STATE OF CALIFORNIA
AIR RESOURCES BOARD

Proposed Revisions to On-Board Diagnostic System Requirements For Heavy-Duty Engines, Passenger Cars, Light-Duty Trucks, Medium-Duty Vehicles and Engines; Supplemental 15-Day Notice	**)**	**Hearing Date: August 23, 2012 Agenda Item: 12-5-2**

COMMENTS OF THE TRUCK AND ENGINE MANUFACTURERS ASSOCIATION

January 25, 2013

Lisa A. Stegink
Timothy A. French
Truck and Engine Manufacturers Association
333 W. Wacker Dr., Suite 810
Chicago, Illinois 60606
(312) 929-1970

STATE OF CALIFORNIA
AIR RESOURCES BOARD

Proposed Revisions to On-Board Diagnostic System Requirements For Heavy-Duty Engines, Passenger Cars, Light-Duty Trucks, Medium-Duty Vehicles and Engines; Supplemental 15-Day Notice	**)**	**Hearing Date: August 23, 2012 Agenda Item: 12-5-2**

COMMENTS OF THE
TRUCK AND ENGINE MANUFACTURERS ASSOCIATION

Introduction

The Truck and Engine Manufacturers Association ("EMA") has previously submitted extensive written and oral comments regarding the "Proposed Revisions to On-Board Diagnostic System Requirements for Heavy-Duty Engines, Passenger Cars, Light-Duty Trucks, Medium-Duty Vehicles and Engines" (the "Proposed Revisions"), which Proposed Revisions were presented for adoption at the ARB hearing held on August 23, 2012. EMA fully adopts and incorporates by reference herein its previous comments on the Proposed Revisions.

On January 4, 2013, ARB published certain supplemental amendments to the Proposed Revisions. Included among those supplemental amendments are additional proposed changes to the definition of "emission standard" and "Nonconforming OBD System." As detailed below, those proposed definitional changes are violative of California law, are arbitrary and capricious, and otherwise amount to an unlawful attempt to circumvent the California Superior Court's recent ruling in EMA v. CARB, Case No. 34-2010-82774, which held that malfunction criteria

for OBD sensors are not emission standards and cannot serve as a basis for mandatory engine recalls under Health and Safety Code ("HSC") section 43105.

The Proposed Revised Definitions
Are Violative of California Law

ARB claims that it has the authority to revise the statutory definition of "emission standard" (codified at HSC section 39027) pursuant to HSC section 39601(b), which provides that ARB may revise certain definitions of statutory terms "to conform those definitions to federal laws and rules and regulations." However, ARB's proposed redefinition of the term "emission standard" does not conform to any specific federal law or regulation, and so is unlawful.

ARB asserts that its proposal to redefine "emission standards" - - solely "for the purposes of HD OBD compliance" - - is consistent with dicta from a U.S. Supreme Court case, EMA v. SCAQMD, 541 U.S. 246 (2004). But ARB's position reflects a fundamental misunderstanding of the SCAQMD case, which did not alter the definitions of terms found in any federal laws or regulations. In SCAQMD, the Court was interpreting the Clean Air Act's provision broadly preempting states from adopting or enforcing "any standard relating to the control of new motor vehicles or new motor vehicle engines…" CAA § 209, 42 U.S.C. § 7543. The issue before the SCAQMD court was whether or not state restrictions on the *purchase* of certain vehicles by fleet owners constituted "standards related to the control of emissions." The respondent in the case, South Coast Air Quality Management District, took the position that the phrase "standards related to the control of emissions" referred only to emission-related *sales* restrictions imposed directly on vehicle/engine manufacturers. The SCAQMD Court ultimately held that the phrase "standards related to the control of emissions" does apply to state purchase restrictions, and therefore such restrictions are subject to the preemptive effect of CAA § 209.

ARB's attempt to use the SCAQMD case as support for its proposed change to California's definition of "emission standards" is faulty in at least two ways. First, the CAA § 209 phrase "standards related to the control of emissions," on its face, has a different and broader meaning than the term "emission standards" in the California Health and Safety Code. Congress sought to preempt states from adopting or enforcing any sort of measure with any connection to motor vehicle emissions, and therefore inserted an expansive phrase into CAA § 209 to suit that specific purpose. The fact that the Court gave this broadly-worded phrase an appropriately broad meaning, in the context of an express preemption provision, does not mean that the Court imparted a new definition to the meaning of "standard" everywhere that it appears in the Clean Air Act.

