

December 15, 2008

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By Mail and Email

Mary Nichols, Chairperson
California Air Resources Board
1001 "I" Street
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Sacramento, CA 95812

Re: Petition to Reconsider and/or Repeal or Amend In-Use Off-Road Diesel-Fueled
Fleets Regulation

Dear Chairperson Nichols:

On behalf of the Associated General Contractors of America and its California chapters (collectively, "AGC"), and pursuant to California Government Code section 11340.6, we petition the California Air Resources Board ("CARB" or "Board") to amend and/or repeal its In-Use Off-Road Diesel-Fueled Fleets Regulation ("Rule"). The Board approved the Rule on July 26, 2007 with Resolution 07-19. CARB's Executive Officer formally adopted the Rule on April 4, 2008. The Office of Administrative Law approved the Rule on May 16, 2008 and the regulation became effective on June 15, 2008, pending U.S. Environmental Protection Agency ("EPA") action on CARB's request for a Clean Air Act waiver. At the time of this writing, EPA has yet to act on that request.

I. SHORT SUMMARY OF THE RULE

The Rule requires the owners of existing fleets of off-road equipment to reduce emissions of oxides of nitrogen ("NOx") and particulate matter ("PM") by quickly replacing their equipment and, in the case of particulate matter, retrofitting their equipment with filters and other emission control devices. The rule requires the owners of fleets that cannot meet the NOx fleet average standard for a particular year to either discard or turn over 8 or 10 percent of their horsepower in that year. It similarly requires the owners of fleets that cannot meet the PM fleet average requirements to retrofit 20 percent of their horsepower (total maximum) with the highest level of verified diesel emission control strategy ("VDECS") available for reducing PM emissions in the respective engines. A VDECS will be considered the highest level VDECS available if it is the highest level device verified by CARB to be effective and durable for the engine on which it will be installed and if the system can be used safely. In

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2007, CARB estimated the cost of the Rule to be \$3 to \$3.4 billion—“the economic limit of what industry could bear.”¹

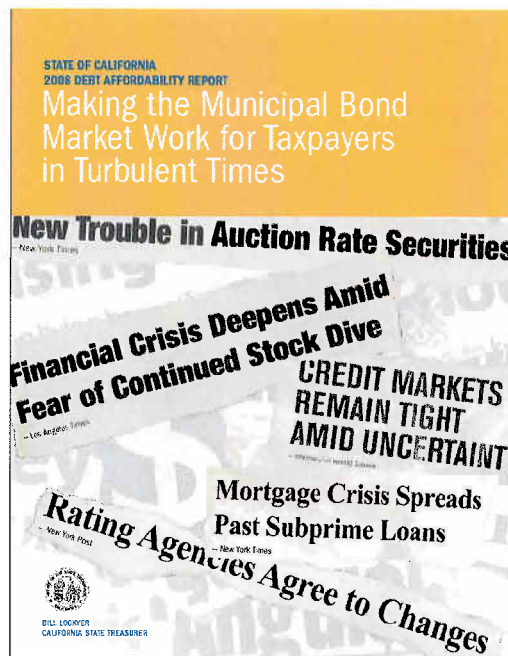
II. SUMMARY OF THE GROUNDS FOR THE PETITION

A. Background

Since the Board approved the Rule in July of 2007, the world has changed in dramatic and enduring ways. As stated by the California State Treasurer:

“The shock waves from this year’s extraordinary upheaval in financial markets have shaken investors, banks, borrowers, workers, retirees and families in our state and around the world. These events are without precedent in modern economic times, and they continue to unfold as of this writing.”

“The State and other public agencies that rely on that market to finance the construction of infrastructure and other important capital projects have faced enormous challenges. Many suffered significant increases in their financing costs.”²



The challenges facing individual construction companies are many times greater than the challenges facing the state as a whole. These companies, on whom all the burdens of the Rule are imposed, are in no position to buy new equipment or to retrofit existing equipment—much of which sits idle today.

According to industry analysts at McGraw-Hill Construction, the national construction market has already dropped by 12% in just the first ten months of 2008, and will continue to

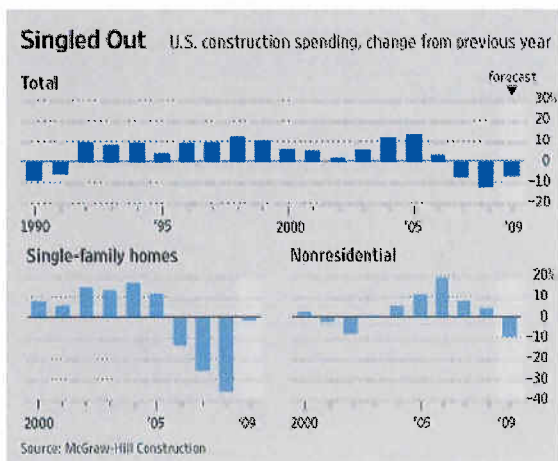
¹ See “Staff Report: Initial Statement of Reasons For Proposed Rulemaking, Public Hearing to Consider Adoption of the Proposed Regulation for In-Use Off-Road Diesel Vehicles,” April 2007 (“ISOR”) at 3.

² 2008 Debt Affordability Report, California State Treasurer’s Office, October 1, 2008. Emphasis added.

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slide another 7% in 2009.³ The first major deadline for compliance with the Rule is in March of 2010, meaning that during the same period of sharply declining construction activity contractors must invest heavily in their equipment fleets, if they are to meet the Rule's requirements.

That would be particularly difficult for California construction contractors, who are being hit even harder than their counterparts throughout the country. Even before the recent collapse of the financial markets, California construction contractors were facing huge challenges.



The current level of building activity is the lowest since the state began tracking figures in 1954.⁴

According to the Construction Industry Research Board, 4,484 residential permits were issued throughout California in August, down 61 percent compared to the same month a year ago and down 21 percent from July.⁵ During the first five months of 2008, permits for single-family units declined to 15,254.⁶ By way of comparison, in the first five months of 2005, single-family units totaled 65,042. That's a decline of almost 80 percent.

These trends are matched by a precipitous decline in off-road diesel fuel usage in California during 2008, which is down significantly from 2007 levels.⁷

Employment in the construction industry reflects these trends. Some 940,000 people were employed in California's construction industry in 2006.⁸ By the summer of 2008, that number had declined to about 820,000. The California Employment Development Department reports that the construction industry will be the hardest hit sector in California as the recession progresses:

³ "The McGraw-Hill Construction Outlook 2009 Report" ("McGraw-Hill Report") McGraw-Hill Construction, October 23, 2008.

⁴ "California Housing Production Continues Decline in July, CBIA Announces," California Building Industry Association, August 22, 2008. <http://www.cbia.org/go/cbia/newsroom>.

⁵ "Construction of New Homes in San Jose Metro Area, State Plunge in August", San Jose Mercury News, September 25, 2008.

⁶ "New Residential Construction Still Slow in May," California Building Industry Association, June 23, 2008.

⁷ California State Board of Equalization. See section III.B.1. *infra*.

⁸ California Bureau of Labor Statistics.

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“Construction will record the most job losses over the projected period [2007-2009], declining by -2.9 percent annually. About 70 percent of the decline in this sector is concentrated in Specialty Trade Contractors (-37,000). The projected decline in this industry is due to the effects of the subprime mortgage crisis with increases in foreclosures, growing housing inventories, and large reductions in new home construction.”⁹

These statistics, of course, only show the direct impacts of the fall-off in construction. Indirect impacts are felt by nearly all sectors of California’s economy, from materials suppliers to architects and engineers to financial services.

The economic impact on the State is staggering. According to a study that the California Homebuilding Foundation published in conjunction with the Sacramento Regional Research Institute shortly before economic conditions reached the point of a meltdown, even during tough economic times, the construction industry has generated nearly \$354 billion in economic output.¹⁰ This industry has consistently supported approximately 1.2 million jobs, accounting for 11 percent of all economic activity in the state, and making it the single largest industry in California, if one includes all economic activity that complements new-home construction.¹¹ The steep decline in construction activity thus has had huge economic impacts — impacts not anticipated when the Rule was drafted.

Due to these extraordinary changes in the economic circumstances that existed and on which the Board relied when it developed and adopted the Rule the various measures included therein are no longer feasible.

B. Recently Identified Safety Issues Make “Major Portions” of the Rule “No Longer Viable.”

As discussed further below, evaluations of some of the first retrofits installed on construction equipment operating in California have revealed that such installations are prone to being unsafe because the equipment was not designed for such retrofits. Among the safety concerns identified, impaired operator visibility was perhaps the most serious concern, putting construction craft workers and anyone else in close proximity to the machines at risk of being run over. CARB staff has admitted that in light of these safety concerns, and recent changes to the State’s safety rules, “major portions” of the Rule are “no longer viable.” This defect alone requires reconsideration of the Rule.

⁹ <http://www.labormarketinfo.edd.ca.gov/?pageid=145>

¹⁰ “*The Economic Benefits of Housing*” August 2008.

