Air Transport Association

December 6, 2010

BY ELECTRONIC SUBMISSION

Clerk of the Board
California Air Resources Board
1001 I. Street
Sacramento, California 95814
http://www.arb.ca.gov/lispub/comm/bclist.php

Re: Proposed Amendments to Regulation for In-Use Off-Road Diesel-Fueled Fleets (ORD Rule)

Dear California Air Resources Board:

I write on behalf of the Air Transport Association of America, Inc. (ATA) to provide comments in response to the Notice of Public Hearing to Consider Proposed Amendments to the Regulations for In-Use Off-Road Diesel-Fueled Fleets.[1] ATA is the principal trade and service organization of the U.S. airline industry, and ATA's airline members and their affiliates transport more than 90 percent of all U.S. airline passenger and cargo traffic.[2] ATA frequently comments on regulatory activities that affect the airline industry and the safety and efficiency of air travel in the United States. ATA has provided numerous comments to ARB in response to prior notices concerning the ORD Rule and its amendments, and comments to EPA concerning whether the ORD Rule should be authorized under the federal Clean Air Act, 42 U.S.C. § 7543(e), each of which are incorporated herein by reference.

As discussed in ATA's prior comments, we continue to believe that ARB lacks the legal authority to regulate airport ground support equipment (GSE) in the manner contemplated by the ORD Rule. Nonetheless, ATA and its members have consistently supported the emission reduction goals of the ORD Rule, and have provided technical information and worked constructively with ARB staff in the hopes that an acceptable regulation would be adopted. From the start, our primary concern with the ORD Rule has been the unnecessarily complex and burdensome means by which it would achieve our shared emission reduction goals.

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[1] Posted at http://www.arb.ca.gov/regact/2010/offroadlsi10/offroadlsi10.htm (dated October 19, posted October 28, 2010).

[2] The members of the Association are: ABX Air, AirTran Airways, Alaska Airlines, American Airlines, ASTAR Air Cargo, Atlas Air, Continental Airlines, Delta Air Lines, Evergreen International Airlines, Federal Express Corporation, Hawaiian Airlines, JetBlue Airways, Southwest Airlines, United Airlines, UPS Airlines, and US Airways; associate members are: Air Canada, Air Jamaica, and Mexicana.

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Even with the proposed changes, the ORD Rule itself remains complex and difficult to implement, issues that are further exacerbated when coupled with the other ARB rules affecting GSE. The regulation includes some fundamental flaws not addressed in the proposed changes, and the proposed changes themselves create a few additional problems, as discussed individually below.[3]

However, we greatly appreciate ARB's recent recognition of both the substantial emission reductions already achieved due to the economic downturn, and that ARB's previous emissions model had significantly overstated the emissions from off-road diesel vehicles subject to the ORD Rule. We are particularly supportive of ARB's proposal to no longer mandate the widespread installation of VDECS retrofits on existing equipment. As we have explained in detail in previous comments, such an inflexible mandate to install unproven retrofit filters would be hugely inefficient and problematic from an operational and technical standpoint, especially for GSE. We appreciate ARB's concurrence with our view that ARB should not mandate that the regulated community use a specific and particularly unsuitable technology to achieve the emission reduction goals to the exclusion of more efficient alternatives.

Overall, we believe that ARB's recent proposed revisions represent a significant step forward in simplifying the Rule and modifying or eliminating many of its unnecessarily burdensome and intrusive elements. As noted above, some of the remaining flaws in the existing ORD Rule, and problems created by the proposed changes, are discussed individually below. These issues should be addressed in the final regulatory language to be adopted by ARB.

I. CREDIT FOR ELECTRIC GSE PURCHASED BEFORE 2007 SHOULD BE RESTORED

Under the existing ORD and LSI Rules, GSE purchased before January 1, 2007, can be counted toward compliance with both rules: all (i.e. 100%) of such equipment can be counted toward LSI Rule compliance and 20% can be counted toward ORD Rule compliance. As had been confirmed previously to us by ARB staff, these provisions were intended to recognize and provide appropriate credit for the early emission reductions voluntarily achieved by the airlines through their substantial GSE electrification efforts.

