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**Statement for the Record**

**Of the U.S. Environmental Protection Agency's**  
**Third Hearing**

**On California's Request**  
**For Federal Authorization to Enforce**  
**Its Off-Road In-Use Diesel-Powered Fleets Regulation**

**By Michael E. Kennedy, General Counsel,**  
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Good morning. My name is Michael Kennedy. I am the General Counsel of the Associated General Contractors of America (AGC), and I am here today to recount the long history of California's current Off-Road In-Use Diesel-Powered Fleets Regulation and to express AGC's position on California's pending request for federal authorization to enforce that rule.

AGC is the leading representative of the construction industry in the United States. The association was formed in 1918, and today it speaks for more than 30,000 firms in 95 chapters across the country. Among the association's members are approximately 7,000 of the nation's leading general contractors, approximately 11,000 specialty contractors, and approximately 12,000 material suppliers and service providers to the construction industry. AGC members construct office buildings, apartments, condominiums, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities, and site utilities necessary for housing development. In doing so, the association's members purchase and operate a considerable amount of off-road diesel equipment.

AGC understands that the construction industry has a significant role to play in environmental protection. For many years, AGC had a formal partnership with EPA. It remains a leader in the field of green construction. And more importantly, for today's purposes, AGC has long and consistently supported EPA's "clean diesel" initiatives, including its incentives to reduce emissions from existing fleets of off-road diesel equipment. From the beginning, AGC has been actively involved in the Clean Diesel Campaign. AGC has a strong working relationship with the Clean Air Task force, and it continues to urge Congress to provide financial and technical assistance to those searching for fair and effective ways to reduce emissions from existing fleets of off-road diesel equipment.

California's off-road rule also seeks to reduce such emissions. It is, however, a mandate that requires existing fleets of off-road diesel equipment to meet a series of steadily declining emission standards, over a period of approximately ten years. Each year, the regulated fleets have to either meet the standard for the year or turn over a certain percentage of their horsepower. In addition, if necessary to meet the standard for the final year, fleets have to continue to turn over their equipment, until they meet that standard. After certain periods of time, the rule also forbids California fleets to add Tier 0, Tier 1 or Tier 2 equipment. The rule also imposes recordkeeping, reporting and labeling requirements, and restricts idling time.

Among AGC members, California's off-road rule has been and remains controversial. Many still consider it fundamentally unfair for the state to require them to retire, repower, rebuild, retrofit or reduce their use of equipment that met all environmental standards that applied at the time the equipment came onto the market. There is no escaping the sense that California is trying to change the rules of the game halfway through the second quarter. California's

construction contractors invested enormous sums in their off-road equipment in the reasonable expectation that they could lawfully operate and use it for the full duration of its useful life.

Nor is there any escaping the reality that emissions from California's off-road diesel equipment are declining, and would continue to decline, even in the absence of this rule. EPA's emissions standards for newly manufactured equipment are taking effect, and as the older equipment wears out, the newer and cleaner equipment is replacing it. Back in 2007, when it proposed its off-road rule, California estimated that the emissions of nitrogen oxides from off-road diesel equipment were already destined to drop 68% over the sixteen year period between 2009 and 2025. The state similarly estimated that emissions of particulate matter were already destined to drop 76%.

Given the great stakes for both the construction industry and the environment, AGC quickly responded to California's proposal. By June of 2008, when the original rule took effect, AGC had already submitted comments, affidavits and expert reports to California's Air Resources Board (CARB) on four separate occasions. These materials exceeded 300 pages in length, and collectively, they laid out the full range of the construction industry's concerns, including the cost of compliance with the rule, how badly the rule would damage contractors' the balance sheets, the limits of the technology available to the industry, and whether the engine manufacturers could provide the support the industry would require. AGC also warned of downstream effects on employment in the construction industry, and questioned how well California had estimated its population of off-road diesel equipment, and its turnover rate.

For much of the construction industry, this off-road construction equipment is both critical and an enormous expense of doing business. This equipment accounts for much if not most of the net worth of many of the companies engaged in heavy and civil construction. Above and beyond the amount of work that these firms can quite literally perform, this equipment determines how much they can borrow and their bonding capacity. Any rule that restricts the use of this equipment, or diminishes its market value, will have an enormous impact, particularly on companies being required, at one and the same time, to make large investments in new technology.

