier or broker maintain "[b]ills of lading and other documentation identifying the motor carrier or broker who hired or dispatched the vehicle and the vehicle dispatched. Cal. Code Regs. tit. 13, § 2025(s)(4)(A). Subsection (u) of the TBR requires that the "fleet owner or other responsible person shall maintain the records for each vehicle subject to the reporting and record keeping requirements of sections 2025(r) and (s) for 3 years after it is retired, and for the overall fleet, for as long as the owner has a fleet, or January 1, 2025, whichever is earlier." 13 Cal. Code Regs. tit. 13, § 2025(u).

[14] CARB issues, and posts to its website, "Certificates of Reported Compliance" to those vehicles which are reported to it as being in compliance with the TBR regulation. Cal. Code Regs. tit. 13, § 2025(y); CX 45 (Sample CARB Certificates).

commercial motor vehicles with a gross vehicle weight rating of 26,001 or more pounds. Cal. Veh. Code § 34500.

Since its enactment, CARB has periodically issued and updated guidance documents on the TBR, including one entitled "How to Verify if Hired Fleets Comply" (hereinafter "CARB Verification Guidance"). CX 12 (CARB Verification Guidance, Dec. 18, 2017); CX 13 (CARB Verification Guidance, Aug. 6, 2018); CX 14 (CARB Verification Guidance, Jun. 27, 2019); CX 15 (CARB Verification Guidance, Jul. 29, 2021); CX 20 (CARB Guide booklet, Feb. 2020). Written in question-and-answer form, that CARB Verification Guidance instructs in relevant part –

> **What are my responsibilities if I hire trucks as part of my business?**
>
> 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 [California] Air Resources Board ([C]ARB). This requirement applies to any in-state or out-of-state motor carrier . . .
>
> **How can I determine if the carrier that I hire has reported to ARB or is in compliance with the regulation?**
>
> Owners that report to the [CARB] to use flexible compliance options must report information about all of the heavier vehicles in their fleet that operate in California during the year and can print a certificate that confirms they have reported to the [C]ARB. Fleet owners that comply by using the engine model year schedule are not required to report but have the option to report company and vehicle information and to print a certificate that states they are complying with the engine model year schedule. Either certificate can be used by a motor carrier, broker or other entity as evidence the hired fleet has reported compliance with the regulation. Motor carriers/brokers or other entities must obtain copies of the certificate or other proof of compliance *annually.* [C]ARB also posts the names and motor carrier numbers of the fleets that have reported compliance at http://www.arb.ca.gov/msprog/onrdiesel/tblookup.php.
>
> **What can I do if the company I hire does not have a certificate?**
>
> If the fleet owner does not report to the [C]ARB because they are complying with the engine model year schedules, then the owner must provide other documentation to demonstrate annually for every compliance year that their fleet complies with the regulation. You should obtain a dated written statement from the owner that

> verifies that they are aware of the Truck and Bus regulation (Title 13, California Code of Regulations, Section 2025) and engine model year and PM filter information about their trucks to demonstrate compliance with the engine model year schedules.
>
> If a fleet owner does report to [C]ARB, they have until January 31 of each compliance year to update their information. Therefore, it is not necessary for motor carriers, brokers, and dispatchers to obtain a certificate to verify compliance from January 1 to January 31 of each compliance year. However, the responsible hiring party should obtain a written statement from the vehicle owner that verifies that their fleet is in compliance with the Truck and Bus regulation *during the month of January* in lieu of a certificate.
>
> The responsible hiring party must perform due diligence by confirming that compliance statements are factual in the contract. If you become aware that one or more vehicles in a fleet do not comply, then you cannot continue to use the services of the fleet.

CX 12 at 1 (emphasis added)[15]; *see also* CX 12 at 1-2; CX 13 at 1-2; CX 14 at 1-2; CX 15 at 1-2; CX 16 (Final Statement as to Reasons for Rulemaking (Dec. 11-12, 2008) (selected pages)) at 7; CX 17 (CARB Staff Report: Initial Statement of Reasons For Proposed Rulemaking (Oct. 2008) (selected pages)) at 4 ("In an effort to ensure that all vehicle owners comply with the proposed regulation, in-state or out-of-state motor carriers . . . , would be responsible for hiring fleets with compliant trucks. Both motor carriers and brokers direct the operation of their drivers, and as such, are in a unique position to verify compliance with the proposed regulation."); CX 18 (CARB Technical Support Document on Proposed Regulation for in-use on-road Diesel vehicles

[15] While potentially useful, such guidance documents, more formally known as "interpretative rules," issued without notice and comment, *do not* have the force and effect of law and can never form the basis for an enforcement action; "An enforcement action must instead rely on a legislative rule [i.e., a regulation], which (to be valid) must go through notice and comment." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (citing *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96–97 (2015) (interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process)). Guidance documents "simply state what the administrative agency thinks a statute means, and only remind affected parties of existing duties." *Chai v. Carroll*, 48 F.3d 1331, 1340-41 (4th Cir. 1995). If an agency wishes to adopt a new regulatory requirement or effect a substantive change in an existing regulation, the agency must comply with the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 551, et seq. *Int'l Internship Programs v. Napolitano*, 853 F. Supp. 2d 86, 94 (D.D.C. 2012), *aff'd*, 718 F.3d 986 (D.C. Cir. 2013); *Humane Soc'y of the U.S. v. U.S. Dep't of Agric.*, 41 F.4th 564, 569 (D.C. Cir. 2022) ("[O]nce an agency makes a rule—that is, once it makes a statement prescribing law with future effect—the APA requires the agency to provide notice and an opportunity for comment before repealing it." (citing 5 U.S.C. § 553)). Thus, to the extent that the guidance document imposes a substantive requirement not provided in a law or regulation, it would be unenforceable.

(Oct. 2008) (selected pages)) at 4 ("The proposed regulation would require in-state and out-of-state motor carriers . . . to retain records documenting that all of the drivers they hire or dispatch are in compliance with the proposed regulation. These motor carriers or brokers would have an affirmative defense for violations by an operator they dispatched if they can demonstrate that they verified the compliance status of the operator at the time they were hired or dispatched."); CX 20 (CARB "A Guide to California's Clean Air Regulations for Heavy-Duty Diesel Vehicles," Feb. 2020)).

