



March 25, 2008

Ms. Mary Nichols, Chair, and Board Members  
Mr. James Goldstone, Executive Officer  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95814

RE: CARB Zero Emission Vehicle Regulatory Revision

Dear Chairperson Nichols, Mr. Goldstone, and Members of the Board:

The ZEV program is critically important to advancing zero emission vehicle technology. Friends of the Earth, a ZEV Alliance Member, appreciates the opportunity to participate in the program's ongoing development and we look forward to revisions that advance the program's twin goals of vehicle emissions reductions and technology improvements.

#### **I. Technology Requirements**

We fully support CARB in its efforts to walk a fine line between fostering continued zero emission vehicle technology development while recognizing true technology limitations. We believe, however, that the ISOR has gone much too far in reducing pure ZEV numbers. This reduction sends the wrong signal to automakers and their suppliers and fails to achieve progress necessary for advancing our air quality and global warming reduction goals. It also provides automakers a substantial windfall profit, on the order of billions of dollars, that we believe should be invested in moving zero emission vehicle technology forward, both in the form of greater numbers of pure gold ZEVs and greater numbers of Enhanced AT-PZEV vehicles.

We strongly object to reducing Phase III pure gold ZEV numbers to less than 150 vehicles per year per automaker, even given PHEV backfill numbers. This small quantity will not move zero emission vehicles toward commercialization, and sends the wrong signal to automakers and suppliers.

We believe that a New Vision is necessary for ZEV. That vision is outlined in the ZEV Alliance's "*Principles for a Strong California Zero-Emission Vehicle Program*" and in comments submitted to the Board and entitled "*A New Vision of California's Zero Emission Vehicles Program: An Analysis of the Impact of the Zero Emission Program on California's Long Term Global Warming Pollution Goals*," Spencer Quong, UCS, March 25, 2008.

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We appreciate staff's inclusion of Enhanced AT-PZEV requirements in the ISOR. Plug-in hybrids are an important step in the move toward pure zero emission vehicles. However, plug-in hybrid requirements should not come at the expense of pure gold ZEVs. Rather, ZEV categories should be restructured to include Enhanced AT-PZEV requirements *in addition to* strong pure gold numbers. To the extent plug-ins are allowed to act as backfill for a limited reduction in pure gold vehicle numbers, only PHEV 20's or better should be given such credit.

We also request that a more significant credit differential be created between Enhanced AT-PZEVs. There is only a small range of differentiation between credits for low-mileage plug-ins and the more advanced plug-ins. Given this current structure, we believe there is little incentive to produce higher mileage plug-ins. In addition, in order to further encourage plug-in hybrid development, we believe that a temporary adjustment of battery warranty is justified, especially to the degree it is limited to the "early adopter" phase. Finally, we would like to see a much greater ramp-up in Enhanced AT-PZEV numbers to reflect a true commercialization pathway. This proposal is set forth in comments submitted to the Board and entitled "*2008 Proposed Amendments to California Zero Emission Vehicle Program Regulations,*" (re: Enhanced AT-PZEV requirements), Luke Tonachel, NRDC, March 25, 2008.

Lastly, we also support closing a series of potential loopholes created by the ISOR. Those comments are set forth in the document entitled: "*2008 Proposed Solutions to Potential Loopholes*" filed by Luke Tonachel and Spencer Quong.

## **II. Public Disclosure**

We appreciate the increased public disclosure provided in the ISOR which proposes to make available to the public: (1) each manufacturer's annual production data and corresponding credits; and (2) annual credit balances for: each type of vehicle, advanced technology demonstration programs; transportation systems; and credits earned under section 1962.1(d)(5)(C). *ISOR, Appendix 6, Proposed Amendments to §1926.1(l).*

The disclosure requirements, however, are unclear and appear too limited. The ISOR appears to exclude from public disclosure detailed information relating to demonstration programs, transportation systems, and importantly, credit trading by automakers. We do not even know what the ISOR means by annual credit balances, for instance will credit balances be listed by manufacturer or generically?

We are particularly concerned about the denial of access to credit trading information. This denial means that, in instances where automakers receive credits beyond their vehicle production, the public cannot ascertain the basis of those credits and therefore the basis for claimed ZEV compliance. Essentially, the public is prevented from knowing where additional credits were obtained, how those credits were derived, whether such credits were issued, or accounted for, accurately, or whether the credits are real or fraudulent.

As noted in a previous submission to CARB by the ZEV Alliance, we request that the following compliance data be made publicly available:

- Any document provided to the California Air Resources Board to demonstrate compliance with the program, including but not limited to automobile sales, emission information, or credit trading data, shall be publicly available;
- Any document created, or action taken by, the California Air Resources Board to confirm compliance, award credit, or recognize a transfer of credit, shall be publicly available, including tools for calculating and verifying such regulatory compliance.

1. CREDIT TRADING INFORMATION IS NOT TRADE SECRET AND SHOULD BE MADE PUBLIC

A. ZEV Credits Are Records of Compliance, Not Trade Secrets

In order to demonstrate compliance with ZEV requirements, an automaker must submit annual vehicle production data to CARB. After review of such data, CARB's Executive Officer issues credits based on the information submitted. 13 CCR §1962.1(g)(5)(D).

These government issued ZEV credits are no more a trade secret than are a county's record of issuing a building permit, or self monitoring reports filed with the Regional Water Quality Control Boards. The act of purchasing ZEV credits from other automakers does not create a trade secret where none existed before.

