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California State Senate

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SENATE MINORITY WHIP
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December 3, 2009

Mr. Armin G. Yazdi
Deputy Legislative Counsel
State of California
Office of Legislative Counsel
925 "L" Street
Sacramento, CA 95814

RE: Legislative Counsel Opinion on Underground Regulations

Dear Mr. Yazdi:

As you know, elected members of the State Legislature depend on the Office of Legislative Counsel to provide us with independent and objective legal opinions on which we can make informed decisions. To that end, I very much appreciate your providing me in October with the well-supported opinion from the Office of Legislative Counsel to my enclosed letter from September 1, 2009. In that letter, I raised concerns that the California Air Resources Board (CARB) was threatening enforcement action against California dealers based on an "underground regulation." An "underground regulation" is "any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule...[that] has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA."¹

The October Legislative Counsel opinion confirmed that "as a matter of law" CARB could not apply (and cannot enforce retroactively) proposed 2006, off-highway recreational vehicle (OHRV) regulations to products manufactured before August 15, 2007. This is because those OHRV regulations were "underground regulations" that did not become effective until after the legally required review and approval of the Office of Administrative Law (OAL), which did not occur until the summer of 2007. In fact, the proposed and still evolving 2006 OHRV regulations continued to go through several additional rounds of revisions by CARB staff in Spring 2007.

To the extent the Office of Legislative Counsel is withholding the opinion on privilege grounds, I am compelled to waive such a privilege in order to ensure an open and transparent government that operates on a complete and accurate record. As explained below, if I did not take this action, then the CARB Board would be placed in the untenable position of making important

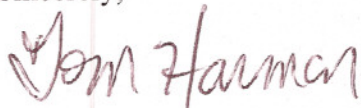
decisions on misleading and inaccurate information. In turn, this would further damage CARB's credibility and integrity.

Like my reliance on the Office of Legislative Counsel, members of the CARB Board rely on CARB staff and Chief Counsel to provide them with a complete objective and accurate record to make well-informed decisions. At the November 20th Board Hearing, serious concerns were raised by Board member Telles about the Board being kept in the dark by staff on serious deficiencies that would have affected the Board's vote in December 2008 on a diesel truck rule making. Dr. Telles testified: "Failure to reveal this information to the Board prior to the vote not only casts doubt on the legitimacy of the truck rule, but also upon the legitimacy of CARB itself." ²

At that same Board hearing, Mr. Kit Enger of the Sand Car Builders of California testified that CARB had illegally relied on the same 2006 "underground OHRV regulations" (covered by the October legislative counsel opinion) – in imposing a \$600,000 settlement against sand cars that were manufactured before those regulations' August 15, 2007 effective date.³ In response to this testimony, Dr. Telles expressed concerns about Mr. Enger's claims and requested CARB Chief Counsel to provide any relevant information about the 2006 "underground OHRV regulations."⁴ In her response, CARB's Chief Counsel only mentioned that the Sand Car Manufacturers had filed a pending petition on this issue with the Office of Administrative Law on this issue⁵. Although I understand she is fully aware of the related October Legislative Counsel opinion, CARB Chief Counsel elected not to mention this on-point opinion in her response to Dr. Telles.⁶ Instead, CARB Chief Counsel summarily dismissed the validity of any claim that the 2006 OHRV were "underground regulations" – despite the conclusions in the October Legislative Counsel opinion.

As a matter of good government, Dr. Telles and the rest of the CARB Board must have access to the whole story and not be misled. For that reason, I would very much appreciate your contacting Dr. Telles and Chairwoman Nichols – so that they have direct and immediate access to the October Legislative Counsel opinion and can make well-informed decisions based on a complete record. Thank you in advance for your assistance.

Sincerely,



TOM HARMAN
Senator, 35th District

CC: Chairwoman Nichols
Daniel Sperling, CARB Board Member

Ken Yeager, CARB Board Member
Dorene D'Adamo, CARB Board Member
Barbara Riordan, CARB Board Member
John Balmes, CARB Board Member
Lydia Kennard, CARB Board Member
Sandra Berg, CARB Board Member
Rob Roberts, CARB Board Member
John Telles, CARB Board Member
Ron Loveridge, CARB Board Member
James Goldstene, CARB Executive Officer
Ellen Peter, CARB Chief Counsel
Susan Lapsley, Director, OAL

¹ Cal. Code. Regs. Tit 1, 250.

² See Dr. Telles's written complaint and testimony at www.box.net/carb.

³ See CARB webcast archive for November 19th testimony at 4:54:57 through 4:58:27.

⁴ See webcast archive for the CARB November 19th Board Hearing at 5:15:16.

⁵ This Sand Car OAL petition, which is posted on the www.centreform.org website, is very similar to the OAL petition filed by the California Motorcycle Dealers Association – which is referenced in my enclosed September 1st letter.

⁶ See webcast archive of the CARB November 19th Board Hearing at 5:15:30 through 5:16:50.