



Air Transport Association

January 4, 2008

**BY ELECTRONIC SUBMITTAL AND FACSIMILE (916-322-3928)**

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

**RE: 15-Day Comment, Regulation for In-Use Off-Road Vehicles**

Dear California Air Resources Board:

I write on behalf of the Air Transport Association of America, Inc. (ATA) to provide comments on the California Air Resources Board's (ARB) "Notice of Public Availability of Modified Text and Availability of Additional Documents" (Notice) for its regulation for in-use off-road diesel vehicles (ORD Rule).<sup>1</sup> ATA is the principal trade and service organization of the U.S. airline industry, and ATA's airline members and their affiliates transport more than 90 percent of all U.S. airline passenger and cargo traffic.<sup>2</sup> ATA frequently comments on regulatory activities that affect the airline industry and the safety and efficiency of air travel in the United States. ATA has commented on various ARB measures purporting to regulate airport ground support equipment (GSE). In this proceeding, ATA has provided comments on previous ORD Rule proposals May 23 and July 25, 2007, which are incorporated herein by reference including all attachments.<sup>3</sup>

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<sup>1</sup> The Notice and attachments are posted at [www.arb.ca.gov/regact/2007/ordiesl07/ordiesl07.htm](http://www.arb.ca.gov/regact/2007/ordiesl07/ordiesl07.htm).

<sup>2</sup> The members of the Association are: ABX Air, Alaska Airlines, Aloha Airlines, American Airlines, ASTAR Air Cargo, Atlas Air, Continental Airlines, Delta Air Lines, Evergreen International Airlines, Federal Express Corporation, Hawaiian Airlines, JetBlue Airways, Midwest Airlines, Northwest Airlines, Southwest Airlines, United Airlines, UPS Airlines, and US Airways; associate members are: Air Canada, Air Jamaica, and Mexicana de Aviación.

<sup>3</sup> ATA's May 23 comments are posted at: [www.arb.ca.gov/lists/ordiesl07/868-2007-05-23\\_ata\\_initial\\_comments\\_on\\_proposed\\_ord\\_rule.pdf](http://www.arb.ca.gov/lists/ordiesl07/868-2007-05-23_ata_initial_comments_on_proposed_ord_rule.pdf), and its July 25 comments are posted at: [www.arb.ca.gov/lists/ordiesl07/1097-ata\\_comments\\_re\\_ord\\_rule\\_with\\_attachments.zip](http://www.arb.ca.gov/lists/ordiesl07/1097-ata_comments_re_ord_rule_with_attachments.zip) (ATA July 25 Comments).

Despite ATA's position that ARB lacks the legal authority to regulate GSE in the manner contemplated,<sup>4</sup> ATA nevertheless has supported ARB's emission reduction objectives for off-road diesel vehicles, including both the emission reduction levels and the timeframe within which the reductions should commence and be achieved. However, as ATA has explained in detail in prior comments, we cannot support the ORD Rule as the means for achieving these objectives. ARB's unprecedented approach to the ORD Rule would impose ever-shifting targets, knowable by the regulated fleet only on the day that compliance is required. In addition, the ORD Rule would impose a new round of more stringent targets every year<sup>5</sup> – denying GSE fleet owners the 2-3 years necessary to implement and test new emission control technologies to ensure safe and efficient integration of new GSE equipment into the interconnected ground service network that supports and moves aircraft through the National Airspace System. *See, e.g.,* ATA July 25 Comments at 15-17. This "Shifting Annual Targets" approach quite simply creates a scheme that is so complex that reasonable compliance planning and budgeting become impossible.

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<sup>4</sup> ARB's lack of legal authority to regulate GSE in the manner contemplated is set forth in detail in ATA's previous comments. *See, e.g.,* ATA July 25 Comments at 26-43, 45-59. Among other grounds detailed in ATA's July 25 comments, the ORD Rule is expressly preempted by the Airline Deregulation Act (ADA) (*see id.* at 50-54), and in this regard we note that the United States Supreme Court has granted certiorari in *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66 (1st Cir. 2006) (confirming that Federal Aviation Administration Authorization Act language expressly preempting state laws "related to a price, route, or service" of an air carrier, was "patterned after the preemption provision of the Airline Deregulation Act," and holding that the preemptive scope of this provision is "exceedingly broad"), *cert granted*, 127 S. Ct. 3037 (2007). Since ATA submitted its July 25 comments, the United States submitted a brief to the Supreme Court supporting affirmance in *Rowe*. *See* Attachment F hereto, Brief for the United States of America as Amicus Curiae in Support of Respondent, *Rowe v. N.H. Motor Transp. Ass'n*, No. 06-457 (October 2007). Therein, the United States has taken the position that the Court should continue to give effect to the "broad pre-emptive purpose" of the ADA preemption language that the Court recognized in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) and *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), notwithstanding subsequent Supreme Court decisions that arguably somewhat narrowed the preemptive scope of similar language under ERISA. *See* Attachment F, Brief at 6-12; *id.* at 9 ("the later ERISA cases should not be read as having narrowed the broad reading that the Court gave to the ADA in *Morales* and *Wolens*."). Although certainly not necessary to ATA's position, if the Supreme Court adopts the position of the United States in *Rowe*, this would lend additional support to ATA's arguments and provide further confirmation that the ORD Rule is expressly preempted by the ADA. *See* ATA July 25 Comments at 50-54.

