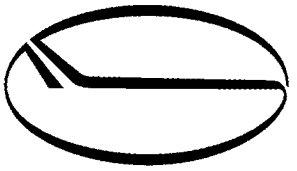

March 6, 2008

BY ELECTRONIC SUBMISSION

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

RE: Second 15-Day Comments, 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) "Second Notice of Public Availability of Modified Text and Availability of Additional Documents" (Second Notice), issued on February 5, 2008, for its regulation of in-use off-road diesel vehicles (ORD Rule).[1] 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.[2] 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 dated May 23, July 25, 2007, and January 4, 2008, in response to prior ARB notices concerning the ORD Rule, which are incorporated herein by reference including all attachments.[3]

As explained in ATA's prior comments, the ORD Rule is arbitrary and capricious, not supported by substantial evidence, was adopted contrary to California's notice and comment

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[1] The Second Notice is posted at www.arb.ca.gov/regact/2007/ordiesl07/ordiesl07.htm.

[2] 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.

[3] 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, its July 25 comments are posted at: www.arb.ca.gov/lists/ordiesl07/1097-ata_comments_re_ord_rule_with_attachments.zip (ATA July 25 Comments), and its January 4 comments are at: www.arb.ca.gov/lists/ordiesl07/1186-ata_15-day_comments_re_ord_rule_with_attachments.zip (ATA January 4 Comments).

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procedures, and is otherwise contrary to law.[4] Among other things, ARB lacks the legal authority to regulate GSE in the manner contemplated, and the ORD Rule is preempted by the Airline Deregulation Act (ADA) and the Federal Aviation Act.[5]

In this regard, the Supreme Court recently reconfirmed the broad scope of ADA preemption. *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. ____ (February 20, 2008) (No. 06-457) (applying ADA precedents to same preemption language in FAA Authorization Act of 1994). In *Rowe*, the Court affirmed and applied the broad ADA preemption test set forth in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), notwithstanding the State of Maine's argument that subsequent cases narrowed the standard. *See Rowe*, slip op. at 3-5. The Court also unanimously rejected Maine's argument that state laws related to public health are exempt from ADA preemption. *Rowe*, slip op. at 7-11. The *Rowe* decision further confirms that the ORD Rule is preempted by the ADA. *See* ATA July 25 Comments at 50-54; ATA January 4 Comments at 2, n.4.

In addition, since ATA's July 25 comments, the Ninth Circuit confirmed that the Federal Aviation Act "preempts the field of aviation safety" and expressly recognized "Congress' intent to make the Federal Aviation Administration the sole arbiter of air safety." *Montalvo*, 508 F.3d 464, 472 (9th Cir. 2007); *id.* at 473 ("We . . . hold that federal law occupies the entire field of aviation safety."). This further confirms ATA's analysis showing that the ORD Rule is preempted by the Federal Aviation Act. *See* ATA July 25 Comments at 45-50. Indeed, the ORD Rule recognizes the potential for safety issues in the installation and operation of potentially high-temperature diesel particulate filters, as required to meet fleet average emission targets and as mandated under the ORD Rule's BACT compliance path. *See, e.g.*, ORD Rule Section 2449(e)(8). However, the ORD Rule inappropriately places the burden on airport fleet operators to prove a lack of safety and relegates to ARB the authority to decide such airport safety issues. *See* ATA January 4 Comments at 11-12. The *Montalvo* decision further demonstrates that this approach is contrary to law as applied to airport GSE.

Despite ARB's lack of authority to regulate GSE in the manner contemplated, ATA nevertheless has consistently supported ARB's emission reduction objectives for off-road diesel vehicles. Unfortunately, while making some additional improvements at the margins, in the Second Notice ARB again fails to identify or consider alternative approaches that would achieve

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[4] *See, e.g.*, ATA July 25 Comments at 11-44, 54-59; ATA January 4 Comments at 2-12.

