GATZKE DILLON & BALLANCE LLP
ATTORNEYS & COUNSELORS AT LAW
EMERALD LAKE CORPORATE CENTRE
1525 FARADAY AVENUE, SUITE 150
CARLSBAD, CALIFORNIA 92008
TELEPHONE 760.431.9501
FACSIMILE 760.431.9512

OF COUNSEL
MICHAEL SCOTT GATZKE
ANTHONY T. DITTY

July 25, 2007

By Facsimile and
U.S. First Class Mail

Air Resources Board
Attention: Clerk of the Board
1001 I Street
Sacramento, California 95814

Re: Comments on Proposed Regulation for In-Use Off-Road Diesel Vehicles

Dear Board:

This letter is submitted on behalf of the County of Orange ("County") in its capacity as the owner and operator of John Wayne Airport, Orange County ("JWA") located in Costa Mesa, California. This letter contains the County's written comments on the proposed regulation for in-use off-road diesel vehicles that is being considered for incorporation into the California Code of Regulations by the Air Resources Board ("ARB") at a public hearing scheduled for July 26, 2007. The County appreciates the opportunity to provide comments on the proposed regulation, which seeks to further increase diesel PM and NOx emissions reductions and is expressly applicable to owners and operators of airport ground support equipment.

To preface, the County strongly supports the ARB's ultimate objectives, namely the reduction of criteria pollutants and the accompanying improvement of air quality. However, the issues associated with the proposed regulation, as it relates to the air transportation industry, are of particular sensitivity and importance to the people of the State of California. The critical importance of this industry to the statewide economy and the current financial state of the airline industry dictate that the issues raised in connection with your consideration of the proposed regulation be approached with special care and caution to ensure that air quality improvement objectives are achieved in a manner which seeks to further enhance this critically important industry.

With this important principle in mind, the County asks the ARB to carefully consider, as identified below, the shortcomings of the proposed regulation and its potential impacts to JWA and other airports and air transportation affiliates.

THE PROPOSED REGULATION FAILS TO ACKNOWLEDGE THAT THE ARB AND THE AIRPORT PROPRIETORS LACK REGULATORY AUTHORITY.

The County continues to recognize and acknowledge that JWA can and should play a role in helping to reduce unnecessary air emissions in the South Coast Air Basin and the State of California. However, it is important for us to emphasize the limited regulatory authority of the ARB and the local public entities which own and operate air carrier airports.

First, we are concerned that the ARB, *via* this proposed regulation, is unlawfully intruding into a federally preempted field of regulation. Arguably, this proposed regulation, if implemented, would significantly impact the maintenance of a reliable ground support equipment fleet, which is crucial to the operation of the National Airspace System. This impact would contravene the Federal Aviation Act and the Airline Deregulation Act.

Second, we have serious concerns regarding our role, as the airport proprietor, with respect to the administration of the ARB's air quality emission strategies. Airports are not in favor of becoming the air quality "enforcers" for all airport users in light of the great administrative burden that would accompany the imposition of such a duty; similarly, our limited resources are not as such to permit the rigorous policing of airport users' compliance with various air quality mandates. Certainly, the airport proprietor should not be required to take any type of enforcement action against any owner or operator of ground support equipment that fails to comply with the proposed regulation, if adopted.

Accordingly, we are concerned as to what, if any, penalties airport proprietors might be subjected to if one of their airport users fails to comply with the turnover and retrofitting requirements set forth in the proposed regulation. While the proposed regulation clearly imposes labeling, reporting, and record keeping requirements on the owners and operators of all qualifying diesel vehicles, it is not clear whether an airport proprietor, such as the County, will be subject to the proposed penalty provision if one of its airport users is noncompliant.[1] The proposed regulation should be revised to expressly provide that airport proprietors will *not* be subject to the penalty provision should an airport user (*i.e.*, an owner or operator of a diesel fleet) fail to comply.

In addition, we have serious doubt, particularly after adoption of the Airport Noise and Capacity Act of 1990 (49 USCA §2151, *et seq.*), as to whether airport proprietors generally have sufficient residual regulatory authority to act effectively as the agencies implementing and enforcing regulations adopted by the ARB.

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[1] The penalty provision is located in subdivision (k) of the proposed regulation and provides:

> Any person who fails to comply with the performance requirements of this regulation, who fails to submit any information, report, or statement required by this regulation, or who knowingly submits any false statement or representation in any application, report, statement, or other document filed, maintained, or used for the purposes of compliance with this regulation may be subject to civil or criminal penalties . . . . In assessing penalties, the Executive Office will consider factors, including but not limited to the willfulness of the violation, the length of time of noncompliance, whether the fleet made an attempt to comply, and the magnitude of the noncompliance.

THE PROPOSED REGULATION IS IMPERMISSIBLY COMPLEX AND PRECLUDES EFFECTIVE COMPLIANCE PLANNING.

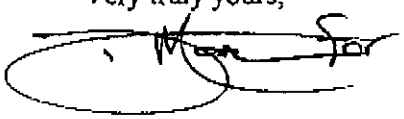
The proposed regulation, as presently drafted, is impermissibly complex and, as a result of such, would impose a great burden on the owners and operators of ground support equipment. Specifically, the proposed regulation's fleet average requirements and targets are subject to such great variability and unpredictability that effective compliance planning is impossible. The emissions targets identified in the proposed regulation readily vary each year because they are based upon the horsepower composition of each fleet on the given compliance date. As a result, the emissions targets cannot be readily predicted in advance with any amount of certainty. The extent of this uncertainty threatens to render the proposed regulation subject to a legal challenge based upon principles of administrative law and the requirement that agencies not proceed with their decision-making authority in an arbitrary or capricious fashion.

The most preferred remedy to this issue would be the elimination of the ARB's reliance on the regulation of end-use consumers of diesel vehicles to improve air quality, which is necessarily but unreasonably complex and inconsistent with the federal Clean Air Act. The ARB should instead achieve its objectives by regulating the manufacturers of new engines. This more direct and reasonable regulatory approach would simultaneously ensure that the ARB does not exceed its regulatory authority and protect the viability of the air transportation industry.

However, should the ARB disagree with the above remedy, then, instead of providing for modulating emissions targets based upon the fleet's horsepower composition, the County proposes that the proposed regulation provide for a *fixed* fleet average target that can be calculated and ascertained well in advance of the compliance deadline. For example, the fleet's fixed target may be calculated in order to ensure that California achieves its 2015 State Implementation Plan target and the ARB's own 2020 Diesel Risk Reduction Plan target. This modification would provide fleet owners and operators with an extended period of time to achieve the specified emissions reductions, and enable them to achieve the emissions targets in an efficient and cost-effective manner.

In closing, we appreciate the opportunity to provide these comments and look forward to working with the ARB as it continues to develop regulatory strategies relating to this proposed regulation. If you have any questions regarding the issues addressed in this letter, please do not hesitate to contact us at your convenience.

Very truly yours,



Lori D. Ballance
of
Gatzke Dillon & Ballance LLP

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