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February 26, 2008

Mary Nichols, Chairman of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95814

RE: Comments on the Surplus Off-Road Opt-In for NOx (SOON) Provisions of the In-Use, Off-Road Diesel Regulation

Dear Chairman Nichols:

Since the early stages of development of the In-Use, Off-Road Diesel Regulation the nearly 300 union-signatory contractor members of the Engineering & Utility Contractors Association (EUCA) have provided, in public forums and in writing, numerous comments and recommendations designed to make the regulation practical and compliance with the regulation feasible. While it remains questionable whether compliance with the regulation is possible for many contractors, the proposed SOON provisions present additional challenges that will make the regulation so complex, costly and burdensome that it is almost assuredly doomed to failure.

The SOON program was originally presented in the days leading up to the July, 2007 Board Hearing as a voluntary, fully funded effort to help two local air districts (South Coast Air Quality Management District and San Joaquin Valley Air Pollution Control District) achieve additional NOx reductions that they suggest are needed to meet their 2014 deadline to achieve compliance with the federal PM_{2.5} standard. Industry stakeholders had little, if any, opportunity to fully consider the potential impacts of the SOON program prior to its consideration by your Board. This lack of opportunity for stakeholder input, as well as actions taken by the Board at the July, 2007 hearing have made the SOON program unworkable and have, as a result, made the already problematic Off-Road Diesel Regulation even more difficult to comply with.

Unlike what stakeholders were presented originally, the SOON program is mandatory beginning in 2009, not voluntary. Contractors are expected to contribute financially to the "over-compliance" requirements of the SOON. Participation in the SOON will negatively impact equipment equity, borrowing ability, bonding ability and the ability of contractors to dispatch equipment to "where the work is" because of restrictions on use. The program requirements in the form of mandatory contract participation and dedicated equipment operational commitments are strong disincentives for virtually any contractor to participate. Additionally, the Board's decision to allow districts other than South Coast and San Joaquin to opt-in threaten to create a patchwork of regulations throughout the state, all with different compliance requirements. Finally, the SOON program is projected to continue well beyond 2014 whether or not South Coast and San Joaquin achieve compliance with the federal PM_{2.5} standard.

Mandatory Participation

Contractors are required to participate in the SOON if, as of January 1, 2008, on a statewide basis, the fleet consisted of more than 40 percent Tier 0 and Tier 1 vehicles and the fleet has more than 20,000 horsepower statewide. No distinction is made regarding whether the Tier 0 and Tier 1 equipment resides in the district opting-in to the SOON. Situations are likely to arise where a contractor is required to participate in the SOON in one district as a result of equipment operating in a completely separate area of the state. Particularly in 2014, even a fleet completely comprised of Tier 2 equipment (equipment manufactured as recently as 2005) will



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not meet the SOON fleet average targets. Further, no distinction is made between equipment that can be repowered and equipment that can only be replaced. Because the districts view SOON as primarily a repower program only equipment that can be repowered should be considered with respect to the 40 percent eligibility criteria.

Setting the benchmark for determining contractor SOON eligibility at January 1, 2008 gave contractors very little time to plan and places too large a period of time between the eligibility date and the first compliance date. Contractors did not have sufficient time to alter their fleets to avoid SOON participation if that was their desire. Also, SOON does not recognize positive, aggressive fleet improvement steps contractors may take between 2008 and the first SOON compliance dates in 2011 and 2014. To carry on with the earlier example, a fleet may have been SOON-eligible on January 1, 2008 but is able to take actions to achieve an all Tier-2 fleet by 2014. This would leave the fleet with zero percent Tier 0 and Tier 1 vehicles, comfortably in compliance with the NOx fleet average targets in the base regulation in 2011 and 2014 but still not in compliance with the SOON fleet average targets in 2014. This fleet will have expended tremendous resources to comply with the base regulation only to be faced with additional requirements in local air districts who still want them to do more, and at a greater cost of compliance.

Contractors are Expected to Contribute Financially

Most contractors will not be able to afford the compliance costs of the base Off-Road Diesel Regulation let alone the added costs of the SOON program. The requirement to provide matching funds will be out of reach for most contractors. The construction industry is facing a severe economic downturn which makes the survival of many companies a difficult challenge. As a result, a large percentage of the construction equipment fleet in California currently sits idle or is being sold off out-of-state or out-of-country resulting in the reduction in emissions CARB seeks as a result of the Off-Road Diesel Regulation. When the economy improves and fleets begin to grow again the regulation will require that Tier 2 or higher equipment be utilized to facilitate this growth. In other words, the bad economy in combination with the Off-Road Diesel Regulation are working in tandem to lock in long-term emission reductions from the off-road equipment fleets operating in the state.

SOON Will Negatively Impact Contractors' Financial Status and Credit Worthiness

Heavy equipment ownership is a complicated business. When it is joined with contracting it becomes even more complicated. EUCA, individual contractors and other associations have tried repeatedly to educate CARB and local air district staff about how financing and bonding impacts the ability to purchase equipment and perform work with little success to date. The Tier 0 and Tier 1 equipment that both the base regulation and the SOON program target is typically completely owned by the fleet owner with no direct debt attached to this equipment. The owner typically has a line of credit with a lender that is backed by the equity in this owned equipment. This line of credit is used to support new equipment purchases and to provide cash flow for day-to-day operations. In addition, the owner has a bonding capability based on a balance sheet that uses the equity in this owned equipment as a large part of the financial base of the company. The real equity base in the company is used by bonding companies to determine the amount of bonding available to the owner.