[5] *See, e.g.*, ATA July 25 Comments at 26-43, 45-59; ATA January 4 Comments at 2, n.4, 11-12. In addition, the ORD Rule is preempted by the federal Clean Air Act (CAA) unless and until EPA issues authorization under CAA § 209(e). *See* ATA July 25 Comments at 54-59. The Ninth Circuit recently confirmed this fundamental principle, holding that ARB's Marine Vessel Rules are preempted by the Clean Air Act and affirming an injunction against their enforcement. *Pacific Merchant Shipping Ass'n v. Goldstene*, ___ F.3d ____ (No. 07-16695) (9th Cir. Feb. 27, 2008).

these objectives in a manner that minimizes burdens on the National Airspace System and that promotes and ensures the continued safety and efficiency of aviation in California.

I. ARB Has Chosen To Ignore Obviously Significant GHG Consequences of the ORD Rule and the Variety of Feasible Alternatives to Reduce Those Emissions

As other commenters have also noted, ARB inexplicably limited its assessment of the greenhouse gas (GHG) emission implications of the ORD Rule to examine "only the direct emissions from operation of the vehicles." Technical Support Document at 145.[6] In other words, ARB chose to ignore the obviously significant GHG emissions associated with the manufacture, delivery, sale, and installation of the new or repowered ORD equipment and VDECS retrofit devices mandated by the ORD Rule, contrary to the California Environmental Quality Act (CEQA), Public Resources Code § 21159, and ARB's own policies and regulations.

The numerous alternatives proposed by ATA and others provide feasible approaches that would substantially mitigate the GHG emissions impacts of the ORD Rule by avoiding unnecessary "double controls" of the same equipment. For example, ATA's proposal would achieve the same NOx and PM emission reductions by the same key 2014 and 2020 deadlines, while minimizing the need for fleet owners to double control the same equipment by retrofitting units and purchasing Tier 3 equipment (to meet the ORD Rule's early-year targets) only to scrap and replace them a few years later to meet the ORD Rule's subsequent emission targets. *See*, *e.g.*, ATA July 25 Comments at 17-18. In adopting the ORD Rule, ARB cannot simply ignore the obviously significant GHG emissions associated with the retrofit and equipment replacement requirements of the ORD Rule, or the variety of feasible alternative approaches that would mitigate these additional emissions. *See*, *e.g.*, 17 CCR § 60006.

II. Changes To The VDECS "Safety" Exemption

As noted above, the ORD Rule is preempted by the ADA and Federal Aviation Act, including the provisions of Section 2449(e)(8), which inappropriately places the burden on GSE fleet owners to prove the safety of equipment that the ORD Rule mandates for airport use, and relegates to ARB, rather than FAA, the authority to make airport safety determinations. In addition, the provision provides for a VDECS exemption if using the equipment conflicts with occupational safety and health laws, and the Second Notice expands this to include conflicts with mining safety and health requirements. Second Notice at 3; ORD Rule Section 2449(e)(8). The provision should make clear that the exemption applies if the use of the VDECS conflicts with any applicable law, including federal laws related to aviation. In addition, the ORD Rule should not require the use of any VDECS unit under circumstances that conflict with voluntary fire or

[6] Available at: www.arb.ca.gov/regact/2007/ordiesl07/TSD.pdf.

other safety standards. While these changes would not rescue the ORD Rule or Section 2449(e)(8) from the preemption and other legal flaws noted in these and previous ATA comments, to the extent ARB elects to list conflicts with occupational and mining requirements as justifying an exemption for VDECS, the agency should recognize the potential for conflicts with other laws, as well as important voluntary safety standards.

III. Expansion Of The "Small Fleet" Definition

The Second Notice expands the definition of "small fleet," and eliminates a prerequisite that only a fleet owned by a "small business" could qualify as a "small fleet." Second Notice at 2. ATA supports these changes as necessary to provide a level playing field among business entities with small fleets of ORD equipment in California. In general, regulatory emission requirements should not vary depending on the level of revenues of the entity that owns the fleet.[7] In addition, these changes represent an important recognition of the need for compliance flexibility among smaller fleets in California. This flexibility will empower these fleets to achieve compliance through maximum use of the cleanest and best technology -- new Tier 4 vehicles -- and help reduce the costs and increased greenhouse gas emissions (among other negative environmental impacts) caused by the wasteful retrofits and double controls required of medium and large fleets under the ORD Rule.