Needless to say, AGC was disappointed in the results of the original rulemaking. The state had estimated that the cost of compliance would be would be somewhere between \$3 billion and \$3.4 billion. California's construction industry put the number closer to \$13 billion. And then there were all of the other issues. Was it even feasible to comply? What about the safety of the men and women working around this equipment?

In December of 2008, in its first effort to address the many questions that surrounded the original rule, AGC petitioned CARB to reopen its rulemaking and to stay the deadlines for meeting the rule's requirements. In a fifty-five page submission that included nine declarations, AGC explained that economic conditions had both suddenly and dramatically changed, making it impossible for contractors to pass along any of their cost of compliance, that emissions had already dropped, that retrofitting equipment was proving to be far more difficult and expensive than expected, and that financing was far tighter than expected. When state officials wrote their rule, they had estimated that California's construction industry would be adding jobs and expanding as the rule took effect. The reality turned out to be just a bit different. Between 2006 and 2008, the industry lost 330,000 or 35% of its jobs, and the real GDP originating from California's construction industry dropped by \$13 billion.

At CARB's request, and in response to its commitment to work with AGC to resolve the issues that the petition had raised, AGC agreed to extend the deadline for CARB to respond to it. AGC did not object to the rule's reporting requirements, and it recognized that CARB would start collecting new and better data on California's off-road diesel equipment in March of 2009. By the following summer, better data on the total population, age distribution, horsepower distribution and other attributes on the off-road diesel equipment in California would be available to everyone. Once it was, both CARB and AGC could more objectively assess the economic downturn and its effects on emissions.

The following June, CARB provided AGC with the data that it had collected up to that point in time, and a copy of the OFFROAD computer model that it had used to estimate emissions from off-road diesel equipment in California. In September, CARB provided AGC with more data, and by the end of November, AGC had run all of the new data through the state's model. That first look at the new data suggested that CARB had overestimated the 2009 emissions of both nitrogen oxides and particular matter by 36%. To AGC, it appeared that CARB had room to modify the original rule, without compromising its original targets. In December of 2009, AGC met with CARB to make that very point. AGC was, however, disappointed to learn, later that month, that CARB was not yet ready to entertain any significant changes to the rule. The first deadline for compliance was March 1, 2010, and as of December of 2009, CARB was unprepared to change it.

In January of 2010, AGC therefore filed a second petition to reopen the rulemaking. While the first petition had sought permanent relief, the second merely requested a delay in the enforcement of the rule. CARB had yet to complete its own analysis of the new data, and AGC believed it reasonable to request CARB to delay enforcement at least until it had completed that step. CARB responded that it would delay enforcement until EPA granted the approval that is the subject of today's hearing. To its greater credit, CARB also announced that in March it

would hold a public hearing on the economic downturn, and whether it justified amendments to the rule.

AGC carefully prepared for and actively participated in that hearing. At AGC's request, the President of the National Association of Business Economists delivered an independent report on the state of the economy, including her forecast for the future of California's construction industry. At AGC's request, several other experts and contractors also testified. By the time the hearing came to end, more than thirty contractors and others had testified that the only way for contractors to comply with the rule was to sell equipment that they would otherwise keep, downsizing their companies and cutting the number of jobs that they could provide.

At the hearing, AGC also reported that it had identified a potentially serious flaw in the OFFROAD computer model that CARB had used to estimate emissions from off-road diesel equipment. It seemed that the model's estimates of diesel fuel consumption were inconsistent with the available data on the amount of fuel that off-road equipment had actually consumed. If the state's original estimates were correct, then in 2009, its off-road diesel equipment should have consumed 581 million gallons of fuel. The data for 2009 suggested that, in fact, this equipment had only consumed 164 million gallons. Something was obviously wrong.

Activity levels and load factors for off-road diesel equipment are very difficult to determine. By a process of elimination, AGC came to believe that the computer model's estimates of these critical factors were wide of the mark. AGC then introduced a correction factor and ran CARB's very latest data through the corrected model. By the following April, the results were available. And they were astonishing. They suggested that CARB had overestimated the emissions from the off-road diesel equipment in the state by 350%. They also suggested that California's fleets were already destined, without any further regulation, to would meet or exceed the state's original targets for many years to come.

