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April 16, 2014

VIA ELECTRONIC SUBMISSION AND UNITED STATES MAIL

Mary D. Nichols
Chair, California Air Resources Board
Post Office Box 2815
Sacramento, California 95812-2815

Re: John R. Lawson Rock & Oil, Inc. Comments to Proposed Truck and Bus Regulation Amendments

Dear Chairwoman Nichols:

This letter is submitted on behalf of John R. Lawson Rock & Oil, Inc. ("Lawson"), which is represented by this firm. The purpose of this letter is to comment on the amendments the California Air Resources Board ("ARB") has proposed to the On-Road Heavy Duty Diesel Vehicles (In-Use) Regulation, more commonly known as the Truck and Bus Regulation (the "Regulation").

Lawson operates a large fleet of vehicles subject to the Regulation, and has invested millions of dollars proactively complying with the current rules in order to be compliant in advance of stated deadlines. Like many fleet and individual owner operators, Lawson cares about the environment and supports measures to improve air quality in California, and has invested a large amount of private capital in pursuit of that goal. Having made that investment, Lawson has grave concerns regarding ARB's recent moves to roll back its environmental protections.

As you know, ARB is required to comply with the California Environmental Quality Act ("CEQA") through its certified regulatory program. (See Pub. Resources Code § 21080.5; Cal. Code Regs. tit. 14 ["Guidelines"], §§ 15250-15253.) Our review of the March 5,

2014, Initial Statement of Reasons ("ISOR") staff report prepared with regard to the proposed amendments to the Regulation indicates that ARB's intended course of action will result in numerous violations of CEQA, as detailed herein.

In addition, giving a "free pass" to those who have been unwilling to make the necessary investments in our state's environment, as has been mandated by ARB, is patently unfair to those who have risked their businesses by exhausting significant resources to comply. ARB's retraction of the Regulation places those who comply with its directives at a significant competitive disadvantage. As a result, Lawson, along with many other compliant operators, will suffer significant damages by ARB's contemplated amendments.

COMMENTS

Comment #1: Failure to Inform Regarding Greenhouse Gas Emissions

The ISOR concludes that the proposed amendments will result in no significant impact to the environment, and therefore does not include any discussion of environmental alternatives or mitigation measures with regard to the amendments.

A staff report finding that a project would not have any significant effects on the environment is the regulatory equivalent of a negative declaration under CEQA. "[A] document used as a substitute negative declaration must include a 'statement that the agency's review of the project showed that the project would not have any significant or potentially significant effects on the environment and therefore no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. **This statement shall be supported by a checklist or other documentation to show the possible effects that the agency examined in reaching this conclusion**.'" (*City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1422 [emphasis added] [quoting Guidelines 15252(a)]; see also *California Sportfishing Protection Alliance v. State Water Resources Control Bd.* (2008) 160 Cal.App.4th 1625, 1643-1644 [same].)

Moreover, "[a] 'certified program's statement of no significant impact must be supported by documentation *showing* the potential environmental impacts that the agency examined in reaching its conclusions,' and '[t]his documentation would be similar to an initial study.'" (*City of Arcadia, supra*, 135 Cal.App.4th at 1424 fn. 11 [italics in original] [quoting 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2005) § 21.11, pp. 1088-1089].)

"A key purpose of an initial study is to provide support for the lead agency's decision to adopt a negative declaration. The initial study can document the factual basis for the agency's finding in a negative declaration that the project will have no significant environmental impact." (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2013) § 6.6, p. 311 [citing Guidelines § 15063(c)(5); *Citizens Ass'n for Sensible Dev. v. County of Inyo* (1985) 172 Cal.App.3d 151, 171].)

> An initial study is required to contain in brief form, *inter alia*:
>
> > An identification of environmental effects by use of a checklist, matrix, or other method, provided that entries on a checklist or other form are briefly explained to indicate that there is some evidence to support the entries. The brief explanation may be either through a narrative or a reference to another information source such as an attached map, photographs, or an earlier EIR or negative declaration. A reference to another document should include, where appropriate, a citation to the page or pages where the information is found.

(Guidelines § 15063(d)(3).)

"Failure to comply with [CEQA's] information disclosure requirements constitutes a prejudicial abuse of discretion when the omission of relevant information has precluded informed decision making and informed public participation, regardless of whether a different outcome would have resulted if the public agency had complied with the disclosure requirements. [Citations.]" (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.)