IV. Surplus Off-Road Opt-In For NOx (SOON) Program

The Second Notice includes a 15-day comment period for the SOON program. This program was proposed by ARB staff on the evening of July 25 and the Board voted to approve it on July 26, 2007. ARB's adoption of the SOON regulation is flawed both procedurally and substantively.

A. ARB Has Failed to Comply With California Notice-And-Comment Rulemaking Requirements in Adopting the SOON

Under California law, the SOON program cannot be promulgated under the 15-day comment provisions of Cal Gov Code § 11346.8. Under California law:

> No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to

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[7] Eliminating the criterion relating to the revenues of the owning entity is also consistent with ARB's approach to small fleets in other regulations. *Cf.*, *e.g.*, 13 CCR 2775 (small fleet provision in regulation addressing existing spark-ignition off-road equipment).

> the public pursuant to Section 11346.5, unless the change is
> (1) nonsubstantial or solely grammatical in nature, or
> (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action.

Cal Gov Code § 11346.8(c). Only a "sufficiently related" change to the original regulation may be adopted under the 15-day comment process. *Id.*[8] A change to the original text of a regulation is deemed to be "sufficiently related" only "if a reasonable member of the directly affected public could have determined from the notice that these changes to the regulation could have resulted." 1 CCR § 42.

While the SOON program is related, in limited respects, to the state-wide regulatory regime embodied in the ORD Rule, the SOON constitutes a separate and distinct opt-in program to allow local air Districts to impose a mandatory system for funding and achieving additional NOx reductions above and beyond those required under the ORD Rule. The SOON program is not merely an amendment or "change" to the ORD Rule provisions, and therefore the program cannot be implemented as a "change" under the 15-day notice and comment provision of Cal Gov Code § 11346.8(c).

In any event, even if the SOON program could be deemed merely a "change" to the original ORD Rule proposal, it is not "substantially related." Nothing in the original notice for the ORD Rule issued by ARB in April 2007 under Cal Gov Code § 11346.5 would have allowed a reasonable member of the public to determine that the SOON program could have resulted. Indeed, the SOON concept and its specific provisions were not contemplated publicly until the very end of the rulemaking process -- literally the evening before the Board's final vote to adopt the ORD Rule. For these reasons, the SOON program cannot be adopted under the truncated 15-day notice and comment process, but must be pursued under the ordinary notice-and-comment procedures set forth in the California Government Code, including Sections 11346.4 and 11346.5.

Moreover, separate and apart from whether 45-day or 15-day notice-and-comment procedures are applicable, in adopting the SOON ARB has failed once again to comply with fundamental prerequisites of the public rulemaking process under California law. ARB staff did not announce or make public the proposed SOON provisions until the evening before the

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[8] Given its use of the 15-day comment process, ARB presumably recognizes the fact that the SOON is not a "solely grammatical" or "nonsubstantial" change to the ORD Rule. *See* 1 CCR § 40 (changes are nonsubstantial "if they clarify without materially altering the requirements, rights, responsibilities, conditions, or prescriptions contained in the original text.").

Board's definitive vote to adopt it at the hearing on July 26, 2007. Thus, ARB failed to provide any meaningful opportunity for public comment on the SOON provisions. As ARB staff recognizes in the Second Notice, the Board made the final decision to adopt the SOON on July 26 without any significant opportunity for submission or consideration of public comments. *See*, *e.g.*, Second Notice at 1 (at the July 26 hearing the Board "directed" staff to add the SOON program); *id.* at 4 ("As directed by the Board, the staff has added section 2449.3, the Surplus Off-road Opt-in for NOx (SOON) program, to the regulation").

For these reasons, ARB must vacate Resolution 07-19 and provide the public announcement and full 45-day comment period for the SOON program required by the California Government Code.

