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January 22, 2008

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Ms. Mary D. Nichols, Chair
and Members
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: *ARB Public Meeting, January 24, 2008*
ARB Board Agenda Item No. 07-12-10 – ZEV Credit Data Disclosure

Dear Ms. Nichols and ARB Board Members:

We are writing on behalf of Chrysler, Ford, General Motors, Honda, Nissan, and Toyota, (collectively, the “Manufacturers”) to update you on developments since the December 6, 2007 public meeting. We also provide a brief discussion of the Manufacturers’ views on certain of the underlying legal and policy issues regarding the requested public disclosure of the ZEV credit data and related information.

Ongoing Efforts by ARB Staff to Reach a Compromise

At the December 6 Board meeting, you asked ARB staff to work with the Manufacturers and the interested environmental groups to try to reach a compromise on the ZEV data that would be disclosed to the public.¹ As your Board requested, the Manufacturers have been working with ARB staff to craft a possible compromise. Various of the Manufacturers have communicated with the staff to achieve a compromise, and wish to thank staff for their efforts. On January 7, 2008, the staff sent the Manufacturers a detailed questionnaire stating, among other things, that:

¹ Those issues are analyzed at length in the 22-page report, dated December 3, 2007, entitled “Options Regarding the Requested Disclosure of Zero Emission Vehicles (ZEV) Credit Data Based on Submittals by Vehicle Manufacturers Who Have Designated The Data as Confidential Trade Secret Information” (“Options Report”). The Manufacturers responded to the Options Report by letter to the Board, dated December 6, 2007, from the undersigned. The response, prepared on less than three-days’ notice, was necessarily preliminary in nature.

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“Your response to this questionnaire will help us in finding a compromise and common ground with the ZEV Alliance with regard to their public records request as directed by the Board at the December 6, 2007 public meeting. In doing so, we should better understand the true differences between what is being asked for by the environmental organizations and what industry is willing to publicly disclose.”

As requested by ARB staff, the Manufacturers responded to the questionnaire by the staff's January 16 deadline. The Manufacturers continue to work diligently with the staff on a compromise and, in fact, plan to meet in Sacramento tomorrow to reach a compromise before the January 24, 2008 Board meeting.

The Manufacturers believe the questionnaire, and their response, can be a useful tool in crafting a compromise, and they commend the staff's efforts in developing the questionnaire and finding common ground. The Manufacturers think that it is in everyone's best interest, including the Board's, to facilitate a negotiated resolution and avoid a contested Board vote on this issue. Thus, the Manufacturers are committed to reaching a compromise if at all possible, and they believe that a resolution can be achieved expeditiously.

Discussion of Options Report

As reported above, the Manufacturers are currently focused on working with ARB staff to reach an early, negotiated resolution of this matter. However, in the event that their efforts toward compromise are not fruitful, the Manufacturers want the Board to be aware that they have significant concerns about — and strongly disagree with — a number of the opinions expressed in the December 3, 2007 Options Report. These opinions have legal and policy implications far beyond the specific ZEV credit information at issue now.

As we said in our December 6 letter to the Board and at the Board meeting later that same day, the Options Report correctly concludes (at p. 14) that “all the requested ZEV credit information claimed to be confidential meets the definition of ‘trade secret’ in Government Code section 6254.7(d).”² However, the Options Report then proposes —

² The Manufacturers request that Board members review the individual Manufacturers' ZEV credit data submissions in confidence. This was clearly not possible before the December 6, 2007 public meeting but Board members have had the opportunity to review this key part of the record in confidence prior to

(... continued)

based largely on the ARB Office of Legal Affairs' review of the convoluted legislative history of Government Code section 6254.7(d) — a complete departure from ARB's and industry's past interpretation of this section, concluding (at pp. 15-16) that section 6254.7(d) provides "... a 'trade secret' exemption only for the categories of information identified in section 6254.7(a), (b) and (c)."