¹¹ *Id.*

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C. Changes in Circumstances that Require Reconsideration of the Rule

Changes in economic, financial and other circumstances compel a careful reexamination of the necessity for and the technological and economic feasibility of compliance with the rule, including the following:

- The Rule is no longer needed to meet the 2015 State Implementation Plan (“SIP”) goals.
- Safety concerns have rendered major portions of the Rule no longer viable.
- The fall in the volume of construction in California has undercut the economic assumptions underlying the Rule.
- Financing for the acquisition of new equipment, for repowering existing equipment, and for purchasing and installing VDECS, to the extent it exists at all, is more difficult to obtain than anyone expected.
- The cost per ton of emissions reduced is considerably higher than CARB anticipated.
 - VDECS are far less available than anticipated due to:
 - Extremely limited number of VDECS actually approved by CARB;
 - Concerns about the safety of these devices;
 - Lack of actual installation experience with VDECS that CARB has approved; and
 - Lack of actual field experience operating the devices.
 - The cost of purchasing and installing VDECS has proven to be considerably greater than CARB anticipated.

III. DISCUSSION

The requirements for petitioning for amendment or repeal of a regulation are set forth in Government Code section 11340.6:

“[A]ny interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation as provided in Article 5 (commencing with Section 11346). This petition shall state the following clearly and concisely:

- (a) The substance or nature of the regulation, amendment, or repeal requested.
- (b) The reason for the request.

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(c) Reference to the authority of the state agency to take the action requested.”

We address each of these requirements in turn.

A. Relief Requested

In light of the new circumstances more fully described below, Petitioner AGC respectfully requests that the Board either:

1. Repeal those portions of the Rule imposing fleet average requirements and refer them to Staff for further consideration in light of current conditions and actual fleet data; or
2. Stay all of the fleet average deadlines until a re-analysis of the need for, and cost of the Rule has been completed based upon data reported by fleet owners.

In either event, we urge the Board to leave in place the reporting requirements for large fleets and to accelerate the reporting requirements for all other fleets, so that CARB can compile accurate information about the composition of the off-road equipment fleet in California. That information is critical to designing a regulation that is “cost effective and technologically feasible” as required by Health and Safety Code section 43013. We suggest that the information collected pursuant to the Rule be evaluated by Staff and that Staff submit a modified rule reflecting actual fleet data to the Board thereafter.

In addition, AGC respectfully requests that the Board advise the EPA that it need not act on the waiver request for the rule until such time as the issues raised by this Petition have been resolved.

B. Reasons for the Request

When the Board proposed the Rule in early 2007, Staff relied largely on data for the period from 2002 to 2006. Staff predicted that the costs of the proposed regulation would reduce California’s economic output in 2010 by roughly \$700 million, and cut statewide employment by approximately 1,000 jobs.¹² Staff also estimated that the Rule would cut \$2.3 billion from personal income in that same year.¹³ Staff concluded that these impacts were not significant.¹⁴

¹² *ISOR* at 46.

¹³ *Id.*

¹⁴ *Id.*

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Now that the economy has taken a dramatic turn for the worse, the economic costs and the environmental benefits of the Rule are much different than expected. As construction activity has dropped, emissions have also dropped, and simultaneously, the economic impact on individual construction contractors has increased. In today's economic environment, the earnings needed to cover the costs of compliance are simply impossible to achieve. The data on which Staff relied during the rulemaking process is not a reliable guide to the very different future that California now contemplates.

In addition to the fundamental changes in the economic assumptions underlying the Rule, significant new technical issues have arisen, making compliance with the Rule impossible. As stated by CARB staff, "most if not all of the retrofits" required by the off-road regulation have become "impossible to install" in light of safety concerns.¹⁵ Staff has further observed that "major portions of the off-road regulation [are] no longer viable."¹⁶

1. The Rule Is No Longer Needed To Meet SIP Commitments for the South Coast and San Joaquin Valley Air Districts.

The fundamental premise of the Rule is that significant emission reductions from off-road construction equipment are needed to meet the National Ambient Air Quality Standards ("NAAQS") for PM and NOx. Neither the South Coast nor the San Joaquin Valley is in attainment for the PM2.5 NAAQS. Under the federal CAA, both are required to attain the PM2.5 standard by 2015. In addition to reductions in directly emitted diesel PM, these areas must achieve significant NOx reductions¹⁷ to achieve the ambient PM2.5 standard by the federally-mandated deadlines. Because the standard is an annual average, the U.S. EPA requires that all necessary emission reductions be achieved one calendar year before the deadline, or by 2014.

For SIP compliance purposes, Staff predicted that in the most heavily affected areas (the South Coast Air Basin and the San Joaquin Valley), the Rule would yield NOx reductions of 14.2 tons per day, or about 11%, in 2014. For PM, the reductions were estimated to be about 3.4 tons per day, or approximately 53%.¹⁸

Significant declines in construction activity have already resulted in significant declines in fuel consumption and resulting emissions and all economic indicators point to a continuation of the current trend. As stated by Staff in the Initial Statement of Reasons:

¹⁵ See section II.B.

¹⁶ *Ibid.*

¹⁷ NOx is a precursor to PM in the atmosphere.

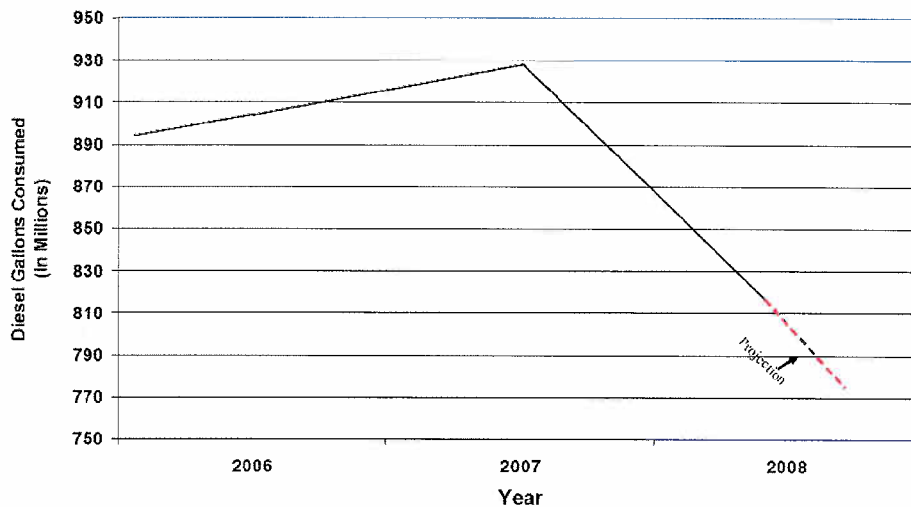
¹⁸ *Proposed Modifications to the Air Resources Board's "Proposed State Strategy for California's 2007 State Implementation Plan"* Attachment B to Resolution 07-28, September 27, 2007, at 12-13. http://www.arb.ca.gov/planning/sip/2007sip/07-28_attachment_b.pdf

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“Available fuel use data supports this, showing total off-road diesel fuel consumption from all sources (off-road vehicles, locomotives, marine, etc.) down over 10 percent from year 2007 levels (BOE, 2008). However, staff cannot precisely quantify at this time the extent of the decline in emissions from off-road vehicles subject to the regulation due to the poor economy. To better understand the impact of current economic conditions on fleets affected by the regulation and their emissions, ARB staff is evaluating available data on vehicle activity, as well as attempting to evaluate whether fleets may have changed their turnover practices due to the poor economy. Staff will present their findings at the January 2009, Board meeting.”¹⁹

Staff’s characterization of the fall-off in diesel usage appears to be understated. According to figures from the State Board of Equalization, off-road diesel use has declined by about 18 percent.

Total Off-Road Diesel Consumption
 for the State of California



Source: California State Board of Equalization, 2008.

The reduction attributable to the construction sector is probably higher. According to a number of California contractors, fuel consumption in 2008 has declined by as much as

¹⁹ Staff Report: Initial Statement of Reasons for Proposed Rulemaking; Proposed Amendments to the Regulation for In-Use Off-Road Diesel-Fueled Fleets and Implementation Update, Air Resources Board, December 2008 at page 2, 39.

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84%.²⁰ Reduced fuel consumption means reduced NOx and PM2.5 emissions, even without expensive and uncertain retrofits, repowers and replacements.

The net result from an emissions perspective is that, without the Rule having taken effect, reduced economic activity may already be achieving essentially all of the SIP goals for 2014. Thus, not only does the Rule impose huge and unnecessary costs, but the cost-effectiveness calculation, made in light of these changed circumstances, shows the rule to be an extremely costly strategy for achieving reductions.

2. Most of the Retrofits Are Unlawful Due to Safety Concerns.

According to CARB staff, "most if not all of the retrofits required by the off-road regulation could become impossible to install" in light of safety concerns raised by the California Department of Industrial Relations, Division of Occupational Safety and Health ("Cal/OSHA"),²¹ contractors and labor representatives.²² Staff has also admitted that in light of these safety concerns, "major portions of the off-road regulation [are] no longer viable."²³ These serious defects in the Rule would require reconsideration even if the construction industry were strong enough to support the Rule.

In the summer of 2008, Cal/OSHA met with industry and labor representatives and CARB staff to examine the safety of VDECS installations. Cal/OSHA concluded that the most promising and widely available VDECS do not meet its long-standing safety standards. As a result, use of such VDECS would be *unlawful* in California.