B. The SOON Program is Substantively Flawed and Contrary to Law

1. Fleets Cannot be Required to Apply for and Accept Carl Moyer Funds or to Make Modifications Dictated by Local Authorities

The SOON regulation purports to authorize local air Districts to make participation "mandatory" starting in 2010 (or 2009 for the South Coast and San Joaquin Valley). *See* SOON Section 2449.3(e)(9). Fleets meeting the statewide horsepower and composition levels of the SOON, with equipment operating in a "mandatory" district, would be required: (1) to apply for funding by responding to District solicitations; and (2) to "complete the actions for which they were funded per the conditions of the solicitation." *Id.* Section 2449.3(d)(1)(D), (E). The SOON purports to authorize local air Districts to adopt guidelines that "include a preapplication process that collects vehicle data (model year, horsepower, hours of use) and then requires full SOON project applications only for vehicles likely to receive funding." *Id.* Section 2449.3(f)(2). These and other provisions that render SOON participation mandatory rather than voluntary are contrary to state and federal law in a number of respects, including the following.

First, with respect to GSE in particular, states and localities are preempted under the ADA and Federal Aviation Act from selecting particular units of GSE that must be modified or replaced, or mandating the timetable for such intrusive changes. As set forth in detail in ATA's previous comments, GSE is inextricably intertwined with the provision of airline transportation service and the selection of routes (and thus ticket prices), and to the safe and efficient movement and operation of aircraft in the National Airspace System. *See*, *e.g.*, ATA July 25 Comments at 45-54. Indeed, the concerns set forth in ATA's previous comments are in many respects even more problematic as applied to the SOON, given the highly intrusive and ill-defined powers the SOON would give localities to mandate changes to GSE. By purporting to authorize each local air District in California to impose its own unchecked mandates dictating changes to specific units of GSE, with no regard to the overriding federal considerations of safety, efficiency, and risks of disruption to air travel, the SOON is plainly preempted by the ADA and Federal Aviation Act. *See, e.g., id.*; *see also Rowe*, slip op. at 4-11 (ADA preempts state laws "having a connection with" airline services, even if the effect "is only indirect");

Montalvo, 508 F.3d at 472 (holding that the Federal Aviation Act preempts the field of aviation safety and recognizing Congress' intent that the FAA be the "sole arbiter of air safety").

Second, ARB lacks the authority to require fleets to consent to the terms of solicitations dictated by local air Districts. By its terms, the SOON purports to allow local air Districts to set the terms of a solicitation, and mandate that fleets selected for funding agree to those terms. There is no legal basis, and ARB cites none, that could allow ARB or local air Districts to unilaterally set the terms of a contractual agreement, and mandate that a private party accept state funds and agree to the contract terms. Just as one party cannot unilaterally change the terms of a contract, neither can a governmental entity mandate that a private party enter into a contract. *Cf. Douglas v. United States Dist. Court*, 495 F.3d 1062, 1066 (9th Cir. 2007) ("Indeed, a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so"), *cert. denied*, *Talk Am. Inc. v. Douglas*, 2008 U.S. Lexis 2299 (Mar. 3, 2008). At a minimum, such a requirement is problematic under Due Process principles and the Impairment of Contracts clauses of the United States and California Constitutions, among other provisions. *See* United States Constitution, Article I, Section 10, Clause 1; California Constitution, Article I, Section 9.

Third, the Second Notice confirms that "most, if not all, of the SOON program funding will be supplied through the Carl Moyer program." Second Notice, Attachment 2 at 6.[9] However, nothing in the Carl Moyer legislation or guidelines, or any other authority, contemplates that ARB or local air Districts may mandate that entities apply for or accept Carl Moyer funds. *See*, *e.g.*, Cal Health & Safety Code, Chapter 9. To the contrary, the framework and language of the Carl Moyer legislation and ARB's implementing guidelines make clear that the program is to be based on financial "incentives" and that participation is to be voluntary. *See*, *e.g.*, Cal Health & Safety Code § 44290 (requiring ARB and Districts to implement an outreach program to inform potential participants "of the availability of grants," and requiring that ARB and Districts "shall vigorously recruit grant applications"); *id.* § 44280 (the program is to "provide grants"); The Carl Moyer Program Guidelines, Part II, Project Criteria, at I-1 (Nov. 17, 2005) (the program "provides financial incentives"). This is further confirmed by the almost exclusive focus of the Carl Moyer legislation and ARB guidelines in setting "eligibility" criteria for awarding grants to "applicants." The SOON would impermissibly seek to divert funds earmarked by the legislature for grants intended to give financial incentives to interested parties to achieve excess emission reductions, and use those funds instead to provide a mechanism for ARB and Districts to impose intrusive and ill-defined mandates on private parties that have either determined that they do not want or need a financial incentive, or who are unwilling to agree to abide by the terms associated with the acceptance of state funds. In this regard, the SOON would misuse Carl Moyer Program funds, is inconsistent with the statute and ARB's own implementing guidelines, and is contrary to law.