III. FACTUAL BACKGROUND

Respondent is a well-established, privately-owned Texas corporation maintaining its offices and facilities at 1085 Jarvis Road in Saginaw, Texas. CX 40 (Texas Secretary of State Business Organization Inquiry response, Feb 20, 2024). It identifies as a "motor carrier engaged in hauling of freight, interstate and intrastate," including into and within the State of California. CX 21 (Lease Agreement template) at 1; CX 23 at 3, 6; CX 25 at 1; CX 31 at 1; CX 38 (Norco 2021 website screen capture) at 1. The record suggests that Respondent, itself, does not own and operate any interstate transport vehicles. Rather, to carry out its business, Norco utilizes a leased fleet of approximately 200 independently owned and operated truck tractors/tractor-trailers.[16] CX 31 at 1-2; CX 21; CX 38 at 2.

On May 20, 2021, EPA issued an Information Request ("IR") to Norco pursuant to Section 114 of the CAA, 42 U.S.C. § 7414. CX 2 (Information Request). In the IR, the Agency advised Respondent that it was seeking information "to determine the compliance status of [Norco] and its subsidiaries, with respect to the Clean Air Act, 42 U.S.C. §§ 7401-7671q . . . , specifically, certain provisions of title 13 of the California Code of Regulations as included in the federally-approved and federally-enforceable State Implementation Plan for the State of California," citing the TRB and other state regulations. CX 2 at 1. The IR was divided into several parts with Part I focused on the TBR. CX 2 at 9 ("*[In responding to requests under this heading, please refer to the definitions and provisions set out in the Truck and Bus Regulation, Cal. Code Regs. tit. 13, § 2025.]."* Part I of the IR was further divided into four lettered subsections (A-D). CX 2 at 9-10. Relevant here is subsection D of Part I of the TR which requested Norco provide the following information:

[16] Norco's Lease Agreement template identifies the owner-operators of the transport vehicles it hires as "independent contractors." CX 21 at 1; *see also* Cal. Code Regs. tit. 13, § 2901 ("A business entity whose ownership interests, management and operation are not subject to control, restriction, modification or limitation by an outside source, individual, or another business entity is considered independently owned and operated.").

> For each fleet[17] from which Norco hired or dispatched any diesel-fueled non-drayage[18] vehicle over 14,000 pounds GVWR to drive in California at any time from January 1, 2017, to the date of this letter, input the following information into the [Excel] workbook document, TRUCKINFO.xlsx, [TAB 4] provided in the attachment:
>
> 1. name of fleet owner;[19]
> 2. date that Norco initially hired or dispatched a vehicle from the fleet;
> 3. total number of vehicles that Norco hired or dispatched during:
>   a. CY 2017;
>   b. CY 2018;
>   c. CY 2019;
>   d. CY 2020; and
>   e. January 1, 2021, to the date of this letter.

CX 2 at 11 (footnotes omitted). Part I, Subsection E, further requested, in pertinent part, that

> 4. For each fleet identified in your response to request I.D., provide copies of documents establishing vehicle compliance with the Truck and Bus Regulation for each of the reported calendar years in request I.D.4, such as a Certificate of Reported Compliance or other documentation demonstrating compliance.
>
> * * *
>
> 6. Describe what actions, if any, Norco has taken to comply with the Truck and Bus Regulation, including but not limited to the Section 2025(f) and (g) engine model year compliance schedules, the Section 2025(w) sales disclosure requirement, and the Section

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[17] Under the TBR, a "'*Fleet'* means one or more vehicles, owned by a person, business, or government agency traveling in California and subject to this regulation." Cal. Code Regs. tit. 13, § 2025(d)(28). A subset of a fleet is a "'*Rental or Leased Fleet*' which is a fleet of vehicles owned by a person (rental or leasing entity) for the purpose of renting or leasing, as defined in California Uniform Commercial Code, section 10103(a)(10) such vehicles to other persons (renters or lessees) for use or operation." Cal. Code Regs. tit. 13, § 2025(d)(28)(B).

[18] A drayage vehicle is basically one transporting goods to and from a port or rail yard. Cal. Code Regs. tit. 13, §§ 2025(d)(19), 2027(c)(15). California has a regulation similar to the TBR specifically addressing air emissions in diesel-fueled heavy-duty drayage trucks. Cal. Code Regs. tit. 13, § 2027.

[19] Under the TBR, a *"'Fleet Owner'* means "the person registered as the owner or lessee of a vehicle by the California Department of Motor Vehicles (DMV), or its equivalent in another state, province, or country; as evidenced on the vehicle registration document carried in the vehicle." Cal. Code Regs. tit. 13, § 2025(d)(29).

> 2025(x)(2) verification requirement for hired or dispatched vehicles.

CX 2 at 11 (footnotes omitted). Finally, the Agency asked Respondent to include with its responses a signed and dated Statement of Certification stating –

> 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.

CX 2 at 8.

On or about June 2, 2021, Respondent submitted to EPA its initial certified responses to the IR ("June Response"). CX 3 (Norco Response to IR request dated June 2, 2021). On the spreadsheet which the Agency provided to Respondent to set forth the data responsive to IR Part I.D. (TAB 4), Respondent wrote "none." CX 3 at 26. However, perhaps sensing this response was in error, with the submission of its June Response, Respondent sought clarity, inquiring whether the Agency considered "an owner-operator not licensed in California a fleet?" CX 41 at 1.

EPA and Respondent then engaged in a conversation on July 8, 2021, during which the Agency apparently reiterated or clarified that it was seeking information from Norco on the leased trucks it hired in or dispatched to California, regardless of where they were licensed. CX 4 at 1. EPA followed up by emailing Respondent the text of certain subsections of the in support of its request. CX 4 at 1; CX 41 at 3.