While the ISOR discusses the increased particulate matter ("PM") and nitrogen oxides ("NOx") that will result from the proposed amendment, it treats many other potential impacts, including greenhouse gas emissions, in a summary manner. The ISOR states:

> The proposed amendments do not cause any changes to the existing truck and bus infrastructure in California or new development, modification to buildings, or new land use designations and do not involve any activity that would involve or affect aesthetics, agricultural resources, biological resources, cultural resources, geology and soils, greenhouse gas emissions, hazards and hazardous materials, hydrology and water quality, land use and planning, mineral resources, noise, population and housing, public services, recreation, transportation and traffic, or utility service systems. Because the amendments do not result in any action that could affect these resources, staff concludes the proposal would not result in any adverse impacts.

(ISOR at 42.)

An initial study requires "[a]n identification of environmental effects by use of a checklist, matrix, or other method, **provided that entries on a checklist or other form are briefly explained to indicate that there is some evidence to support the entries**. The brief explanation may be either through a narrative or a reference to another information source such as an attached map, photographs, or an earlier EIR or negative declaration. A reference to

another document should include, where appropriate, a citation to the page or pages where the information is found." (Guidelines § 15063(d)(3) [emphasis added].)

The laundry list of disregarded potential impacts is at ISOR page 42 is enumerated without any attempt at the "brief explanation" required by Guidelines Section 15063(d)(3). A barebones checklist, without any evidence or data relied on to support the study's environmental findings, is insufficient. (Guidelines § 15063(d)(3); *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.) "CEQA places the burden of environmental investigation on government rather than the public. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311; see also *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1597 [same].)

Admittedly, "[w]hen the absence of particular impacts is evident from the project description and technical information is not needed to support the checklist's findings, a further explanation is not required." (1 Kostka & Zischke, supra, § 6.18, p. 320.1 [citing *Silveira v. Las Gallinas Valley Sanitary Dist.* (1997) 54 Cal.App.4th 980, 989].) This exception may apply to some of the items summarily disregarded in the ISOR. For example, it is facially unlikely that the amendments would have an adverse impact on items such as cultural resources, or aesthetics.

The lack of impact as to other summarily disregarded items is far from clear, and ARB does not provide the "brief explanation" necessary for the public to determine if there is, as ARB states, no impact in those areas. Most significant is ARB's summary dismissal of any potential greenhouse gas impacts.

Many of the proposed amendments, including the expansion of NOx exempt areas, expansion of the low-use vehicle exemption, and exemption of certain classes of trucks will result in many older trucks remaining in service that would have been replaced with newer models under the current Regulation. Just as one example, a pre-1994 truck in a newly-proposed NOx exempt area would have been subject to replacement with a 2010 equivalent engine by January 1, 2015. In order to meet that requirement, owners of such trucks would have had to replace those vehicles this year. Pre-1994 engines produce significantly greater greenhouse gases, and have higher fuel consumption than modern 2010 or newer engines. The additional time and expansions provided for small fleets, those unable to obtain financing, work trucks, low-mileage agricultural vehicles, NOx exempt areas, the twenty-five percent cap on fleet upgrades, and extending use of early adoption credits will all similarly result in delayed upgrading to newer engines with less greenhouse gas emissions.

These effects are not only occurring in the future. Expensive fleet upgrades are commonly phased-in in advance of regulatory deadlines. Moreover, ARB has taken the unusual step of permitting these exemptions to exist in the marketplace prior to any environmental review on the effects thereof.

From the summary dismissal of greenhouse gas impacts in the ISOR, it is unclear whether ARB gave *any* consideration to these issues. Similarly, ARB gave no consideration to agricultural resources, biological resources, geology and soils, hazards and hazardous materials, hydrology and water quality, or transportation and traffic. Without the "brief explanation" required by Guidelines Section 15063(d)(3), it is impossible for the public to have any understanding as to how or why ARB determined that these issues will not be impacted by the proposed amendments.