This proposed interpretation — which casts aside ARB's understanding and interpretation of section 6254.7(d) dating back to its adoption by the Legislature in 1970 — fails to explain a critically important piece of the section's legislative history. Specifically, it fails to explain the fact that in 1981 the Legislature amended (d) to add a very important exception for standardized tests referenced in the Education Code. If (d) is as narrow as now proposed, there would have been no need for the Legislature to be concerned about standardized test information — or for the Legislature to provide such an exception — since that information is clearly not covered by section 6254.7(a), (b) or (c). Indeed, the Education Code exception would be inexplicable. The Options Report itself concedes (at pp. 15-16) that "[t]he referenced Education Code provisions pertain to standardized tests" and that "... the information covered by the new exception has nothing to do with the kinds of information declared to be public records in Government Code section 6254.7(a), (b) or (c)."

Rather than recognize that the 1981 amendment supports industry's, ARB's, and other agencies' long-standing interpretation of the trade secret protection provided in (d), the Options Report tries to ignore the Education Code language by calling it "surplusage" (at p.15). But it is not "surplusage." It is not redundant, superfluous or non-substantive. The Legislature inserted the specific language about the standardized test records by a special amendment and, as the Legislative history demonstrates, obviously takes special care in addressing standardized tests for California students. Given this history, it is not appropriate simply to read the entire 1981 amendment out of section 6254.7(d) in order to try to support a new interpretation of it. That approach is contrary to the well-established California rules of statutory construction (*People v. Johnson*, 28 Cal.4th 240 (2002)). The bottom line is that if the Options Report had appropriately considered this 1981 amendment, then the Options Report should have concluded that Manufacturers' ZEV credit materials constitute trade secrets that are not subject to disclosure under the California Public Records Act.

(... continued)

the January 24, 2008 public meeting. Given the importance of this issue, such a review is necessary to assure a full and fair hearing of this matter.

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Very importantly, at the December 6 public meeting, former Chief Counsel Jennings recognized that the Options Report's proposed interpretation is a complete departure from how ARB and industry have interpreted the trade secret provision in (d) in the past. This change of policy is underscored by the guidance document that ARB issued for the ZEV Credit program itself. Enclosed as Attachment A is ARB's "Manufacturers Advisory Correspondence (MAC) 2006-03," dated October 11, 2006 ("MAC"), just a year ago. The Options Report does not discuss this recent MAC, even though the subject of the MAC is "Zero Emission Vehicle (ZEV) Credit Reporting and Tracking System." ARB addressed this October 2006 MAC to car and truck manufacturers. This MAC addresses, among other things, how vehicle manufacturers can protect the confidentiality of the information they submit to ARB under the ZEV program (at pp. 6-7). Having well in mind the specific information it was requiring be submitted under the ZEV program, ARB told manufacturers in October 2006 the following:

"In accordance with Title 17, CCR, Sections 91000 to 91022, and the California Public Records Act (Government Code Section 6250 et seq.), the information that a company provides to the ARB may be released (1) to the public upon request, except trade secrets which are not emissions data

"Trade secrets as defined in Government Code Section 6254.7 are not public records and therefore will not be released to the public." (emphasis added)

Each of the Manufacturers relied upon this instruction in submitting ZEV Credit information to ARB. The unambiguous meaning of this language is that, if the ZEV Credit information qualifies as a trade secret under section 6254.7(d), it is exempt from disclosure under the California Public Records Act. In relying on this instruction from ARB, each of the Manufacturers submitted trade secret ZEV Credit information in the belief that it would be kept confidential, as stated in the October 2006 MAC and consistent with prior ARB practice. The Options Report

concedes that the ZEV Credit information is trade secret and thus, as stated in the October 2006 MAC, ARB should continue to hold this information confidential.³

The Options Report proposes that ZEV credit information found to be trade secret must be disclosed because it does not also fit within the categories of information identified in Section 6254.7(a), (b) and (c). In making this proposal, the ARB Office of Legal Affairs now would render meaningless — and seriously misleading — the section on confidentiality in the ARB's October 2006 MAC on the ZEV program. At the time ARB issued the October 2006 MAC, it knew exactly what information it was requiring be submitted under the ZEV program. Yet, this MAC relies on the absolute protection section (6254.7(d)), which the Options Report now says could never apply to the ZEV data, and it fails to mention the balancing test section (6254(k)), which the Report now says is the only protection available for the ZEV credit data.