<sup>5</sup> For Large fleets, the ORD Rule imposes a new, more stringent fleet average NOx emissions requirement every year from 2010 to 2020, with an annual BACT turnover requirement for fleets that cannot achieve the fleet average. *See* ORD Rule, 13 CCR Section 2449.1. For PM emissions, the ORD Rule imposes a new, more stringent fleet average emissions requirement every other year from 2010 to 2020, with an annual BACT retrofit requirement for fleets that cannot achieve the fleet average. *See id.*, 13 CCR Section 2449.2.

ATA's attempts to engage Staff were not limited to explaining the shortcomings of the Shifting Annual Targets approach, but included developing an alternative approach that not only would achieve ARB's emission reduction objectives but would be far less burdensome and costly (reinforcing rather than undermining regulated entities' ability to comply). This approach, similar to that which ARB has routinely adopted for other vehicle emission regulations, would set a schedule of fixed targets designed to achieve the same emission reductions by the same key dates (2014 and 2020) as the ORD Rule contemplated by ARB. *See* ATA July 25 Comments at 19-21. Under such a "Fixed Targets" approach, the regulated community would know definitively their emission reduction targets in advance thus providing the lead-time necessary to allow reasonable compliance planning and avoid waste and uncertainty. As discussed in detail in ATA's July 25 comments, any number of alternatives could readily be devised that would achieve ARB's emission reduction objectives while providing regulated entities with fixed prospective requirements and adequate lead-time between each new emissions target. Unfortunately, while making a few improvements at the margins, ARB has not fully or genuinely considered the specific alternative proposed by ATA (or, as discussed below, other similar alternatives including those proposed by other regulated sectors).

ARB's insistence on following its unnecessarily complex, costly and arbitrary Shifting Annual Targets approach is, to put it mildly, confounding. While ATA (demonstrated by its long engagement with ARB on this and other regulatory initiatives) understands regulation necessarily entails the imposition of additional burdens and costs, such burdens and costs must be balanced by concomitant environmental benefits. The ORD Rule framework imposes huge administrative and compliance costs and burdens without securing significant additional environmental benefits. The Agency's insistence on following its Shifting Annual Targets approach is all the more confounding given that in developing and adopting other vehicle air emissions regulations the Agency routinely has imposed a Fixed Targets approach.<sup>6</sup> There is simply no reason ARB cannot pursue an ORD Rule that would achieve the same emission reduction objectives at lower cost and with less disruption (including federally preempted disruptions to the National Airspace System), by providing fixed targets and adequate time between each new round of targets to allow the regulated community to achieve them.

Indeed, the rulemaking record provides no support for ARB's arbitrary insistence on achieving relatively uncontroversial emission reduction objectives in the most burdensome manner, and ARB's position seems explicable only as intended to provide a subsidy to engine retrofit manufacturers at the expense of the end-use purchasers of diesel vehicles. The proposed changes and materials released for 15-day comment in the Notice further confirm that ARB's adoption of the ORD Rule is arbitrary and capricious and contrary to law, as discussed below.

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<sup>6</sup> *See, e.g.,* CAL. CODE REGS. tit. 13, § 2775.1 (Large Spark-Ignition (LSI) Engine Fleet Requirements); CAL. CODE REGS. tit. 17, § 93116.3 (Fleet Requirements, Airborne Toxic Control Measure for Diesel Particulate Matter from Portable Engines Rated at 50 Horsepower And Greater).