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[9] Available at: www.arb.ca.gov/regact/2007/ordiesl07/2nd15dayattach2.pdf.

2. The Program Would Violate Other Carl Moyer Program Requirements

The Carl Moyer Program is intended to fund the "incremental cost" of projects that achieve emission reductions above and beyond what is already required by regulation. *See*, *e.g.*, Cal Health & Safety Code at §§ 44280(b), 44281(b). As ARB recognizes in the current guidelines, Carl Moyer "is a grant program that funds the incremental cost of cleaner-than-required engines, equipment, and other sources of air pollution." *See* Carl Moyer Program Guidelines, Part I (Release Date January 6, 2006) at 1-1.[10] The statute makes clear that the funds are intended to "offset the incremental cost of projects" for the parties who receive the funds. Cal Health & Safety Code 44280(b) ("The program shall provide grants to offset the incremental cost of projects that reduce covered emissions from covered sources in California.").

However, rather than being used to offset the actual incremental cost of achieving additional emission reductions, the SOON would use Carl Moyer funds for emission reduction measures that would otherwise already be required by the ORD Rule. The SOON would then require the fleet to bear the entire cost of making subsequent additional emission reductions, which ARB recognizes are likely to be more expensive that the measures funded under the SOON. *See* Second Notice, Attachment 2 at 5 (the SOON program may "force" fleets "to choose actions for statewide rule compliance that are more expensive" than otherwise). In other words, rather than being used to "offset" the true incremental costs of achieving additional emission reductions, the SOON program would use Carl Moyer funds to reimburse fleets for making cheaper "low-hanging fruit" changes already required under the ORD Rule, and then mandate that those fleets pay the entire cost of making the more expensive changes required to achieve additional reductions. The SOON would thus inappropriately allocate Carl Moyer funds without regard to the actual cost of the additional, incremental reductions, which the fleet owner would be obligated to bear without reimbursement.[11]

3. ARB Failed to Adequately Consider the Costs of Requiring Fleets to Apply

ARB staff evidently failed to consider the substantial costs imposed on those fleets who are required to apply for SOON funds, but ultimately do not receive them. *See*, *e.g.*, Second Notice, Attachment 2 at 7. Those costs achieve no air emission reductions, and must be

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[10] Available at: www.arb.ca.gov/msprog/moyer/guidelines/Carl_Moyer_Guidleines_Part1.doc.

[11] In addition to violating the substantive purpose and requirements of the statute, this approach would also presumably distort the consideration of whether the incremental reductions are cost effective under Cal Health & Safety Code 44282(b), since the reduction measures contemplated for SOON funding are different from (and potentially less expensive than) the subsequent measures that actually achieve the additional emission reductions beyond those otherwise required by the ORD Rule.

considered by ARB in evaluating the cost effectiveness of the regulation. Moreover, the SOON appears to place no limitation on the number of fleets forced to apply, regardless of the amount of funds actually made available by a District for a particular solicitation. There is no reason for ARB to impose such a magnitude of administrative costs on private parties, forcing them to participate in a burdensome application process that may have little or no relationship to any potential to achieve emission reductions.

In any event, in light of ARB's determination that fleets who receive SOON funding will realize an economic benefit (*see* Second Notice, Attachment 2 at 6), there is no reason to force fleets to apply for funds. The same objectives can be achieved through a voluntary program, that provides an "incentive" and not a mandate, consistent with the Carl Moyer Program legislation.

V. Conclusion

For the reasons set forth herein and in ATA's previous comments, ARB Resolution 07-19 must be vacated. The ORD Rule should be replaced with an approach that achieves the needed emission reductions in a more cost-effective manner, and that minimizes burdens on the National Airspace System.

Sincerely,

Timothy Pohle
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& Associate General Counsel
Air Transport Association of America, Inc.