

August 10, 2009

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Mr. David Dickinson
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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
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Re: California State Nonroad Engine Pollution Control Standards; California Nonroad Compression Ignition Engines -- In-Use Fleets; Request for Public Hearing; Docket ID No. EPA-HQ-OAR-2008-0691

Dear Mr. Dickinson:

The Associated General Contractors of America ("AGC") and its California Chapters submit these comments in response to the letter dated June 12, 2009 from James Goldstene, Executive Officer of the California Air Resources Board (the "ARB" or "Board").

Status of the Rule

ARB's letter first offers a "Legislative and Regulatory Update" summarizing steps the Board and the Legislature have taken in recognition of the unworkability of some aspects of the Rule. ARB, however, neglects to include in its "update" the fact that on January 22, 2009 the Board directed staff to work with AGC and other stakeholders to determine the impact of the recession on emissions from the construction sector.¹ As stated in the June 2009 staff report for the recent amendments to the Rule, "Staff is currently collecting and preparing to analyze relevant data from off-road fleets, including the reporting data required by the regulation, to address this question, and will provide an assessment of the impact of the regulatory changes to the emission reduction obligations contained in the SIP as part of staff's October, 2009 update to the Board."² Since that Board meeting, staff members met with AGC representatives in April and June and have exchanged extensive data on the current equipment inventory in California. AGC expects ARB to provide additional fleet inventory information in the next few days. In addition, AGC obtained from ARB the

¹ See the transcript of the ARB's meeting held on January 22, 2009, at 215:10-22 (Riordan); 218:12-24 (Nichols); 219: 2-4; 219: 13-14 (D'Adamo); 220:13-18 (White); 226:17-227:8 (Berg); 231:9-13 (Telles) <http://www.arb.ca.gov/board/mt/2009/mt012209.pdf>

² Staff Report: Initial Statement of Reasons for Proposed Rulemaking; Proposed Amendments to the Regulation for In-Use Off-Road Diesel-Fueled Fleets, June 2009 at p. 5; see also pp. 44-45.

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modeling protocols necessary to determine current emission levels based on the inventory data. Both ARB and AGC are examining this data and modeling emissions. The parties expect to exchange findings sometime in the next two months.

The purpose of these efforts by AGC and ARB is to answer the fundamental question posed to staff by the Board: has the recession caused such a reduction in emissions that the extremely aggressive retrofit/replacement schedule called for by the Rule is no longer necessary? Although AGC provided extensive factual support indicating that fuel use, operating hours and revenue have all fallen precipitously since 2007, ARB has either ignored this data or denied that it is a reliable proxy for emissions. It is anticipated that the current efforts, which use ARB's model to calculate emissions from the equipment inventory reported to ARB as required by the Rule, will provide ARB with an acceptable measure of emissions so that there can be agreement whether the actual data supports the assumptions underlying the Rule. EPA should defer any action on the pending waiver until these efforts are complete.

EPA Standard of Review

Notably, ARB does not contradict the facts set forth in AGC's comments, but simply offers its "opinion" and "belief" that the facts will change over time in a way that supports the Rule. ARB then argues that EPA must defer to its judgment on such "policy issues." The issue is not one of policy, but fact. Although ARB may be entitled to substantial deference with respect to its policy determinations, it is not entitled to such deference when it comes to the facts. Throughout this rulemaking process, stakeholders have urged ARB to base the Rule on facts and sound science. And throughout this process staff has relied upon its own "opinions" and "beliefs" about how the construction industry works, in complete disregard of the factual data provided to it by people who actually work in the industry.

A waiver cannot be arbitrarily or capriciously granted. In determining whether an action is arbitrary or capricious, the courts presume the regularity of agency decision making but still expect the agency to come forward with evidence of a thorough, probing and in-depth review. EPA must perform such a review of ARB's request.

EPA must examine several questions: whether ARB considered all relevant factors in its determination,³ whether it made any clear errors of judgment, whether its determination was reasonable, whether there is a rational connection between the facts found and the choice made⁴ and whether there is substantial evidence to support the determination.⁵

³ *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990).

⁴ *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976).

⁵ *Ass'n. of Data Processing Svc. Orgs. V. Fed'l Reserve Sys.*, 745 F.3d 677 (D.C. Cir. 1984).