**I. STAFF'S ANALYSIS OF CIAQC'S ALTERNATIVE COMPLIANCE PROPOSALS FURTHER DEMONSTRATES THAT ARB'S ORD RULE IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW**

ATA's July 25 comments explained in detail the reasons the ORD Rule's compliance target structure is arbitrary and capricious (including that it is needlessly complex, unpredictable, and requires extensive double conversions of the same equipment). *See, e.g.*, ATA July 25 Comments at 11-21. As noted above, ATA continues to support ARB's emission reduction objectives, and – again as ATA detailed in its July 25 comments – already has explained how these objectives could be achieved just as effectively with a Fixed Targets approach (i.e., a rule that imposes clear, prospective, and fixed fleet average emission targets at intervals adequate to allow incorporation of new emission control technologies into GSE fleets). *See, e.g.*, ATA July 25 Comments at 15-17, 19-21. Unfortunately, ARB and its Staff have not engaged seriously with ATA on this issue or genuinely evaluated or considered alternative proposals for achieving the same goals through clear, prospective targets, knowable in advance that provide adequate lead-time for compliance.

Staff's inadequate analysis of the alternative proposals of the Construction Industry Air Quality Coalition (CIAQC), presented to the Board before its vote on July 26, 2007, and released to the public for comment as part of the Notice, further illustrates ARB's arbitrary adherence to its Shifting Annual Targets framework. *See* Notice, Attachment 3.

**A. ARB Failed to Consider the Cost-Effectiveness, Technical Feasibility, and Other Advantages of a Multi-Year Targets Rule**

ARB Staff sought to compare the expected emissions benefits of the ORD Rule as contemplated by ARB, against a CIAQC proposal submitted on July 25, 2007, and three similar alternative compliance interval proposals. Each of the alternatives considered by Staff were a type of "Multi-Year Targets" rule, calling for new fleet average emission targets every three years, rather than every year. *See* Notice, Attachment 3 at 1. Based on a number of questionable and flawed assumptions (*see* Part I.B, below), Staff estimated the difference in cumulative emission reductions from 2010 through 2015 for each proposal, and concluded that the alternatives resulted in a cumulative loss in emissions benefit of between 3% and 17% compared to Staff's Shifting Annual Targets approach. *Id.* at 2. Thus, in its recommendations to the Board, issued the evening before the Board's final determination and vote on July 26, 2007, Staff concluded only that the alternatives examined would result in "higher PM emissions and a loss of health benefits, compared to the staff proposal."<sup>7</sup> This conclusion was based solely on assumed differences in interim years, since the ultimate emissions targets were the same among all the proposals.

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<sup>7</sup> *See* Summary of Key Issues (July 25, 2007) at 3, available at: [www.arb.ca.gov/msprog/ordiesel/documents/Board\\_issues\\_handout.pdf](http://www.arb.ca.gov/msprog/ordiesel/documents/Board_issues_handout.pdf).

However, ARB Staff failed to consider or weigh the benefits associated with the alternative proposals, including increased cost-effectiveness and reduced compliance burdens. Absent balancing of both the costs and benefits, ARB's preference for annual compliance targets over a framework that provides more time between targets is purely arbitrary and contrary to ARB's statutory obligations to consider cost-effectiveness, lead-time, and technical feasibility in adopting the ORD Rule. *See, e.g.*, Cal Health & Safety Code § 43013(a) (emission standards adopted by ARB must be necessary to carry out the purposes of the statute, and satisfy cost-effectiveness and technological feasibility); 42 U.S.C. § 7521(a) (requiring that emission standards satisfy technical feasibility, lead-time, cost, useful life, and other requirements); *id.* § 7543(e) (requiring compliance with § 7521(a) requirements to obtain EPA authorization of California emission standards); ATA July 25 comments at 12-21, 26-39, 54-59.

The arbitrariness of ARB's selection of the ORD Rule's numerical emission reduction targets themselves, in addition to the compliance intervals between targets, is particularly apparent in light of the relatively small differences in cumulative emissions benefits of the alternative proposals selected by Staff for review.<sup>8</sup> ARB's rejection of the alternatives it did consider, based solely on a relatively small difference in estimated cumulative emission benefits, and without even considering the reduced cost and compliance burdens, demonstrates that the emission targets and deadlines selected by ARB in the ORD Rule were not the result of a reasoned evaluation and weighing of the costs and benefits of the proposal. In effect, ARB concluded that no cost savings could justify any reduction in cumulative emissions benefits in interim years. Using that approach, ARB could adopt *any* emissions targets however stringent or frequent – demonstrating that the approach is the very definition of arbitrary and capricious. The approach taken by ARB not only taints its rejection of the proposed alternative targets but its adoption of the targets it did select – that is, both actions are arbitrary and capricious.