Fairly promptly thereafter, on or about July 13, 2021, Respondent submitted to EPA a revised certified response to the IR ("July Response"). CX 4 (Norco Response to IR request dated July 13, 2021). In its July Response as to Part I, Subsection D, Respondent listed by name on numbered lines approximately 90 different "Fleet Owners" whose vehicle(s) it dispatched to California in each of four calendar years (2017-2020), and from January 1, 2017, to May 20, 2021 (the date of the IR) (hereinafter the "Original Spreadsheet").[20] CX 4 at 26-28; RX 1. There

[20] Certain fleet owners' names are repeated on multiple lines of the July Spreadsheet, which *may* reflect that different vehicles owned by the same person were dispatched, however, the dispatched vehicles themselves are not identified in any way on the July Spreadsheet. See CX 4 at 26, lines 19-21 (Bobby Ashcroft). The July

is no evidence in the record that Respondent submitted with its July Response any certificates of reported compliance or other documentation evidencing that it verified the compliance with the TBR for the vehicles it had dispatched to California during the relevant time period.

As a result, on December 22, 2021, EPA issued a Finding and Notice of Violation ("NOV") to Respondent. CX 8. Based upon Norco's July Response to the IR, the NOV alleged, inter alia, that Respondent had violated section 2025(x)(2) of the TBR (Code Regs. tit. 13, § 2025(x)(2)) by failing to verify TBR compliance for 78 affected vehicles it hired or dispatched to California between January 1, 2017 and May 20, 2021. CX 8b at 6-7.

The parties held a "NOV Conference" on January 5, 2022. CX 42 at 9. In connection with that conference, Respondent provided EPA with its "[C]ARB list," as to vehicle compliance status,[21] along with an undated statement from Jim Golden, one of the fleet owners identified on the July Spreadsheet (line 6) as to his truck and trailer being in compliance with CARB and federal regulations. CX 42 at 1-5, 7; CX 4 at 26.

Approximately, two weeks later, in an email dated January 19, 2022, Respondent advised EPA:

> Regarding question 1.a. Those trucks belong to owner operators. As I explained previously, We do not know if those trucks are equipped with diesel particulate filters or not so we ask the operators prior to dispatch and have them sign a statement that the vehicle they are going to use is compliant The vehicles are Texas based and all have a current Texas DMV inspection. We did not populate the columns because we don't have that information. I hope this answers your question.

CX 42 at 9 (unchanged)(emphasis added). There is no evidence in the record that Respondent submitted with this email, or at any other point, signed statements of compliance with the TBR from any fleet owner, other than Jim Golden, listed on the Original Spreadsheet.

On February 5, 2022, the parties arranged to hold another conference to "clarify any possible misunderstandings and discuss next steps." CX 42 at 8. After that conference, which was held on February 9, 2022, EPA offered Respondent an additional opportunity to amend its responses to the IR and specifically requested, inter alia, Respondent "[p]rovide a copy of all of

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Spreadsheet indicates that Respondent dispatched vehicles to California over the approximately four-and-a-half-year period a total of 183 times, with 14 vehicles dispatched in calendar year 2017, 36 in 2018, 51 in 2019, 50 in 2020, and 32 from January 1, 2021, to May 20, 2021. CX 4 at 26-28.

[21] The list identifies vehicles by their "IDN," company equipment number, unit model, year, and serial number, engine model and serial number, compliance status and date through which the compliance status applies, but not owner. CX 42 at 2-5.

the CARB certificates from each motor carrier for all your 98 listed hired/dispatched trucks that drove in the State of California in response to Question I.D of the information request (tab 4)." CX 42 at 11, 26-27.

Respondent subsequently submitted a revised response as to Part II of the IR on or about March 16, 2022, but did not alter the data shown on the July Spreadsheet in regard to Part I.D.[22] CX 6. However, in an email sent on that same date, Respondent advised EPA that it did "not have CARB certificates for the owner operators. The trucks leased on Tabs 1 and 2 of our initial response were all owner operators leased to Norco." CX 5.

It appears the parties may have engaged in another conference call regarding the IR on or about May 5, 2022. CX 6 at 1-2; CX 42 at 31. On that same day, Respondent submitted another revised IR Response, again without making any change to the data reflected on the July Spreadsheet previously submitted in response to IR Part 1.D. CX 6 at 26-27, 40; CX 43 at 1.

On or about June 24, 2022, at EPA's request, Norco submitted to the Agency a copy of its Independent Contractor Lease Agreement, with the owner/operators of the vehicles it leases. CX 21; CX 42 at 34-35. A week later, on July 1, 2022, in response to an inquiry from EPA as to whether there was any overlap between the trucks listed in Tabs 1 and (responding to IR Part I.A and B) and Tab 4 (IR Part I.D), Respondent stated:

> The information on 1 and 2 reflects owner operators, not company trucks. As you said during our telephone conversation they should have bee[n] left blank. Tab 4 is a list of fleet owners, owner operators that traveled in California during the time frame, please disregard tabs 1 and 2 they were produced in error.

CX 42 at 33.

On July 11, 2022, EPA inquired whether Norco had any additional documentation to add to Tab 4, that is in response to the inquiry set out in IR Part I.D. CX 42 at 32. On July 18, 2022, Respondent represented to EPA that it had "[n]othing to add." CX 42 at 32.

Almost exactly a year later, on July 18, 2023, EPA sent Norco a lengthy email explaining that since Norco has not produced Certificates of Reported Compliance or other documentation demonstrating compliance with the TBR for the vehicles list in response to IR Part I.D., the Agency considers the missing documentation as evidencing one violation for each vehicle, subjecting Norco to a penalty. CX 43 at 1-2.

[22] The revision of its response to the IR which Respondent submitted on March 16, 2022, is erroneously dated March 5, 20*21*. CX 6.

A few days later, on July 20, 2023, the parties met again, and sometime between July 21 and July 28, 2023, Respondent provided to EPA copies of the Fleet Supplement renewal forms ("Fleet forms") it submitted to the Texas International Registration Program ("TxIRP")[23] for calendar years 2017 through 2019.[24] CX 43 at 1; CX 7a-7d; RX 2. In early August 2023, Respondent submitted its TxIRP Fleet forms for 2020 and 2021. CX 7e & 7f; *see also* CX 43 at 6.