Second, ARB's position here relies on the Court's in-passing statements to the effect that CAA "standards" encompass "some other design feature related to the control of emissions" in addition to numerical limits on the emissions of pollutants. While such statements make sense in the context of the Court's review of the broadly-worded phrase in CAA § 209, they are nothing more than dicta outside of that context. The SCAQMD Court was not asked to determine the technological scope of the term "emission standards" or any comparable term in federal laws or regulations, nor was it asked to decide whether OBD requirements are "emission standards" for all purposes under federal laws and regulations. Such questions were simply not before the Court, and not briefed by the parties in SCAQMD; yet ARB seeks to seize on this dicta and use it as the basis for changing its regulations. Supreme Court dicta is not the equivalent of a federal statute or regulation, and so is not a proper basis for redefining terms under the California Health and Safety Code in any event. Thus, ARB's effort to redefine terms to meet its own agenda -- an

agenda to grant to itself expanded recall authority beyond that intended by the California legislature -- is inconsistent with HSC section 39601(b) and, as a result, invalid.

In reality, ARB's pending proposal to redefine statutory terms is nothing more than an exercise in bootstrapping. ARB wants the authority to order mandatory engine recalls if OBD sensors do not trigger malfunction indicator lights (MILs) when various OBD sensor malfunction criteria are exceeded. But ARB faces a fundamental problem in that regard due to the fact that mandatory engine recalls are only available under HSC section 43105 when there has been a violation of emission standards, and OBD sensor malfunction criteria are not "emission standards," as defined under California law. To "fix" that, ARB seeks to invent for itself a new and expanded definition of "emission standard," which ARB hopes will be broad enough to encompass OBD sensor malfunction criteria. In that way, ARB can attempt to bootstrap itself into a position of unilaterally-expanded authority to compel mandatory engine recalls.

While ARB's attempted power grab is certainly bold and transparent, it is nonetheless invalid. A basic requirement to any attempt by ARB to redefine terms is that ARB "conform those definitions to federal laws and rules and regulations." (HSC §39601(b).) In its eagerness to expand its recall authority unilaterally, ARB failed to adhere to that basic requirement. As a result, the proposed amended definitions are invalid and should not be approved.

ARB's Proposal to Redefine Terms
Is Arbitrary And Capricious

ARB claims that it is redefining the term "emission standard" solely "for the purposes of HD OBD compliance" (solely "as it applies to OBD compliance and the remedies provided for in the Health and Safety Code for noncompliance"), which presumably means that the existing definition of "emission standard" as codified at HSC section 39027 will apply for all other purposes. ARB's provisional authority under HSC section 39601(b) to redefine terms does not

include the authority to give a different meaning to the same statutory term solely to suit ARB's fluctuating purposes. To the contrary, ARB's effort to ascribe a different meaning to the same statutory term solely for the purpose of manufacturing expanded recall authority for itself is nothing short of arbitrary and capricious, and is far outside the scope of ARB's delegated authority. Consequently, ARB's proposed exercise in semantic gamesmanship is, again, unlawful and invalid.

ARB's Proposal Is An Improper
End-Run Around The California Superior Court

On June 11, 2012, the California Superior Court issued its decision expressly ruling that "a malfunction criterion is not an emission standard." (Slip Op. at 6.) The Superior Court also ruled that ARB does not have the statutory authority to compel mandatory engine recalls on the basis of a failed test of OBD malfunction criteria. (Slip Op. at 7.)

ARB's proposal to redefine the term "emission standard" solely for the purposes of HD OBD compliance and enforcement is a transparent attempt to short-circuit the Superior Court's ruling. It is an attempt that is bound to fail. No amount of definitional gymnastics can contort a malfunction criterion for an OBD sensor into an "emission standard" as properly defined under current California or federal law. Thus, ARB's latest and last-minute revisions to its HD OBD program should be recognized for what they are - - a bald attempt to disregard the directly applicable ruling of the California Superior Court, and an even more transparent grab for expanded recall authority that ARB is not entitled to under the controlling California statutes. ARB should not continue with this misguided course of action, as its only result will be additional legal proceedings

Conclusion

ARB is proposing additional revisions to the terms "emission standard" and "Nonconforming OBD System" that are invalid under California law, arbitrary and capricious, and clearly violative of the directly applicable ruling of the California Superior Court. Accordingly, and also for the reasons stated in EMA's earlier comments, ARB should not adopt the Proposed Revisions at issue.

Respectfully submitted,

TRUCK AND ENGINE MANUFACTURERS ASSOCIATION