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THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

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Testimony

By

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To

U.S. Environmental Protection Agency

On behalf of

Associated General Contractors of America

On

**California Request for Federal Authorization
To Enforce Off-Road In-Use Diesel-Powered
Fleets Regulation**

Washington, DC

April 14, 2009

Good morning. I am Jon Cloud, the Treasurer of J. Cloud, Inc., a family-owned construction firm headquartered in El Cajon, California. My father started our company in 1993, and today, he continues to work there, along with me and two of my brothers.

Over the years, our company has become a leading supplier of the recycled concrete and asphalt that AGC members use to construct the base for the roads in and around San Diego. It is a relatively small company, with annual sales of approximately \$3 million and just 18 employees. It is, however, big enough to recycle approximately 200,000 tons of the concrete and asphalt that would otherwise end up in San Diego's landfills each and every year.

I am here today to speak for the Associated General Contractors of America, which has been and remains very strongly opposed to California's request for federal approval to enforce its off-road rule. Our firm is a member of the association, and in fact, I am pleased to serve on the Board of Directors for its San Diego Chapter.

AGC was founded in 1918 at the express request of President Woodrow Wilson, and today it represents more than 33,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms engage in the construction of both public and private infrastructure, including highways, bridges, transit systems, airports, office buildings, apartments, condominiums, hospitals, schools, shopping centers, factories, warehouses, and water works facilities. AGC members also prepare sites and install utilities necessary for housing

development. Like my firm, most AGC members are family-owned, and many of them are heavily invested in off-road diesel equipment.

AGC has already provided EPA with detailed comments on California's request for federal approval to enforce its off-road rule. AGC wrote two letters to EPA in October of 2008, and made an extremely detailed, one-hundred-eighty-three page submission to the agency in December of the same year. AGC wrote to EPA again in March and August of 2009, and in January of this year. Included in several of these submissions were sworn statements and other evidence of the facts that California's request requires EPA to consider.

In advance of the May deadline, AGC will also provide written comments and additional evidence for the record of the current proceedings. AGC continues to research California's original emissions inventory and the other underpinnings of its off-road rule, and in late April, California's Air Resources Board will entertain proposals for further amendments to the rule. The results of both the research and the Board's next meeting are among the many factors that EPA can and should consider.

Today, I will just summarize AGC's central reasons for asking EPA to delay or deny California's request for federal authorization, and then try to provide some context for what can become a very abstract discussion of diesel emissions. If nothing else, I hope to remind you that real people, and real families, are counting on EPA to make the right decision.

First, I would emphasize that the off-road rule is not yet ripe for federal review. It has been and it remains a moving target. AGC has filed two petitions to amend the rule, and as of today, the California Air Resources Board has neither granted nor denied either of them. Since August of 2008, when it made its request for federal approval to enforce the rule, California has revisited the rule on three separate occasions, and twice amended it. In apparent response to the petitions that AGC has filed, the California Air Resources Board has also made it clear that more amendments are on their way. Just over a month ago, the Board held another public hearing on the rule, gathering additional facts for the better part of a day. Two experts and several construction contractors spoke for AGC. Thirty-seven others also testified. And the Board staff confirmed that it was already making “plans to provide additional regulatory relief” to the construction industry. In this regard, it is one thing to accept that California might amend a particular rule at some point in the future and quite another thing to know that the state is already making plans to amend a rule. That kind of information provides a clear and sound basis for EPA to defer any action on a California request for federal authorization, and indeed, it would be imprudent for EPA to disregard it.

Second, the state’s emissions inventory – which served as the starting point for the off-road rule – has proven to be quite wide of the mark. New and better data collected in 2009, and new research into the emissions that California has reason to anticipate, reveal that California simply does not need the rule in anything approaching its current form. The new data reveals that the population of off-road equipment in California is both smaller and newer than the state believed at the time it developed the rule. In addition, in a recently published article, two professors at the University of California at Berkeley have demonstrated that California’s computer model is

irreconcilable with historical data on diesel fuel consumption, and therefore requires adjustment. While AGC is still waiting for final results of its own research, the association is already confident that PM and NOx emissions from California's construction industry are and will remain below the levels that the rule sought to achieve for several years to come.