To eliminate any doubt about how its regulations apply to VDECS, on November 20, 2008 the Cal/OSHA Standards Board amended sections 1590, 1591 and 1597 of Title 8, California Code of Regulations to make it clear that:

- (1) Engine exhaust piping must direct exhaust gases away from the operator's breathing zone.
- (2) No modifications must be made to the exhaust systems that would create a fire hazard, or expose employees to burns from radiant heat and or high temperature surfaces.

²⁰ Declaration of Christopher M. Hickey, paragraph 5, attached hereto as Exhibit A. *See also*, Declaration of Bruno Dietl, paragraph 5, attached hereto as Exhibit B.

²¹ Cal/OSHA has exclusive authority over the safety of California's workers. Labor Code section 142.3(a).

²² Letter to Ms. Marley Hart, Executive Officer Cal/OSHA Standards Board, from Mr. Bob Cross, Chief, Mobile Source Division, CARB, dated November 18, 2008 (Hereafter the "Cross Letter.")

²³ Cross Letter at p. 3.

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(3) Equipment and accessories installed on haulage vehicles must be arranged so as to avoid impairing the driver's operational vision to the front or sides.

(4) Modifications and structural changes to haulage and earth moving vehicles that affect the capacity, safety, structural integrity, operator's visibility, or handling of the vehicle shall not be performed by the employer or user without prior written approval from the vehicle's manufacturer.

(5) Vehicles shall not be modified in any way that affects the capacity, safety, structural integrity, operator's visibility, or handling of the vehicle without prior written approval from the vehicle's manufacturer or certification of modifications by a California Registered Professional Engineer.

In commenting on the amendments set forth above, CARB staff begrudgingly admitted that "theoretical" safety issues include "significant visibility impairment, thermal hazards, and compromising the structural integrity or center of gravity of the vehicle. . . ." ²⁴

The risk to workers posed by VDECS installations is not merely theoretical.

Before granting the petition to amend its regulations, Cal/OSHA evaluated actual VDECS installations and determined that because they would "obstruct operator's already restricted vision [they] would be a violation of Title 8 standards and would increase the hazard of operating equipment."²⁵ As Cal/OSHA emphasized in its evaluation of VDECS installations, California safety standards require that "equipment and accessories be installed so as to avoid impairing the driver's operational vision to the front or sides."²⁶

²⁴ Cross Letter at p. 3.

²⁵ Insert reference.

²⁶ See 8 Cal. Code of Regulations section 1591(b); see also 8 Cal Code of Regulations sections 3650(e), 3802, 3706, 1592(a) and (b).

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The photographs reproduced here make the basis for safety concerns fairly obvious – one would not want to be the person walking behind this equipment after it had been retrofitted.



View from equipment cab without VDECS; note the worker standing behind of the equipment



View from the same equipment cab with VDECS; note that the worker standing behind the equipment is extremely difficult to see

In finding that the VDECS it examined violated California’s worker safety laws, Cal/OSHA stressed that “[n]umerous fatal and serious accidents have occurred from ... operators not seeing workers in the path of a backing or turning equipment.” *Id.* The risk to workers is clear from the photographs reproduced above, where a man can be seen standing forty feet behind the equipment without the VDECS, but is obscured when the VDECS is installed.

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Remarkably enough, the potential for worker fatalities resulting from VDECS installations was not discussed in the ISOR or FSOR, except to note that a procedure for obtaining a ruling on from CARB's Executive Officer is set forth in the Rule itself.²⁷ That procedure, however, is itself unlawful.²⁸ And only now, as the deadlines for installing VDECS approach, is it clear that the rule does not make adequate or lawful provision for worker safety.

With "most if not all" retrofits called for by the Rule impossible to install, we urge the Board to send the Rule back to staff for further consideration.

3. There Is a Lack of Experience with the Installation of VDECS.

Even if CARB quickly listed a large number of new VDECS, industry would require considerable time to confirm that such VDECS are capable of being installed on all of the many different pieces of the equipment actually in use. Equipment dealers and other suppliers have yet to determine how to solve all of the engineering, much less the safety problems. They simply do not know whether they have the resources to meet a sharp spike in the demand for their services.²⁹

As noted by Staff, "The selection of an appropriate retrofit for a particular application is a multi-step process. First, a fleet owner must determine which VDECS are verified for a given engine, and then the owner, typically in consultation with a retrofit installer or manufacturer, must ensure that the VDECS is appropriate and feasible for the given application." *FSOR*, p. 71. Thus, from the very beginning of the process, a retrofit installer must be relied upon to guide the contractor. And these evaluations must be completed immediately so that contractors can plan for rapidly-approaching compliance deadlines.

These installers, however, are not available or capable of providing the types of assistance contractors must have if they are to comply with the Rule. As stated by one contractor:

"The CAT dealer reports that it may have some DPFs for some larger tractors but I have no CAT equipment. The John Deere dealer has nothing to offer. . . . Neither

²⁷ See 17 Cal. Code of Regulations section 2449(e)(8).

²⁸ Although the Rule purports to authorize CARB to make a determination as to the safety of VDECS installations, CARB lacks any legal authority to make decisions relating to safety. Thus, the portion of the Rule that purports to give CARB's Executive Officer the power to determine the safety of VDECS installations is unlawful. That authority is vested solely and exclusively in Cal/OSHA. Labor Code section 142.3(a).

²⁹ While Section 2449(e)(6) of the rule does excuse "immediate compliance . . . due to manufacturing delays," the Rule makes no allowance for the delays likely to result from the shortage of mechanics available to install VDECS.

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the dealer not its engine supplier had any experience with filters. The Case dealer knows nothing and offers no help whatsoever.

“We have also contacted Huss and Valley Power Systems. . . . The quotes were specific on price but not on the method or materials to accomplish the installation. No examples could be provided of any previous work on equipment like mine – backhoes, small dozers, compactors and reachlifts. Nor could Huss assure me that my engines are ready to receive a filter.

“I can get that assurance only after I install filters and they discern if the engines are operating well enough as to the fuel injection system and/or wear-and-tear. The warranty only covers the filter, and not my engines, and there is no assurance that the condition of my engines is good enough to be fitted with the filter. There is no trial filter that can be mounted temporarily to assess the effects on my engines, and there are no other completed tractors to investigate for reference.”³⁰

The lack of approved VDECS, qualified suppliers and a proven track record essentially makes this industry a guinea pig for new technology. Even in the best of times, the vast majority of California’s contractors don’t have the resources to serve in such a capacity.

4. Declining Construction Activity Has Changed the Economic Assumptions Underlying the Rule.

a. Construction work has declined precipitously.

The ISOR for the Rule states that construction activity increased at an annual rate of five percent or more during the period 2002 to 2006 and can be expected to continue increasing.³¹ This assumption has proven to be wildly inaccurate.

CARB Staff graphed the growth of construction, and that graph is reproduced here, but with dotted red lines added to reflect the changes in circumstances since the predictions upon which the Rule were based.

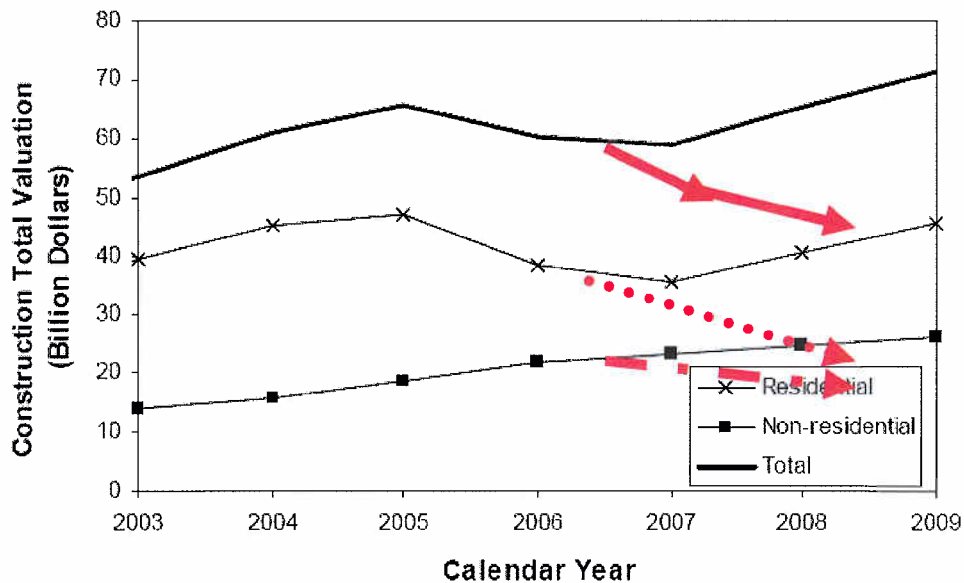
³⁰ Declaration of Robert Dorazio, paragraphs 4, 5 and 6, attached hereto as Exhibit C. *See also*, Declaration of Mark Berry, paragraph 6, attached hereto as Exhibit D.