In addition, even with respect to emissions benefits, ARB Staff evaluated only a few select alternative proposals. The fact remains that whatever ARB's emission reduction objectives, it could readily select emission reduction targets with reasonable intervals before each new target, that would achieve those objectives. Particularly given the potential reduction

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<sup>8</sup> As noted above, Staff estimated cumulative reductions in emissions benefits for the alternatives evaluated as low as 3% through 2015. However, in evaluating the impact of allowing credit for Tier 0 retirements, a provision that had already been approved by the Board, Staff concluded that a loss of emissions benefits of 0.5%, and 2.3% in a given year, was "an insignificant loss in emission benefits." *See* Notice, Attachment 4, at 3. Moreover, Staff did not even attempt to evaluate the emissions difference, if any, if the evaluated alternatives were applied only to airport GSE – where the regulation presents particularly acute compliance burdens and is most legally problematic. Given that GSE emissions account for less than 1% of the PM and 0.8% of the NOx emissions from vehicles regulated under the ORD Rule (*see, e.g.*, ARB Technical Support Document, April 2007, at 64), any cumulative emissions losses from a rule that applied a Multi-Year Targets framework only to GSE would be vastly lower than the amounts Staff found were "insignificant," while the increased cost-effectiveness and reduced burdens on the National Airspace System would be considerable.

in costs and compliance burdens of a framework that provides adequate lead-time to regulated entities,<sup>9</sup> ARB's implicit conclusion – that nothing other than the annual compliance targets adopted by ARB can achieve the emission reductions objectives – is unsupportable, and is contradicted by ARB's own years of experience and analysis in promulgating other vehicle emissions regulations.

Moreover, ARB also failed to consider the need for an ORD Rule that provides some economic margin for regulated entities to make potential future investments to comply with any future ARB regulation of greenhouse gas emissions as dictated under the California Global Warming Solutions Act of 2006 (AB 32). In sum, ARB's rejection of a few select alternatives based solely on estimated cumulative reductions in emissions benefits, and failure to consider cost-effectiveness, lead-time, and technical feasibility, further demonstrate that the ORD Rule is arbitrary, capricious, and contrary to law.

**B. ARB Staff's Evaluation of the Emissions Benefits of the Few Multi-Year Targets Alternatives Considered Was Based on Flawed Assumptions**

Even if ARB were free to evaluate only one side of the coin in assessing Multi-Year Targets alternatives, its assessment of the emissions benefits of the few alternatives it did consider was based on unsupported and patently incorrect assumptions. As noted above, each of the alternatives Staff chose to evaluate would impose new compliance targets every three years, rather than annually, but would impose the same emissions requirements as Staff's proposal in each year that carried a compliance target (*i.e.*, every third year). Thus, the only difference in cumulative emissions benefits (if any) would be during "interim" years – *i.e.* years in which the alternative proposal did not impose a new emissions target. *See generally*, Notice, Attachment 3 ("Analysis of Alternatives to the Proposed In-Use Off-Road Diesel Vehicle Regulation Discussed at the July 26, 2007 Board Meeting").

For interim years, without citing data or other support, Staff simply assumed that the alternatives would always achieve a certain percentage lower emissions reductions in interim years than the Staff's proposal. For example, ARB assumed that emissions benefits in certain interim years would be only 20% or 40% of the amount targeted under the ORD Rule as contemplated by ARB. *See id.* at 2-3. As an initial matter, there is absolutely no support in the rulemaking record for ARB's selection of these figures. In addition, the assumption "builds in" a huge emissions reduction penalty for any Multi-Year Targets approach, ensuring that any alternative with fewer target dates than proposed by Staff will be estimated to achieve lower cumulative emission reductions. Given Staff's apparent conclusion – discussed above – that *any* lower cumulative emission reductions (however small) is *necessarily* unacceptable to ARB

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<sup>9</sup> Indeed, had ARB considered the reductions in cost and compliance burdens, it might have found that a regulation that achieves an ultimate target slightly *lower* than the current 2020 target, would remain more cost-effective than the ORD Rule adopted by ARB, and achieve comparable or better cumulative emissions benefits including during interim years.

regardless of its other benefits, the unsupported assumption ensures that Staff's evaluation of any alternative approach will always yield the same conclusion – the Shifting Annual Targets must be adopted.

Most egregiously, Staff assumed that under a three-year alternative, in every interim year when the next compliance date is two years away (*i.e.*, the year following each compliance target), the fleet's emissions would *increase*. According to Staff "some benefits would be lost due to normal vehicle turnover." *Id.* at 3. Thus, "Staff assumed five percent of the benefits from the previous year would be lost due to vehicle turnover." *Id.* Staff cited no support for this assumption, which is absurd for a number of reasons.