ARB is not the only agency that has read 6254.7(d) as a broad statement of absolute protection of trade secrets for many years. Contrary to the proposed interpretation in the Options Report (that it is limited to three categories of documents dealing with air quality and construction), other agencies believe that 6254.7(d) applies to them. See, for example, the Department of Health Services' regulations relating to certification of environmental laboratories (22 CCR § 64801, et seq.) and the California Integrated Waste Management Board's regulations for the Rigid Plastic Packaging Container Program (14 CCR § 17942, et seq.). The proposed interpretation in the Options Report would undermine the practices of these and other State agencies.

Even assuming that the proposed new ARB interpretation were adopted, it should be recognized for what it would be: a complete departure from the long-standing interpretation and practice of ARB and other state agencies and a reversal of the guidance given by ARB to the Manufacturers in the ZEV program. It would not be appropriate for the Board or staff to apply it retroactively to the Manufacturers, which relied on ARB's own interpretation and guidance documents in submitting the data over many years up to the current time. If the Board or staff were to apply the balancing test to this data, rather than absolute protection, this reversal, as well as the sensitive and confidential nature of the data itself, should tip strongly in favor of shielding the data from disclosure.

³ The 2006 instruction regarding trade secrets is identical to the prior instruction, in MAC 2004-01, dated March 24, 2004, regarding credit reporting and tracking for 2002 and subsequent ZEVs, AT PZEVs and PZEVs.

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In addition to the issues discussed in the body of this letter, the Options Report and ARB's current proceeding raise other significant legal and policy issues. In the interest of achieving a compromise, we have not elaborated on those other issues in this letter but reserve all of the Manufacturers' rights to raise them in any forum. Other issues include, but are not limited to, the issues briefly listed and discussed in the enclosed Attachment B. Individually or collectively these additional issues support the Manufacturers' position that the ZEV credit information, that is the subject of this agenda item, constitutes trade secrets that are protected from public disclosure under the California Public Records Act and other applicable California laws.

Broader Implications

The opinions expressed in the Options Report have ramifications that potentially reach far beyond the issue of ZEV-related data, such as the protection of confidential and proprietary pre-certification, production, and compliance information and may have ramifications beyond ARB rulemaking activities. These broader issues should be resolved in a fashion that is fair and reasonable for all interested parties.

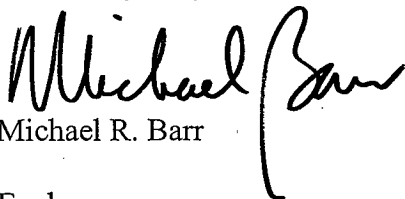
For the time being, however, the Manufacturers' focus is on the narrower task of working with ARB staff toward a compromise on the ZEV data issue. The Manufacturers remain optimistic that if all interested parties work cooperatively toward compromise, it will be unnecessary for the Board to act on the Options Report and decide these significant legal and policy issues. If a compromise is not reached by the time of your January 24 public meeting but discussions are still ongoing, we would encourage the Board to provide ARB staff and the interested parties with some additional time to reach agreement.

Assuming the immediate ZEV data issue can be resolved, the larger questions raised in the Options Report about trade secret protection of Manufacturers' data and other information will still remain. These questions should be addressed in an open and deliberative process designed to involve a much broader group of affected parties.

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Thank you very much for your consideration of this letter.

Yours very truly,

A handwritten signature in black ink that reads "Michael Barr". The signature is written in a cursive style with a large, sweeping "B" at the end.