³¹ “[N]on-residential construction has grown by more than 5 percent per year since 2002 and is projected to increase in the next several years. Between 2007 and 2009, construction valuation is expected to increase over 10 billion dollars, which greatly exceeds the expected cumulative cost of this regulation.” ISOR at 44. Contrast this optimistic prediction with the steep decline in construction that has in fact taken place, and is predicted to persist at least through 2009. *See McGraw-Hill Report.*

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Air Resources Board Chart Modified with Updated Trend Lines (in Red)

Figure VII-2 - California Construction Valuation



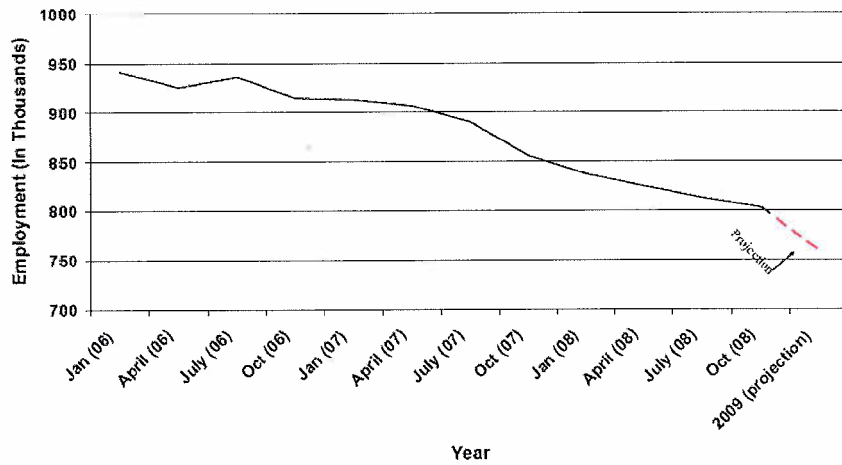
This CARB chart, updated to reflect actual reality, vividly demonstrates that the volume of available work for California’s construction contractors has dropped precipitously since Staff analyzed the impacts of the Rule. Not only has the 5 percent growth rate assumed by Staff failed to materialize, economic activity is actually rapidly declining. Instead of the \$10 billion increase in construction volume predicted by Staff, volume has actually fallen by about \$12 billion.³² By itself, this amounts to a \$22 billion change in the analysis, clearly warranting reconsideration of the Rule.

The precipitous decline in construction activity is consistent with trends seen in total employment in construction and the hours that operating engineers are working for California construction contractors:

³² *Id.*

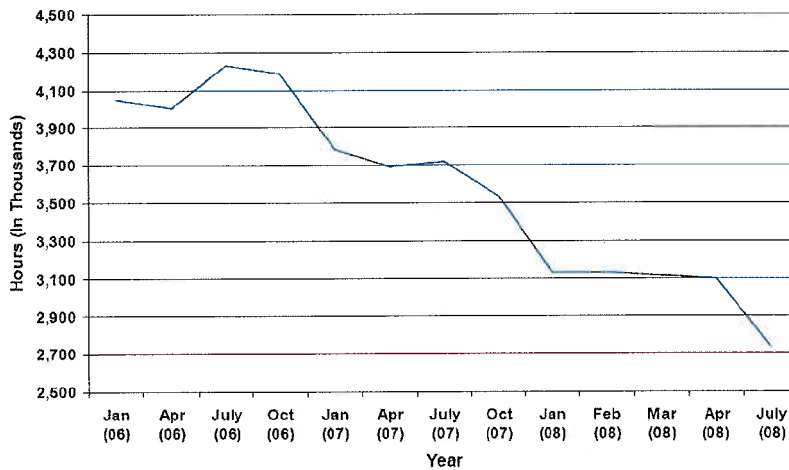
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California Construction Industry Employment by Quarter



*Data for 2006-2008 obtained from The Bureau of Labor Statistics; 2009 projection is a forecasted average and was obtained from the California Employment Development Department

California Operating Engineer Hours



*Data obtained from Operating Engineers Local 3 & Local 12

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Contractors now face a climate where being able to keep people employed and perhaps even making a profit seems increasingly unlikely. As one contractor put it, “Under these economic conditions, contractors are eliminating both the wear and tear costs for their equipment and any profit from their estimates. Contractors are offering rates that just barely cover their costs, and are still being rejected.”³³ And yet this is the time when the front-loaded costs of the Rule will have their greatest impacts.³⁴ What may have been a 10 percent impact on profits when the Rule was evaluated now seems more likely to be a 100 percent or greater impact.

b. Staff’s calculations of the impact of the Rule on the viability of contractors do not reflect changed conditions.

At the time the Rule was evaluated, economic conditions were robust and growing. Staff assumed that for many fleets, the Rule would have “no noticeable impact on their profitability (i.e., compliance costs would reduce the profitability less than 10 percent).”³⁵ Most people would consider a 10 percent reduction in their net income to be quite significant. Assuming for the sake of analysis, however, that Staff’s assessment was correct, it is nevertheless clear that the impact of the Rule in the current climate will be much larger than a 10 percent reduction in profits – especially where profits may be zero for the next few years.

Still, even with a strong economy, CARB Staff predicted that:

“compliance with the regulation may be financially challenging for owners of regulated vehicles. Many fleets may have to change how they allocate capital resources, and they may need to borrow money to purchase retrofits and repowers, or to upgrade their vehicles.”³⁶

The impacts, however, are far more severe. As stated by one contractor:

“[We] developed a compliance plan based on a combination of replacing some of our Tier 0 engines with Tier 3 engines and selling over 3000 HP of our older pieces of equipment. In July of 2008, when we prepared the first portion our fleet for sale at auction, we found that its value had dropped 33% since the end of 2007. In the two

³³ Declaration of Robert Dorazio, paragraph 2. *See also*, Declaration of Jim Hunt, paragraph 7, attached hereto as Exhibit E.

³⁴ *See FSOR* at 176: “We acknowledge that many fleets will experience the highest annual compliance costs in the first few years of the regulation’s implementation (2010-2012).”

³⁵ *ISOR* at 43.

³⁶ *FSOR* at 122.

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months from July to September of 2008, when we actually sold that equipment at auction, its value dropped another 30%.

“The results from the auction are forcing [us] to revise [our] compliance plan. We cannot afford to sell our equipment at these prices. But this is creating great concern about the ultimate cost of complying with the regulation. We originally intended the revenue that we derived from this equipment to help with the overall cost of compliance. Now compliance will require financing, which is both difficult and expensive to secure, if you are lucky enough to get it.”³⁷

The reallocation of capital and borrowing anticipated by Staff when the Rule was adopted are not possible for many contractors today.³⁸

Staff also noted that “Municipalities and government fleets would need to absorb the costs as part of their operating budgets and therefore would need to increase operating budgets to cover the cost of the regulation.”³⁹ However, with the State facing huge budget deficits,⁴⁰ and local agencies looking at significantly reduced tax revenues,⁴¹ it is simply not realistic to expect that governmental entities will be able to increase their operating budgets to absorb their own compliance costs, let alone pay increased costs Staff expects contractors to pass through.

In evaluating the effects of the Rule, Staff performed a case study on the economic impacts of the regulation for seven actual California construction fleets who voluntarily shared financial and fleet data with CARB. Staff evaluated the regulatory costs relative to the

³⁷ Declaration of Christopher M. Hickey, paragraphs 8 and 9.

³⁸ Declaration of Jim Hunt, paragraph 8; Declaration of Bruno Dietel, paragraph 7; Declaration of Robert Dorazio, paragraph 7; Declaration of Christopher M. Hickey, paragraph 9.

³⁹ *ISOR* at 42. Commenting on the proposed Rule, the County of Los Angeles Department of Public Works noted that “to comply with [the Rule it] would have to budget at least \$4 to \$5 million per year for replacement equipment (more than double its current replacement budget for its off-road equipment). The regulation also requires Public Works to upgrade and/or retrofit twenty percent of its [fleet] per year ... [which] will cost ... an additional \$800,000 per year.” The budget for these expenses does not exist. Neither does the revenue.

⁴⁰ See “California’s Budget Shortfall May Top \$8 Billion,” “Schwarzenegger spoke of a fast-growing shortfall amid a ‘new reality’ of a plunge in revenues as the state’s economy slows, consumers rein in spending, the housing slump presses on and unemployment rises” *Reuters*, October 29, 2008.

⁴¹ See “Outlook is dismal for L.A.’s future budgets,” Mayor Villaraigosa says the city’s shortfall could surpass \$400 million next year, forcing slashes to services. *Los Angeles Times*, October 12, 2008. See also “Lehman Bros, Bust Hit San Mateo County Hard,” San Mateo County has been stung by the recent Wall Street investment crisis, absorbing about \$150 million in potential losses that could result in public school budget cuts, delays on road and Caltrain improvements, and scaled-down city services. *San Francisco Chronicle*, October 19, 2008.