- First, as common sense dictates, "normal vehicle turnover" on average entails replacing outdated older (and therefore dirtier) equipment with newer (and therefore cleaner) replacements. In fact, ARB expressly recognized in the Initial Statement of Reasons (ISOR) for the ORD Rule that normal turnover results in significant emissions *reductions* – not an increase. *See* ISOR<sup>10</sup> at 7 (projecting steadily declining PM and NOx emissions without the regulation, and concluding that absent regulation "emissions would trend naturally down as the fleet gradually turned over to newer, cleaner engines"). ARB has also recognized this fact in other rulemakings.<sup>11</sup>
- Second, Staff simply ignored the other provisions of the ORD Rule that would restrict or prohibit a fleet owner from adding higher-emitting equipment to the fleet. *See, e.g.*, 13 CCR Section 2449(d)(7) ("Adding Vehicles"). Perhaps even more fundamentally, if there were any concern whatsoever that emissions benefits could be lost during interim years, there was no reason for Staff to presume that any alternative with longer compliance intervals would not include an "anti-backsliding" provision.
- Finally, no rational fleet owner would scrap newer vehicles or equipment that had already been retrofit or controlled (and thus exempt from most or all further requirements under the ORD Rule), and/or invest money in older, dirtier equipment that

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<sup>10</sup> Staff Report: Initial Statement Of Reasons For Proposed Rulemaking, Proposed Regulation For In-Use Off-Road Diesel Vehicles, April 2007 (ISOR), [www.arb.ca.gov/regact/2007/ordiesl07/isor.pdf](http://www.arb.ca.gov/regact/2007/ordiesl07/isor.pdf).

<sup>11</sup> *See, e.g.*, Initial Statement Of Reasons For Proposed Rulemaking, Emission Standards And Test Procedures For New 2007 And Later Off-Road Large Spark-Ignition (LSI) Engines And Fleet Requirements For Users Of Off-Road LSI Engines at 22 (recognizing that a fleet with more frequent natural turnover would find it "easier to comply" with fleet average requirements imposed over time) (available at: [www.arb.ca.gov/regact/lore2005/isor.pdf](http://www.arb.ca.gov/regact/lore2005/isor.pdf)); Staff Report: New Emission Standards, Fleet Requirements, and Test Procedures for Forklifts and Other Industrial Equipment at 5 (showing 50% decrease in HC and NOx emissions from LSI engines over time due to introduction of new engine standards) (available at: [www.arb.ca.gov/regact/lore2006/isor.pdf](http://www.arb.ca.gov/regact/lore2006/isor.pdf)).

would make compliance more difficult and costly at the next compliance target. Staff's assumption to the contrary is wholly unsupported.

In sum, Staff's evaluation was arbitrary and capricious, and unsupported by the rulemaking record. Staff's flawed approach significantly inflated Staff's estimates to the Board of the marginal emissions benefits of the Staff proposal as compared to the few alternatives selected by Staff for evaluation.

**C. ARB Failed to Consider any Other Alternatives, Including Alternatives That Would Provide Fixed Compliance Targets**

Finally, Staff elected to consider only a few alternative proposals, each of which apparently entailed calculation of compliance targets for each fleet in the same manner as the Staff proposal – *i.e.*, based on the fleet's horsepower-weighted composition as of the date of compliance. None of the proposals evaluated by Staff involved fixed, prospective targets, known to the regulated entity in advance of compliance. In particular, ARB failed to evaluate ATA's detailed suggestions and alternative proposals, including the simple notion of imposing fixed compliance targets for each fleet, designed to achieve the same emission reductions by the same key dates (2014 and 2020) as the ORD Rule contemplated by ARB. *See, e.g.*, ATA July 25 Comments at 12-21.

Separate and apart from the length of time between targets, a rule that provides regulated entities with known, fixed requirements in advance of the compliance date increases flexibility and cost-effectiveness, provides necessary lead-time, and reduces uncertainty. Particularly with respect to GSE, the ability to plan with certainty in advance is essential to minimize the risk of disruptions to the National Airspace System from last-minute or unpredictable changes to the GSE fleet mandated by a state regulation. *See, e.g.*, ATA July 25 Comments at 4-6, 12-17, 45-50. ARB failed to evaluate any alternative that would impose fixed emission targets, and failed to assess the magnitude of reduced costs and compliance burdens associated with any fixed-target alternative.

In sum, there is no doubt that ARB could formulate a regulation that would achieve the same level of emission reductions (or indeed whatever level of emission reductions ARB aims to achieve), using fixed emission targets, with adequate lead-time between targets. ARB Staff's flawed and inadequate evaluation of a few "strawman" proposals fails to provide a reasoned basis to support the needlessly complex, unpredictable, and frequent compliance target framework adopted by ARB for the ORD Rule, and further demonstrates that the ORD Rule is arbitrary, capricious, and contrary to law.