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AGC believes that CARB: (1) failed to consider all relevant factors in its determination; (2) made many clear errors of judgment; (3) made determinations that were not reasonable; (4) lacked a rational connection between the facts found and the choice made; and (5) lacked substantial evidence to support the determination. While we do not restate our earlier comments here, we stand by those comments and both the declarations and other evidence that we submitted in support of them,

ARB’s Assertions Are Not Supported by the Record

In the end, ARB disputes only two of AGC’s comments: (1) that the recession makes the Rule much more costly and burdensome than the record indicates; and (2) that the VDECS approved by ARB are not yet technologically feasible. In disputing these comments, ARB offers no facts beyond those asserted in the rulemaking record, which predates both the recession and the construction industry’s initial efforts to come into compliance. Nor does ARB contest the truthfulness or validity of the facts provided by AGC in its comments on the waiver and the accompanying declarations. Rather, ARB simply states that in its opinion the recession is just part of the “normal economic cycle,” and problems with the feasibility and cost of VDECS will work themselves out at some point in the future. These assertions are completely unsupported by any facts in the record, and have been repeatedly contradicted by Governor Schwarzenegger.⁶

Many of the conclusory assertions ARB makes are specifically contradicted by the sworn statements of actual construction contractors. Others are contradicted by published data compiled by independent third parties. For example:

<u>ARB Assertion</u>	<u>Facts</u>
The current downturn is just part of normal 4 to 6 year cycle	Average employment in construction in California for the 18 months preceding the rulemaking (January 2006 to June 2007) was 925,000; average employment for the last 18 months (January 2008 to June 2009) is 763,000, a 17.5% decline; this is not a normal downturn
Most fleets will be able to comply without significantly impacting profitability	Most fleets are not profitable, so any impact on profitability is <i>per se</i> significant

⁶ Governor’s State of the State Address, January 15, 2009 (“The truth is that California is in a state of emergency.”)

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<u>ARB Assertion</u>	<u>Facts</u>
Most fleets will be able to pass along costs to customers	Numerous declarations submitted by AGC attest to the fact that contractors are not able to pass on these costs to customers; ARB offers no facts to the contrary
Emission estimates from the rulemaking represent best available information	ARB knows that better information is now available and staff has been directed to work with stakeholders in examining this data to determine the impact of the recession
Total cost does not go to the rule's impact on cost per vehicle	This comment makes no sense; total cost and cost per vehicle are inextricably intertwined
Industry artificially inflated the estimated costs of the regulation	ARB again offers no facts in support of this assertion; see discussion of Caltrans costs below
VDECS costs will come down over time, so initial 30% underestimate does not affect overall costs	ARB again offers no facts in support of this assertion; see discussion of Caltrans costs below
Using "Industrial" energy prices to estimate costs for construction is appropriate	ARB ignores the fact that "industrial" energy pricing refers primarily to energy costs for fixed industrial facilities; the cost of energy at temporary construction costs is considerably higher than the cost for fixed facilities

ARB's Own Comments Show That VDECS Are Not Feasible

Remarkably, ARB admits that it does not know whether any of the eight VDECS it has approved will work on any of the specific vehicles to which its rule applies. ARB dismisses the significance of this admission by arguing that requiring it to make such determinations would be "unduly burdensome" and would "threaten the viability" of the program. But what of the burden on fleet owners who must make such determinations in

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order to comply with the rule? According to ARB, such obligations are too burdensome for it—or even manufacturers—to bear. Yet contractors, who have no technical expertise with respect to VDECS, are expected to fill this void, and to bear the ultimate cost of any misjudgments that ARB has made.⁷

ARB also ignores critical issues relating to the safety of VDECS installations. ARB's comments make no reference to the decision of California's Occupational Safety and Health Standards Board's decision to grant a petition to amend its rules to make it clear that VDECS installations must be approved in writing by the vehicle manufacturer. ARB itself characterized this decision as one that renders "major portions of the off-road regulation no longer viable." Yet ARB's response to the waiver comments simply ignores this major issue.

ARB's Cost Estimates Have Proven Wildly Understated

ARB repeats its assertion that the total cost of the rule will be between \$3 billion and \$3.5 billion between 2010 and 2025. Although ARB at the same time admits that costs for VDECS installed as of late 2008 were about 30% higher than ARB initially estimated, ARB argues—again with no support—that in the future the costs will drop to a point where, on average, they are consistent with the estimates in the rulemaking record.⁸ In effect, ARB is saying "yes, we were off by 30%, but eventually it will all work out." Plainly, ARB's estimates are entitled to no deference.