Michael R. Barr

Enclosures

cc: Thomas Cackette
Diane Moritz Johnston, Esq.
Manufacturers' Counsel Group
Sarah G. Flanagan

Attachment A

MAC 2006-03

Robert H. Cross (CARB) Oct. 11, 2006 Letter re
ZEV Credit Reporting and Tracking System



Linda S. Adams
Secretary for
Environmental Protection

Air Resources Board

Robert F. Sawyer, Ph.D., Chair
9480 Telstar Avenue, Suite 4
El Monte, California 91731 www.arb.ca.gov



Arnold Schwarzenegger
Governor

October 11, 2006

MANUFACTURERS ADVISORY CORRESPONDENCE (MAC) 2006-03

TO: ALL PASSENGER CAR MANUFACTURERS
ALL LIGHT-DUTY TRUCK MANUFACTURERS
ALL MEDIUM-DUTY VEHICLE MANUFACTURERS
ALL OTHER INTERESTED PARTIES

SUBJECT: Zero Emission Vehicle (ZEV) Credit Reporting and Tracking System

This letter transmits a Manufacturers Advisory Correspondence (MAC) that provides vehicle manufacturers and other interested parties with the Air Resources Board's (ARB) mechanism and format to be used for reporting and tracking ZEV deliveries and placements to determine ZEV credit compliance. This MAC supersedes MAC 2004-01. The modifications included in this MAC are: reordering of attachments/forms, a new form to collect information on the calculation method and production numbers (Attachment B), minor changes to the credit data file highlighted in bold (Attachment C), and a new debit data file (Attachment D).

If you have any questions regarding this matter, please contact Ms. Krista Eley, at (916) 322-2333, or via email at keley@arb.ca.gov.

Sincerely,

/s/

Robert H. Cross, Chief
Mobile Source Control Division

Attachments

cc: Ms. Krista Eley
Air Pollution Specialist

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website: <http://www.arb.ca.gov>.

California Environmental Protection Agency

**State of California
Air Resources Board**

Manufacturers' Advisory Correspondence (MAC) MAC #2006-03

- Subject:** Format and policies for manufacturer Zero Emission Vehicle (ZEV) Reporting for 2006 and subsequent model-year ZEVs, Advanced Technology Partial ZEVs (AT PZEVs) and Partial ZEVs (PZEVs). This MAC supersedes MAC 2004-01.
- Applicability:** Manufacturers of 2006 and subsequent model-year ZEVs, AT PZEVs and PZEVs certified for sale in California and any person or entity that transacts credits for these vehicles including, but not limited to, credit brokers and transportation project managers.
- References:** Section 1962, Title 13, California Code of Regulations (CCR), and the incorporated "California Exhaust Emission Standards and Test Procedures for 2005 and Subsequent Model ZEVs, and 2001 and Subsequent Model Hybrid Electric Vehicles, in the Passenger Car, Light-Duty Truck and Medium-Duty Vehicle Classes," adopted August 5, 1999, as last amended December 19, 2003.
- Background:** The California ZEV regulations were originally adopted by the Air Resources Board (ARB or Board) in 1990, as part of the first generation California low-emission vehicle regulations. The ZEV program is an integral part of California's mobile source control efforts, and is intended to encourage the development of advanced technologies that will secure increasing air quality benefits for California now and into the future. The ZEV regulations nominally require that ten percent of the passenger cars and light-duty trucks produced and delivered for sale in California by all but small volume manufacturers be ZEVs – vehicles with no emissions. However, there are mechanisms under which a manufacturer may satisfy part – or in some cases all – of its ZEV obligation with PZEV allowances generated from vehicles with extremely low emissions.

In 2003, the ZEV regulation was amended to address issues raised by industry litigation and to take into account current conditions and trends in zero and near-zero emissions technology development. As a result of the amendments, the ZEV regulation became more complex and therefore requires more detailed reporting from vehicle manufacturers. Although the 2003 amendments simplified credit calculations in many cases, more detailed reporting is still needed in order to track compliance given the numerous options available.

Currently, manufacturers submit quarterly production data for ZEVs and PZEVs in accordance with MAC 2000-03 and annual summary production reports in accordance with Mail Out 95-04. However, these data would be insufficient to determine ZEV credits and compliance with the regulation given the complexity of the ZEV regulation.

Discussion: This MAC provides a consistent format for reporting delivery and placement of ZEV program vehicles in California for demonstration of compliance with the regulation. Additionally, the process and format for submitting data related to other ZEV credit activities is provided.