Third, the cost of compliance is very clearly excessive. In April of 2007, when it issued its Initial Statement of Reasons, the state conceded that this cost had reached "the economic limit of what industry could bear." Since then, the actual costs of retrofitting and repowering off-road equipment have proven to be far higher than the state predicted. At the same time, California's construction industry has gone into the worst depression in the memory of anyone still in the industry. Over the last four years, one-third of California's construction industry has completely disappeared. In the record of the hearing that California held on March 11, EPA will find abundant evidence that the state's construction contractors cannot generate the earnings they would need to self-finance their compliance with the off-road rule, and that bank financing is not available to them. California adopted the rule in April of 2007, and the first of several deadlines for compliance with the rule's fleet average requirements came and went in March of 2010. As this lead time expired, the technology necessary to comply at anything approaching an affordable cost had yet to develop. Retrofits, repowers and replacements remained economically infeasible. For most contractors, the only option was to downsize their fleets – and in turn, their earning capacity.

Fourth, the cost of compliance remains only one of several reasons for questioning the technology. When it adopted the rule, California acknowledged that the rule would ultimately

require fleet owners to retrofit more than 100,000 pieces of equipment, but by March of 2010, after the deadline for large fleets to comply with the first of the rule's compliance had come and gone, fleet owners had succeeded in retrofitting fewer than 1000 pieces of this equipment. To this day, the technical feasibility of installing verified devices on the regulated equipment remains a great unknown. The state has not taken anything approaching a systematic look at the feasibility of actually marrying verified devices to the diverse population of equipment that the rule covers. When pressed, the state has simply cited a string of exemptions for individual pieces of equipment, as if these exemptions somehow relieved the burden on the fleets to which the equipment belongs.

Fifth, fleet owners have to retrofit their off-road equipment far more carefully than CARB anticipated. As CalOSHA has discovered, the technology on which the rule so heavily depends can impair visibility and create other risks for construction workers. AGC continues to support incentives for construction contractors voluntarily to retrofit their equipment, or otherwise reduce their emissions. The off-road rule is, however, so broad and aggressive that it is nearly certain to put construction workers at risk of serious injury or even death. By CARB's own admission, appropriate safety standards would threaten the viability of major portions of the rule.

My own company could not begin to afford the cost of retrofitting, repowering or replacing its equipment to the extent necessary to comply with the rule. Most of this equipment is Tier 0, and verified devices for reducing its emissions are not even available. As the first deadline approached, our only option for dealing with the rule was to downsize our fleet to the point where it became a medium and not a large fleet. This meant that we did not have to meet the

deadline that passed just over a month ago. But this strategy will only buy us a couple of years. And then, quite frankly, I am not sure what we will do. We have absolutely no reason to believe that the technology necessary to come into compliance at anything approaching affordable cost is going to develop in the little time that remains available.

I am reminded of a meeting that California's Air Resources Board held in San Diego. During that meeting, the staff looked straight into the audience – at me and my colleagues in the construction industry – and declared that “Some of you will have to go out of business.” Well, I am here to tell you that the staff was wrong. The number is more than “some.” To comply with the rule, most of the smaller and family-owned businesses that heavily depend on their off-road equipment will have to go out of business. Their only option is to continue to shrink until, in the end, they simply disappear.

In closing, let me also join AGC in urging EPA also to hold hearings in California. The vast majority of the affected construction contractors simply cannot afford the time or expense of traveling to Washington. It is true that they can submit written comments, but also true that their live testimony would greatly enhance the decision-making process. At some point, you need to really feel the fear and frustration that the off-road rule continues to cause. As I said earlier, real people, and real families, are counting on you to make the right decision.

Again, I thank you for the chance to testify.