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fleets' financial data to determine the expected economic impact of the regulation on the fleets.⁴²

Staff's analysis of these seven fleets showed that only one of the fleets evaluated would be able to absorb the cost of the regulation with "no noticeable impact on their profitability" (i.e., compliance costs would reduce the profitability less than 10 percent). The remaining six fleets would either have to bear significantly lower profits or pass on some of the costs to their customers to increase revenue.⁴³ For the seven fleets analyzed, the revenue increase needed ranged up to 4 percent.⁴⁴

Staff acknowledges that many contactors would have to "pass through at least some of the costs to their customers in the form of higher prices for their services to maintain their profitability . . ." and that "Customers that could expect to pay higher construction costs include developers, home builders, and government agencies sponsoring road construction and other transportation projects."⁴⁵

But faced with a decline of more than 20 percent in industry revenue,⁴⁶ there is obviously no way that any of the contractors affected by the Rule can expect to *increase* revenues by any amount, let alone 4 percent.⁴⁷ The same is true for passing costs along to customers. In a contracting marketplace, increasing prices is just not possible.

5. Financing for the Acquisition of New Equipment and VDECS Is More Difficult To Obtain than Anyone Expected.

As has been reported in the press daily since the credit crisis began in August 2008, financing of any sort is quite difficult to obtain and the nationalization of the banks, along with other government efforts to jump start the financial markets has yet to have any discernable impact. These conditions are affecting contractors in ways that no one anticipated when the Rule was evaluated.

It is important to note that a construction contractor's equipment value may be a substantial portion of the firm's total assets – and thus its collateral for any borrowing. The Rule would

⁴² See *ISOR* at 43.

⁴³ These impacts are perhaps felt most by small businesses, which make up a substantial part of California's construction contractor community. California had 78,000 construction establishments (locations) in 2006, of which 68,000 (88%) employed fewer than 20 workers. See also Declaration of Robert Dorazio, paragraph 2; Declaration of Jim Hunt, paragraph 6, 7 and 8; Declaration of Bruno Dietel, paragraph 7; Declaration of Christopher M. Hickey, paragraph 9; Declaration of Mark Berry, paragraph 3.

⁴⁴ See *ISOR* at 43-44.

⁴⁵ *ISOR* at 42, 44.

⁴⁶ *McGraw-Hill Report*.

⁴⁷

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December 15, 2008
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undermine contractors' equity in their construction fleets. First, it would flood the market with older equipment, leading to a deterioration of equity. Second, companies may still owe debt on Tier 0 units (some of which are fairly new) that could exceed the equipment's deteriorated value, leading to both a loss on the sale and the need to generate outside cash to retire the debt. Moreover, by reducing the equity that a contractor would have relied on to finance new purchases, the Rule simultaneously imposes new costs *and* undermines contractors' ability to finance. By forcing equipment to be scrapped, or by flooding out-of-state markets with used equipment, the Rule seriously erodes the value of keys assets needed to secure funding for equipment upgrades, making borrowing in a difficult economic environment nearly impossible.

Staff assumed that there would be little impact on the resale value of equipment that cannot meet the stringent new standards of the Rule:

“Staff expects that there would be significant continued demand for construction vehicles worldwide such that these older vehicles would retain much of [their] residual value, less increased transportation costs to destinations outside California . . . for modeling purposes, staff assumed a decrease in value of \$10 per horsepower for each Tier 0 piece replaced. This is an approximation of the shipping costs for transporting a Tier 0 vehicle for sale out of state.”⁴⁸

This expectation has not been matched by reality. Contractors and others in the equipment resale industry have noted sharp declines in the prices for such equipment, ranging from 30 to 60 percent since the Rule was adopted.⁴⁹

Staff predicted that financing would be available and even noted that it was “consulting with other state agencies such as the Pollution Control Financing Authority in the State Treasurer's Office and private lenders to look for ways to leverage existing public programs and funding in the private sector, through potential programs such as government loan guarantees, interest rate buy down programs, etc.”⁵⁰ None of these efforts has borne any fruit, and financing remains extremely difficult to obtain.⁵¹ In fact, contractors report that financing has become extremely difficult if not impossible to obtain.⁵² Obviously, with little work in the pipeline, and an asset base that is rapidly declining in value due to the

⁴⁸ *ISOR*, at 45.

⁴⁹ Declaration of Bruno Dietl, paragraph 6; Declaration of Hickey, paragraph 8; Declaration of Mike Burns, paragraph 4, attached hereto as Exhibit F; Kevin Wiley, paragraph 4, attached hereto as Exhibit G.

⁵⁰ *ISOR*, at 48.

⁵¹ Indeed, the 2008 Debt Affordability Report, California State Treasurer's Office, October 1, 2008 indicates that there is no prospect of providing additional funding to support contractors or government agencies' efforts to comply with the Rule.

⁵² Declaration of Bruno Dietl, paragraph 76; Declaration of Robert Dorazio, paragraph 7; Declaration of Christopher M. Hickey, paragraph 9.

Mary Nichols, Chairman
December 15, 2008
Page Twenty

requirements of the Rule, the ability of construction contractors to borrow for new equipment is severely impaired.

6. The Retrofits Contemplated by the Rule Are Not Available.

At the time the Rule was evaluated, Staff stated that only 6 VDECS had been approved by CARB, but asserted that “more will be verified soon.”⁵³ Staff explained that 16 manufacturers with 30 products in development had agreed to seek verification.⁵⁴ A year and a half later, with deadlines looming, CARB has approved only 6 more VDECS retrofits for off-road equipment.⁵⁵ With hundreds of different engine types and configurations subject to the Rule, such extremely limited options make retrofitting very difficult and in many cases impossible.

Staff’s response to this concern is that, if a safe and effective VDECS is not available, the equipment may not need to be retrofit.⁵⁶ What this explanation fails to note, however, is that the equipment is still counted in determining the fleet average requirement. So, although the specific equipment may not need to be retrofit, the fleet owner must still find a way to make up for this shortfall by finding other reductions. In many ways, this only makes the Rule more burdensome.

⁵³ *FSOR* at 56-57.

⁵⁴ *FSOR* at 58.

⁵⁵ <http://www.arb.ca.gov/diesel/verdev/vt/cvt.htm>

⁵⁶ *FSOR*, at 57.

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7. The Cost of Purchasing and Installing VDECS Is Greater than CARB Anticipated.

Staff calculated the cost of complying with the Rule to be up to \$170 per horsepower.⁵⁷ That analysis is summarized in the following table reproduced from the ISOR:

Chart from Air Resources Board

Table VII-1 – Expected Total Regulation Cost for Fleets with Various Initial Average Ages (2006 dollars)

Average Fleet Age (years)	Small Fleets (\$/hp)	Medium Fleets (\$/hp)	Large Fleets (\$/hp)
Less than 8	0-50	0-50	0-50
8 to 12	0-110	40-110	40-115
12 to 16	0-110	75-120	75-130
16 to 20	0-150	75-150	110-150
20 and up	0-150	110-150	110-180

ISOR, at 41.

These estimates were based upon a number of assumptions that, if they were ever correct, are no longer accurate. For example:

- An analysis of three California construction fleets, varying from about 11,000 total horsepower to about 43,000 total horsepower, shows that the actual costs (based on supplier estimates) of complying with the Rule ranged from \$1300 to \$1600 per horsepower—nearly ten times the Staff estimate. These are not theoretical estimates prepared by some economist or vendor hoping to persuade the agency that a rule should be adopted. They are real-life examples of what the industry faces in its efforts to comply with the Rule. Even if one assumes that Staff’s estimates were only off by 50-100 percent (rather than 1000%), the difference adds up to several billion dollars for a Rule that is already the most expensive rule affecting private industry in the history of the State.⁵⁸
- Retrofitting equipment with control devices results in a fuel penalty. CARB calculated the penalty to be \$70,316,000, based on a diesel fuel cost of \$2.76 per gallon. Between the time that CARB made its calculation in 2007, and the approval of the Rule in 2008, the price of diesel nearly doubled, to about \$4.90 per gallon.

⁵⁷ ISOR at 3.

⁵⁸ Declaration of Gary Rohman attached hereto as Exhibit H.

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December 15, 2008
Page Twenty-Two

Although the recent economic meltdown has resulted in reduced demand and therefore reduced consumption, the price of diesel is, as of this writing, about 25% higher than CARB assumed in its analysis.⁵⁹ The EIA forecasts diesel prices nationally to average \$3.91 per gallon in 2009.⁶⁰ Thus, CARB's estimate of the fuel penalty cost is at least 30% too low, a difference of over \$20 million.

- In calculating the cost of electricity used to regenerate retrofit controls, CARB used a cost of 10 cents per kilowatt hour (kW-H), based upon the average cost to industrial users in 2007.⁶¹ However, construction contractors are not "industrial" businesses as EIA uses that term.⁶² Actual cost for construction contractors is likely to be approximately 13 cents per kW-H, a difference of over 30%.⁶³ Thus, CARB's estimate of the cost of electricity (over \$144 million) is understated by over \$40 million.
- The unavailability of VDECS also adds significantly to the cost of the rule, since it leaves scrapping and replacing equipment as the only viable compliance alternative. This cost scenario was not examined by Staff in preparing the Rule.

Staff concluded that "the off-road regulation is cost effective at an estimated \$2.1 per pound (/lb) to \$2.5/lb for NOx and \$37/lb to \$43/lb for PM."⁶⁴ By Staff's own estimate, the Rule was the least cost-effective rule CARB had ever adopted for any private sector businesses. That cost-effectiveness analysis was based on several assumptions that, even if they were correct at the time, are certainly no longer accurate today.