The SOON will require contractors to repower or replace equipment that they normally would not modify, even given the base regulation. The problem with this is that there is not a dollar-for-dollar value added to the equipment by going forward with these repower projects. The value of the equipment is based on the condition of the equipment and its engine(s), not on engine Tier. On the day a SOON repower project is performed the equipment it is encumbered with a new liability in the amount of the district's contribution to the project. The equipment owner has also spent a considerable amount of his available cash (or access to credit), further weakening his balance sheet.

Once this happens the finance company issuing the line of credit will no longer attribute any equity to the SOON-repowered equipment to support the line of credit because the ownership of the machine is questionable given the district's position. The equipment owner's bonding company will follow the finance company's lead



in terms of determining equity when calculating the contractor's ability to secure bonding. There will be a direct, significant reduction in the equipment owner's bonding capacity.

Mandatory Contract Participation

The SOON program requires that equipment owners enter into contracts with air districts whether they want to or not and regardless of whether they are capable of meeting their financial obligations as stated in the contract. If an equipment owner is unwilling to sign a contract he is potentially subject to enforcement action by either CARB or a local air district. Having reviewed several potential air district contracts there are several common terms that make signing the contract problematic. For example, contracts often include a provision that asks the equipment owner to certify that he has had the contract reviewed by counsel, but provides no relief in the event that the advice of counsel is to not sign the contract. Contracts also have language with strong indemnity language in favor of the air district. If contract owners are compelled to sign the contracts they should be indemnified by the air districts. Finally, the typical insurance requirements contained in the contracts are well in excess of insurance many equipment owners would consider having on the equipment.

The operational conditions in the contracts are also cumbersome and add cost to compliance. SOON contracts will require that equipment operate a vast majority of the time in the air district providing the funding, whether the equipment owner has work in that air district or not. These contracts may last up to seven years and during the contract period the equipment owner cannot account for the lower emissions from the SOON equipment with respect to the base regulation. There will be times when the equipment owner has work outside of the air district providing the SOON funding and no work within this air district. The equipment owner will then be faced with renting or purchasing new equipment to perform this work even though he already owns equipment capable of performing the work which is sitting idle and not generating revenue. Contractors need to maintain the flexibility to dispatch equipment to locations where there is work for them to perform. The SOON greatly restricts this flexibility. This represents an additional compliance cost to the equipment owner. An additional consideration is one of competitiveness. SOON-obligated companies will often be faced with competing against fleets that are just under 20,000 horsepower or just under 40 percent Tier 0 and Tier 1 for work. These contractors who just barely miss the SOON-obligation benchmarks will have a competitive advantage over those that are forced to bear the additional costs and equipment operation restrictions of the SOON.

EUCA is not aware of any authority that CARB or any local air district has to force an equipment owner to involuntarily sign a contract they knowingly are unable to comply with.

A Patchwork of Regulations

In allowing South Coast and San Joaquin Valley air districts to develop SOON programs, contractors operating statewide have at least three off-road diesel regulations to consider (the base regulation, the South Coast SOON regulation and the San Joaquin Valley SOON regulation). The prospect of allowing air districts beyond South Coast and San Joaquin to opt-in to the SOON program makes a bad problem worse. Statewide contractors may have several different off-road regulations to consider, each with different compliance requirements, contract provisions and equipment operation restrictions. To provide just a single example, the equipment eligibility requirements differ in the proposed South Coast and San Joaquin rules. San Joaquin proposes that only equipment operating more than 50 percent of the time in their air district will be required to participate in their SOON program. The South Coast proposal would include any equipment operating most of the time in the South Coast District, even if the percentage of time is less than 50 percent. This will result in nearly impossible compliance burden where equipment owners will have equipment sitting idle in one air district while renting equipment to perform work in another air district only because the SOON restricts the operation of a significant portion of their fleet.

EUCA feels strongly that the SOON program as proposed is unworkable and needs to be removed entirely from the Off-Road Diesel Regulation. Barring that, EUCA would like CARB to reconsider allowing air districts



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other than South Coast and San Joaquin Valley to opt-in to the SOON program. CARB should also require that South Coast and San Joaquin Valley harmonize the requirements of their SOON programs to facilitate contractor compliance.

These regulations are impacting the construction industry at a time when many businesses are already facing financial challenges. Page 61 of the April, 2007 Initial Statement of Reasons for Proposed Rulemaking states, ***“Staff also considered requiring higher turnover rates and more stringent NOx averages, but the higher costs would likely be more than the industry could bear.”*** This document is dated prior to the introduction of the SOON program which includes the higher turnover rates and more stringent NOx averages staff believes the industry cannot bear. By staff’s own estimation the SOON will produce an untenable economic burden without even considering the other regulations the construction industry is faced with including the Portable Equipment Regulation Program (PERP) and the upcoming On-Road (In-Use) Diesel regulation which promises to be even more costly than the Off-Road Diesel Regulation.

The SOON is simply a bad idea proposed at the worst possible time.

Sincerely,

Tara McGovern
Director of Government Relations

Cc: All California Public Works Agency Directors (inc. cities, counties and special districts)
Members of the California State Assembly
Members of the California State Senate
The Honorable Arnold Schwarzenegger, Governor of California
Cabinet Secretary, Dan Dunmoyer – Office of the Governor

The Engineering & Utility Contractors Association serves 400 union-affiliated contractors and vendor firms working in California, Nevada, Utah, Hawaii and other areas of the U.S. Member firms employ over 25,000 workers. The association is the most prominent and influential union contractors association in the Western United States.