**II. ARB FAILED TO CONSIDER ATA'S TIMELY WRITTEN COMMENTS PRIOR TO TAKING FINAL ACTION WITH RESPECT TO THE ORD RULE**

As discussed in ATA's July 25 Comments, California law requires that all public comments be considered by the Board *before* it takes action on a regulation. Cal. Gov't Code § 11346.8 (requiring an agency to "consider all relevant matter presented to it before adopting,



amending, or repealing any regulation"); *Building Code Action v. Energy Resources Conservation and Development Commission*, 162 Cal. Rptr. 734, 743 (Cal. Ct. App. 1980) (invalidating regulation due, in part, to the agency's failure to consider matters presented in comments); *see also Tidewater Marine W. v. Bradshaw*, 927 P.2d 296, 303 (Cal. 1996) ("The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation.").

Here, the Board directed the adoption of the ORD Rule and enacted Resolution 7-19 on July 26, 2007, the day after the deadline for written comments.<sup>12</sup> Given this timeframe, it is clear that no one at ARB performed any meaningful review of the written comments submitted on the July 25 deadline by ATA<sup>13</sup> and others before ARB adopted the ORD Rule. Accordingly, the process followed by ARB in its adoption of the ORD Rule is contrary to law.

Among other things, on July 26 the Board made its final decision directing staff "to adopt" the ORD Rule, with certain specific modifications approved by the Board and any other Staff modifications "conforming" to the Board's directive. *See* Notice, Attachment 1 (Resolution 7-19) at 9. The Board directed Staff to make available the modified regulatory language for comment for 15 days, and directed the Executive Officer to "consider such written comments *regarding the modifications* as may be submitted during this period" and make any further modifications warranted in light of those comments on the modifications. *Id.* (emphasis added). At the July 26, hearing, the Board also voted to reject a three-year compliance interval option, based on Staff's flawed assessment discussed above. *See* Board Hearing Transcript (July 26, 2007) at 346:14 - 360:10.<sup>14</sup> In addition, the Board made various statutory findings, including relating to cost-effectiveness, technical feasibility, and EPA authorization under Section 209 of the federal Clean Air Act. *See, e.g.,* Resolution 7-19 at 2, 5, 8, 10.

Every indication surrounding the Board's July 26 decision confirms that it constituted ARB's final decision to adopt the ORD Rule with the essential framework proposed by Staff. For example, ARB immediately issued a press release entitled "ARB adopts landmark rule to

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<sup>12</sup> The original deadline for submission of written comments of May 23, 2007, was extended by ARB until July 25, 2007. This extension and the new comment deadline was confirmed by an ARB e-mail dated May 18, 2007, posted at [www.arb.ca.gov/lists/ordiesel/ordiesel.2007](http://www.arb.ca.gov/lists/ordiesel/ordiesel.2007), as well as the "Deadline for Comments" posted by ARB through the July 25, 2007, deadline at ARB's portal for electronic submission of comments, [www.arb.ca.gov/lispub/comm/bclist.php](http://www.arb.ca.gov/lispub/comm/bclist.php).

<sup>13</sup> ATA's July 25 comments included detailed discussion of a variety of issues directly bearing on whether the Board should adopt the proposed ORD Rule, including cost-effectiveness, technical feasibility, lead-time, the suitability of the regulation for EPA authorization under Section 209 of the federal Clean Air Act, details concerning superior compliance alternatives for achieving the same emissions reductions, as well as various legal, policy, factual, and technical flaws with the ORD Rule proposal. *See* ATA July 25 Comments.

<sup>14</sup> Available at: [www.arb.ca.gov/board/mt/2007/mt072607.txt](http://www.arb.ca.gov/board/mt/2007/mt072607.txt).

reduce toxic emissions from off-road equipment.” *See* Attachment A hereto (ARB Press Release dated July 26, 2007) (also available at: [www.arb.ca.gov/newsrel/nr072607.htm](http://www.arb.ca.gov/newsrel/nr072607.htm)). Therein, ARB confirmed to the media, the public, the other agencies and political branches of California government, and its own Staff that: “The California Air Resources Board today adopted a pioneering regulation aimed at reducing toxic emissions from the state’s estimated 180,000 ‘off-road’ vehicles used in construction, mining, airport ground support, and other industries.” *Id.* at 1.

Other ARB documents and communications have repeatedly confirmed that the final decision to adopt the ORD Rule was made by the Board on July 26, 2007. *See, e.g.*, Attachment B hereto (ARB listserve e-mail dated September 6, 2007) (“At the July 26, 2007, Air Resources Board (Board) meeting, the Board adopted the proposed in-use off-road diesel vehicle regulation, along with staff’s proposed minor modifications to it”) (also available at: <http://arb.ca.gov/lists/ordiesel/ordiesel.2007>).<sup>15</sup> Staff subsequently issued various compliance guidance documents communicating the regulation’s requirements to the regulated community, including fact sheets “describing the adopted in-use off-road diesel rule.” *Id.*<sup>16</sup> Moreover, Staff confirmed directly to ATA in a telephone call that the Board’s July 26 vote precluded Staff from considering *any* Multi-Year Targets approach, such as that proposed by ATA in its July 25 comments.