8. There Is a Lack of Actual Field Experience Operating the Devices.

Similarly, no matter how quickly CARB proceeds, there has not been a determination of whether — and if so, to what extent — such newly listed VDECS compromise the performance of the construction equipment in use. As one commenter noted, CARB's verification process should "address the feasibility of installation (for such things as visibility impacts, space constraints, etc), extent of necessary vehicle redesign, necessary lead-time, cost, and other issues involved in determining the feasibility and appropriateness of a specific retrofit installation."⁶⁵ Staff's response was that such an evaluation would be inappropriate and impractical for the agency. Instead, contractors should make these evaluations themselves, with the help of retrofit installers and manufacturers. As noted above, however,

⁵⁹ See Energy Information Administration ("EIA") <http://tonto.eia.doe.gov/oog/info/wohdp/diesel.asp>

⁶⁰ See <http://www.eia.doe.gov/emeu/steo/pub/contents.html>

⁶¹ *ISOR, App. J.* at 8.

⁶² See definition quoted in the *ISOR, App. J.* at 8.

⁶³ See http://www.eia.doe.gov/cneaf/electricity/st_profiles/california.html.

⁶⁴ *FSOR* at 207.

⁶⁵ *FSOR* at 71.

Mary Nichols, Chairman
December 15, 2008
Page Twenty-Three

there are not enough VDECS or VDECS installers to provide such assistance.⁶⁶ And even if there were, it is often not possible to anticipate operating issues that may arise when these retrofits are actually installed and operated.

C. Authority to Take the Action Requested

The authority of CARB to take the action requested is found in the following provisions of the Health and Safety Code:

Section 39002 (“The control of vehicular sources, except as otherwise provided in this division, shall be the responsibility of the State Air Resources Board”):

Section 39600 (“The state board shall do such acts as may be necessary for the proper execution of the powers and duties granted to, and imposed upon, the state board by this division and by any other provision of law”);

Section 39601 (“The state board shall adopt standards, rules, and regulations in accordance with the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, necessary for the proper execution of the powers and duties granted to, and imposed upon, the state board by this division and by any other provision of law”)

Section 39602 (“The state board is designated the air pollution control agency for all purposes set forth in federal law. The state board is designated as the state agency responsible for the preparation of the state implementation plan required by the Clean Air Act (42 U.S.C., Sec. 7401, et seq.) and, to this end, shall coordinate the activities of all districts necessary to comply with that act”);

Section 43000 (“The state has a responsibility to establish uniform procedures for compliance with standards which control or eliminate [air pollutants from motor vehicles]”);

Section 43000.5 (“The state board should take immediate action to implement both short- and long-range programs of across-the-board reductions in vehicle emissions and smoke, including smoke from heavy-duty diesel vehicles, which can be relied upon by the districts in the preparation of their attainment plans or plan revisions pursuant to Sections 40911, 40902, and 40925”);

Section 43013 (“(a)The state board may adopt and implement motor vehicle emission standards, in-use performance standards ... for the control of air contaminants and

⁶⁶ See footnote 30, *supra* and accompanying text.

Mary Nichols, Chairman
December 15, 2008
Page Twenty-Four

sources of air pollution which the state board has found to be necessary, cost-effective, and technologically feasible, to carry out the purposes of this division, unless preempted by federal law

“(b) The state board shall, consistent with subdivision (a), adopt standards and regulations for ... off-road or nonvehicle engine categories....”);

Section 43018 (“(a) The state board shall endeavor to achieve the maximum degree of emission reduction possible from vehicular and other mobile sources in order to accomplish the attainment of the state standards at the earliest practicable date.

“(e) Prior to adopting standards and regulations pursuant to this section, the state board shall consider the effect of the standards and regulations on the economy of the state, including, but not limited to, motor vehicle fuel efficiency”).

IV. CONCLUSION

Pursuant to California Government Code section 11340.6(a), Petitioner requests that the California Air Resources Board immediately stay the effect of the Rule and schedule a public hearing regarding the issues discussed above. In addition, AGC respectfully requests that the Board advise the U.S.E.P.A. that it need not act on the waiver request for the rule until such time as the issues raised by this Petition have been resolved.

Following public hearing and comment, the Board should repeal those portions of the Rule other than recordkeeping and reporting. The Board should request that Staff further evaluate the necessity, feasibility and cost-effectiveness of the Rule in light of changed circumstances and the actual fleet data collected pursuant to the Rule. The Board could then either:

1. Repeal those portions of the Rule imposing fleet average requirements and refer them to staff for further consideration in light of current conditions; or
2. Stay all of the fleet average deadlines until an analysis of the need for, and cost of the Rule has been completed based upon data reported by fleet owners.

AGC and its members appreciate this opportunity to bring these important issues before the Board and look forward to presenting our views more thoroughly at the appropriate time.

Mary Nichols, Chairman
December 15, 2008
Page Twenty-Five

Respectfully Submitted,



Michèle B. Corash
Attorney for Petitioner,
Associated General Contractors of America

Enclosures

cc: Michael Kennedy, General Counsel, AGC (w/ encs.)

EXHIBIT A

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BEFORE THE AIR RESOURCES BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Associated General
Contractors of America's Petition for
Reconsideration, Amendment and/or Repeal

**DECLARATION OF
CHRISTOPHER M. HICKEY**

I, Christopher M. Hickey, declare as follows:

1. I am the Chief Engineer of Agee Construction Corporation, a general engineering contractor, headquartered in Clovis, California. Our company is a medium sized company (\$12 million average annual volume) with a typical balanced volume between structural concrete, earthwork and paving.

2. Over the last three years, the private work in the Central Valley of California has dried up. This has dramatically increased the number of bidders for the public work in the same area, and it has just as dramatically lowered the prices that construction contractors can charge for their services.

3. For the projects that Agee Construction would like to construct, the average number of bidders has nearly doubled. In 2006 the average number of bidders was 4.8, and in earlier years, the average consistently fell between 4 and 5. In 2007 and 2008, the average has climbed to 8.4. This increase is particularly striking for Agee Construction, as it has spent 2007 and 2008 targeting the

1 more difficult projects that typically attract fewer bidders. The simpler earth and road jobs are
2 attracting 10 to 18 bidders.

3 4. As the number of bidders increases, we are also seeing a downturn in pricing. We are
4 now seeing many projects awarded at 30 to 40 percent below the engineer's estimate.

5 5. Between 2007 and 2008, our off-road consumption of diesel has dropped 83.9%. Our
6 total off-road consumption of diesel fuel in 2007 was 45,557 gallons. As 2008 draws to a close, our
7 2008 consumption totals just 7,350 gallons. We are not planning to purchase any more diesel fuel
8 before the end of this month.

9 6. In 2007, when the local Air Board held a seminar on the newly proposed off-road
10 regulation, we were told that the cost of retrofitting each of our pieces of equipment would be
11 between \$10,000.00 and \$15,000.00. In 2008, the actual quote to retrofit one of our CAT 623
12 Scrapers was \$52,000.00. The quote did not come close to number that the Air Board had led us to
13 expect.

14 7. In addition, we have been told that the available VDECS will have a great impact on
15 our maintenance program. We have been told that maintenance will require one hour for every eight
16 hours of operation. That means a minimum of a 12.5% drop in production.

17 8. Agee Construction developed a compliance plan based on a combination of replacing
18 some of our Tier 0 engines with Tier 3 engines and selling over 3000 HP of our older pieces of
19 equipment. In July of 2008, when we prepared the first portion our fleet for sale at auction, we found
20 that its value had dropped 33% since the end of 2007. In the two months from July to September of
21 2008, when we actually sold that equipment at auction, its value dropped another 30%.

22 9. The results from the auction are forcing Agee Construction to revise its compliance
23 plan. We cannot afford to sell our equipment at these prices. But this is creating great concern about
24 the ultimate cost of complying with the regulation. We originally intended the revenue that we
25 derived from this equipment to help with the overall cost of compliance. Now compliance will
26 require financing, which is both difficult and expensive to secure, if you are lucky enough to get it.
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I declare under penalty of perjury under the laws of the State of California that the foregoing
is to the best of my knowledge true and correct and that this Declaration was executed on
December 10, 2008 at Clovis, California.

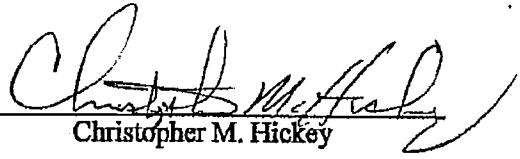

Christopher M. Hickey

EXHIBIT B

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BEFORE THE AIR RESOURCES BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Associated General
Contractors of America's Petition for
Reconsideration, Amendment and/or Repeal

DECLARATION OF BRUNO DIETL

I, Bruno Dietl, declare as follows:

1. I am the President of Vulcan Construction & Maintenance, Inc., headquartered in Fresno, California.
2. Our company is a general engineering contractor licensed in California and operating since 1981. The majority of our work is in public work construction. We are a very small company and very much impacted by the economic downturn in California, which started in 2007.
3. In a "normal" year we have a construction volume of \$7-\$8 million. In 2008 our volume has declined to \$4 million. For the year 2008 our construction volume has dropped by 42% as compared to a normal year.
4. We now see anywhere from 10 to 15 bidders on public project. Ordinarily there are 4 to 5 bidders. With such a competitive market it is impossible to pass on any higher cost. Like most California contractor's we are struggling to survive this serous economic downturn.
5. Our consumption of diesel fule during 2008 has declined by 79% as compared to a normal year.