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[3] We also wish to note that, notwithstanding ARB's revision of its baseline GSE population estimate from 1,830 to 3,080 units, in light of the economic downturn the number of diesel GSE operated in California by ATA members has *decreased* significantly since the Rule was first adopted, totaling approximately 1,216 today. *See* Staff Report: Initial Statement Of Reasons For Proposed Rulemaking; Proposed Amendments To The Regulation For In-Use Off-Road Diesel-Fueled Fleets And The Off-Road Large Spark-Ignition Fleet Requirements (October 2010) ("ISOR"), Appendix D at D-7. ARB's total population estimate seems to suggest that the majority of diesel GSE is operated by non-ATA members. We are not in a position to evaluate the accuracy of ARB's total figure, however, because (among other things) we do not have access to DOORS information reported by other fleets. Moreover, while ARB's growth assumption for all GSE was revised slightly downward from 2.02% to 1.78%, attempts to estimate future aviation activity based on past performance are often unreliable, and the revised figure may very well prove optimistic. *See* ISOR, App. D, at D-34.

However, the proposed changes to the regulatory language apparently require GSE fleets first, to choose to include such pre-2007 electric units in either the LSI or ORD fleet, and then, limit them to counting only 20% of the units designated for the ORD fleet towards compliance. Specifically, ORD Rule credit for electric GSE purchased prior to 2007 would now be available only if "[t]he electric vehicle is not already included in the fleet average emission level requirements for large spark ignition engine fleets in title 13, Section 2775.1." *See* Proposed 13 C.C.R. § 2449(d)(1)(B)(1)(c). This conflicts with Section 2449(d)(1)(B)(2)(a), under which airlines receive only 20% credit for the max HP of all electric GSE in the ORD Rule fleet purchased before 2007. This restriction would not apply to any of the other types of vehicles regulated under the ORD Rule.

Such a change, particularly applied only to GSE, would be arbitrary and capricious, and is entirely unsupported by the rulemaking record. Given that it would make no sense to arbitrarily limit ORD Rule compliance credit for electric GSE to 20%, we assume this change is the result of an inadvertent drafting error. To correct this error, proposed Section 2449(d)(1)(B)(1)(c) should be amended to read: "Except for units subject to Section 2449(d)(1)(B)(2)(a) below, the electric vehicle is not…."[4]

II. THE SIX-MONTH TIME RESTRICTION ON GASOLINE-POWERED REPLACEMENT UNITS SHOULD BE REMOVED

Under proposed Section 2449(d)(1)(A)(1)(e), a fleet operator receives credit for a gasoline-powered vehicle that replaced a diesel vehicle only if the diesel vehicle was retired from the fleet within six months of the date the gasoline-powered unit is added. No such time restriction applies to other alternative-fueled replacement units.

This time restriction would needlessly penalize fleets that have removed diesel units to comply with fleet averages, but do not have the immediate need or financial ability to purchase a gasoline-powered replacement unit within six months. Using the DOORS inventory, comprehensive data regarding the fleet size and make-up is available. Accordingly, ARB and the fleet owner will be able to readily determine whether a new gasoline vehicle qualifies as a replacement of a retired diesel unit. No time restriction is necessary. Accordingly, Section (d)(1)(A)(1)(e) should be revised to read as follows: "If the vehicle is a gasoline-powered vehicle, the owner must identify the diesel vehicle that the gasoline-powered vehicle replaced through data entry in the DOORS program."

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[4] If the proposed change was intentional, at the very least electric GSE should be treated the same as other pre-2007 electric units that perform the work of diesel vehicles. Such pre-2007 non-GSE are afforded 100% credit toward ORD Rule compliance so long as they are not also included in an LSI fleet. 13 C.C.R. § 2449(d)(1)(B)(2)(b).

III. THE PROPOSED FINAL FLEET AVERAGE EMISSION REQUIREMENTS ARE EVEN MORE STRINGENT THAN THE EXISTING REQUIREMENTS, AND SHOULD BE REVISED

The revised ORD Rule would impose final NOx fleet average emission requirements in 2022 or 2023 that are more stringent than the final fleet average requirements contemplated under the existing regulation. These requirements would require fleets to consist primarily or exclusively of Tier 4i and Tier 4 units by 2022 or 2023. As ARB has noted, the final fleet average NOx targets in the original ORD Rule were designed to "represent[] the economic limit of what industry could bear." *See* Initial Statement of Reasons for Proposed Regulation of In-Use Off-Road Diesel Vehicles (April 2007) (EPA-HQ-OAR-2008-0691-0002.1) at 3. There is no reason for ARB to seek to impose even more stringent final fleet average emission targets.