On August 2, 2023. Respondent submitted to EPA a hand-altered copy of the Original Spreadsheet whereon it identified the "truck number" and model year of vehicles associated with each fleet owner/operator, and indicated that some of the owners/vehicles listed had "no CA loads" or "were not here any longer" ("Modified Spreadsheet"). CX 7 at 1-2; CX 43 at 27-29. Respondent followed up on August 8, 2023, sending EPA an email identifying by name 11 fleet owners whom it claimed had been mistakenly included on the Original Spreadsheet, but as to which Respondent had not found any record of their vehicles being dispatched to California. CX 7g at 1.

On September 19, 2023, EPA wrote Norco asking for additional information "to corroborate discrepancies between the prior submissions you have made to the EPA and the most recent submission, which you certified under penalty of law on August 10, 2023." CX 43 at 11-13. In its correspondence, the Agency enumerated at length the discrepancies it observed as to certain identified owner-operated vehicles.[25] CX 43 at 11-13. Norco responded the next day by email indicating the information it provided in its last submission was the correct data. CX 43 at 14-15. The parties followed up with a telephone conference and then on September 28,

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[23] The IRP is a "registration reciprocity agreement among the 48 contiguous US states, the District of Columbia and ten (10) Canadian provinces." International Registration Plan, Information for Motor Carriers, https://www.irponline.org/page/MotorCarrierHomepage (last visited June 21, 2024). Under the IRP, motor carriers register with, and pay fees to, a single "base" jurisdiction and then their vehicles can travel interstate without incurring the expense and inconvenience of obtaining trip permits for each state through which they travel. CX 7e. Vehicles are issued "Cab cards" as evidence of their registration under the IRP. CX 7d at 2-3.

The Texas Fleet Supplement renewal forms contain a list of vehicles registered by Respondent with each identified by its license plate number, unit number, vehicle identification number ("VIN"), and model year and make, but *not* by owner's name. *See, e.g.*, CX 7a at 4-7; CX 7b at 2-7, 9-10.

[24] Handwritten on the bottom of many of the Fleet forms appear to be the name(s) of owner/operators listed on the Original Spreadsheet with their associated vehicle unit number, shown on the form. *See, e.g.*, CX 7b at 2, 3, 5-7, 9, 11-12, 14-15, 17-18, 20, 22-24, 26-28, 30-36. For example, written on the 2018 Fleet form is the name "Raul Zambrano 1840," which suggests that his vehicle was a 2009 INTL [International] truck, plate number R358305. Mr. Zambrano was listed on the Original Spreadsheet on line 5 with Respondent indicating his vehicle was dispatched to California once in 2018 and once in 2019. CX 7b at 2, 31; CX 4 at 1.

[25] In this correspondence, for example, EPA inquired with regard to the Modified Spreadsheet as follows - "Row 95 (Anthony Omorodion) says 'no CA loads' next to the '1' Norco entered for 2021. How does Norco account for its previous certifications, made under penalty of law, that Norco hired or dispatched one truck owned or operated by Anthony Omorodion into California in 2021?" CX 43 at 13; *see also* CX 43 at 29 (Spreadsheet).

2023, EPA sent Respondent another lengthy and detailed request for additional information in an attempt to reconcile the discrepancies it found in various documents Respondent had submitted to it.[26] CX 43 at 19-26.

Respondent provided additional clarifying documentation to EPA in November 2023.[27] CX 43 at 30-31; CX 7g; RX 5. Then on January 4, 2024, Respondent emailed the Agency requesting "a copy of all memoranda and orders served on it by email or other means." RX 3. The following day the Agency responded advising Norco that "[m]any e mails were lost as a result of computer failure. I need to impose on you to retrieve tham." RX 3 (unaltered). On February 7, 2024, Respondent again advised EPA that the Original Spreadsheet it provided in response to IR section I.D., and purportedly used by EPA as the basis for finding of violation, was "incorrect." RX 7. On March 25, 2024, Respondent sent EPA an e-mail stating "I have asked if you are basing your case on page 4 of the original spreadsheet. I am sure you know that data was flawed and I have declared that it is wrong and not to be used." RX 4.

IV. RESPONDENT'S MOTION TO DISMISS

The substantive text of Respondent's Motion, in full and as corrected, is as follows:

> An e-mail dated Feb 7,2024 from Mark Sims, Environmental engineer, enclosed as Respondents Exhibit 1, (Rx7) consisting of an email containing 12 attachments contains the following statement" This worksheet and these documents are the basis for EPA's finding of violation." The worksheet enclosed as Respondents exhibit (Rx8) is from the original worksheet submitted on July 13,2021 is an incorrect document and should not be used. The other attachments are copies of Texas IRP fleet supplements. They show that the vehicles were added to the Texas IRP account assigned to NORCO. One attachment is a copy of a cab card issued by the state of Texas. There is nothing in these documents to indicate a violation. NORCO respectfully requests that this allegation of

[26] In this correspondence, for example, as to Row 95 (Anthony Omorodion), EPA asked Norco whether the singular general response it provided on September 20, 2023, that its "[l]ast submission was correct," meant that the data on its Modified Spreadsheet was correct, and if so, "What accounts for the discrepancy between this submission and past submissions from Norco? What records was Norco going off of when it submitted previous responses to this agency that stated this truck drove into California in 2021?" CX 43 at 26. Norco suggested in response to many of the discrepancies that the corrections were the result of its President, A.G. Hollenstein, personally taking a closer look at the freight bills. *E.g.* CX 43 at 20.

[27] On November 2, 2023, Respondent advised EPA that the vehicle of one of the fleet operators listed on lines 19-21 of the Original Spreadsheet, Bobby Ashcraft, was a 2014 model. CX 7g at 5. A week later, on November 9, 2023, Respondent provided EPA with Mr. Ashcraft's cab card indicating that his vehicle was actually a 2011 model. CX 7g at 7-8.