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6. In anticipation of the new California Air Resources Board rules our company sold at an auction last December all except one Tier 0 equipment. Our observation has been that resale values of older equipment have markedly declined.

7. Our Bank of 25 years has severely restricted credits by lowering available loans by 20% as well as now requiring collateral.

I declare under penalty of perjury under the laws of the State of California that the foregoing is to the best of my knowledge true and correct and that this Declaration was executed on December 9, 2008 at Fresno, California.



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EXHIBIT C

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BEFORE THE AIR RESOURCES BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Associated General
Contractors of America's Petition for
Reconsideration, Amendment and/or Repeal

**DECLARATION OF
RANDY CAILLIER**

I, Randy Caillier, declare as follows:

1. I am an owner of Associated Ready Mixed Concrete Inc., headquartered in Newport Beach, California. My family founded this company in 1949.

2. Our company has 70 pieces of diesel powered off-road equipment and 600 diesel powered on-road trucks/tractors.

3. Our company is producing less than half the concrete that it was producing in the past. While our revenue has been cut in half, the operating costs have not gone down nearly that much. We are being forced to replace fully functional equipment with much higher priced new or late model equipment.

4. The amount of diesel fuel used is directly proportionate with the amount of concrete produced. This, as I previously stated, is less than half.

5. Of the 70 pieces of equipment in our company's fleet that are regulated by the in-use, off-road equipment rule, only five of them are capable of using Level 3 exhaust retrofits that have been certified by the Air Resources Board. The other 65 pieces are Tier 0 machines for which there

1 is currently not a Level 3 device certified that will operate properly on them. The alternative is to
2 replace these with new machines or buy newer used machines and then add costly retrofits to them.
3 Either one of these choices along with the impending on-road diesel regulation could have a
4 devastating effect on use.

5 6. The cost to replace the 65 Tier 0 machines is approximately \$200,000.00 each, for a
6 total of \$13,000,000.00. Factor in the additional cost to retrofit our on-road diesel fleet, which is
7 approximately \$5,100,000.00 for 2004 and newer trucks.

8 7. Then add in the replacement cost for our pre-2004 trucks, which amounts to around
9 \$60,000,000.00. Clearly, these numbers are staggering for a small family business started in 1949.

10 I declare under penalty of perjury under the laws of the State of California that the foregoing
11 is to the best of my knowledge true and correct and that this Declaration was executed on
12 December 10, 2008 at Newport Beach, California.

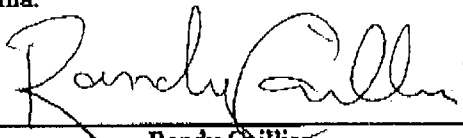
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EXHIBIT D

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BEFORE THE AIR RESOURCES BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Associated General
Contractors of America's Petition for
Reconsideration, Amendment and/or Repeal

**DECLARATION OF
ROBERT DORAZIO**

I, Robert Dorazio, declare as follows:

1. I am the Owner of Robert Dorazio, General Contractor company, headquartered in Oceano, California. My company is a small contracting firm and does one job at a time constructing and repairing small buildings such as houses and small commercial.

2. In recent weeks, we have witnessed a significant drop in the number of requests for construction work and an increase in the number of contractors attending job walks. As just one example of the recent increase in competition for available work, a small (\$45,000) wood pedestrian bridge replacement project attracted 10 bids. Under these economic conditions, contractors are eliminating both the wear and tear costs for their equipment and any profit from their estimates. Contractors are offering rates that just barely cover their costs, and are still being rejected.

3. As the economy has fallen, we have also seen a significant reduction in our use of diesel fuel. We have not operated our dozer or compactor for several months.

4. In our area, we have three equipment dealers that sell and/or install VDECS suitable for our type of equipment: CAT, John Deere and New Holland. Until about a year or so ago, Case

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DECLARATION OF ROBERT DORAZIO

1 also had a local dealership but Case closed that dealership and is now servicing our area from a
 2 location 170 miles away. The CAT dealer reports that it may have some DPFs for some larger
 3 tractors but I have no CAT equipment. The John Deere dealer has nothing to offer. It may be able to
 4 offer filters in the future, but nothing is established at this time. We also contacted its independent
 5 engine supplier and found that the engine supplier can upgrade some engines from Tier 1 to Tier 2,
 6 but that is about it. Neither the dealer nor its engine supplier had any experience with filters. The
 7 Case dealer knows nothing and offers no help whatsoever.

8 5. We have also contacted Huss and Valley Power Systems. The Huss folks provided
 9 quotes for all of our machines, but it took about 6 weeks to arrange the opacity test and obtain the
 10 quotes. The quotes were specific on price but not on the method or materials to accomplish the
 11 installation. No examples could be provided of any previous work on equipment like mine --
 12 backhoes, small dozers, compactors and reachlifts. Nor could Huss assure me that my engines are
 13 ready to receive a filter.

14 6. I can get that assurance only after I install filters and they discern if the engines are
 15 operating well enough as to the fuel injection system and/or wear-and-tear. The warranty only covers
 16 the filter, and not my engines, and there is no assurance that the condition of my engines is good
 17 enough to be fitted with the filter. There is no trial filter that can be mounted temporarily to assess
 18 the effects on my engines, and there are no other completed tractors to investigate for reference.

19 7. Huss is not offering any financing. CAT indicates that it will only be addressing Cat
 20 equipment. There is no other financing currently available. The only question is whether the John
 21 Deere dealer will allow me to use my credit for any options that it may be able to offer in the future.

22 8. Huss told us that we should budget one half hour per shift to regenerate the filter. The
 23 operator will be paid to do nothing during this time unless we can accomplish this during the lunch
 24 break. The Huss folks have indicated a truck will be dispatched from Southern California (a 3 or 4
 25 hours drive on way) to service our filter. There is no truck or filter service center in our area. We
 26 were also told to expect a reduction in power, and increased fuel consumption.

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DECLARATION OF ROBERT DORAZIO

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I declare under penalty of perjury under the laws of the State of California that the foregoing is to the best of my knowledge true and correct and that this Declaration was executed on December 9th, 2008 at Oceano, California.



Robert Dorazio

three pages

*3 TRS
12/9/08*

EXHIBIT E

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BEFORE THE AIR RESOURCES BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Associated General
Contractors of America's Petition for
Reconsideration, Amendment and/or Repeal

DECLARATION OF MARK BERRY

I, Mark Berry, declare as follows:

1. I am the Vice President of R.J. Berry Jr., Inc., a grading and paving contractor in the Central Valley. On any given year, somewhere between 80% and 90% of our work is public work.

The downturn in construction is clear to us, and most strikingly demonstrated in the number of bidders on public works projects and the prices offered by contractors for the work.

2. In the past 18 months we have bid as a prime contractor on 41 public works jobs. We have seen as many as 27 bidders on one job (a \$500,000 drainage basin for the City of Tulare). Average number of bidders was 10.4 for the 41 jobs bid in Fresno, Madera, Tulare, or Kings Counties. Total cost (total of low bids) of the 41 jobs bid was \$60 million, and average price of job was \$1.4 million. Increase in number of bidders began in earnest about 24 months ago. Prior to that, competition for projects of this size was more like 2-5 bidders per job.

3. In this competitive bidding environment, it is not possible for a contractor to submit a low bid to an agency that includes (a) enough funding to cover all direct costs, (b) a modest profit, and (c) the additional equipment capitalization costs that the new Air Resources Board rules require.

1 It is apparent to us that low bidders in our segment of the industry are bidding the work with the
2 short-term goal of paying creditors, rather than strengthening their balance sheets, it is impossible for
3 any company to pass along additional equipment costs. Contractors can include those costs in their
4 bids, but they will not be competitive in this market. If a company can't submit competitive bids,
5 their equipment will be parked in the yard, and their crew will be at home drawing unemployment.


6 4. Our consumption of diesel fuel use is a fraction of the type of work we perform, the
7 type of equipment we use, and our hours of use. We utilized our heavy horsepower equipment more
8 through September 2008 than in the previous year. In FY 2008, with one month of our fiscal year to
9 go, we will have used 6,600 gallons of off-road diesel, 16% more than the previous year. But since
10 September we have been out of work, and our October/November diesel fuel consumption is near
11 zero.

12 5. I have spoken to Cummins, Caterpillar, John Deere, and Ironman, all whom have
13 representatives in California. I have provided our heavy-duty off-road diesel fleet information to
14 them and asked them to specify and price appropriate filters and potential re-powers for our 3,000 hp
15 off-road fleet. Due to the nature of our jobsites (often remote, almost always without electrical
16 power), only passive VDECS, or active units not requiring electricity and active monitoring (no need
17 to plug in an keep employees overtime at night) are practical.