ARB's position on costs is all the more remarkable in light of recent budget demands made by the California Department of Transportation ("Caltrans"). As California grappled with an unprecedented \$24 billion budget shortfall, Caltrans appealed to the state Senate for a special, major increase in funding because the cost of retrofitting the Caltrans fleet. Originally estimated by ARB at \$60 million—these retrofits and replacements will in fact cost \$260 million.⁹ Thus, as ARB well knows, its estimates for the state's own equipment

⁷ Many of the exemptions that ARB cites are exemptions for individual vehicles, and not for the fleets to which they belong. Fleet owners have to meet the average emissions standards, or the BACT requirements, even if one, some or many of the vehicles in their fleets are individually exempt. In addition, fleet owners have to include the emissions from their "exempt" vehicles in their calculation of average emissions, and they have to include the total horsepower of those vehicles in their calculation of the horsepower subject to the BACT requirements. In the end, these exemptions merely shift and increase the burden on the "non-exempt" of the vehicles in the covered fleets. Where these exemptions apply, because, for example, a retrofit would be unsafe, fleet owners actually have fewer options.

⁸ Conspicuously missing from the Declaration of Charlie Cox is any data on the cost of implementing emissions compliance solutions. In addition, it is noteworthy that this declaration lumps on- and off-road vehicles together – though they present very different challenges, and doing so makes it impossible to determine the extent to which the declaration even relates to off-road equipment.

⁹ See, California State Senate Committee on Budget and Fiscal Review, Agenda and Report dated April 30, 2009, copy enclosed.

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were off by more than 400%. Unlike Caltrans, ordinary contractors cannot turn to the state for funding to make up for ARB's gross underestimation of the cost of compliance.

ARB Admits That the Rule is Uncertain and That Compliance Bottlenecks May Occur

ARB argues that EPA should hurry to approve its waiver request in order to provide certainty to the regulated community. And yet ARB was still revising its rule as recently as ten days ago. More revisions may well be called for when the staff reports back to the Board on the results of its analyses of recently collected fleet data in the Fall. EPA should not rush to approve a regulation that is admittedly still in flux, and which has myriad costs that ARB has not fully evaluated.¹⁰ EPA should await the outcome of the additional work the Board has directed staff to undertake. The agency should then hold hearings in California in order to complete a "thorough, probing in-depth review" of the waiver request.

Sincerely,



Michael Jacob Steel

Enclosure

cc: Michael Kennedy, Esq.
Michael Terris, Esq.

¹⁰ ARB's letter notes that businesses are still lacking "the certainty they need to meet their obligations and responsibilities." That uncertainty is very largely the product of ARB's ongoing review and adjustment of its rule – and not the pace of EPA's process. It also provides more than ample grounds for EPA to make a further inquiry into all of the facts, and more specifically, to question whether ARB has provided the regulated community with the lead time that the Clean Air Act contemplates.

SUBCOMMITTEE NO. 2

Agenda

S. Joseph Simitian, Chair
John Benoit
Alan Lowenthal



Day: Thursday April 30, 2009
Time: 9:30 am or upon adjournment of session
Room: Rose Ann Vuich Hearing Room (2040)

Consultant: Brian Annis

Transportation

2660	Department of Transportation	1-19
2640	State Transit Assistance (cross-cutting issue related to Proposition 1B)	10-12
3900	Air Resources Board (cross-cutting issues related to Diesel Retrofit)	15-16
2670	Board of Pilot Commissioners	20-24
2665	High Speed Rail Authority	23-30
	Appendix I— High Speed Rail Authority list of projects for Federal Stimulus	31

Note on the 2009-10 Budget Process: On February 19, 2009, the Legislature approved the 2009 Budget Act (SB 1XXX). However, certain items were withheld from the budget, without prejudice, pending a more thorough discussion in the budget subcommittees. Items withheld generally met one or more of the following criteria: (1) were rejected in a prior budget year; (2) have substantial policy implications – for example, information technology or the state's bond capacity; or (3) represent a new program or expansion. Additionally, there are numerous pieces of trailer bill language proposed by the Administration that were not adopted and that require further consideration. The issues in this agenda are these aforementioned issues along with April Finance Letters and other issues of interest to the Subcommittee.