ARB requests that both a hard copy and an electronic version of the appropriate forms and ZEV reports be submitted with an attached cover letter for all ZEV, AT PZEV and PZEV manufacturers, and other interested parties. Vehicle manufacturers will continue to report production data as previously required.

The ARB forms and specified electronic format for reporting credits and debits for ZEV reporting include: 1) an application form for opening a "ZEV account" with the ARB, 2) a form for indicating calculation method and Non-Methane Organic Gases (NMOG) production numbers, 3) credit and debit electronic format, and 4) a form for transferring credits. These electronic forms are presented in the following Attachments:

Application for Zero Emission Vehicle (ZEV) Account with the ZEV Bank	Attachment A
Calculation Method for Zero Emission Vehicle (ZEV) Credit Requirement	Attachment B
Credits	Attachment C
Debits	Attachment D
Zero Emission Vehicle (ZEV) Credit Transfer Form	Attachment E
ZEV Account Holder Identification Codes	Attachment F

Guidance: Credit Bank

The ARB will utilize the ZEV Bank to track ZEVs and the credits earned by vehicle manufacturers and transacted by credit traders. The system will also generate ZEV credit balance and summary statements.

Manufacturers of 2002 and subsequent model-year ZEVs, AT PZEVs, and PZEVs certified for sale in California and any person or entity that holds ZEV credits for any length of time including, but not limited to, credit brokers and transportation project managers need to apply for a ZEV account with the ARB. See Attachment A Application for Zero Emission Vehicle (ZEV) Account with the ZEV Bank.

The ARB will record ZEVs in the ZEV Bank. The recording of vehicles is then subject to verification of the information substantiating delivery and placement of ZEVs. If the ARB determines that discrepancies exist in any ZEV information submitted, staff will notify the appropriate party and will accordingly adjust the ZEV Account. ARB may perform audits at any time.

Recorded ZEV credits will be multiplied by the NMOG fleet average requirement for the appropriate model year. ZEV credits will be stored in the ZEV Bank in units of grams per mile Non-Methane Organic Gases (g/mi NMOG). Please note that the grams/mile NMOG units are only used as an index and do not represent actual values of g/mi NMOG.

Frequency of Reporting

ZEV account holders are to report ZEV data as indicated in Attachment B, C and D, annually by May 1st of the calendar year following the close of a model year. Annual Reports may be updated by September 1st of the same year. ZEV account holders may choose to report more frequently, however, please contact the ZEV Bank Program Manager prior to transmittal. The schedule is as follows:

Annual

Report Date

May 1 of a given calendar year

Data Represents

preceding model year

Supplement to Annual

Report Date

September 1st of a given calendar year

Data Represents

preceding model year
April 1 to June 30

Credit Statements

The ZEV Bank Program Manager will issue credit statements to ZEV account holders annually. Additional credit statements are available upon request.

Credit Types and Conditions

ZEVs

ZEVs may generate ZEV credits at several points in time including "Delivered for sale," "Placed in service" and "Extended service." Vehicles receive a base credit when "Delivered for sale" and remaining ZEV credits based on applicable multipliers when "Placed in Service."

Delivered for sale – Means vehicles that have received a bill of lading for sale in California and are shipped, or in the process of being shipped to a dealer in California.

Placed in service – As defined in the ZEV regulation "means having been sold or leased to an end-user and not to a dealer or other distribution chain entity, and having been individually registered for on-road use by the California Department of Motor Vehicles (DMV)." (§1962(i)(4))

Vehicles sold en masse to another state by one person, entity or company shortly after registering at the California DMV do not meet the definition of "Placed in service" in the ZEV regulation. Specifically they do not meet the criteria of being sold or leased to an end-user and not to a dealer or other distribution chain entity. The person, entity or company in this situation would be a dealer or other distribution chain entity. Therefore vehicles in this circumstance do not qualify for ZEV credits.

All "Placed in service" vehicles will be verified with the California DMV with the exception of vehicles leased or sold to the federal government (see below). If any vehicles within a reported batch cannot be verified with the DMV, the ZEV Program Manager will contact the Account Holder and request that those records be corrected and resubmitted.

Vehicles Leased Or Sold To Federal Government - Vehicles sold to the federal government may or may not be registered at the California DMV. Indicate government agency name when reporting credits.