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<sup>15</sup> *See also, e.g.*, Attachment C hereto, *Air Pollution: New Calif. board leader gets first test with diesel rules*, GREENWIRE, July 24, 2007 (quoting ARB spokesperson that staff is “entertaining [industry’s] ideas, but it’s really up to the board to make a final determination”); Attachment D hereto, “In-Use Off-Road Diesel Vehicle Regulation, What’s New?” (screenshot of ARB website taken November 30, 2007, from [www.arb.ca.gov/msprog/ordiesel/ordiesel.htm](http://www.arb.ca.gov/msprog/ordiesel/ordiesel.htm)) (“On July 26, 2007, the Air Resources Board (ARB) adopted a regulation to reduce diesel particulate matter (PM) and oxides of nitrogen (NOx) emissions from in-use (existing) off-road heavy-duty diesel vehicles in California”); Attachment E hereto, “In-Use Off-Road Diesel Vehicle Regulation, Documents and Files” (screenshot of ARB website taken September 10, 2007, from [www.arb.ca.gov/msprog/ordiesel/documents.htm](http://www.arb.ca.gov/msprog/ordiesel/documents.htm)) (stating that Staff proposed changes to the ORD Rule on July 25, and that these changes “were adopted by the Board on July 26, 2007”); Attachment B hereto (announcing that “Staff have developed draft regulatory language implementing the Board’s direction” issued at the July 26 meeting); ARB listserve e-mail from jjohnson@arb.ca.gov dated August 14, 2007 (confirming that ARB adopted the ORD Rule on July 26, 2007, and announcing commencement of implementation activities) (available at: <http://arb.ca.gov/lists/ordiesel/ordiesel.2007>).

<sup>16</sup> *See also* ARB’s ORD Fact Sheets (Overview of Regulation, Regulation for Medium and Large Fleets, Regulation for Small Fleets, Compliance Examples, Early Actions), available at: [www.arb.ca.gov/msprog/ordiesel/factsheets.htm](http://www.arb.ca.gov/msprog/ordiesel/factsheets.htm) (posted September 2007); *id.* Early Actions at 1 (stating, among other things, that “[t]he regulation requires fleets to meet certain emissions targets and take specific actions by specific dates,” and suggesting various means by which regulated fleets can mitigate compliance costs by commencing “early actions”) (available at: [www.arb.ca.gov/msprog/ordiesel/documents/OffRoadDieselEarlyActionsFS.pdf](http://www.arb.ca.gov/msprog/ordiesel/documents/OffRoadDieselEarlyActionsFS.pdf)).

Under these circumstances, the Board's adoption of the ORD Rule as proposed is contrary to California law. Cal. Gov't Code § 11346.8. The Board must vacate Resolution 7-19, and reconsider the proposed regulation after appropriate ARB review and consideration of all timely-submitted written comments, including ATA's.

### **III. THE BACT VDECS EXEMPTION INAPPROPRIATELY PLACES THE BURDEN OF PROOF TO DEMONSTRATE LACK OF SAFETY ON GSE OPERATORS**

Section 2449(e)(8) ("VDECS That Impairs Safe Operation of Vehicle") now provides that a VDECS will not be required under the BACT provisions for a particular vehicle if the manufacturer of the VDECS unit states to ARB that there is "no safe or appropriate method of mounting its VDECS" on the vehicle. Absent such a declaration by the manufacturer, a party must provide evidence, such as "published" reports or findings of government agencies, independent testing laboratories, "or other equally reliable sources" demonstrating that the unit cannot be safely installed or operated. *Id.*

This provision is fundamentally flawed and contrary to federal law with respect to GSE. As a practical matter, a VDECS manufacturer wishing to increase sales would be very unlikely to volunteer that there is "no safe or appropriate" way to install its product – particularly since this standard includes no consideration of the cost or disruption required to achieve VDECS mounting. Accordingly, the burden shifts to GSE operators to prove a lack of safety, under circumstances where ARB might presume that the manufacturer refused to make such a statement.