Comment #2: Failure to Use Present-Conditions Baseline

The ISOR expressly treats the pre-Regulation environment as the baseline for its analysis. Section IV, page 28 states, "[t]he proposed amendments continue to reduce the PM emissions from trucks and buses by the maximum feasible amount, and would achieve significantly lower diesel PM emissions that **baseline conditions without the regulation**. (ISOR at 28 [emphasis added].) Section IV, page 33 states, "[s]taff anticipates the proposed amendments to the regulation will reduce diesel PM emissions by 39 percent from **baseline (without the regulation)** levels . . . . The revised **baseline emissions (without the regulation)** . . . ." (ISOR at 33 [emphasis added].) Finally, the Section IV, page 34, describes two tables on page 35 as "compare[ing] the statewide NOx and PM2.5 emissions trends **without the regulation (baseline)**, with the current regulation, and with the proposed amendments. (ISOR at 34 [emphasis added].)

Use of the pre-Regulation environment to be used as the baseline for environmental analysis is prohibited by CEQA, and directly at odds with the holding in *Citizens for East Shore Parks v. California State Lands Com.* (2011) 202 Cal.App.4th 549 ("*Citizens*"). In *Citizens*, a CEQA challenge was brought against the State Lands Commission's approval of a lease to allow Chevron to continue operation of a marine terminal. Petitioners sought to establish a baseline that excluded the fact that the marine terminal was presently in operation. (*Id.* at 560-561.) The court held such a baseline impermissible, as the continued operation of the marine terminal reflected the conditions as they existed at the time, and therefore was the appropriate baseline. (*Ibid.*)

Similarly, ARB seeks to use as a baseline the environment as it existed before the Regulation was initially adopted. This cannot be, as the Regulation is in fact in operation, causing fleets throughout California to install PM filters and replace trucks in advance of the Regulation's deadlines. In order to use a present-day baseline, ARB must include in its analysis the effect that the Regulation has had on emissions to date. *Citizens* plainly held that the baseline must reflect "what [is] actually happening" at the time of the ISOR's preparation with regard to the current regulatory and compliance posture. (*Citizens, supra*, 202 Cal.App.4th at 560-561.)

Comment #3: ARB's Future Baseline Analysis Shows Clear Adverse Impact

In addition to its express use of the pre-Regulation environment as its "baseline," the ISOR also analyzes the proposed amendments in comparison to how the present Regulation would reduce emissions. This effectively establishes a "future" baseline ARB is using to prepare its environmental document.

The California Supreme Court has expressly permitted the use of future environmental conditions as a baseline. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 453-454.) The Court noted that use of a future baseline is particularly appropriate where it "promotes public participation and more informed decisionmaking by providing a more accurate picture of a proposed project's likely impacts." (*Id.* at 453.)

ARB's proposed amendments to the ISOR fall squarely into the circumstances where the Supreme Court approved usage of a future baseline. Without informing the public of the expected environmental benefits of the current Regulation, any environmental analysis of the impacts caused by rolling back the Regulation would be grossly misleading. As such, the ISOR's comparison of the expected environmental benefits of the Regulation as adopted, against the reduced benefits of the proposed amended Regulation, is particularly meaningful.

Paradoxical to ARB's stated finding of no adverse impact, its comparison of the future effects of the adopted Regulation against the proposed amendments demonstrates that the proposed amendments will result in serious adverse environmental impacts.

Section IV of the ISOR, specifically at pages 33-34, provides tables showing the estimated NOx and PM emissions without the regulation, with the current regulation, and with the proposed amendments. As can be seen in the following table, the proposed amendments significantly lower the emissions reductions resulting from the Regulation as presently adopted, particularly in the near term:

NOx Emissions (tons per day)

Year	Total Emissions Without Regulation	Reductions Without Proposed Amendment	Reductions With Proposed Amendments	Percent Change in Emissions Reductions
2014	403	57	52	-8.8%
2017	330	83	62	-13.3%
2020	281	63	70	+11.1%
2023	250	95	94	-1.1%

PM Emissions (tons per day)

Year	Total Emissions Without Regulation	Reductions Without Proposed Amendment	Reductions With Proposed Amendments	Percent Change in Emissions Reductions
2014	14.3	6.0	5.6	-6.7%
2017	10.9	6.1	5.0	-18.0%
2020	8.8	4.2	4.2	0%
2023	7.4	2.9	2.9	0%

Tons Per Year Increase

Using ARB's numbers, which are stated in daily as opposed to annual numbers, the proposed amendment will equate to an increase, in tons per year terms, of the following annual amounts:

Year	NOx Increase	PM Increase
2014	1825	146
2017	4015	401.5
2020	-2555	0
2023	365	0

These are undeniably significant adverse increases in pollutants. The ISOR sidesteps this glaring adverse impact by concluding that if an air basin attains state and federal clean air standards, then additional emissions in those areas are de facto insignificant. In doing so, the ISOR ignores the thresholds of significance that have been set for the various regions that are now proposed to be newly designated as NOx Exempt. The fact that a particular basin attains state and federal air standards does not obviate the existence of the established thresholds of significance. Those thresholds are:[1]

[1] This table, by way of example, analyzes NOx thresholds of significance. The result is similar when considering PM thresholds of significance.

County	NOx Tons per Year
Amador	100
Butte	25
Calaveras	100
Eastern Kern	25
Inyo (Great Basin) (Mojave)	25
Mariposa	100
Mono (Great Basin) (Mojave)	25
Nevada	25
Tuolumne	100
TOTAL	**525**

The projected increases in NOx emissions due to the proposed amendments (1825 tpy in 2014; 4015 tpy in 2017) are significantly greater than the 525 tpy total significance threshold of all affected counties. Any public agency subject to CEQA approving a project exceeding these thresholds is required to conduct a full environmental review. ARB should not, and indeed is not, treated any differently.

ARB cannot analyze a future baseline – which is entirely appropriate in this case as the absence thereof would be misleading – and simply ignore the clearly significant adverse environmental impacts it finds.

Comment #4: ARB Assumes, Without Any Analysis, That Fleet Upgrades Will Not Be Rolled Back as a Result of the Amendment

Even if ARB had considered the presently existing environmental conditions resulting from the Regulation as adopted (rather than using pre-adoption as a "current" baseline), and assuming, *arguendo*, that the future baseline ARB analyzed is of no consequence, there remains a defective assumption on the part of ARB that all PM filtration upgrades and 2010 equivalent replacements are permanent, and would not be rolled back by amending the regulation.

ARB fails to consider whether those who have installed PM filters, and would not become exempted by the proposed amendment, would opt to remove or disable those systems. Given the substantial record of complaints regarding PM filter systems, including high maintenance costs, resulting vehicle breakdowns, and reduced performance, ARB should consider whether the proposed amendments would induce those who have already installed PM filtration systems to roll back those upgrades. If that does occur, this will result in a further adverse effect to the environment, reversing gains the Regulation has accomplished to date.

Comment #5: ARB Does Not Address the Effect the Proposed Amendments Will Have the Resale Market for Used Trucks

Similarly, ARB does not address the effects of market forces resulting from the Regulation and the proposed amendments with regard to 2010 and newer engines. For example, the Regulation has reduced the resale value of pre-2010 trucks in California, given their expected forced regulatory obsolescence. This has the effect of those trucks being sold out of state, and not for use in California. In NOx exempt areas, which do not face the ultimate obsolescence of pre-2010 trucks, the dynamic is considerably different, as a 2009 model, for example, will be available at reduced prices in comparison to the less polluting 2010 and newer models. This effectively induces the use of pre-2010 trucks in NOx exempt areas. The proposed amendments greatly increase the number of NOx exempt areas, and in turn will result in more pre-2010 trucks in service in California – trucks which otherwise may likely have been sold out of state.

Comment #6: That the Proposed Amendments Will Eventually Result in the Same Reductions as the Current Regulation Does Not Obviate Environmental Review

The ISOR, at page 41, supports its finding of no adverse impact with the proposition that any increases in pollution caused by the proposed amendments will be temporary in nature, and that as of 2020 the same levels of reductions will be achieved.

Such an argument does not obviate the need for environmental review. It is well-settled that significant temporary adverse impacts cannot be the subject of a negative declaration, and require a complete environmental review to be conducted. (See, e.g., *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1450-1451.)