Multiplier for Type I and Type II vehicles – A Type I and Type II vehicle produced in model years 2004 to 2011 may receive a one time multiplier of 1.25 if it is either sold to a motorist or is leased for three or more years to a motorist who is given the option to purchase or re-lease the vehicle for two years or more at the end of the first term. (§1962(d)(5)(C))

Neighborhood Electric Vehicles (NEVs) and non-NEVs – For reporting and tracking purposes, a distinction is made between NEVs and ZEVs that are not NEVs regarding the use of banked NEV credits and the application of the NEV discount multiplier.

AT PZEVs and PZEVs

AT PZEVs and PZEVs may earn credits for having been “Delivered for sale” as described for ZEVs. No additional credits or multipliers are applied when the vehicles are placed. Thus, the ZEV Bank does not track placement for AT PZEVs and PZEVs.

Extended Service Multiplier

ZEVs and some AT PZEVs in model years 1997-2003 may earn ZEV credits for having been re-leased after an initial three years in accordance with the ZEV regulation. NEVs are not eligible to earn the credit for the Extended Service Multiplier. (§1962(f))

Advanced Technology Demonstration Programs

A vehicle placed in a California advanced technology demonstration program may earn ZEV credits even if it is not “delivered for sale” in accordance with the ZEV regulation. (§1962(g)(4)) Approval by the ARB’s Executive Officer is required for Advance Technology Demonstration Program credits. Generally this credit is only available for advanced technology vehicles, such as fuel cell powered vehicles that may or may not be registered with the DMV.

Transportation Systems

In model years 2001 through 2011, a ZEV, AT PZEV or PZEV placed as part of a transportation system may earn ZEV credits in accordance with the ZEV regulation. (§1962(g)(5)) Approval by the Executive Officer is required for transportation system credits. NEVs are not eligible to earn credit for transportation systems.

Transferring Credits

Credits may be transferred between parties and entities. Any party or entity that holds ZEV credits for any length of time including, but not limited to, credit brokers and transportation project managers, needs to have an account with the ARB ZEV Bank. Credit transfers can take place outside of the ZEV Bank at anytime. However, if credits are to be acknowledged for ZEV compliance, each transfer needs to be recorded in the ZEV Bank and all parties need to have an account with the ZEV Bank as indicated above. The ZEV Bank Program Manager will contact the Primary Account Holders and confirm the transfer request. See Attachment E for the Transferring ZEV Credit Form.

If a transferor double sells credits (sells the same credits to two or more parties or manufacturers), only the transferee to first record with the ZEV Bank will receive credit. The transferee that records with the ZEV Bank after the transferor's credits have been exhausted will not receive credit and will be notified of the shortfall. The ZEV Bank Program Manager will notify the appropriate parties of the discrepancy.

Confidentiality

In accordance with Title 17, CCR, sections 91000 to 91022, and the California Public Records Act (Government Code Section 6250 et seq.), the information that a company provides to the ARB may be released (1) to the public upon request, except trade secrets which are not emissions data or other information which is exempt from disclosure or the disclosure of which is prohibited by law; and (2) to the Federal Environmental Protection Agency (U.S. EPA), which protects trade secrets as provided in Section 114(c) of the Clean Air Act and amendments thereto (42 USC 7401 et seq.) and in federal regulation; and (3) to other public agencies provided that those agencies preserve the protections afforded information which is identified as a trade secret, or otherwise exempt from disclosure by law (Government Code Section 6254.5 (e)).

Trade secrets as defined in Government Code Section 6254.7 are not public records and therefore will not be released to the public. However, the California Public Records Act provides that air pollution emission data are always public records, even if data come within the definition of trade secrets. On the other hand, the information used to calculate emission data can be trade secret.

If any company believes that any of the information it may provide is trade secret or otherwise exempt from disclosure under any other provision of law, it must identify the confidential information as such at the time of submission to the ARB and must provide the name, address, and telephone number of the individual to be consulted if the ARB receives a request for disclosure or seeks to disclose the data. The ARB may ask the company to provide documentation of its claim of trade secret or exemption at a later date. Data identified as confidential will not be disclosed unless the ARB determines, in accordance with the above referenced regulations that the data do not qualify for a legal exemption from disclosure. In such a case the party claiming confidentiality will be notified at least 21 days before disclosure.

