State of California
AIR RESOURCES BOARD

**Addendum to the Final Statement of Reasons for Rulemaking**

ADOPTION OF THE 2012 AMENDMENTS TO THE CALIFORNIA ZERO EMISSION VEHICLE REGULATION

Public Hearing Date: January 26-27, 2012
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## I. Background

On June 25, 2012, the Air Resources Board (ARB or Board) submitted the Final Statement of Reasons (FSOR) for the "Adoption of the 2012 Amendments to the California Zero Emission Vehicle Regulations" to the Office of Administrative Law (OAL) for its review and approval. In the course of its review, OAL questioned several regulatory changes that it interpreted as being potentially impermissibly retroactive, and identified a single incorrect reference to an incorporated test procedure. Each of these issues is addressed in turn below.

### A. RETROACTIVITY

ARB understands there to be two types of retroactivity that regulatory text might present: a prohibited "primary" retroactive effect, and an allowable "secondary" retroactive effect. "Primary" retroactivity is altering "the *past* legal consequences of past actions." (20th Century Ins. Co. v. Garamendi, (1994) 8 Cal. 4th 216, 281, original italics, citing Bowen v. Georgetown Univ. Hosp., (1988) 488 U.S. 204, 219). "Secondary" retroactivity is altering "the *future* legal consequences of past transactions." (20th Century Ins. Co. v. Garamendi, (1994) 8 Cal. 4th 216, 281, original italics, citing Nat'l Med. Enterprises, Inc. v. Sullivan, (9th Cir. 1992) 957 F.2d 664, 671). "Secondary" retroactivity is "an entirely lawful consequence of rulemaking and hence does not itself offend any law, including the United States and California Constitutions and their respective due process clauses." (20th Century Ins. Co. v. Garamendi, (1994) 8 Cal. 4th 216, 281-282).

In fact, ARB has, with OAL approval, exercised this "entirely lawful consequence" several times in the last few years, primarily in response to the economic downturn that began in 2008. Rulemakings in which ARB provided relief shortly before or even during the compliance year include our Truck and Bus rule (OAL Regulatory Action No. 2011-1028-04s), the In-Use Off-Road rule (OAL Regulatory Action No. 2011-1028-03s), and the Transport Refrigeration Unit rule (OAL Regulatory Action No. 2011-0204-06s). These rulemaking amendments were noticed before the compliance year had

begun but were formally adopted after it had begun. ARB has also provided some compliance relief for new motor vehicle manufacturers having to comply with on-board diagnostic (OBD) requirements under both the light-and medium duty-vehicle OBD II regulation and the heavy-duty OBD regulation. Some of these OBD amendments were not noticed or adopted until the first model-year affected by the amendments was already underway. Like the amendments at issue here, these prior ARB rulemakings address real world, future consequences of past transactions as allowed, without changing the past legal consequences of past actions, as would be arguably prohibited.

As explained in Section II below, all regulatory changes OAL identified as potentially impermissibly retroactive have at most a "secondary" retroactive effect and so are permissible.

B. INCORRECT REFERENCE TO TEST PROCEDURE

OAL identified one incorrect reference to a test procedure incorporated into the ZEV regulation. This inadvertent mistake and intention to use the latest version of the test procedure is explained in Section III. below.

## II. Retroactivity

**Subdivisions 1962.1(g)(2)(A) and (B):**

> (A) Credits from ZEVs. For model years 2009 through 2014, ~~T~~the amount of g/mi ~~ZEV~~ credits earned by a manufacturer in a given model year from ZEVs shall be expressed in units of g/mi NMOG, and shall be equal to the number of credits from ZEVs produced and delivered for sale in California that the manufacturer applies towards meeting the ZEV requirements for the model year subtracted from the number of ZEVs produced and delivered for sale in California by the manufacturer in the model year and then multiplied by the NMOG fleet average requirement for PCs and LDT1s, or LDT2s as applicable, for 2009 through 2011 model years, and for PCs and LDT1s for 2012 through 2014 ~~that~~ model years.
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> (B) Credits from PZEVs. For model years 2009 through 2014, ~~The~~ amount of g/mi ~~ZEV~~ credits from PZEVs earned by a manufacturer in a given model year shall be expressed in units of g/mi NMOG, and shall be equal to the total number of PZEVs produced and delivered for sale in California that the manufacturer applies towards meeting its ZEV requirement for the model year subtracted from the total number of PZEV allowances from PZEVs produced and delivered for sale in California by the manufacturer in the model year and then multiplied by the NMOG fleet average requirement for PCs and LDT1s, or LDT2s as applicable, for 2009 through 2011 model years, and for PCs and LDT1s for 2012 through 2014 ~~that~~ model years.