Comment #7: ARB Violated CEQA By Its Implementation of the Amended Regulations Prior to Environmental Review

In November 2013, ARB issued Regulatory Advisory MSC 13-28, which provided, *inter alia*, that any person who would benefit from the proposed amendments could proceed under certain proposed amended rules, including the increase of the thresholds for the low-use exemption to 5,000 miles and 200 hours, and the expansion of NOx exempt areas. This advance implementation of the proposed amendments, prior to any environmental review, includes a one-year extension of the PM filter requirement for the new NOx exempt areas. This violated CEQA because the exemptions were provided without *any* environmental review whatsoever. In order to take discretionary action rolling back the Regulation in a manner that will cause significant adverse effects to the environment – such as eliminating the need for PM filters in a broad class of vehicles in large portions of the state for one year – ARB is required to comply with CEQA. (See Pub. Resources Code § 21080, *et seq.*; *POET, LLC v. California Air Resources Board* (2013) 218 Cal.App.4th 681, 713-722.)

Comment #8: Failure to Protect Against Fraudulent Loan Denials

The proposed amendments to the Regulation provide a significant extension of time to truck owners who apply for, and are denied financing to replace or retrofit vehicles. The vague nature of this exemption provides no protection against fraud. The only requirement is that the owner make a "good faith effort" to obtain financing. This exemption creates an incentive for truck owners to make loan applications with financing institutions less likely to approve loans, and/or submit applications in a manner that makes approval less likely. Without any definition of "good faith effort," ARB will be unable to enforce the limitations of this exemption.

At a minimum, this exemption should only apply where a truck owner has applied to some minimum number of financial institutions, and should also have credit rating limitations, under which those with good credit scores must provide further assurances of a "good faith effort" to secure financing.

Comment #9: Damages for Regulatory Takings

A particularly egregious result of ARB's proposed amendments is that many truck and fleet owners who have expended significant sums of money to comply with the Regulation in advance of the deadline will be in a position where they could have avoided these costs by waiting until the last minute, and taking advantage of the amendments now proposed. In other words, the money spent complying with the Regulation will have been unnecessary under the proposed changes. ARB concedes in the ISOR that the investments in the trucks that are proposed to be exempted or provided extensions is unnecessary to reach its emissions-reducing goals.

This effectively results in a deprivation of private property, by ARB's regulatory action, in a manner that is arbitrary, capricious, and is of no benefit to the public. Without any public benefit supporting the deprivation, ARB violates well-settled constitutional property rights. (See *Kelo v. City of New London, Conn.* (2005) 545 U.S. 469; see also Cal. Const. art. 1, § 19.)

Lawson will seek to recover the expenses it has incurred as a result of ARB's unjust, arbitrary, and capricious regulatory action.

Comment #10: Violation of Equal Protection and Due Process

The proposed amendments provide significant benefits to small fleet owners and those with poor credit who cannot or will not obtain financing, and/or apply for grants to achieve compliance with the Regulation. ARB has not provided rational justification for providing this significantly deferential treatment to these selective groups. By providing extensions to small fleets and truck owners with poor credit, ARB places compliant fleet and truck owners at a significant competitive disadvantage. The ISOR fails to recognize this result, let alone provide any rational justification for it.

Again, Lawson will pursue all available legal remedies to "even the playing" field in the face of ARB's wholly unjustified selective enforcement of the Regulation.

Comment #11: Interference With Contract

As stated above, selective enforcement and application of the Regulation, particularly through adoption of the proposed amendments, will disrupt the highly competitive environment of the trucking and transportation industry. Those who comply, while providing substantial benefits to the environment and supporting ARB's mission to improve air quality, will be placed at a significant competitive disadvantage in comparison to those who fail to comply, and then take advantage of ARB's eleventh-hour rolling back of the regulation – which, ironically, is being proposed for no other reason because some truck and fleet owners have failed to comply.

This is highly disruptive to the contracts and business relationships established by Lawson and other compliant truck and fleet owners, who are now faced with competition from those who have significantly reduced their overhead costs by failing to comply with the Regulation of which they have had lengthy notice.

Again, Lawson will pursue all available legal remedies to recover the losses incurred by ARB artificially, arbitrarily, and capriciously disrupting Lawson's contracts and business relationships by disrupting the competitive market environment.

CONCLUSION

Based on the foregoing, ARB is required to apply legally cognizable baselines in preparing its ISOR. Further, the adverse environmental impacts plainly recognized by ARB's own data in the ISOR require full environmental review, equivalent to preparation of an environmental impact report (EIR), in compliance with CEQA. Further, Lawson will pursue all available legal remedies to recover the damages it has directly suffered as a result of the proposed amendments and ARB's failure to enforce its well-established Regulation.

Respectfully submitted,

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TJ/das