The other major changes proposed by ARB to the ORD Rule, including the changes in compliance deadlines, are fully supported by the decline in equipment use due to the economic downturn. This decline, while unplanned, has been enormously effective in reducing emissions. The changes are further supported by ARB's correction of its emissions model, which confirms that the off-road diesel vehicles regulated by the ORD Rule represent a much smaller portion of overall emissions than ARB believed when it initially adopted the Rule. While it may be appropriate for ARB to adopt for 2023 the same stringent fleet average NOx requirements contemplated under the existing regulation for 2020, there is no support in the rulemaking record for adopting even more stringent final fleet average requirements for NOx.

Instead, for the same reasons identified by ARB in adopting the existing ORD Rule, including economic limitations, the final 2023 fleet average emissions requirements for NOx should be no more stringent than the final targets contemplated under the existing regulation for 2020. By definition, this will retain the same stringent final NOx emission limits as originally contemplated by ARB. Certainly, the massive economic downturn has not increased the "economic limit of what industry can bear," and the final targets should not be made even more stringent than initially contemplated. The economic and other burdens associated with adopting even more stringent final fleet average requirements are substantial, and have not been adequately assessed by ARB. Nor have any significant incremental air quality benefits been identified to justify this change.

IV. CREDIT FOR EARLY VEHICLE RETIREMENTS SHOULD NOT BE ARBITRARILY LIMITED TO 50%

Under the proposed revisions, fleets that reduce their size between March 1, 2010 and March 1, 2011, would appropriately be given full credit for the associated early emission reductions thus achieved. However, with respect to fleet-size reductions that were accomplished during March 1, 2006 to March 1, 2010, the proposed revisions would cut the emission credit in half. The Initial Statement of Reasons explains this proposed change by stating only that:

> "Staff still believes there is value in retaining the credit, but that it is appropriate to discount the amount of credit accumulated by fleets under this credit by 50 percent."[5]

No meaningful explanation is provided for this conclusion, which is unsupported by the rulemaking record, and is illogical. If anything, because emission reductions accomplished through fleet-size reductions in earlier years accomplish *more* total emission reductions, they should be afforded *more* credit than later-year reductions.

This arbitrary restriction on credit for early fleet size reductions is also inconsistent with Assembly Bill 8 2X (AB 8 2X) (signed February 20, 2009), in which the California State Legislature directed ARB to, among other things, modify the ORD Rule credit provisions:

> "to reflect vehicle retirements that reduce total fleet horsepower between March 1, 2006, and March 1, 2010 . . ."[6]

Consistent with the intent of the legislature, and with ARB's initial implementation of this directive in the ORD Rule, regulated entities took steps to reduce diesel fleet sizes and associated emissions in order to obtain credit toward compliance with the regulation. Arbitrarily cutting that credit in half would not only be inconsistent with the legislative intent, but would punish those fleets that acted responsibly to implement fleet size reductions in reliance on AB 8 2X and ARB's implementation of it.

Simply put, there is no reason to retroactively deny full credit for emissions eliminated through fleet-size reductions that occurred prior to March 1, 2010. Compliance strategy decisions and investments have already been made in reliance on this credit, despite limited budgets. Cutting the credit in half effectively cuts in half the value of capital invested. Clearly, this was not the legislature's intent when it directed ARB to amend the regulation. Because early fleet-size reductions continue to yield emission reductions in each successive year, if anything the credit afforded for earlier reductions should be higher, not lower. The proposal to retroactively eliminate 50% of the credit for fleet size reductions achieved before March 2010 is arbitrary and capricious, unsupported by the rulemaking record, and contrary to law.

V. THE SOON PROGRAM SHOULD BE MADE VOLUNTARY, AND SHOULD BE MODIFIED AND MADE MORE CONSISTENT WITH THE ORD RULE

As ATA has explained in prior comments, the SOON program is substantively flawed and illegal, and none of its fundamental problems are addressed in the proposed revisions.[7] In fact, the proposed revisions only exacerbate the problems with the SOON program.

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[5] ISOR at 33.