These amendments would not require any manufacturer to make any changes to any 2012 model year vehicle already produced. Credits, which these subdivisions 1962.1(g)(2)(A) and (B) affect, are not awarded for any MY 2012 vehicle until May 1, 2013. Consequently, there are only future legal consequences (calculation of credits) for past acts (production), but no past legal consequences for those past acts. There are no changes made in any way to a manufacturer's compliance status as a result of implementing this subdivision.

**Subdivision 1962.1(g)(2)(D):**

> Rounding Credits. For model year 2012 through 2014, ZEV credits and debits shall be rounded to the nearest 1/1000th only on the final credit and debit totals using the conventional rounding method. For model year 2015 through 2017, ZEV credits and debits shall be rounded to the nearest 1/100th only on the final credit and debit totals using the conventional rounding method.

These amendments would not require any manufacturer to make any changes to any 2012 model year vehicle already produced. Credits in the ZEV regulation, which this subdivision 1962.1(g)(2)(D) affects, are not awarded for any MY 2012 vehicle until May 1, 2013. Consequently, there are only future legal consequences (calculation of credits) for past acts (production), but no past legal consequences for those past acts. There are no changes made in any way to a manufacturer's compliance status as a result of implementing this subdivision.

**Subdivision 1962.1(g)(5)(A):**

> General. In model years 2009 through 2011, a ZEV placed, for two or more years, as part of a transportation system may earn additional ZEV credits, which may be used in the same manner as other credits earned by vehicles of that category, except as provided in subdivision (g)(5)(C) below. In model years 2012~~09 and subsequent~~ through 2017, a ZEV, Type I.5x and Type IIx vehicles, or TZEV placed, for two or more years, as part of a transportation system may earn additional ZEV credits, which may be used in the same manner as other credits earned by vehicles of that category, except as provided in subdivision (d)(5)(E)2. and as provided in ~~section~~subdivision (g)(5)(C) below.

These amendments would not require any manufacturer to make changes to any 2012 model year vehicle already produced. Credits in the ZEV regulation, which this subdivision 1962.1(g)(5)(A) affects, are not awarded for any model year 2012 vehicle until May 1, 2013. Consequently, there are only future legal consequences (treatment of credits) for past acts (production), but no past legal consequences for those past acts. There are no changes made in any way to a manufacturer's compliance status as a result of implementing this subdivision.

**Subdivision 1962.1(d)(5)(C):**

> ~~ZEV~~ Credits for 2009 ~~and Subsequent~~through 2017 Model Year ZEVs. A 2009 ~~and subsequent~~through 2017 model-year ZEV, including a Type I.5x and Type IIx, other than a NEV or Type 0, earns 1 ZEV credit when it is produced and delivered for sale in California. A 2009 ~~and subsequent~~through 2017 model-year ZEV earns additional credits based on the earliest year in which the ZEV is placed in service in California (not earlier than the ZEV's model year). The vehicle must be delivered for sale and placed in service in a Section 177 state or in California in order to earn the total credit amount. The Total credit amount will be earned in the state (i.e. California or a Section 177 state) in which the vehicle was delivered for sale.

These amendments would not require any manufacturer to make changes to any 2012 model year vehicle already produced. Credits in the ZEV regulation, which this subdivision 1962.1(d)(5)(C) affects, are not awarded for any model year 2012 vehicle until May 1, 2013. Additionally, manufacturers have until June 30, 2013 to "place in service" 2012 model year ZEVs. This means that this provision would not affect the regulated party until after May 2013 for model year 2012. There are no changes made in any way to a manufacturer's compliance status as a result of implementing this subdivision. Consequently, there are only future legal consequences (placement of vehicles) for past acts (production), but no past legal consequences for those past acts.

**Subdivision 1962.1(d)(5)(G):**

> Type I.5x and Type IIx Vehicles. Beginning in 2012 model year, to be eligible for the credit amount in subdivision 1962.1(d)(5)(C), Type I.5x and Type IIx vehicles must meet the following specifications and requirements:
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> 1. PZEV Requirements. Type I.5x and Type IIx vehicles must meet all PZEV requirements, specified in subdivision 1962.1(c)(2)(A) through (D).
>
> 2. Type G Requirements. Type I.5x and Type IIx vehicles must meet the requirements for Type G advanced componentry allowance, specified in subdivision 1962.1(c)(4)(B).