> violations set forth in Docket No. CAA-09-2024-0025, that NORCO violated Section 2025(x)(2) of the California Truck and bus Regulation, be dismissed.

Mot. 1 (unaltered).[28]

Respondent's Reply is similarly pithy -

> The complaint does not set forth any direct or indirect allegations that indicate any violations or wrongdoing by the respondent. There is no prima facie case set forth in the supporting documents provided. Respondent has stated many times that the data being used is faulty. Respondent has furnished many documents that demonstrate the data is faulty. From December 2022 to present there have been 60 e mails from Daniel Haskell, 20 from Jacob Finkle, and 5 or more from Mark Sims asking questions. Ther are many more prior to December 2022 that I no longer have. I asked complainant for copies, but they were not furnished. All these emails were answered. There is no lack of data that could have been used.
>
> There is no question the data presented by the complainant is flawed. Much more data has been furnished but not used.
>
> Complainant has listed 77 violations. Of these 77 named one hasn't worked here since 2010, Kenneth Roquemore, Respondents exhibit (Rx4) another, Four Way Trucking, hauled one load from Florida to the Midwest in 2004 Respondents exhibit (Rx5) These are two examples to show the flawed nature of the data
>
> Complainant refers to the August 10,2023 submission as the basis for his findings, however that is the same document as the submission of July 13, 2021, with a further explanation of the vehicles listed. This was done at the request of the complainant. Complainant refers to the certification issued with each as proof of accuracy. The complainant would not accept anything unless accompanied by a certificate of accuracy. As it became apparent

[28] As indicated above Respondent submitted two exhibits with its Motion. The first exhibit is a two-page email thread dated February 7, 2024, between the parties, wherein Respondent advises EPA that the Original Spreadsheet it provided in response to IR section I.D., and used by EPA as the basis for finding of violation, was "incorrect." RX 7. The second exhibit is a copy of the Modified Spreadsheet. RX 8.

> that the data might be flawed, the complainant was notified. Respondents exhibit (Rx5)
>
> Th worksheet attached to the Motion to Dismiss, Respondents (Rx2) is flawed and should be ignored. Since this is the basis of Complainant's petition Respondent respectfully requests that the complaint be dismissed.

Reply at 1-2 (unaltered).[29]

V. COMPLAINANT'S OPPOSITION AND MOTION

In Complainant's Opposition/Motion, the Agency asserts that its Complaint sufficiently states a claim against Respondent for violations of TBR Section 2025(x)(2), as it alleges that:

> (a) Respondent is an out- of-state motor carrier (Compl. ¶ 22); (b) Respondent operated or directed the operation of at least one (1) vehicle in California that was subject to the TBR on various date(s) between January 1, 2018, and May 20, 2021, inclusive (Compl. ¶ 32); and (c) Respondent hired or dispatched at least seventy-seven (77) vehicles and failed to verify the TBR compliance of those seventy-seven (77) vehicles (Compl. ¶ 33).

Complainant's Opp'n/Mot. 5. Moreover, it asserts that it has proven by a preponderance of the evidence that there is no genuine issue of material fact as to the truth of those allegations made in the Complaint and therefore, it is entitled to judgment as a matter of law, citing various exhibits in support. Complainant's Opp'n/Mot. 8-17. Complainant specifically denies Respondent's allegation that it relied on incorrect documentation in bringing this action, and states that the TxIRP fleet forms and the cab cards issued by the State of Texas do not show that Respondent "verified" the compliance of the trucks at issue when it hired them, as required by TBR Section 2025(x)(2). Complainant's Opp'n/Mot. 15-16. Those documents, EPA advises, only –

> show the model years of the trucks [Respondent] hired; they are not substitutes for documentation to demonstrate that Respondent verified the compliance of the trucks it hired or dispatched into

[29] The three exhibits (nos. 2, 4 & 5) attached to Respondent's Reply were: a small selection of Respondent's TxIRP 2018 Fleet forms (nos. 5, 45, 67) with handwritten modifications (Reply, Ex. 2); an email dated May 31, 2024 from Respondent to the Agency indicating that the lease for the fleet owner identified on the Spreadsheets on line 16, Kenneth Roquemore, was cancelled in 2010 (Reply, Ex. 4); and an email dated November 6, 2023 from Respondent to EPA advising it that the 4-Way Transportation Inc. 2019 trip reflected on the Spreadsheets at line 77, was actually taken in 2004 (Reply, Ex. 5).

> California. Furthermore, the documents show that many of the trucks that Respondent hired or dispatched would be violative of the TBR without exhaust controls or engine retrofits, but Respondent did not provide any information that those trucks were retrofitted to meet the compliance schedules in the TBR.

Complainant's Opp'n/Mot. 15 (footnote omitted). EPA argues that to comply "Respondent should have obtained on an annual basis a dated, written statement from each owner of the hired or dispatched vehicle that verifies that the owner is aware of the TBR and provides the engine model year and PM filter information about their trucks to demonstrate compliance with the TBR engine model year schedules." Complainant's Opp'n/Mot. 15 n.7 (citing CX 12-15).

VI. RESPONDENT'S OPPOSITION

The substantive portion of Respondent's Opposition to Complainant's Motion for Partial Accelerated Decision on Liability ("Respondent's Opposition") states in full –

> Respondent, Norco Corporation was notified of complainant's intention to file a notion for accelerated decision on May 16,2024. Respondent replied, Respondents exhibit (Rx6), that they felt that their Motion to Dismiss stated their position and requested complainant to file their opposition to file an amended motion to dismiss. There has been no reply from the complainant to date.
>
> Respondent, Norco Corporation opposes Complainants' motion for partial accelerated decision on liability. Respondents' opposition is based on Complainant's use of flawed data. Complainant has not proved any violations of California Air Resources Board Truck and Bus Regulations Section 2025(x)(2). Complainant had every opportunity to use other than flawed data. During phone conversation with Daniel Haskell Respondent invited Him to come to Respondents offices and review records. Many records were furnished to the Complainant. Respondent feels that the Motion to Dismiss will be settled favorably.
>
> Respondent respectfully request that Complainants Motion for Partial Accelerated Decision on Liability be denied.