[6] California Health & Safety Code § 43018.2(a)(2)(A).

[7] *See*, *e.g.*, Letter from T. Pohle to ARB, dated March 6, 2008, at pages 4-9. Available at:

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A. The SOON Program is Illegal as Written and Should be Made Voluntary

The SOON program provides only a partial financial contribution toward the installation of additional control measures, above and beyond those required by the ORD Rule. The SOON program purports to allow local air districts to mandate the submission of detailed and onerous reports, the preparation and submission of burdensome applications for SOON funds (regardless of whether the fleet wishes to accept the funds and the related conditions), and that fleets selected by the district to receive funds must install emission controls and achieve additional NOx emission reductions beyond those required by the ORD Rule. These burdens continue to be imposed until the fleet meets the more stringent fleet average emission targets set forth in the SOON program. *See* 13 C.C.R. § 2449.2(d)(1)(D).

Whether mandated directly or indirectly, by a district or by ARB, the numerical fleet average targets, additional emission controls, and related reporting and application obligations under the SOON program taken together impose "emission standards," and require authorization by EPA under Section 209(e) of the federal Clean Air Act. *See*, *e.g.*, *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004) (emission "standards" include fleet requirements that require installation of emission controls or impose numerical emission limits). To our knowledge, ARB has neither sought nor received EPA authorization for the SOON program. Absent EPA authorization, the SOON program is preempted by the federal Clean Air Act and is unenforceable.

ARB should make clear that all aspects of the SOON program are voluntary, including the onerous application and reporting requirements, and the acceptance of SOON funds for additional emission controls beyond those required under the ORD Rule. Without that change, the SOON program remains illegal under federal and state law for all of the reasons explained in previous ATA comments.[8]

B. The SOON Fleet Average Emission Targets and Deadlines Should be Adjusted to be Consistent with the ORD Rule

Under the proposed amendments, the 2011 fleet average NOx targets under the SOON would not be moved to correspond to the revised compliance deadlines for the ORD Rule, but would instead be moved *forward* by two months (from March to January 2011), and the final fleet average targets would be made *more* stringent for most HP categories. Indeed, as proposed, the 2011 fleet average emission targets under the SOON are more stringent than the 2014 ORD Rule targets. This makes little sense, particularly given the fact that the SOON will remain preempted and unenforceable until ARB submits a formal request for EPA authorization, and EPA holds a hearing and decides whether to grant that request.

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http://www.arb.ca.gov/lists/ordiesl07/1244-2008-03-06_ata_second_15-day_comments_re_ord_rule.pdf.

[8] *Id.*

The initial 2011 compliance deadline and associated application and reporting obligations should be deferred until 2014 to correspond with the initial ORD Rule compliance deadline, or at a minimum by one or two years. Moreover, the fleet average emission targets under the SOON should be made less stringent, for the same reasons the ORD Rule targets are being adjusted.

C. Fleets who Participate in the SOON Program Should Not be Punished in Terms of ORD Rule Compliance

Participation in the SOON program unnecessarily makes ORD Rule compliance even more difficult and expensive because emission control equipment purchased with SOON funds cannot be counted toward ORD Rule compliance during the contract period, which may last a number of years. 13 C.C.R. § 2449.2(e)(2). Thus, if a fleet installs emission controls on a vehicle under the SOON program, for purposes of ORD Rule compliance that vehicle is treated as if it were uncontrolled. *Id.* The fleet not only loses the ability to install controls on that vehicle to achieve ORD Rule compliance (forcing the fleet to address other vehicles that may be more difficult and expensive to control), it is saddled with additional non-existent emissions in calculating its fleet average emissions levels. Instead, the regulation should be revised so that vehicles purchased or controlled with SOON funds can simply be removed from the fleet for ORD Rule purposes until the end of the contract period.

As noted above, we believe that the proposed revisions overall represent a significant step forward toward a workable regulatory scheme for achieving our shared emission reduction goals for these off-road diesel vehicles. We look forward to the opportunity to continue to work closely with ARB and its staff to resolve the remaining issues with the regulation, and to achieving these goals together.

Please contact me at 202-626-4216 if you have any questions or would like additional information in connection with any of the points raised in these comments.

Sincerely,

Timothy Pohle
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& Assistant General Counsel
Air Transport Association of America, Inc.