These amendments would not require any manufacturer to make changes to any 2012 model year vehicle already produced. Additionally, manufacturers have always been able to certify Type I.5x and Type IIx vehicles as transitional zero emission vehicles (TZEV) prior to this category being added. This means that aforementioned changes affecting model year 2012 only modify the types of credits a manufacturer may earn for this type of vehicle, but would not require a manufacturer to make changes to the vehicle itself. Consequently, there are only future legal consequences (treatment of credits) for past acts (production), but no past legal consequences for those past acts.

**Subdivision 1962.3(c)(1):**

> Beginning with the 2006 model year, all vehicles identified in ~~subsection~~subdivision (a) must be equipped with a conductive charger inlet ~~port~~ and charging system which meets all the specifications applicable to AC Level 1 and Level 2 charging contained in Society of Automotive Engineers (SAE) Surface Vehicle Recommended Practice SAE J1772 REV ~~NOV 2001~~ JAN 2010, SAE Electric Vehicle and Plug in Hybrid Electric Vehicle Conductive Charge Coupler, which is incorporated herein by reference. All such vehicles must also be equipped with an on-board charger with a minimum output of 3.3 ~~kilovolt amps~~kilowatts, or, sufficient power to enable a complete charge in less than 4 hours.

These amendments would not require any manufacturer to make any changes to any 2012 model year, or prior model year, vehicle already produced. Additionally, the previous revision (NOV2001) is contained in the JAN 2010 revision of SAE J1772, for reference; manufacturers are still allowed to use the previous revision of the specification.

## III. Incorrect Reference to Test Procedure

**1962.1(h)(2): NEV Compliance**

The newly adopted section 1962.2 includes an updated version of an incorporated by reference document that had previously been incorporated by reference in existing section 1962.1. However, the version date and revision number in section 1962.1 were inadvertently noticed with the outdated version. . However, it is clear from the context of the ZEV proposal as a whole as expressed in both related text and the accompanying rulemaking documents that under no circumstance could any affected stakeholder believe that ARB intended to retain a mismatched and outdated version of the incorporated document.

Staff intended for the most recent versions (February 1, 2008) of ETA-NTP002 and ETA-NTP004 to be used. This is evidenced on p. 113 of the "Staff Report (Initial Statement of Reasons): 2012 Proposed Amendments to the California Zero Emission Vehicle Program Regulations" (from here on, referred to as Staff Report). Page 113 of the Staff Report lists test procedures with the correct dates under "Documents Incorporated By Reference in 1962.1, 1962.2, and the Incorporated test procedures, and 1962.3, Title 13, California Code of Regulations." Because the test procedures with 2004 revision dates were not included in this list on p. 113 in the Staff Report, and because the documents themselves were not incorporated anywhere within the public record for this rulemaking, it was clearly staff's intent to include the test procedures with updated and corrected February 1, 2008 revision dates for both regulatory sections, 1962.1 and 1962.2. Additionally, in the "California Exhaust Emission Standards and Test Procedures for 2009 through 2017 Model Zero-Emission Vehicles and Hybrid Electric Vehicles, in the Passenger Car, Light-Duty Truck and Medium-Duty Vehicle

Classes", in Section E (Determination of NEV Acceleration, Top Speed, and Constant Speed Range), and in the "California Exhaust Emission Standards and Test Procedures for 2018 and Subsequent Model Zero-Emission Vehicles and Hybrid Electric Vehicles, in the Passenger Car, Light-Duty Truck and Medium-Duty Vehicle Classes", in Section E (Determination of NEV Acceleration, Top Speed, and Constant Speed Range), the correct test procedures and revision dates are listed. Thus staff could not have intended for affected manufacturers to use the outdated version of ETA-NTP002 and ETA-NTP-004, and nothing in the record suggests any manufacturer did or could have thought this was staff's intent.

## IV. Peer Review

Health and Safety Code Section 57004 sets forth requirements for peer review of identified portions of rulemakings proposed by entities within the California Environmental Protection Agency, including ARB. Specifically, the scientific basis or scientific portion of a proposed rule may be subject to this peer review process. Here, ARB determined that the rulemaking at issue does not contain a scientific basis or scientific portion subject to peer review, and thus no peer review as set forth in Section 57004 was or needed to be performed.