To its great credit, the state took all of this very seriously. This is highly complex and technical work, and even the very best and the brightest can easily make a mistake. The agency quickly launched an independent review of its computer model, and by September of 2010, CARB had independently reached the conclusion that its original estimates of the emissions from the off-road diesel equipment in California were off by 340%.

What followed, through the fall of 2010, was a good faith and ultimately successful effort to reach an agreement that would protect both the environment and the construction industry. The final agreement was to push back the original deadlines for meeting the rule's emission standards and/or turnover requirements for nearly four years, from March 1 of 2010, to January 1 of 2014. CARB and AGC also agreed to cut the percentage of the total horsepower that the

rule would require contractors and other fleet owners to turn over each year. In the first year, that number dropped from 28% to 4%. In years two and three, it dropped from 16.8% to 8%. In years four and five, it dropped from a minimum of 28% to 10%. And in all subsequent years, it dropped from 30% to 10%.

The parties also agreed to double the number of hours that vehicles could operate in any one year and still qualify for special treatment as “low-use” vehicles. And critical to any other state that may have an interest in adopting California’s off-road rule, CARB and AGC also agreed to do two other things. First, they agreed to preserve a series of early action credits, giving California’s contractors an opportunity to get a significant head start on compliance with the rule, and spread the cost over time. And second, they agreed to give contractors a more reasonable amount of time to phase out, and salvage the value, of their Tier 0, Tier 1 and Tier 2 equipment.

The net effect was to save California’s construction industry at least \$1.5 billion and as much as \$9 billion. CARB estimated that the December 2010 changes to the rule would reduce the total cost of compliance by something on the order of 70%, and even today, AGC has no grounds for questioning that estimate. The actual savings therefore depend on the cost of compliance with the original rule. CARB originally put that cost at somewhere between \$3 and \$3.4 billion. Later CARB reduced its estimate to \$2.15 billion. On the other hand, California’s construction industry estimated that the cost would be close to \$13 billion.

Even as amended in December of 2010, California’s off-road rule will, however, be a burden for contractors. California’s construction industry has yet to recover from its sudden and dramatic downturn. Nationwide, the construction industry continues to shed capacity, which is just a polite way of saying the contractors continue to go out of business. Indeed, the anecdotal evidence suggests that contractor defaults will be higher in 2012 than in any of the previous three years. The outcome of EPA’s review of the latest and current version of California’s off-road rule is a matter of great interest, and even concern.

From the very beginning, as it worked with CARB, AGC encouraged EPA to expect future amendments to the rule, and to be sure to take them into account. In its very first letter to EPA, in October of 2008, AGC requested EPA to delay any proceedings on California’s request until the state had completed its already announced plans to revisit at least portions of the rule.

In subsequent submissions to EPA, AGC went on to explain how and why the original rule did not meet the standards that the Clean Air Act has established. Among other things, AGC was deeply concerned about the cost and other estimates that CARB had made, about the technology that contractors would require to comply with the rule, and about the lead time provided to them. AGC also questioned whether the rule was ripe for review. Over the

approximately two-year period that began in October 2008, AGC made a total of eight submissions to EPA, collectively exceeding 550 pages in length. AGC also participated in the hearing that EPA held on April 14, 2009. AGC considered it important both to express its views of California's request and to ensure that EPA stayed abreast of the latest developments.

In its notice of today's hearing, EPA states that it will not be taking earlier comments and testimony, based on earlier versions of the off-road rule, into account. The agency then explains that "the December 2010 amendments are likely to affect" the merits of California's request for federal authorization to proceed. I am here today primarily to report that AGC agrees. While the Clean Air Act has not changed, and the questions that EPA must address are one and the same, the rule that CARB now seeks the authority to enforce is very different from the rule that CARB originally submitted to EPA.

AGC is not prepared to support California's request but AGC does believe that the state's request can be fairly submitted to EPA, and left to the sound discretion of the professionals who staff the agency. AGC has been quite impressed by their fair and impartial approach to this entire matter, and AGC has confidence that they will reach the right conclusions.

In the end, AGC remains very concerned about its members, and worries that they will find it difficult to afford the cost of compliance with even the amended rule. The construction industry continues to suffer great economic hardship. At the same time, AGC has an obligation to give California credit for coming as far as it has come.

Thank you.