

FINDING OF EMERGENCY

EMERGENCY REGULATORY AMENDMENT OF THE:

1. AIRBORNE TOXIC AIR CONTAMINANT FOR NEW AND IN USE STATIONARY DIESEL-FUELED COMPRESSION IGNITED ENGINES
2. AIRBORNE TOXIC AIR CONTAMINANT FOR PORTABLE DIESEL-FUELED COMPRESSION IGNITED ENGINES AND
3. REGULATIONS FOR THE PORTABLE EQUIPMENT REGISTRATION PROGRAM

INFORMATIVE DIGEST OF EMERGENCY REGULATORY AMENDMENT

Section Affected: Amendments to title 17 California Code of Regulations (CCR) sections 93115; 93116.2, 93116.3, 93116.3.1 and to title 13 CCR sections 2452, 2456, 2461.

Introduction:

The Air Resources Board (ARB or Board) has taken emergency action to address an unanticipated market imbalance that may have the effect of disrupting, perhaps even eliminating, ongoing business operations in a number of business sectors. Over the last several years, ARB has adopted regulations (discussed below) designed to reduce emissions of diesel particulate matter, a toxic air contaminant, from diesel engines. These regulations are part of ARB's ongoing Diesel Risk Reduction Program. The process involves the implementation of increasingly more stringent emissions standards for diesel engines over time. One of these standards became effective January 1, 2006. Another standard (for a different category of engine) will become effective January 1, 2007. The implementation of these standards encourages the turnover of older, dirtier engines for cleaner, less polluting engines.

The ability to comply with these standards is in large part dependent on the availability of compliant engines in makes, models and horsepower ranges. Over the last several months, ARB has been advised that engine manufacturers are not meeting demand in time frames adequate for owners/purchasers to obtain compliant engines. In some cases involving specialty equipment, such as engines used to operate cranes, where the purchasing decision must be made well in advance, sometimes years in advance, there now exists the problem in years where there is a standards change of a crane owner needing an engine that has not yet even been manufactured. Without some form of regulatory relief, many businesses, mostly small businesses dependent on continued use of these engines to operate their equipment, will face closure.

To address these immediate issues, ARB has adopted emergency regulatory changes that will allow these businesses more flexibility in their purchasing decisions and allow for extended use of engines meeting the standards in effect immediately prior to a standards change. These changes are discussed in greater detail below.

Background:

These emergency regulatory amendments affect three regulatory programs. The amendments all pertain to the use of diesel-fueled compression ignited engines. It is necessary to assure that these regulations work in concert because these programs may apply to a same engine type based on how the engine is used (i.e.) whether the engine is used in a stationary or portable application.

ARB is charged with the responsibility of identifying and regulating toxic air contaminants (Health and Safety Code (HSC) 39650 et seq.). In fulfilling this responsibility, the Board has adopted two regulations for the control of toxic air contaminants from diesel-fueled compression ignited engines; the stationary diesel engine control measure and the portable diesel engine control measure. A diesel engine cannot be subject to both regulations. A diesel engine is either stationary or portable. A diesel engine cannot be both stationary and portable.

The Board was also charged with the responsibility to create and maintain a program for the registration of portable equipment (HSC §41750 et seq.). This program, referred to as PERP (for portable equipment registration program), establishes a program for the registration and regulation of portable engines and equipment. Most of the engines associated with portable equipment are diesel engines.

The Stationary Diesel Engine Control Measure

The Board adopted the Stationary Diesel Engine Airborne Toxic Control Measure (Stationary ATCM) on February 26, 2004. The Stationary ATCM covers new and in-use diesel engines employed in many different uses, including diesel engines providing primary, back-up or emergency power. The Stationary ATCM sets increasingly stringent (tiered) emissions standards for these engines over time.

The Portable Diesel Engine Control Measure

The Board adopted the Portable Diesel Engine Airborne Toxic Control Measure (Portable ATCM) in February 2004. Portable engines include a wide variety of engine types and uses. A portable engine may provide primary power to a piece of equipment or it may serve as an auxiliary engine. The Portable ATCM will preclude the use of any engine after 2006 that is not certified to a California or federal emissions standard.

The Portable Equipment Registration Regulations

The Legislature passed the portable equipment registration statutes in 1995. These statutes (HSC §§41750 et seq.) required ARB to create and maintain a program for the registration of engines and equipment that are operated in more than one air district. Most of the engines associated with portable equipment are diesel-fueled, making these engines also subject to the requirements of the Portable ATCM. This program, called PERP, was created to provide those who must operate in more than one air district an alternative to district permitting requirements. When an engine is registered in PERP, state law provides that the owner of that engine need not obtain air district permits prior to operating. To be registered in PERP, however, the engine being registered must meet the most stringent emissions standards in effect at the time of application.

The Emergency Regulatory Amendment

At its regularly scheduled December 7, 2006 meeting, the Board took emergency action to effect the following changes:

The Portable Equipment Registration Regulation

1. Tier 1 and Tier 2 engines have been defined.
2. Registration in PERP will be expanded to include “resident” Tier 1 and Tier 2 engines only.
3. The definition of “resident” has been expanded to include “proof that an engine operated in California between March 1, 2004 and October 1, 2006.”
4. Prior to January 1, 2008, total fees will consist of 150 percent of back registration fees and the current registration fee.
5. Starting January 1, 2008, total fees will be assessed at 200 percent of back registration fees and the current registration fee.
6. Starting January 1, 2009, total fees will be assessed at 300 percent of back registration fees and the current registration fee.
7. Fees will be distributed to the local air districts to use for portable equipment compliance programs. ARB will retain a flat processing fee for each engine registered under the proposed emergency provisions.
8. Fees for Tier 1 engines will be based on the earlier of the following—the date of purchase or the date that Tier 2 standards became effective. If there is no proof of purchase, the date of engine manufacture will be used.
9. Fees for Tier 2 engines will be based on the year the engine was purchased or the year the engine was manufactured (where there is no proof of purchase).