18 6. I requested recommendations and pricing from the four dealers above about the same
19 time (approximately September 1, 2008). Two of the four firms have not responded with any
20 substantive proposals, though they have periodically called me to let me know that they are still
21 trying to piece together some recommendations for our fleet. They want to sell me something, but
22 have nothing substantive to offer. The two firms responding did so with similar
23 recommendations/proposals within two weeks, though their proposals were far from complete, due to
24 a lack of appropriate product. Their recommendations were primarily to utilize filters that were still
25 in the verification review process, meaning that they weren't available for purchase yet.

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I declare under penalty of perjury under the laws of the State of California that the foregoing
is to the best of my knowledge true and correct and that this Declaration was executed on
December 10, 2008 at Selma, California.



Mark Berry

EXHIBIT F

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BEFORE THE AIR RESOURCES BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Associated General
Contractors of America's Petition for
Reconsideration, Amendment and/or Repeal

DECLARATION OF JIM HUNT

I, Jim Hunt, declare as follows:

1. I am the President of Syblon Reid, which is a General Engineering Contractor based in Folsom, California. We provide construction services on various types of work including heavy grading, underground utilities, structures and treatment plant.
2. We own and maintain a +/-7,500 Hp fleet of off-road equipment including dozers, loaders, scrapers, blades, cranes, rubber tired hoes and a fleet of on-road vehicles.
3. Until 2008, much of our grading and underground work was residential related. In this work, we typically put an average of 1,000 hours per year on our individual pieces of off-road equipment.
4. In 2008, most of our larger equipment was parked for lack of work due to the downturn in the economy and collapse of the residential market. All indications are that this will not improve substantially in 2009 and possibly not until well into 2010.
5. Currently, our new work for 2009 is primarily treatment plant related which requires a minimum of off-road equipment. Our internal equipment rental revenue expectations are down over

1 50 percent as a result. Our ongoing payments and ownership costs continue, however, at the same
2 rate. There is no money in our budget for capital expenditure in 2008 or 2009.

3 6. Our overall company revenue in 2008 from construction projects is down nearly 40%
4 from 2007 and the revenue projected in 2009 is down by the same. In addition, profit margins on
5 these reduced revenues are only 60% of what they were in 2007.

6 7. The bidding environment is the worst we've seen in years. What we are experiencing
7 is that, as a result of the residential collapse, the market is flooded with contractors, that would
8 otherwise been focusing on residential work, invading our market and cutting prices below survivable
9 levels just to maintain cash flow. This has been occurring since early 2008 and is expected to
10 continue thru 2009.

11 8. As if all this were not enough, banking covenants are being tightened in the current
12 environment. Our covenants have been tightened to the point where it would be extremely difficult if
13 not impossible to obtain and service any type of equipment debt. We are barely above the line now
14 with current debt service.

15 I declare under penalty of perjury under the laws of the State of California that the foregoing
16 is to the best of my knowledge true and correct and that this Declaration was executed on
17 December 10, 2008 at Folsom, California.

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20 Jim Hunt

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EXHIBIT G

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BEFORE THE AIR RESOURCES BOARD
OF THE STATE OF CALIFORNIA

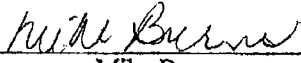
In the Matter of the Associated General
Contractors of America's Petition for
Reconsideration, Amendment and/or Repeal

DECLARATION OF MIKE BURNS

I, Mike Burns, declare as follows:

1. I am the Resource Manage of Blois Construction Inc. ("BCI"), headquartered in Oxnard, California. My company is a privately owned general engineering contractor, specializing in underground pipeline construction.
2. As a heavy underground contractor, BCI is primarily involved in installing sewer, water, and storm drain systems in Ventura, Los Angeles, Kern and Santa Barbara counties.
3. BCI's average job size is approximately \$1.5 million and the mix of work will vary, but is comprised primarily of public works and commercial projects.
4. The combination of Air Resources Board (ARB) regulations and the economic downturn will depress the market value of the machines we are planning to turnover as part of our normal acquisition/disposition cycle. We are attempting to sell (2) excavators, (1) loader, and (4) backhoes. With prices we have seen at recent auctions and local equipment markets, we will receive only 60% of normally expected return on sales of assets.

1 I declare under penalty of perjury under the laws of the State of California that the foregoing
2 is to the best of my knowledge true and correct and that this Declaration was executed on
3 December 10, 2008 at Oxnard, California.

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6 Mike Burns

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EXHIBIT H

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BEFORE THE AIR RESOURCES BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Associated General
Contractors of America's Petition for
Reconsideration, Amendment and/or Repeal

DECLARATION OF KEVIN WILLY

I, Kevin Willy, declare as follows:

1. I am the Equipment Manager for C.C. Myers, Inc., headquartered in Rancho Cordova, California. My company is a leader in the bridge and highway construction industry.

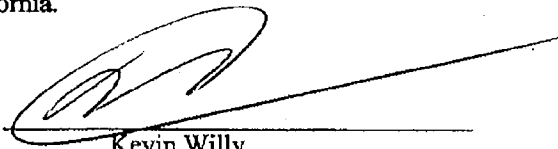
2. Currently we have close to 100 pieces of equipment that will be affected by the Off-Road Diesel Emissions standards. More than 40% of these units are considered too old to retrofit with a PM VDECS because their engines are uncertified (TIER 0) and there are no PM VDECS being produced for a TIER 0 engine. Furthermore, there are no VDECS on the market that will reduce NOx, the technology is just not there yet.

3. For a large fleet, such as ours, with an average manufacture date of 1991, our only option for compliance, in the first year alone, is to retire (sell) 20% of our fleet beginning with the oldest units. The alternative is to "Repower" tractors that are more than 30 years old, a prospect we consider financially not feasible, with an estimated average cost of approximately \$75,000.00 for the installation of a new Tier 3 engine, in tractors worth no more than \$20,000 (per unit).

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4. So we're forced to sell. However, the only way to get "credit" towards compliance through "retirement" is to sell our equipment between March 1, 2009 and March 1, 2010. After consulting with used equipment brokers who gave us their current resale estimates for our older units we were told that we could expect approximately half of that value in 2009 because of the obvious influx of used equipment that will flood the market due to other California contractors similarly forced to sell their older units during the same time frame.

I declare under penalty of perjury under the laws of the State of California that the foregoing is to the best of my knowledge true and correct and that this Declaration was executed on December 12, 2008 at Rancho Cordova, California.



Kevin Willy

EXHIBIT I

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BEFORE THE AIR RESOURCES BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Associated General
Contractors of America's Petition for
Reconsideration, Amendment and/or Repeal

**DECLARATION OF
GARY E. ROHMAN**

I, Gary E. Rohman, declare as follows:

1. I am over the age of 18 and otherwise competent to testify to the matters contained in this declaration.

2. I have worked in the heavy construction equipment rental industry for twenty-eight years for ECCO Equipment Corporation, located in Visalia, California. I am currently a vice president for ECCO, a position that I have held for more than twenty years. Since 2000, I have been actively involved with the Associated General Contractors of California. Currently, I serve as chairman of the San Joaquin District of AGC. In addition, I currently hold a seat on the Executive Committee of AGC of California.

3. The experience and information that I have gained while working in the equipment rental industry has given me extensive knowledge of the different types of off-road equipment, as well as the engine enhancement and aftertreatment integration challenges that go along with any effort to reduce emissions from a machine after it has been manufactured and sold to industry.

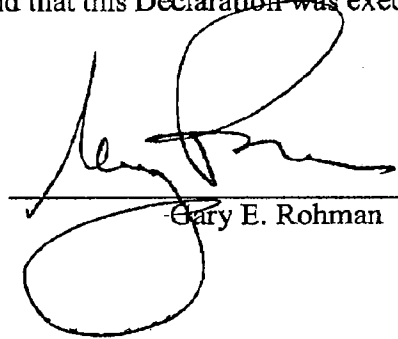
1 4. I collected detailed information on the make, model, horsepower and other relevant
 2 information necessary to determine the manner and cost of complying with the In-Use Off-Road
 3 Diesel Fueled Fleets Regulation (the "Rule). This information was collected for those fleets with
 4 total horsepower ranging from about 11,000 to 43,000. Compilations of the data I collected are
 5 attached to this Declaration as Exhibit 1.

6 5. I retained an environmental engineering firm, Justice and Associates, to assist with the
 7 compliance planning for these three fleets.

8 6. Once a compliance strategy had been developed with the assistance of Justice and
 9 Associates, I consulted with Quinn Company, a leading Caterpillar dealer with 18 locations in
 10 California and Arizona, to determine the feasibility and cost of retrofitting equipment to comply with
 11 the Rule.

12 7. The results of this evaluation are set forth in the attached summaries and spreadsheets.
 13 They show that, contrary to the Air Resources Board's ("ARB") analyses, the cost of compliance
 14 ranges from about \$1,200 to \$1,600 per horsepower, nearly ten times higher than the ARB estimate.

15 I declare under penalty of perjury under the laws of the State of California that the foregoing
 16 is to the best of my knowledge true and correct and that this Declaration was executed on
 17 December 12, 2008 at Visalia, California.

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 Gary E. Rohman
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