Guidance for Electronic Submittal of Data Files

Manufacturers and other persons or entities transacting ZEV credits need to submit ZEV data reports electronically using all applicable fields with the domains as defined in Attachment C and Attachment D. Note that all fields are required. The preferred electronic format is comma delimited text. As a convenience, ARB is able to import Microsoft Office 97 software products Excel and Access. Please contact the ZEV Bank Program Manager if you can not use any of these file formats.

If an electronic submittal has incomplete or incorrectly formatted data, the data will take longer to process. In addition, the ZEV Bank Program Manager will contact the Account Holder and request that the records be corrected and a complete new data batch submitted. Only if the entire data batch is complete and correctly formatted will the data be recorded in the ZEV bank.

Each file should be named using the format, MMMM/MM/DD/YYYY.XXX, as defined below:

MMMM	=	Manufacturer code (see Attachment F)
MM/DD/YYYY	=	Date report generated for example March 25, 2006 = 03252006
XXX	=	file extension
		CSV for comma separated ASCII Text file
		TXT for comma delimited ASCII Text file
		MDB for Access file Microsoft Office 97
		XLS for Excel file Microsoft Office 97

The electronic file formats provided in Attachments C and D describe each field in detail. The columns are:

Sequence	Order of the data in the record
Data Name	Name of the data field
Type	Identifies type of the field
	C = Characters (i.e. Alpha-Numeric)
	N = Numeric
	D = Date - date format should be used
Length	Specifies the number of characters in each field. For numeric, specifies the number of digits including the decimal, if any.
Range or Domain	Lists the possible inputs or format for the field
Description	Describes the field

Attachment B

Other Issues

In addition to the issues discussed in the body of this letter, the December 3, 2007 Options Report and ARB's current proceeding raise other significant legal and policy issues. In the interest of achieving a compromise, we have not elaborated on those other issues in this letter but reserve all of the companies' rights to raise them in any forum. Other issues include, but are not limited to the following.

1. The absolute protection for Manufacturers' trade secrets added to the Health & Safety Code Section 43206 in 1975 by the Legislature. Section 43206 currently provides, in relevant part, as follows:

"43206. Commencing January 1, 1982, and annually thereafter, every person who manufactures new motor vehicles for sale in California shall file with the state board a report as to the person's efforts and progress in meeting state standards adopted pursuant to Section 43101 and federal standards and research objectives specified in Section 7521 of Title 42 of the United States Code.

"The reports shall be available to the public. However, the manufacturer may designate that a portion of the report is a trade secret and the portion shall not be released except to the state board employees specifically designated by the executive officer, unless the state board, after an investigation, determines that the portion is not in fact a trade secret. State board employees having access to the trade secret shall maintain its confidentiality. * * *"

[Emphasis added]

The ZEV program was promulgated in part pursuant to H&SC Section 43101 (titled "Emission standards for new motor vehicles"). The ZEV credit data subject to the current CPRA request was required by the CARB to be submitted by the Manufacturers in order to demonstrate the Manufacturers' efforts and progress in meeting the requirements of ARB's emissions standards for new motor vehicles. Indeed, the information was required as a condition to the Manufacturers receiving an Executive Order permitting them to deliver their products into the State of California in compliance with ARB's emissions standards for new motor vehicles. As the Options Report found, these reports can include, and in this particular situation do include, trade secret information relating to ZEV credits. Accordingly, under H&SC Section 43206, such information cannot be released to the public. The Options Report did not mention this section or the absolute protection it provides for Manufacturer's trade secrets.