Respondent's Opp'n at 1-2.[30]

[30] Attached to Respondent's Opposition as "RX 6" is an email thread dated May 16, 2024 between the Agency and Respondent consisting of an email from the Agency notifying Respondent of its intent to file a motion for

VII. APPLICABLE ADJUDICATORY STANDARDS

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), set forth at 40 C.F.R. Part 22. The Consolidated Rules provide that –

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a).

Motions to dismiss under Section 22.20(a) of the Rules of Practice are analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993). Rule 12(b)(6) of the FRCP provides that a complaint filed in federal court may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. Pro. 12(b) (6). Motions for dismissal under Rule 12(b)(6) are commonly said to "test the legal sufficiency of a claim." *See, e.g.*, *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). As stated by the Supreme Court:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, in considering a motion for dismissal, a federal court should assume the veracity of all "well-pleaded factual allegations" in the complaint and "then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 1950.

While the FRCP are not binding on administrative agencies, Rule 12(b)(6) and federal

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accelerated decision and requesting Norco's position thereon; an email from Respondent noting Norco has filed a motion to dismiss stating "That is our position and feel confident we will prevail;" and an email from Norco stating it would "file an amended motion to dismiss if you will send me your objections to my motion" and "[y]ou never responded when I asked you if you were using page 4(tab4) of my original request as the basis for your case and I am still awaiting your answer." RX 6 (unaltered).

court decisions construing it provide useful and instructive guidance in adjudicating a motion to dismiss under the Rules of Practice. *See, e.g., Euclid of Va., Inc.*, 13 E.A.D. 616, 657-58 (EAB 2008) ("While it is appropriate for Administrative Law Judges and the [Environmental Appeals Board] to consult the Federal Rules of Civil Procedure . . . for guidance, these rules are not binding upon administrative agencies."); *Commercial Cartage Co., Inc.*, 5 E.A.D. 112, 117 n.9 (EAB 1994) ("Although the [FRCP] are not applicable here, we have found them to be instructive in analyzing motions to dismiss."). Relying upon the FRCP, the Environmental Appeals Board ("EAB") has held that, "[i]n determining whether dismissal is warranted, all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the complainant. In addition, in the event dismissal appears to be appropriate, dismissal of a complaint should ordinarily be without prejudice." *Commercial Cartage Co., Inc.*, 5 E.A.D. at 117.

Accordingly, to prevail on a motion to dismiss in the present proceeding, Respondent must demonstrate that the allegations as set forth within the text of the Complaint, if assumed true, fail to establish a violation of the CAA as charged or otherwise fail to show a right to relief. I note, however, that Respondent does not appear to be directly challenging the sufficiency of the Complaint as written in its Motion. Rather, Respondent seems to be requesting a dismissal of this proceeding citing certain external exhibits it provides as affirmatively evidencing the lack of a violation. Under these circumstances, Respondent's Motion is deemed to be more appropriately considered under the standard for adjudicating a motion for accelerated decision, similar to that filed by Complainant in its Opposition, rather than a motion to dismiss. *See* Fed. R. Civ. Pro. 12(d) ("If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."); *BWX Techs., Inc.*, 9 E.A.D. 61, 74 (EAB 2000) *("BWX Techs.")* (considering a motion to dismiss supported by affidavits as a motion for accelerated decision).

With regard to motions for accelerated decision, the Consolidated Rules provide –

> (a) *General.* The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. . . .

40 C.F.R. § 22.20(a).

In adjudicating motions for accelerated decision under the Rules of Practice, the EAB has consistently relied upon FRCP 56 and jurisprudence regarding summary judgment thereunder for guidance. *See, e.g.*, *Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs.*, 9 E.A.D. at 74-75; *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999); *see also P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148

(1995) ("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment.").

Like accelerated decision under Consolidated Rule 22.20(a), FRCP 56 directs a federal court to grant summary judgment upon motion by a party "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In construing this standard, the Supreme Court has held that a fact is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). In turn, a factual dispute is genuine if a fact finder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 250–52.

The Supreme Court has held that the party moving for summary judgment bears the burden of showing an absence of a genuine dispute as to any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). This burden consists of two components: an initial burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2727 (2d ed. 1983)). To establish that a dispute over a material fact does not or does exist, respectively, the movant and non-movant must cite to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or show "that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

In determining whether a genuine issue of material fact exists for trial, a federal court is required to construe the evidentiary material and reasonable inferences drawn therefrom in a light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [evidentiary] materials must be viewed in the light most favorable to the party opposing the motion."). The court is then required to consider whether a fact finder could reasonably find in favor of the non-moving party under the applicable evidentiary standards. *Anderson*, 477 U.S. at 252–55. Where the evidence viewed in the light most favorable to the non-moving party is such that the fact finder could not reasonably find in favor of that party, summary judgment is appropriate. *See id.* at 249–50; *Adickes*, 398 U.S. at 158–59. Conversely, where conflicting inferences may be drawn from the evidence and a choice among those inferences would amount to fact-finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Even where summary judgment appears technically proper, sound judicial policy and the exercise of

judicial discretion may support denial of the motion so the case may be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

The EAB has applied the foregoing principles in adjudicating motions for accelerated decision under Section 22.20(a) of the Consolidated Rules, holding that the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX Techs*., 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no reasonable [fact finder] is free to disregard it[.]" *Id.* Where the moving party does not bear the burden of persuasion, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue[.]" *Id.* Once the moving party has discharged this burden, the burden of production shifts to the non-moving party bearing the burden of persuasion on the issue to identify specific facts from which a finder of fact could reasonably find in its favor on each element of the claim. *Id.*

As noted by the EAB, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *Id*. at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a scintilla of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id*. at 76.

Consistent with the jurisprudence of Federal Rule 56, the EAB has held that a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *Id.* at 75. As prescribed by section 22.24(b) of the Consolidated Rules, 40 C.F.R. § 22.24(b), the evidentiary standard that applies here is proof by a preponderance of the evidence. Section 22.24(a) provides that the complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint and that the relief sought is appropriate, while the respondent bears the burdens of presentation and persuasion for any affirmative defenses.