B. Limited Nature of Trade Secret Exemption

The trade secret exemption of the Public Records Act provides only limited relief from the broad constitutional principle that the public is entitled to understand what its government is doing and to participate fully in that process. (All laws furthering the right of public access shall be "broadly construed" and all exemptions "narrowly construed." Cal. Const. Article 1, Section 3(b).

C. Credit Trading Information Does Not Meet the Requirements of A Trade Secret

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The fundamental purpose of the trade secret exemption is to protect a companies' investment of time and resources in developing, producing or selling a product, a formula, or a compilation of information. A trade secret is "any formula, plan, pattern, process, tool, mechanism, compound procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern, who are using to it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to

obtain a business advantage over competitors who do not know or use it. *Gov. Code* §6254.7(d).

In order for a piece of information to be kept from the public under this limited exception, each of the stated elements must be met. Meeting one element -- for instance claiming that a business advantage occurs when information is kept secret -- is insufficient to keep such information from the public.

Critical elements of section 6254.7(d) are not met in the case of ZEV credit trading information. First, credit information is known to many individuals outside a commercial concern. Credits are created and issued by CARB, a public agency; by definition, they are known by persons outside a company.<sup>1</sup> The mere act of trading those credits does not transform public compliance data into secret information.

Second, credit trading information is not used “to fabricate, produce, or compound an article of trade or a service having commercial value.” Product plans, engineering details, and customer lists are the types of information that automakers use to produce and sell automobiles and would properly be the subject of trade secret protection. In contrast, credit trading information is not used in automakers’ production or sales. Rather, it is used to assure that a company is complying with the law. This does not meet the test of trade secret.

D. Trade Secret Protection Should Not Be Turned Into a Catch-All Exemption for Preventing Public Review

There has been an increasing tendency for companies to try to use the trade secret exemption for anything related to conducting their business. The trade secret, exemption, however is not so encompassing.

To extend trade secret protection to all compliance actions by a business, as the December 3, 2007 Report of the Office of Legal Affairs (OLA) does, not only goes beyond the clear definition of trade secret, but it subverts the very purpose of the Public Records Act, which is to bring sunlight to government regulatory actions. The OLA’s argument, which appears to be that anything a company does to “assure they are complying” with the law and that provides a “business advantage,” if accepted, would work a massive expansion of the trade secret exemption.

Pursuant to this logic, regulated industry could claim that everything they do to comply with the law is trade secret. As just one example, regulated industry could argue that submission of required monitoring data revealing violations of the law should be

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<sup>1</sup> This is distinct from the scenario where trade secret information is created by a regulated entity and then submitted to an agency. In that instance, the secrecy element is retained. In contrast, when a public agency creates information at issue, there is no secrecy to maintain. By definition, such information is not “known only to individuals within a commercial concern.”

considered a trade secret because public disclosure could subject a company to hundreds of thousands of dollars in penalties. Keeping such data secret would provide a company a significant financial advantage. Similarly, divulging spills or information about contaminated lands could also be argued to be a competitive disadvantage.

Such an attempted extension of trade secret law, in fact, has already begun. In a recent lawsuit, Union Pacific Railroad claimed that wetlands on their property constituted a trade secret that should bar citizen enforcers' request to inspect their land.<sup>2</sup> The railroad's stated rationale was that allowing the public to know where wetlands were located could delay the development of their property and cost them significant money.

The OLA's compliance-related theory of business activity does not fit within the elements of a trade secret and would open up an enormous loophole in trade secret law.

E. Public Interest in Full Disclosure

Automakers have come to CARB asking for a reduction in the number of zero emission vehicles they have to produce. They would certainly like to keep the public uninformed and unable to effectively participate in this process and, to a large extent, have been successful in doing so. This type of gaming should not be allowed in the future.

The ZEV program helps ensure clean air, a resource that is vital to the public. The public, therefore, has a vital stake in ensuring this regulation remains as strong as possible and is adequately enforced. There are many points at which enforcement of the ZEV law can go wrong, from incorrect information supplied by automakers, to errors in calculations, or lack of enforcement due to inadvertence, lack of resources, or lack of will. Public oversight and participation helps ensure the proper functioning of the system and therefore helps ensure clean air and reduced emissions.

Absent public accountability, trading systems can go badly wrong and have done so in the past. RECLAIM's Rule 1610 program is a good example. That trading system was kept confidential and was plagued by under reporting of emissions, over reporting of emissions reductions, and outright fraud. Public participation helps curb those tendencies. When the regulated community knows that the public has access to compliance data, such as ZEV credits and the sales data on which they are based, it has an incentive to produce accurate information.

Similarly, transparency around credit trading may discourage large automakers from trading with low cost, low technology providers. Further, the public should be apprised of the entities from which automakers are buying credits so that responsibility is clear in instances where such technology creates problems or where trading subverts the intent of the regulations such as occurred with NEVs in the early 2000s.

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<sup>2</sup> *Humboldt Baykeeper v. Union Pacific Railroad*, Case No. C06-02560 (Motion to Compel Defendant CUE IV to Allow Entry Upon Designated Property, June 29, 2007).

If the public does not receive the full array of information on which compliance decisions are made, it cannot fully participate in the regulatory process. This participation has for decades been recognized as important in a functioning democracy. We ask that the Board require that all ZEV compliance data be made fully accessible to the public.

Thank you for your time and consideration.

Sincerely,



Danielle Fugere  
Regional Program Director  
Friends of the Earth