2. The absolute federal protection of trade secrets under Section 208 of the federal Clean Air Act (codified in Title 42, Section 7542, of the United States Code):

“(c) Availability to public; trade secrets

“Any records, reports, or information obtained under this part or part C of this subchapter shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or a particular portion thereof (other than emission data), to which the Administrator has access under this section, if made public, would divulge methods or processes entitled to protection as **trade secrets** of that person, **the Administrator shall consider the record, report, or information or particular portion thereof confidential** in accordance with the purposes of section 1905 of title 18. * * *” [Emphasis added]

Government Code Section 6254(k) specifically provides that “...nothing in this chapter shall be construed to require disclosure of records that are any of the following...records, the disclosure of which is exempted or prohibited pursuant to **federal** or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.” [Emphasis added] The reports in question have been determined by the Options Report to include trade secret information, i.e., information relating to ZEV credits. The Manufacturers’ reports to the Administrator of U.S. EPA can also include trade secret information relating to ZEV credits. That information relates to federal standards specified in Section 7521 of Title 42 of the United States Code (titled “Emission standards for new motor vehicles or new motor vehicle engines”), as also referenced by Section 43206 of the Health & Safety Code. The Options Report did not mention Section 208 of the Clean Air Act or the absolute protection that Section 208 provides under federal law for Manufacturer’s trade secrets.

3. Government Code section 6254.7(a), which covers “[a]ll information, analyses, plans, or specifications that disclose the nature, extent, quantity, or degree of air contaminants or other pollution which any article, machine, equipment, or other contrivance will produce . . .” ZEV credits are expressed as g/mi NMOG and are clearly “information” that discloses the nature of “air contaminants or other pollution” that a Manufacturer’s fleet will emit. The Manufacturers must submit this information to ARB before ARB will issue Executive Orders that permit them to produce vehicles and sell them in California. The Options Report does not recognize that section 6254.7(a) covers this information and, therefore, incorrectly concludes that Government Code section 6254.7(d) does not provide an absolute protection from disclosure of the trade secrets included in the ZEV credit submissions.
4. The ARB staff requested that the ARB governing Board “consider options regarding the requested disclosure” of ZEV credit data at the Board’s December 6, 2007 and January 24, 2008 public meetings. The ARB staff made a

lengthy public presentation on December 6 and will make another one on January 24. The Board will consider various policy options regarding disclosure based on the staff presentations and public testimony. Any Board decision regarding disclosure would be “relevant to the upcoming rulemaking on proposed amendments to the ZEV regulation,” as indicated in the Board’s public notice of the January 24 meeting. In these circumstances, any Board decision that departs from the ARB’s settled policies regarding the confidential treatment of ZEV credit data would constitute a quasi-legislative action subject to the California Administrative Procedures Act (APA). The ARB has not followed the APA procedures in this proceeding and thus action by the Board to change the ARB policy at the public meeting on January 24, 2008 would violate the APA.

5. ARB Board Agenda Item 07-12-10 fails to provide adequate notice under the APA and, therefore, cannot be considered by the Board at the January 24, 2008 meeting. That agenda item states that the Board is to consider whether “information **compiled by the ARB** from submittals by vehicle manufacturers” of ZEV related data should be disclosed to the public. This is consistent with the entitled agenda item that refers only to “disclosure of Zero Emission Vehicle (ZEV) credit data **based on submittals by vehicle manufacturers...**” [Emphasis added] There has been no notice provided to the public regarding the nature or content of the “information **compiled by the ARB**” and “**based on submittals by vehicle manufacturers**”. [Emphasis added] Such a compilation would be completely different from the actual data supplied by the Manufacturers in confidence to the ARB. Absent adequate notice about the ARB compilation, the Board has not followed the APA procedures in this proceeding and thus action by the Board to change the ARB policy at the public meeting on January 24, 2008 would violate the APA.
6. The ARB regulations regarding the protection of trade secrets provide, in part, as follows: “The state board shall give notice to any person from whom it requests information that the information provided may be released (1) to the public upon request, **except trade secrets which are not emissions data...**” (17 CCR Section 91010). [Emphasis added] These are regulations that the CARB itself has adopted and followed for many years. These ARB regulations clearly indicate that trade secrets that are not emissions data may not be released to the public. The Options Report determined that the Manufacturers’ ZEV information constitutes trade secrets and, therefore, such information cannot be disclosed to the public under ARB’s own regulations.