Pursuant to the Americans with Disabilities Act, individuals who, because of a disability, need special assistance to attend or participate in a Senate Committee hearing, or in connection with other Senate services, may request assistance at the Senate Rules Committee, 1020 N Street, Suite 255 or by calling 916-324-9335. Requests should be made one week in advance whenever possible.

8. Diesel Retrofit and other Mitigation (BCP #6). The Administration submitted a January budget for \$53.4 million (State Highway Account) to replace or retrofit 1,161 vehicles and pieces of equipment. This includes both on-road and off-road vehicles. Caltrans indicates this budget augmentation is necessary to comply with State Air Resources Board (ARB) and South Coast Air Quality Management District (SCAQMD) regulations. This funding was pulled from the 2009 Budget Act (SB 1XXX), without prejudice, to allow further review in the subcommittee. The funding was pulled because this is the start of a new round of retrofit that may cost about \$260 million over five years.

LAO Comment:

ARB Issues: The Legislative Analyst indicates that compliance with diesel rules is much more costly than planned – the ARB had estimated the total cost for the entire state fleet at \$60 million. Additionally, in some cases, such as for off-road vehicles, even new replacement vehicles must be retrofitted with particulate matter traps. Because most such devices are too large to easily fit onto the department's trucks, Caltrans is requesting staff to modify and rebuild some of its vehicles. Caltrans concluded, based on its discussions with ARB that this expensive and difficult process is the only way to achieve compliance. If ARB found the technology does not exist to complete this type of retrofit at a feasible cost, it could amend its regulations.

SCAQMD Issues: The SCAQMD regulations require that Caltrans use alternative energy sources (such as natural gas) for vehicle *replacement* in the district. Natural gas vehicles cost about \$100,000 more than an ARB-compliant new diesel truck. Caltrans has been complying with this SCAQMD requirement, but the ARB rules will also require Caltrans to *retrofit* a portion of the existing diesel fleet in SCAQMD. Absent the SCAQMD rules, Caltrans would do more diesel *replacement* in that district and less diesel *retrofit*. Caltrans will be pursuing the less cost-effective retrofit, in order to avoid the higher cost natural gas vehicles in the SCAQMD. (Caltrans indicates an additional cost of \$14.2 million if they pursued alternative-fuel vehicle replacement in SCAQMD instead of the proposed diesel retrofit.)

LAO recommendations: The LAO recommends that Caltrans and the ARB report at the hearing:

- Any changes to the statewide and regional air quality regulations that should be made to allow the state to reach its air quality goals in a cost-effective manner.
- Any legislation needed to allow the state to take a more cost-effective approach to comply with these air quality rules. This could include changes in the way the ARB and SCAQMD implement their air quality rules.
- How Caltrans can comply with these air quality requirements, over multiple years, in the most cost-effective manner.

- The steps Caltrans can take that are technologically feasible to comply with these air quality rules and what actions are not technologically feasible.
- The number of Caltrans vehicles that provide emergency services and whether or not these vehicles have been (and can be) exempted from the regulations.

Revised Request: Since the January budget proposal and the *LAO Analysis*, there have been several meetings among Caltrans, ARB, LAO, and legislative staff. These meetings have resulted in a consensus between Caltrans and ARB about the options Caltrans has in complying with the ARB rules. Caltrans indicates that compliance with ARB rules can be achieved with a slightly smaller level of retrofits/replacements in 2009-10. The modified request is \$5.4 million less, but it should be noted this represents a deferral of costs instead of long-run cost savings.

Staff Comment: The ARB is also noticed for this hearing, so that department, along with Caltrans can explain the regulations and the proposed solutions. Both departments should update the Subcommittee on any conclusions that may have been revised since Caltrans submitted the BCP, and be prepared to respond to all the issues raised by the LAO. Staff also understands that the South Coast Air Quality Management District will have a representative at the hearing.

The multi-year Caltrans costs of diesel retrofit/replacement is estimated at \$260 million, and it is unfortunate that cost is significantly higher than the original ARB estimate. ARB, however, notes there is a high cost of diesel pollution for human health and the environment. For the SCAQMD issue, Caltrans should explain their decision to opt for diesel retrofit instead of alternative-fuel vehicle replacement in terms of cost savings and pollution mitigation.

Staff Recommendation: Approve the revised budget request of \$48 million (this is the original request of \$53.4 million minus the \$5.4 million in deferred retrofit).

Vote: