**STATE OF CALIFORNIA**
**AIR RESOURCES BOARD**

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| PUBLIC HEARING TO CONSIDER PROPOSED REGULATION FOR IN-USE OFF-ROAD DIESEL VEHICLES | ) ) ) ) ) | Agenda Item: 07-5-6<br>May 25, 2007 |

# INITIAL COMMENTS OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA

May 23, 2007

*On behalf of—*
Associated General Contractors of America

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## INTRODUCTION

The Associated General Contractors of America ("AGC") respectfully submits the following comments to the California Air Resources Board ("ARB") on its recently proposed rule on off-road diesel equipment already in use. Because ARB delayed the release of its economic model for this rule, found it necessary to update its fleet calculator, and has just provided AGC with the results of its survey of public and private construction equipment, AGC will later submit further comments on the proposed rule, taking advantage of the recently extended period for public comment.

Until AGC can complete its review of the entire rulemaking package, and submit final comments, AGC urges ARB carefully to consider these initial comments.

## STATEMENT OF INTEREST

AGC is the largest and most diverse trade association in the construction industry. The Association has more than 32,000 members and 96 state and local chapters throughout the United States. Among AGC's members are more than 7,000 of the nation's leading general construction contractors and approximately 25,000 specialty contractors and other firms engaged in the construction of highways, bridges, tunnels, airport runways and terminals, buildings, factories, warehouses, shopping centers, and both water and wastewater treatment facilities.

AGC contractors need diesel-powered construction equipment to maintain the quality of life that this nation has come to enjoy. AGC members rely on such off-road equipment to construct and maintain the nation's public and private infrastructure. Given the great importance of such equipment to the construction industry, AGC appreciates the opportunity to express its views on the proposed regulation of off-road diesel equipment already in use.

In recent years, AGC has been deeply involved in several "clean diesel" initiatives intended to improve air quality and simultaneously protect the construction industry from serious disruption. These initiatives have sought to identify appropriate incentives for the retrofit of diesel equipment, to inform fleet owners that they may qualify for government grants to retrofit their equipment, to secure federal funding for diesel retrofit, and to enact a federal tax incentive for diesel retrofit.

Since the inception of U.S. Environmental Protection Agency's ("EPA") National Clean Diesel Campaign in 2000, AGC has worked closely with EPA to identify ways to reduce emissions from construction equipment, and in particular, to identify retrofit "incentives" that would appeal to the construction industry. This joint effort has yielded in a landmark report entitled *Emission Reduction Incentives for Off-road Diesel Equipment Used in the Port and Construction Sectors* (May 2005). Looking at diesel retrofit from the contractor's perspective, and capturing significant industry input, this EPA report has contributed to the work of the Clean Diesel Retrofit Work Group, a federal advisory group organized by and reporting to EPA, and co-chaired by AGC. The Work Group is charged with providing guidance and recommendations to EPA on strategies for reducing emissions from off-road diesel equipment already in use.

AGC has also been an active partner in a number of regional Clean Diesel Collaboratives and continues to inform its members of grants being awarded by and through the collaborative network.

On the legislative front, AGC has urged Congress to provide financial and technical assistance to construction equipment owners and operators, encouraging these firms to install emissions control technologies on their diesel engines. AGC worked closely with Senators Inhofe and Clinton to craft Section 1808 of SAFETEA-LU, which allows states (and other recipients of federal-aid highway funding) to use CMAQ funds to pay for the retrofit of off-road diesel equipment needed to construct projects funded under Title 23 of the United States Code. AGC also played a key role in the development and passage of the Diesel Emissions Reduction Act ("DERA"), which became part of the Energy Policy Act of 2005. As the bill was originally written, it did not ensure that qualified private fleets could apply for the public funds set aside for retrofitting equipment. Today, AGC continues to lobby Congress for full funding of EPA's new Diesel Emissions Reduction Program, which was created under DERA. In addition, AGC seeks to modify the federal tax code to provide other financial incentives for contractors to retrofit their existing diesel equipment.

For the construction industry, the costs of retrofitting equipment are prohibitive, and financial assistance is therefore needed to facilitate such work. Construction companies are thinly capitalized businesses often worth little more than the equipment they own. Such companies typically expect their equipment will last up to 30 years, and they purchase it with the understanding that it will be legal to operate "as built" until the end of its useful life. Retroactive emissions limits, imposed on equipment already in use, could render a company's fleet prematurely obsolete, and wipe out much if not most of its net worth. Such dramatic action deprives a company of its ability to bond or bid work, or to borrow money.

AGC opposes government mandates to modify equipment already in use, or to replace such equipment (via either regulation or contractual requirement). AGC also opposes mandates for early fleet turnover. All such requirements place the financial burden of a largely public benefit exclusively on private contractors. All have a very negative impact on the construction industry, and particularly the small and often minority businesses that dominate this key industry.

## LEGISLATIVE AND REGULATORY BACKGROUND

"[ARB] is designated the air pollution control agency for all purposes set forth in federal law." Health & Safety Code §39602. ARB is therefore responsible for developing the California State Implementation Plan ("SIP") in accordance with Section 110 of the federal Clean Air Act ("CAA"), and for California's attainment-demonstration SIP revisions for the state's nonattainment areas. ARB also has the exclusive authority to regulate mobile-source emissions in California, and is responsible for developing rules to reduce the release of criteria pollutants and air toxics from such sources. Health & Safety Code §§39002, 39500, 40000. ARB's vehicle

emissions standards enter the California SIP as emissions factors on which California's various air districts rely for the purpose of demonstrating attainment with federal ambient air quality standards.

ARB is developing a rule that would force construction contractors to retrofit their off-road diesel equipment – or to replace that expensive equipment. As currently structured, this rule would mandate diesel emissions control technology for nearly all off-road diesel equipment already in use. The rule would apply to all engines greater than 25 horsepower (hp) and used in construction, mining, airport ground support, logging, and industrial equipment, such as forklifts. The rule would not cover equipment used to perform agricultural operations or to handle cargo at ports or intermodal rail facilities, or equipment already covered by other rules.

For nearly all off-road diesel equipment, the proposed rule would mandate or impose the following:

- **Accelerated fleet turnover:** The proposal would require all fleets to meet declining targets for average emission rates for particulate matter ("PM"). Large and medium fleets would also be required to meet targets for oxides of nitrogen ("NOx").

- **Use of BACT:** To meet the fleet targets for average emission rates, the rule would require the use of the best available control technology ("BACT") and/or the use of engines that meet the U.S. Environmental Protection Agency Tier 3 or 4 off-road engine standards and/or equipment replacement by a certain date.

- **Idling limitations:** The rule would limit the time allowed for equipment to idle.

Although ARB makes certain points that the construction industry can support, including the point that the industry has something to gain from turning over older equipment for new, lower-emitting equipment, its proposal goes far beyond anything that the industry can finance. By arbitrarily imposing retroactive requirements on the end users of diesel equipment, instead of setting new standards for manufacturers, the proposal would have a massive financial impact. It would be highly disruptive of the construction industry and closely related efforts to maintain and expand both public and private infrastructure. ARB should not penalize end-users for purchasing equipment that ARB could have regulated but did not. ARB is wrongly asking these purchasers of entirely lawful equipment to pay an enormous price for not, much earlier, setting standards for manufacturers.

## I. ARB'S PROPOSAL WOULD DETRIMENTALLY IMPACT AGC OF AMERICA'S MEMBERS NATIONWIDE

While this proposal is specific to equipment that operates in California, history has shown that other states frequently adopt air quality rules developed in California. Fifteen other states have already opted to implement at least one of California's more protective emission standards. These

states include Connecticut, Delaware, the District of Columbia, Georgia, Maine, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Texas, Vermont, and Washington. In conjunction with California, these states are home to 142 million Americans, or almost half of the population.

Nationwide, diesel systems (both engines and fuel) power the majority of the off-road equipment that constructs and repairs America's roads, bridges, homes, and factories. As reported by the Diesel Technology Forum (DTF), the construction industry depends on almost $17 billion worth of existing diesel-powered equipment.

Its reasons for relying on this equipment include:

- **Higher Energy:** Diesel fuel contains more energy per unit than gasoline.

- **Safety:** Diesel fuel is safer than gasoline. It is less volatile and has a lower flash point, making it far less likely to ignite or explode if spilled or released.

- **Cost and Fuel Efficiency:** Diesel fuel costs less to refine than gasoline, and diesel engines are more fuel efficient.

- **Higher Torque:** Diesel engines have much more torque (or pulling power at low speeds), enabling equipment to carry or tow heavier loads than gasoline-powered engines.

- **Durability and Reliability:** Diesel engines are more durable and reliable, with lifetimes of 250,000 miles or more for highway engines.

Currently, there is no substitute for diesel power, and over time, it is likely to become even more attractive. New diesel engines are friendlier to the environment than their gasoline counterparts, when judged by their emission of carbon dioxide and smog-contributing hydrocarbons. Because of the greater efficiency of diesel engines and the significant fuel economy advantage, diesel engines have 30 to 35 percent lower carbon emissions. They clearly provide advantages, and they must remain available for future use.

## II. ARB'S PROPOSAL FAILS TO MEET THE SUBSTANTIVE STANDARDS AND PROCEDURAL REQUIREMENTS UNDER STATE LAW

Because ARB seeks to regulate emissions of criteria air pollutants (i.e., diesel PM and NOx) and emissions of a designated toxic air contaminant (i.e., diesel PM), ARB must comply with both the California Clean Air Act (which governs criteria air pollutants) and the Tanner Act (which governs toxic air contaminants). Both of these statutory programs are codified in the California Health & Safety Code and neither program preempts the other. *Western Oil & Gas Assn. v. Orange County Air Pollution Control Dist.,* 14 Cal.3d 411 (1975).

In addition, several other California statutes establish requirements for ARB's adoption of retrofit standards: (1) the California Administrative Procedure Act (for all rulemakings by state agencies), (2) the California Environmental Quality Act ("CEQA"), and (3) the provisions of the Health & Safety Code specifically relating to ARB's statutory authority. Under the Clean Air Act and the Tanner Act, *see* Health & Safety Code §§43013, 39665(b)(4)-(6), and these procedural standards, *see* 14 Cal. Code Regs., §15000 *et seq.* and the Gov't Code §11340 *et seq.*, AGC challenges the feasibility, cost effectiveness, alternatives analysis, and impacts of ARB's proposed standard.

**A. Proposal Is Not Technically Feasible**

Before ARB can adopt an off-road engine emission standard to regulate criteria pollutant emissions from construction equipment, ARB must meet certain standards and obligations set forth the California Health & Safety Code. By its terms, the code authorizes ARB to "adopt and implement motor vehicle emission standards… [that ARB] has found to be technologically feasible…, unless preempted by federal law." Health & Safety Code §43013(a) (emphasis added); *see also id.* §§43013(b) (ARB's off-road standards must be consistent with §43013(a)), §43013(d) (ARB's off-road regulations must be feasible); §39665(b)(4) (ARB must consider technological feasibility for air toxic control measures), §39666(c) (same). Similarly, under federal law, ARB's standards must be consistent with federal requirements for technological feasibility in order for those ARB standards to qualify for a waiver of federal preemption. *See* Section III.A, *infra* (discussing CAA §202(a) and §209). Without the waiver of federal preemption, the California standards exceed ARB's authority under both federal and state law. 42 U.S.C. §7543(e); Health & Safety Code §43013(a)-(b).

In its Technical Support Document ("TSD"), ARB seeks to defend the technical feasibility of its proposal, addressing the availability of retrofit controls, and options for repowering equipment or replacing it. TSD, at 99-127. Because ARB released its rulemaking package in phases, AGC and the construction industry have not had the 45 days that California law provides to review this material. Accordingly, AGC will later supplement its comments on technical feasibility. AGC expects to demonstrate that engine and retrofit manufacturers, the used-equipment market, and suppliers and installers could not meet the demand that the rule would create for equipment essential to the construction industry.

**B. Proposal Is Not Economically Feasible**

As explained in Section II.A, *supra*, both the federal Clean Air Act and the Health and Safety Code require that ARB standards be feasible, which includes an economic component as well as a technical one. Health & Safety Code §43013(a)-(b), (d); *see also id.* §43018(a), (e) (ARB required to reduce mobile-source emissions to attain state air quality standards, "consider[ing] the effect of the standards and regulations on the economy of the state"); §§39665(b)(5), 39666(c) (ARB must consider cost of air toxic control measures); 42 U.S.C. §§7543(e)(2)(A),

7521(a)(2) (standards must "take effect *after* such period as [EPA] finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period") (emphasis added).

In its Initial Statement of Reasons ("ISOR"), ARB speculates that many affected businesses could pass the regulation's costs to their customers and/or absorb its costs internally. ISOR, at 42-44. Because ARB released its rulemaking package in phases, AGC and the construction industry have not had the 45 days that California law provides to review such a proposal. Accordingly, AGC will later supplement its comments on economic feasible under California or federal law. AGC expects to demonstrate that ARB's proposal – which is cumulative with ARB requirements for onroad and portable equipment – would deliver an economically crippling blow to the construction industry. AGC believes that ARB significantly understates the cost of its rule, overstates the industry's ability to pass the increased cost on to its customers, and completely disregards the economic effect of devaluing the construction equipment currently in use while simultaneously requiring massive capital investment. ARB should not adopt a rule that would qualify the entire industry for variance relief as an arbitrary, unreasonable taking of property and the practical closing and elimination of lawful businesses. *See* Health & Safety Code §§42352(a)(2), 42352.5(a)(2), 42368(a)(2).

**C. Proposal Is Not Cost Effective**

Before ARB can adopt an off-road engine emission standard to regulate criteria pollutant emissions from construction equipment, ARB must meet certain standards and obligations as set forth the California Health & Safety Code. By its terms, the code authorizes ARB to "adopt and implement motor vehicle emission standards… [that ARB] has found to be cost-effective…, unless preempted by federal law." Health & Safety Code §43013(a); *see also* Health & Safety Code §§43013(b) (ARB's off-road standards must be consistent with §43013(a)). The Code also requires ARB to consider approximate cost, before it can adopt an off-road engine emission standard to regulate air toxic emissions from construction equipment. Health & Safety Code §§39665(b)(5), 39666(c).

In its TSD, ARB defends the proposal's cost effectiveness primarily by comparing it to ARB's Public Fleet Rule. TSD, at 186. Because ARB released its rulemaking package in phases, AGC and the construction industry have not had the 45 days that California law provides to review such a proposal. Accordingly, AGC will later supplement its comments on cost effectiveness. AGC expects to demonstrate that ARB significantly understates the cost of the rule, and in turn, its cost effectiveness (as a cost-per-ton of reducing the pollutants that the rule covers). AGC believes that ARB's "representative" fleet of construction equipment is not, in fact, representative of the statewide construction fleet. To the contrary, this fictional fleet is newer than the actual fleet, and would therefore cost less to bring into compliance. By basing its economic analysis on an unrealistically new "representative" fleet, ARB systemically understates the cost of compliance.

ARB bases its analysis on an aggregation of 22 fleets that ARB staff selected from a 200-fleet database that ARB selected from two surveys of California fleets. *See* ARB TSD, App. H, at H-2, H-16. These data have two significant biases that render them inappropriate for use as ARB's model for the California construction fleet. First, ARB's 22-fleet database has an average vehicle age of 10.74 years, whereas ARB's 200-fleet database has an average age of 12.05 years. *Id.* at 16-21. Second, even ARB's 200-fleet database does not appear representative of the overall statewide fleet because the 200-fleet database includes a disproportionate number of public fleets, which typically have newer vehicles. These two biases compound to make ARB's data unrepresentative of the California industry that ARB seeks to regulate.

Indeed, it is already clear that ARB's proposal is wildly cost ineffective as a control strategy for particulate matter. For example, the South Coast Air Quality Management District ("SCAQMD") has set incremental cost effectiveness at $6.70/pound ($13,400/ton) for particulate matter. SCAQMD, Best Available Control Technology Guidelines, at C29 (July 14, 2006).[1] By contrast, even with its understated costs, ARB estimates that the off-road, in-use diesel proposal will reduce particulate matter at between $37 and $43 per pound ($74,000 to $83,000 per ton) for particulate matter. TSD, at 186. ARB justifies this by reference to a rulemaking on public fleets that ARB adopted, which ARB estimated to cost $159.95 per pound ($319,900/ton) of particulate matter. *Id.* Given the governmental relationships binding ARB and the regulated public fleets, ARB should not attempt to bridge the cost-effectiveness data from its public-fleet rule to private fleets. Instead, ARB should recognize that – in addition to the unprecedented unfairness of changing the standards applicable to in-use vehicles – this rule is the most expensive rule that ARB ever has imposed on private industry. In any event, as a purely legal matter, AGC submits that ARB's public-fleet rule was not cost effective, and that public entities' failure to challenge ARB's unlawful action does not preclude private entities from challenging such actions here.

## D. ARB Failed to Satisfy CEQA Requirements

The California Environmental Quality Act ("CEQA") requires California agencies to analyze and consider feasible mitigation and alternatives to projects that have significant adverse effects on the environment. Under CEQA, a "project" means an action that "has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." 14 Cal. Code Regs. §15378; *id.* §15064(d) ("lead agency shall consider direct physical changes in the environment which may be caused by the project and reasonably foreseeable indirect physical changes in the environment which may be caused by the project").

For indirect effects, CEQA includes those that "are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable," 14 Cal. Code Regs.

[1] SCAQMD sets PM cost effectiveness at $2.25 per pound ($4,500/ton). *Id.*

§§15358(a)(2), 15064(d)(2) (CEQA includes physical change in the environment "not immediately related to the project, but which is caused indirectly by the project"), provided that the effect relates to a physical change and is not speculative. 14 Cal. Code Regs. §§15358(b), 15064(d)(3). CEQA weighs economic and social changes both to determine the significance of a physical change in the environment and to assess whether a project's economic or social changes in turn will cause a physical change in the environment. 14 Cal. Code Regs. §15064(e). "Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project." *Id.* (emphasis added); *Citizens for Sensible Development v. County of Inyo*, 172 Cal.App.3d 151, 170-71 (1985).

Although the Secretary of Resources has certified ARB's rulemaking process as "functionally equivalent" to the CEQA planning process, 14 Cal. Code Regs. §15251(d); Pub. Resources Code §21080.5, ARB's exemption applies only to CEQA's Chapters 3 and 4, and ARB remains subject to the balance of CEQA's requirements. *Sierra Club v. State Bd. of Forestry*, 7 Cal.4th 1215, 1231 (1994); 14 Cal. Code Regs. §15250. Further, ARB "must demonstrate strict compliance with its certified regulatory program." *Mountain Lion Foundation v. Fish & Game Comm'n*, 16 Cal.4th 105, 132 (1997).

As part of its CEQA compliance, ARB must consider the following: (a) reasonably foreseeable environmental impacts of the project; (b) reasonably foreseeable feasible mitigation measures; and (c) reasonably foreseeable alternatives to the project. Pub. Resources Code §21159(a); 14 Cal. Code Regs. §§15252, 15187(c). The lead agency's identification and analysis of alternatives are imperative for "courts [and] the public [to] fulfill their proper roles in the CEQA process." *Laurel Heights Improvement Ass'n v. Regents of University of California*, 47 Cal.3d 376, 404 (1988). The lead agency should use "good faith" and a "reasoned analysis" in considering alternatives. *Los Angeles Unified School Dist. v. City of Los Angeles*, 58 Cal.App.4th 1019, 1029 (1997). Under CEQA, an alternative is "feasible" if it is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." *Sierra Club v. County of Napa*, 121 Cal.App.4th 1490, 1507 (2004) (citations omitted).

ARB's rulemaking triggers CEQA as a project with a significant adverse effect on the environment for at least two reasons:

(1) The fuel penalty and resulting increase in carbon dioxide ("CO2") emissions that ARB identifies in Appendix I of the TSD. Contrary to the TSD, ARB's proposed idling requirements do not offset the global-warming impact that ARB identified from higher CO2 emissions because ARB has the obligation to consider an idling-only rule, which would not have any fuel penalty.

(2) The negative environmental impacts (e.g., air emissions, noise, and congestion) that will indirectly result from the construction sector's higher costs, degraded ability to perform, and reduced competition. These changes to the construction industry in turn will cause delays on ongoing construction projects as well as deferrals and cancellations of future environmentally beneficial construction projects. The indirect physical changes on the environment include greater air and noise emissions from increased congestion that results from longer delays during construction projects and from California's deferring or undertaking fewer congestion-reducing projects with available bond monies.[2]

After it completes its analysis of ARB's recently released modeling and survey date, AGC will submit final comments on the negative environmental impacts caused by ARB's rule.

**E. Proposal Does Not Consider Reasonable Alternatives**

Like CEQA, the California Administrative Procedures Act (APA) requires ARB to "describe [in the ISOR] reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives." Gov't Code §11346.2(b)(3)(A)). The California APA defines a regulation as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision [thereof] adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it." *Id.* §11342.600.

ARB's ISOR Section XI describes the alternatives to the regulation that ARB considered and why they were rejected in favor of the proposed regulation. *See* ARB ISOR, at 59. AGC maintains that ARB has failed to consider a variety of less costly and reasonable alternatives to its proposal that would improve air quality in California.

AGC requests that ARB consider the following alternatives to its proposal—

- **Deferred Implementation:** ARB should consider relying on vehicle turnover and incentive programs to achieve emission reductions until (1) the technology is available to satisfy the demand for cleaner-burning engines that will ensue, and (2) ARB creates a better inventory of the "categories, numbers, and relative contribution of present or anticipated sources of the substance, including mobile… sources," as the Tanner Act requires. Health & Safety Code §39665(b)(3). The proposal before the Board is not

[2] Pending litigation seeks to equate the preemption that EPA applies to construction and farm equipment under 175 horsepower with the preemption that EPA applies to the other vehicles listed in CAA §209(e)(1) (namely, locomotives). *Am. Road & Transp. Builders Ass'n v. EPA*, No. 06-1112 (D.C. Cir.); 72 Fed. Reg. 28,098, 28,209-10 (2007). If that litigation succeeds, ARB's regulation of equipment over 175 horsepower would create environmentally counterproductive incentives for industry to use smaller, preempted equipment to accomplish tasks that industry could achieve more efficiently with larger equipment.

feasible from an economic or technical perspective and, if implemented, it would also cut off access to critical funding for retrofitting older equipment under the Carl Moyer Program. The California legislature has recently committed $140 million a year, for the next five years, to continue the Carl Moyer Program. In that same timeframe, cleaner burning Tier 4 engines – which will be the only engines that meet both NOx and PM requirements under CARB's proposed rules – will be entering the marketplace. In addition, ARB needs additional time to determine whether diesel PM has a carcinogenic threshold. Other aspects of California law – such as CEQA – will continue to protect the environment and public during construction projects.

- **Carl Moyer-Style Retrofit System:** ARB should work with industry, the construction-funding agencies, and the Legislature to explore the availability of using incentive programs to reduce emissions from construction projects and to accelerate the turnover of construction fleets.

- **Project-Specific and Pilot Mitigation Projects:** ARB should consider working with industry, California air districts, and the funding agencies to develop models for using retrofits, new equipment, and site-specific mitigation techniques to reduce the impact of construction projects. *See, e.g.*, 13 Cal. Code Regs. §2610 (pilot program in South Coast air basin).

- **Single-Pollutant Rules:** ARB should consider proposing and supporting single-pollutant alternatives because the legal and policy arguments for the two rules do not overlap completely. For example, if a court or EPA decided that the Clean Air Act preempts ARB's PM requirement, it would not be clear whether the NOx-only component could survive when severed from the PM component. If ARB considers the two halves of its rule as stand-alone rules, that may would provide useful data on the relative merits of each portion of the rule.

- **Geographic Limitations:** ARB should consider a proposal that would have limited geographic applicability to areas like the South Coast (Los Angeles) basin and San Joaquin Valley with especially intractable air-quality problems.

- **Limit Rule to Public Fleets:** Insofar as ARB's cost-effectiveness justification for this rule applied only to public fleets, ARB should consider limiting the rule's applicability to public fleets. By limiting the rule to public fleets, this alternative would follow past precedents for public fleets' serving as incubators for new technologies and would address industry's concern that retrofit-package and new-vehicle manufacturers cannot meet demand if ARB's proposal applies to both public and private fleets.

## F. Proposal Does Not Consider Small Business Impacts

Under the California APA, to enact a "regulation," ARB must consider any adverse effects on small businesses that would have to comply with the proposed regulation. Gov't Code §11346.2(b)(3)(B). Specifically, the ISOR document must "describe reasonable alternatives to the regulation that would lessen any adverse impact on small business and the reasons for rejecting those alternatives.[3] *Id.* ARB's rulemaking documents note that the regulation has the least stringent provisions for the smallest fleets owned by small businesses or municipalities. While this may be the case, ARB's proposal would still put a significant percentage of California's contractors out of business.

The typical construction firm is very small. Based on 2005 U.S. Census Bureau data, the construction industry includes more than 831,000 businesses employing 6.8 million workers, plus more than 2.0 million firms (mainly sole proprietorships) without employees. Data from the same year show that 91 percent of the businesses nationwide had fewer than 20 employees.[4] California-specific data show that there were 70,333 construction establishments in the state in 2003, of which 61,839 (88%) had fewer than 20 employees. Based on AGC's experience working with its members on diesel retrofit issues, it has learned that small businesses tend to own older equipment due to a slower turnover rate in their equipment fleets.

ARB's own research has found that the greatest economic impact will be on the oldest, most expensive and longest-lived vehicles. The ISOR document analyses an earth-moving fleet with all Tier 0 vehicles. "For this fleet, staff estimated that the annual cost of the regulation would significantly exceed the company's annual profits. To remain viable, such a heavily impacted fleet would need to pass on most, if not all, of the costs of the regulation to its customers. Staff's analysis showed that the regulation would require an increase in revenues for this fleet of about 2.4 percent to bring the impact of the regulation to less than 10 percent ROE." *See* ISOR, at 44 (emphasis added).

Construction is a low-margin industry. Internal Revenue Service data for 2003 (the latest IRS data available) show that corporations in construction averaged 2.8 percent in net earnings (before income tax.). After labor, materials, insurance, fuel and overhead, a very small portion of the $60 billion spent on construction every year in California is available for fleet upgrades.

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[3] The APA defines a "small business" in the construction field as an independently owned and operated firm not dominant in its field of operation, with no more than $9.5 million in gross receipts for general construction and no more than $5.0 million for special trade construction. Gov't Code §11342.610(a), (c).

[4] Source: U.S. Small Business Administration, Office of Advocacy at http://www.sba.gov/advo/research/data.html.

ARB's own research, as explained above, illustrates that a company with old equipment would need to double its profits to say in business.

Contrary to ARB's assumptions, contractors will not be able to pass-through compliance costs. Construction is a highly competitive business. Most construction contracts are awarded on a "low-bid" basis. A job can be lost over a $1000 difference in bids. Contractors often bid jobs at or below cost in order to keep their employees working and recover basic operating costs. Any contractor who has spent substantial dollars to purchase new equipment will be at a distinct disadvantage in the bidding process. If it tried to recover those costs, its bids would be higher than those of his competitors.

To meet ARB's proposal, businesses might need to downsize, laying off construction workers and reducing the capacity to build projects.[5] In all likelihood, many contractors would be forced to retire equipment before the end of its useful life. If a contractor could not pay the annual replacement of 8 percent of its fleet and retrofit of 20 percent of the fleet – as required under the proposal – it would need to reduce the size of its fleet simply to achieve compliance. Most small, medium and other thinly capitalized contractors would have to shrink their equipment fleets and staffing in order to comply.

ARB has also neglected its proposal's negative impact on a company's financial strength, and in turn, its bonding capacity, and ability to bid for new work. Most construction companies have few capital assets, other than the equipment they own. ARB's rulemaking documents fail to account for the fact that contractors recover the cost of equipment investments over time. It is spread out over a variety of contracts. Purchases or upgrades of existing equipment are made with this in mind. To impose a huge retrofit, repower or replacement cost all at once would cause significant financial problems for contractors, particularly small businesses. For many construction companies, the proposal would wipe out their balance sheet overnight. These companies would no longer be able to borrow money because contractors rely on the value of their current equipment to finance their purchase of new equipment.

AGC urges ARB to work with the California construction industry to tailor the cutoffs for small and medium fleets to minimize the rule's economic burden on the industry as a whole. ARB already has a history of including small-refiner provisions in its fuels regulations. *See, e.g.,* 13 Cal. Code Regs. §§2250(c), 2262.

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[5] In California, seasonally adjusted nonfarm employment in March 2007 totaled 15.2 million, of which 946,000 (6%) worked for construction companies. Nationally, construction accounts for about 5.6% of nonfarm employment.

### G. Proposal Does Not Account for Cumulative Impacts

A control measure's economic feasibility, and its impact on small-businesses, both depend on the ability of the regulated industry to bear the burden of compliance. An industry's ability to bear that burden depends, in turn, on the cumulative impact of all economic and regulatory burdens on the industry. Indeed, under all of the factors discussed above, except cost effectiveness, ARB must consider not merely the immediate impact of ARB's proposed rule on the construction industry but also the cumulative burdens of other requirements that the industry must meet. *See* 14 Cal. Code Regs. §15064(h)(1) ("incremental effects of an individual project [can be] significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects"). Accordingly, ARB must consider the costs of compliance with other ARB rules for other equipment (*e.g.*, portable equipment, onroad equipment) in the same timeframe. AGC's expects its final comments to demonstrate that the combined costs of all rules render the incremental costs of this rule even more difficult to bear.

## III. ARB'S RULE DOES NOT MEET CRITERIA FOR WAIVER OF PREEMPTION

Before ARB can enforce an off-road engine emission standard, it must seek a waiver of federal preemption from the EPA and meet certain standards and obligations set forth in §209(b) and §209(e)(2)(A) of the federal Clean Air Act. Even if ARB's standard met all of the state-law requirements discussed in the prior section, ARB would not meet the criteria for a waiver of federal preemption.

### A. Criteria for a Waiver

If EPA affirmatively found that one or more of three criteria applied, ARB would not be entitled to a waiver of preemption for its in-use off-road proposal:

1. California was arbitrary and capricious in determining that its standards were, in the aggregate, at least as protective of public health as the federal standards;

2. California did not need the standards "to meet compelling and extraordinary conditions;"

3. California's standards and the accompanying enforcement procedures are inconsistent with CAA §202(a).

42 U.S.C. §7543(b)(2). In §209(e)(2)(A), the 1990 amendments to the CAA replicate these three motor-vehicle criteria for off-road vehicles, except that the third criterion requires consistency with "this section" instead of specifying either §202(a) (for motor-vehicle standards) or §213(a) (for off-road vehicle standards). 42 U.S.C. §7543(e)(2)(A)(1)-(3). Here, AGC takes issue with ARB's entitlement to a waiver under the second and third criteria.

Under the second criterion, California must need its in-use off-road standards to address compelling and extraordinary conditions. 42 U.S.C. §§7543(b)(1)(B), (e)(2)(A)(ii). As a matter of federal law, California does not need a retrofit rule to further California's unsupported views under the Tanner Act. Specifically, ARB has failed to determine, based on an assessment of risk, whether any level of emission reduction is adequate or necessary to prevent an endangerment of public health and to identify whether a threshold value for diesel PM exists. Health & Safety Code §§39666(b), §39667.

Instead, ARB's record suggests mixed data on whether diesel PM has a carcinogenic threshold:

> Based upon on information available, the report could not identify a threshold below which no significant adverse health effects are anticipated. It has been suggested that information based on the rat data suggested the presence of a threshold. However, the same data suggests that the rat data may not be relevant to humans.

Air Resources Board & Office of Environmental Health Hazard Assessment, "Proposed Identification of Diesel Exhaust as a Toxic Air Contaminant," at ES-27 (Scientific Review Panel Apr. 22, 1998) (emphasis added). Even assuming that this uncertainty provides an adequate basis for ARB to proceed as a matter of state law, it cannot establish that ARB needs the proposed standards as a matter of federal law. Before ARB seeks a waiver of preemption based on Tanner Act criteria, ARB should answer the question whether the rat data are relevant to humans. If those data are relevant, ARB should set a threshold value for diesel PM. If this data is not relevant to humans, ARB or California should commission the appropriate studies with species that would be relevant to humans.

Under the third criterion, ARB's standards and the accompanying enforcement procedures must be consistent with "this section." 42 U.S.C. §7543(e)(2)(A)(3). EPA's 1994 off-road rulemaking interpreted consistency with "this section" to mean consistency with §209(b), which in turn means consistency with §202(a) and its leadtime requirements. 59 Fed. Reg. 36,969, 36,982-83 (July 20, 1994) ("California's standards are not consistent with section 202(a) if there is inadequate lead time to permit the development of technology necessary to meet those requirements"). ARB's proposal is inconsistent with §202(a) in two respects.

First, CAA §202(a)(2) requires that standards "take effect after such period as [EPA] finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period" (emphasis added). Although EPA's past waiver proceedings involved cost to the manufacturer, the standards at issue were manufacturer-based standards. Here, by contrast, the standards are for end-users because ARB's proposed off-road standards apply to private fleet owners and operators. As a result, in this unprecedented waiver proceeding, EPA will need to consider the technology and cost of compliance from the perspective of the private end-user's regulated fleets.

Second, §202(a)(1) expressly requires that "standards shall be applicable to such vehicles and engines for their useful life (as determined under [§202(d)])," and §202(d) expressly incorporations §207. In *Am. Motors Corp. v. Blum,* 603 F.2d 978, 981 (D.C. Cir. 1979), the D.C. Circuit reversed EPA's waiver of federal preemption for an ARB standard that deprived small manufacturers of additional lead-time that §202(b) required federal standards to provide. In essence, ARB and EPA reasoned that §209 required consistency with the leadtime requirements in §202(a), not those in §202(b). The court rejected that limited view because it found §202(b)'s "congressional mandate… to assimilate or incorporate" its requirements into §202(a). *Id.* Under *Blum,* California standards must meet CAA's useful-life criteria to qualify for consistency with §202(a).

In addition to considering express preemption, the D.C. Circuit also will need to consider whether the Clean Air Act impliedly preempts ARB's standard. In *Motor & Equipment Mfrs. Ass'n, Inc. v. EPA,* 627 F.2d 1095, 1108 n.20 (D.C. Cir. 1979), the D.C. Circuit held that the elements of CAA's federal motor-vehicle regime that fall outside §209's express preemption could not qualify for implied or conflict preemption. In reaching that conclusion, the court relied on the general presumption against preemption and CAA's specifically including both an express-preemption clause (§209) and a general savings clause (§116). *Id.* Recent Supreme Court decisions have, however, rejected that rationale for excluding conflict preemption. *See Geier v. American Honda Motor Co.,* 529 U.S. 861, 873 (2000) (neither savings clause nor express preemption provision bars working of "conflict preemption"); *Buckman Co. v. Plaintiffs' Legal Comm.,* 531 U.S. 341, 352 (2001) (same); *U.S. v. Locke,* 529 U.S. 89, 107-08 (2000) (presumption against preemption applies only if "the field which Congress is said to have pre-empted has been traditionally occupied by the States" and not if there is a history of significant federal presence); *Buckman,* 531 U.S. at 347 (same).

## B. Potential Limitations on California Waivers

ARB should consider limiting or qualifying the waiver of preemption that it seeks along several parameters:

- **Diesel PM as a Toxic Air Contaminant:** As indicated in Section III.A, *supra,* ARB's Tanner Act analysis does not meet §209's compelling-and-extraordinary conditions test for diesel PM as a toxic air contaminant.

- **Vehicles and Engines under 175 Horsepower:** Under CAA §209(e)(1), ARB is completely preempted from setting standards or other requirements for new construction equipment under 175 horsepower because that category of construction equipment is entitled to the same preemption as locomotives under the identical provisions of §209(e)(1). *See* note 2, *supra.*

- **Geographic Limitations:** Although it has not yet adopted a geographically restricted vehicular standard, ARB considered adopting the South Coast Air Quality Management District ("SCAQMD") fleet rules as SCAQMD-specific ARB standards in the aftermath of SCAQMD's loss in the Supreme Court over whether CAA §209 preempts consumer-based standards. *Engine Mfrs. Ass'n v. SCAQMD*, 541 U.S. 246, 252-55 (2004). An ARB standard with appropriate geographic limitations would prevent spreading the rule's economic dislocation to other parts of the California that do not need the rules to address truly compelling and extraordinary conditions.

## CONCLUSION

For all the foregoing reasons, ARB should direct its staff to work with industry and other state and local agencies to develop a rule that will provide emission reductions without increasing emissions from other sectors and without reducing the capacity of California's construction industry to provide the infrastructure that California needs.

Respectfully submitted,
*On behalf of—*
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