VIII. DISCUSSION

As indicated above, the TBR, the California regulation Respondent is alleged to have violated, requires in pertinent part that –

> (2) Any in-state or out-of-state motor carrier, . . . 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).

Cal. Code Regs. tit. 13, § 2025(x)(2).

Thus, to establish a prima facie violation of Section 2025(x), the Agency must show that Respondent: (1) is a "motor carrier;" (2) which operated or directed a vehicle subject to the TBR (an "affected vehicle"); and (3) failed to "verify" the vehicle's compliance with the TBR.[31]

The Complaint alleges that Respondent is a "motor carrier," as defined in the TBR. Compl. ¶ 22. Respondent does not appear to dispute this allegation in its Answer or other pleadings, and its own documents in the record support finding that it is such a "motor carrier." *See* CX 21 at 1; CX 23 at 3, 6; CX 25 at 1; CX 31 at 1; CX 38 at 1.

The Complaint further alleges that "Respondent operated or directed the operation of at least one (1) vehicle in California and subject to the TBR on various date(s) between January 1, 2018 and May 20, 2021, inclusive." Compl. ¶ 32. Based on the Answer and other documentation, it appears that Respondent is not disputing that it dispatched at least one TBR "affected vehicle" to drive (and which did drive) in the State of California each calendar year from 2017–2021. Answer 1 ("Norco feels they have submitted enough evidence to show they were complying with the spirit and letter of the law."); CX 43 at 27-29 (Modified Spreadsheet).

Finally, as to the third element, the Complaint alleges that Respondent "failed to verify the TBR compliance" of those vehicles it hired or dispatched to California between January 1, 2018 and May 20, 2021. Compl. ¶¶ 29, 33. Both parties appear to suggest in their respective motions that this element too is not in dispute; however, Respondent asserts in its Motion that the record does not evince a violation of the verification requirement and the Complainant asserts in its Motion that undisputed facts document Respondent's noncompliance with the verification requirement, at least as to one vehicle.

Both Motions fail to present adequate record support for these conflicting assertions. The parties instead appear to assume that I share their understanding of the voluminous record, including which documents show that a given vehicle is at issue here and that Norco did/did not verify compliance for that vehicle. I do not, nor is it the Tribunal's role to scour the record to piece together analyses the parties have failed to present. *Brenda L. v. Saul*, 392 F. Supp. 3d 858, 866 (N.D. Ill. 2019) ("Judges are not expected to be archaeologists, sifting through a 2000-page transcript in search of evidence to support one side's case.") (citing *Spitz v. Proven Winners N. Am., LLC*, 759 F.3d 724, 731 (7th Cir. 2014) ("A brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record."); *Bunn v. Fed. Deposit Ins. Corp. for Valley Bank Ill.*, 908 F.3d 290, 297 (7th Cir. 2018) ("As has become 'axiomatic' in our Circuit, '[j]udges are not like pigs, hunting for truffles buried in the record.'"); *Dal Pozzo v. Basic Mach. Co.*, 463 F.3d 609, 613 (7th Cir. 2006) ("An advocate's job is to make it

[31] The Complaint does not appear to allege a violation based upon the final clause of this regulation, i.e., that Respondent failed to "comply with the record keeping requirements of section 2025(s)(4)."

easy for the court to rule in his client's favor."); *see also Paskenta Band of Nomlaki Indians v. Crosby*, No. 215CV00538MCECMK, 2017 WL 1956147, at *2 (E.D. Cal. May 11, 2017) ("District judges are not archaeologists. They need not excavate masses of papers in search of revealing tidbits—not only because the rules of procedure place the burden on the litigants, but also because their time is scarce.") (quoting *NW Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662 (7th Cir. 1994)).

Turning first to Respondent's Motion: Respondent alleges that the Original Spreadsheet is erroneous and the Agency is inappropriately relying upon for its allegations of violation. But even for the narrower list of vehicles dispatched to California that Respondent identified through its Modified Spreadsheet, Respondent has failed to point to *record evidence* that demonstrates Respondent actually verified the TBR compliance of each of those listed vehicles.

As indicated above, at EPA's request, Respondent itself generated the data set forth in its Original Spreadsheet, presumably from its own records, and provided it to EPA certifying it as being correct. CX 4 at 26-28. That data purported to reflect the 90 or so affected vehicles Respondent dispatched to California during the relevant time period. CX 2 at 11. Respondent was simultaneously requested by EPA in the IR to provide documentation of its compliance with its obligation to verify the vehicles it dispatched complied with the TBR. CX 2 at 11. It appears Respondent did not provide any such documentation with its initial Response to the IR. Based upon the Respondent's IR Response indicating that it had dispatched dozens of affected vehicles to California and offered no evidence of verification, the Agency reasonably concluded that Respondent was noncompliant with the TBR and issued the NOV. CX 8.

It was only after the NOV was issued that Respondent begin to offer evidence purportedly evidencing verification. Specifically, it then represented to the Agency that, as to diesel particulate filters, "we ask the operators prior to dispatch and have them sign a statement that the vehicle they are going to use is compliant." CX 42 at 9. In support it provided EPA with what appears to be a signed, but undated, sample of such a statement from one of its Fleet owners, Jim Golden, as to his vehicle's compliance, as well as its CARB list. CX 42 at 1-5, 7; CX 4 at 26. However, the record suggests that at no point did Respondent ever provided the Agency with any similar signed statements from any other vehicle operators listed on the Original Spreadsheet. Nor did it ever provide the names of the owners of the vehicles identified on its CARB list as being compliant. As the Original Spreadsheet does not identify the vehicles dispatched by anything more than the name of the owner, and the CARB list does not identify the owners of the vehicles listed, it is impossible to cross check for compliance by comparing the two documents alone.