However, in the field of aviation, which is regulated exclusively at the federal level to ensure the safety and efficiency of the National Airspace System, this turns the appropriate burden for safety on its head. No GSE or other equipment can be mandated for airport operation unless and until it has been tested and proved safe for airport operations.<sup>17</sup> In the absence of evidence or findings from a governmental agency or independent testing laboratory concerning the safety of a GSE retrofit device for airport operations, the presumption must be that the device should not be required unless and until proven safe. Indeed, as detailed in ATA's July 25

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<sup>17</sup> See, e.g., ATA July 25 Comments at 45-50. Congress has made clear that "the safe operation" of our complex airport and airway system is our nation's "highest aviation priority." 49 U.S.C. § 47101(a)(1); see also *id.* § 40103(a)(2) (recognizing that safe public travel by air furthers both the national and local interests). Congress has vested the FAA with exclusive federal sovereignty over the use of the airspace of the United States, with responsibility to "maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public." *Id.* § 40101(a)(3); *id.* § 40103(a)(1).

Comments, any state regulation that impairs the safe and efficient operation of the National Airspace System, or impacts the movement and operation of aircraft, is federally preempted.

**IV. ARB'S IMPOSITION OF A 1.18 FACTOR TO BE APPLIED TO A FLEET'S EMISSIONS UNDER THE HOURS OF USE COMPLIANCE OPTION IS ARBITRARY AND CAPRICIOUS**

In the Notice, ARB Staff explains that a 1.18 factor should be applied to each fleet's emissions under the hours of use activity weighted compliance option, 13 CCR Section 2449(d)(1)(D). Specifically, Staff states that the factor is "to account for the fact that, in general, newer, cleaner vehicles operate more than, older, dirtier ones." Notice at 2 (item #13). This explanation is irrational, and supports the opposite conclusion. Fleets should be rewarded, not punished, for favoring the use of newer, cleaner vehicles – indeed, this is the very goal of allowing compliance based on hours of use. Moreover, the number 1.18 was apparently selected arbitrarily, and is unsupported by the rulemaking record.

In addition, ARB's adoption of a 1.18 "fudge factor" for the hours of use option appears to be an implicit concession that the fleet average emission targets mandated under the standard compliance option (under which hours of use, and hence actual emissions levels, are ignored) are roughly 18% too stringent on average. In other words, when actual emissions are measured based on hours of use, ARB apparently finds its own standard fleet average emission levels inadequate or inaccurate. This further illustrates the arbitrary and capricious nature of the standard fleet average emission targets selected by ARB.

**V. WHERE EXECUTIVE OFFICER APPROVAL IS REQUIRED TO OBTAIN CREDIT FOR ELECTRIC REPLACEMENTS, APPROVAL SHOULD BE PRESUMED GRANTED IF NO DECISION IS ISSUED WITHIN 20 DAYS**

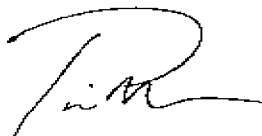
In at least two instances, Staff proposes revising the ORD Rule in a way that requires Executive Officer (EO) approval to obtain appropriate credit for electric replacement units. For new electric units added to expand a fleet, the fleet may apply to the EO for approval to use the maximum horsepower rating of a diesel vehicle that would serve the same function and perform the same work, in lieu of using the electric vehicle's power rating, in calculating fleet average emissions. ORD Rule, 13 CCR Section 2449(d)(1)(C)1.b. For stationary or portable electric systems used to replace diesel vehicles, fleets must now obtain EO approval in order to obtain credit. *Id.*, 13 CCR Section 2449(d)(1)(C) (previously, no EO approval was required).

Given the ORD Rule's uncertain and shifting emission targets, any significant delay by the EO in considering and resolving such requests may further complicate compliance planning, or put a fleet in technical non-compliance pending an EO approval that should be granted. Accordingly, the proposal should be revised to provide that if no EO resolution is issued within a certain time period after a request for approval is submitted (*e.g.*, 20 days), the fleet may rely on the approval as granted. If the EO later decides to deny the approval, the fleet should be given additional time to achieve compliance.

## **VI. CONCLUSION**

While ATA continues to support ARB's ultimate objectives for emission reductions from off-road diesel vehicles, ATA cannot support the arbitrary and unlawful mechanism for achieving those objectives set forth in the ORD Rule. There is no reason ARB cannot adopt a regulation that – at a minimum – provides for fixed fleet average emission targets and adequate lead-time between compliance dates. For the reasons set forth herein, and in ATA's previous comments, ARB should vacate Resolution 7-19, and work together with ATA and others to formulate a regulation that would achieve the same emission reductions in a more cost-effective and less burdensome manner, and ensure the continued safety and efficiency of air travel in the United States.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim", with a stylized flourish extending to the right.

Timothy Pohle  
Managing Director – U.S. Environmental Affairs  
& Associate General Counsel  
Air Transport Association of America, Inc.