The Portable Diesel Engine Air Toxic Control Measure

1. Compliance flexibility will be provided to engine dealers and distributors when portable engines are not available in sufficient numbers or in a sufficient range of makes, models, or horsepower ratings.
2. Compliance flexibility will be provided to owners of portable engines during those periods when a more stringent tier standard comes into effect.
3. Compliance flexibility will be provided to engine dealers or distributors to give them additional time to sell or register portable engines during those periods when a more stringent tier standard comes into effect.

4. At the discretion of the air pollution control officer, a local air pollution district may permit or register uncertified, Tier 1, or Tier 2 engines. (Uncertified engines, also called Tier 0 engines, are not certified to a tier standard pursuant to 40 CFR Part 89 or Title 13 of the California Code of Regulations.)

The Stationary Diesel Engine Air Toxic Control Measure

1. Compliance flexibility will be provided to engine dealers and distributors when stationary engines are not available in sufficient numbers or in a sufficient range of makes, models, or horsepower ratings.

NEED FOR IMMEDIATE ACTION

Under the California Administrative Procedure Act and state regulations, state agencies are normally required to submit a hearing notice to the Office of Administrative Law (OAL) at least 55 days before a hearing to amend a regulation, so that it can be published in the California Notice Register at least 45 days before the hearing. However, an agency is authorized to amend a regulation on an emergency basis upon a finding that the amendment "is necessary for the immediate preservation of the public health and safety or general welfare." OAL has an abbreviated 10-day period to review the amendment after it is submitted by the adopting agency, and the amendment may go into effect immediately after it is approved by OAL and filed with the Secretary of State. An amendment adopted on an emergency basis may remain in effect for no more than 120 days unless the adopting agency complies with the procedural requirements for a normal amendment. (Government Code section 11346.1.)

Based on comments received by ARB staff prior to the Board's December meeting, as well as ARB staff's further investigation of the issues raised by those comments, and testimony from affected parties at the Board meeting, the Board found that there is a limited segment of the regulated community that could be disproportionately burdened by the above summarized regulatory requirements. This segment, basically those owners of diesel engines who neither permitted nor registered their engines, who use those engines in specialized applications and are required to make purchase decisions many months, sometimes over a year, in advance of actually taking delivery of the engine.

As noted above, the Portable ATCM requires that an engine that was neither permitted nor registered by January 1, 2006 cannot be operated unless it meets the most stringent standards in effect. The PERP regulations require that an engine cannot be registered unless it meets the most stringent standards at the time of application. The Portable ATCM also has the effect of precluding local district permitting of older tier engines because of the requirement that the engine meet the most stringent standard in effect. Accordingly, if the owner had not permitted or registered the engine before a new emissions standard became effective, that owner would not be able to operate that engine legally. For owner/purchasers of specialized engines, getting these engines registered in years when there is a change in the applicable emissions standard has proved to be difficult. Consequently there has been an unintended effect of precluding

the use of engines that, had they been more readily available, could have been registered (or permitted) and therefore operated beyond the date of the emissions standards change.

The Stationary ATCM also needs to be amended because of a similar situation. ARB staff has been made aware that engine manufacturers have not been able to get to market, new engines meeting a new emission standard until well after the new standard has been in effect. This has resulted in owners of older tier engines needing replacement being precluded from obtaining compliant engines in a timely fashion.

In sum, as a result of the regulatory impact of the above discussed regulations, owners/operators, many of whom are small businesses, cannot conduct their business legally. In order to meet these market conditions, ARB is proposing these emergency regulatory changes. These changes will allow more leeway for engine owners to purchase and use older tier engine during years of emissions standards change.

Based on the foregoing facts, the Board has found that an emergency exists and unless emergency action is taken, continued operation of the small businesses relying on these regulated engines will be impaired resulting in loss of income and closure of some small businesses and the corresponding loss of jobs. This result would adversely affect the general welfare of the state.

FISCAL IMPACTS ON STATE AND LOCAL AGENCIES AND SCHOOL DISTRICTS

The Executive Officer has determined that the proposed regulatory actions will not create costs or savings to any state agency or in federal funding to the state, costs or mandate to any local agency or school district whether or not reimbursable by the state pursuant to Part 7 (commencing with section 17500), Division 4, Title 2 of the Government Code, or other nondiscretionary savings to state or local agencies.

STATUTORY AUTHORITY AND REFERENCES

This regulatory action is proposed under that authority granted in sections 39600 and 39601 and 41750 of the Health and Safety Code. This regulatory action is proposed to implement, interpret, and make specific sections 39000, 39001, 39002, 39003, 39500, 39515, 39516, 41511, and 41750, 41751, 41752, 41753, 41754 and 41755 of the Health and Safety Code.

Executed this _____ day of December, 2006, at Sacramento, California.

Catherine Witherspoon
Executive Officer