Subsequently, Respondent also provided EPA with its various annual Fleet forms, some hand modified to identify the name of the vehicle owner(s) listed thereon. CX 7a-7f; RX 2. While the Fleet forms do show the make and model year of vehicles, they do not explicitly indicate the TBR compliance status. And, again, because the Fleet forms do not provide the

data reflected in the CARB list, it is impossible to determine compliance by merely comparing the two documents.

In addition, around this time, some two years after Respondent submitted its Original Spreadsheet to EPA, Respondent advised the Agency that, after additional record review, it had discovered that some of the data it had included on its Original Spreadsheet was erroneous, including that it had mistakenly listed 11 fleet owners whose vehicles it never, in fact, dispatched to California during the relevant time period. CX 7g at 1. Respondent then submitted to EPA its Modified Spreadsheet, adding handwritten notations as to which vehicles should not have been included as well as truck numbers and model years for the Fleet owner's vehicles. CX 43 at 27-29. In its Prehearing Exchange, Respondent attributed the errors in the Original Spreadsheet to mistakes in a software program it originally used to gather the data. Respondent's PHE at 1.

This Tribunal has reviewed all the documentation in the record and is unpersuaded that it clearly establishes that Respondent did not violate its obligations as a motor carrier under the TBR between January 1, 2019 and May 20, 2021.[32] Even assuming, arguendo, that the data in the Original Spreadsheet is "faulty," "incorrect," "flawed," wrong," and "not to be used," as Respondent suggests in its Reply, the Modified Spreadsheet still identifies dozens of affected vehicles Respondent dispatched to California between January 1, 2019, and May 20, 2021. Reply at 1; CX 43 at 27-29; CX 46. And, there is no evidence currently in the record—particularly none that Respondent has identified—which plainly indicates to this Tribunal that Respondent verified the TBR compliance of each of those vehicles.[33] *See, e.g.*, *Brenda L.*, 392 F. Supp. 3d at 866; *Bunn*, 908 F.3d at 297. As such, the Tribunal cannot grant the dismissal of the case requested by the Respondent based upon an absence of a genuine issue of material fact.

As to the Agency's Motion, EPA has the burden of presentation and persuasion, 40 C.F.R. § 22.24, and to prevail on its motion for partial accelerated decision it must establish that for at least one affected vehicle dispatched during the relevant period, there is "no genuine

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[32] The Tribunal cites to violation period of January 1, 2019, here as the start of the violation period because there is a general five year statute of limitations from the date the claim first accrued on actions for enforcement of penalties. 28 U.S.C. § 2462; *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994). As this action was initiated on December 23, 2023, the earliest or oldest dated violation the Agency may pursue is one that occurred on or after December 23, 2018. As the vehicles dispatched are identified in the IR by calendar year, the Tribunal has defaulted to using a start date of January 1, 2019, for the purposes of this Order.

[33] The addition of the truck numbers to the Modified Spreadsheet allows for the vehicles listed therein to be checked against the vehicles listed on the Fleet forms, but that does not prove compliance. For example, the Modified Spreadsheet lists Raul Zambrano's vehicle number, 1840, as being dispatched by Respondent to California in 2019. CX 43 at 27, line 5. Respondent's Fleet forms identify Mr. Zambrano's vehicle number 1840 as a 2009 International model Truck Tractor. CX 7b at 2 (2018 Fleet form); CX 7c at 20 (2019 Fleet form). While this vehicle maybe included on the CARB list as being reported compliant, the Tribunal is unable to derive that information from the record as it now stands.

issue of material fact" and it "is entitled to judgment as a matter of law." 40 C.F.R. § 22.20. However, in its Motion the Agency fails to identify the material facts evidencing noncompliance as to any one *specific* affected vehicle. Rather, it generally alleges violations as to 77 vehicles and leaves it to this Tribunal to derive a single specific incident of non-compliance from the record.[34] *See* Complainant's Opp'n/Mot. 12. Based on the vagueness of the Complainant's Motion, the cryptic documentation in the record, and the lack of assurance that the record contains all the documentation Respondent possesses and/or submitted to the Agency as to compliance, at this point, this Tribunal on its own cannot with sufficient certainty make the requisite finding in EPA's favor as to any one specific vehicle. Thus, it cannot find at present that Complainant is entitled to partial accelerated decision as to liability as a matter of law.

IX. CONCLUSION

Based upon the foregoing, this Tribunal finds that there are genuine issues of material fact and neither party is entitled to judgment as a matter of law as to Respondent's liability for violations of the TRB, Cal. Code Regs. tit. 13, § 2025.

ORDER

Upon consideration of the foregoing, it is hereby ORDERED as follows:

a. Respondent's Motion to Dismiss is hereby **DENIED**;

b. Complainant's Motion to Partial Accelerated Decision is hereby **DENIED**; and

c. This matter shall be set for hearing to determine liability and the appropriate penalty to be imposed for any violations found.

SO ORDERED.

Susan L. Biro

[34] This Tribunal reviewed CX 46, which appears to be a table created by the Agency in an attempt to collate the evidence of violations for each Fleet owner listed on Respondent's Original Spreadsheet. That Spreadsheet indicates a violation associated with 60 of the approximately 90 the Fleet owners listed on the Original Spreadsheet. CX 46. CX 46 indicates that the Agency did not count as a violation those trips made in vehicles with a model year after 2010. CX 46, e.g., lines 7, 23, 24. On the other hand, the Agency did identify as violations trips possibly barred by the statute of limitations (i.e., made prior to December 23, 2018) and vehicles which Respondent has claimed were never actually dispatched to California and were mistakenly included on the Original Spreadsheet. *E.g.* CX 46 lines 2, 3, 9 (2018 trips) & lines 6, 18, 34 (non-California trips). As such, the Tribunal is unwilling to rely upon this exhibit as accurately enumerating evidence of violations.

Chief Administrative Law Judge

Dated: June 21, 2024
Washington, D.C.

In the Matter of Norco Corporation, Respondent.
Docket No. CAA-09-2024-0025

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Order on Motions dated June 21, 2024, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

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Attorney-Advisor

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Dated: June 21, 2024
Washington, D.C.