



Air Resources Board



Linda S. Adams
Secretary for
Environmental Protection

Mary D. Nichols, Chairman
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Arnold Schwarzenegger
Governor

(Via email and U.S. Mail)

February 11, 2010

Mr. Michael J. Steel, Esq.
Morrison Foerster
425 Market Street
San Francisco, California, 94105-2482
msteel@mofo.com

Re: Response to January 11, 2010, Petition Filed by Associated General Contractors of America

Dear Mr. Steel:

I am writing in response to the petition filed pursuant to the Administrative Procedure Act (APA), Government Code section 11340.6, by the Associated General Contractors of America (AGC or petitioner) dated January 11, 2010.¹ The petition requests that the Air Resources Board (ARB or Board) adopt an emergency amendment to delay the fleet average target dates of the In-Use Off-Road Diesel-Fueled Fleets Regulation (regulation)² for two years. The petition also requests that ARB ask the United States Environmental Protection Agency (U.S. EPA) to postpone consideration of California's request for authorization of the regulation that ARB submitted pursuant to section 209(e)(2) of the federal Clean Air Act (CAA) until such time that ARB has resolved the issues underlying the petition.

After careful consideration of all of the facts associated with the petitioner's request, pursuant to Government Code section 11340.7(b), I am granting the following relief and finding that the following actions are warranted:

¹ The petition is available from ARB upon request. Under the APA, any interested person may petition a State agency requesting the adoption, amendment, or repeal of a regulation as provided in Government Code section 11340.6. The petition must clearly and concisely state the substance or nature of the regulation, the requested amendment or repeal, the reason for the request, and the reference to the authority of the State agency to take the action requested. Under Government Code section 11340.7, the State agency within 30 days may grant or deny the petition in part, and may grant any other relief or take any other action as it may determine to be warranted by the petition. It must also indicate why the agency has reached its decision in writing and if it grants the petition, it must schedule the matter for public hearing in accordance with the notice and hearing requirements of the APA.

² Title 13, California Code of Regulations, sections 2449 through 2449.3.

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

- (1) ARB will issue an advisory notifying all stakeholders subject to the regulation that ARB will take no enforcement action regarding compliance with the regulation's emission standards or other emission related requirements before ARB receives authorization from U.S. EPA; and
- (2) a hearing will be held in Sacramento on March 11, 2010, before the Executive Officer to take testimony and other relevant information on the need for further amendments to the regulation to address the economic recession confronting the State and the adverse impacts that the recession has caused to the construction and other industries that operate off-road vehicles. As the Board has already directed staff to provide an update on the regulation at its April 2010 meeting, any information and testimony collected at this hearing shall be compiled and included as part of that update.

This relief, coupled with statutory and regulatory relief already provided by Assembly Bill 8 2X (AB 8 2X or bill), will ensure no stakeholders will be in violation with the regulation's March 1, 2010 emission standards or other emission related requirements. Therefore, I have concluded that an emergency does not exist. I am also taking no action on the petitioner's request that ARB request U.S. EPA to delay issuance of the authorization, because the request is outside the scope of the APA petition process.

Summary of January 11, 2010 Petition

The petitioner's request that ARB delay implementation of the regulation can be summarized as follows: since the Board's approval and adoption of the regulation in 2007-2008, changed circumstances in the economy and its impact on construction activity in California have affected the financial ability of construction fleets to comply with the regulation's requirements while concurrently resulting in fewer emissions from construction vehicles. In claiming that a two-year moratorium in implementing the initial compliance requirements is urgently necessary, the petition argues that, without such immediate relief, California construction contractors will suffer immediate and irreparable harm because the regulation as it currently exists will force fleets to either downsize or have to purchase and install expensive and unreliable emission control devices or repower their equipment in order to meet the 2010 and 2011 fleet average requirements.³ In making this claim, AGC asserts that the relief provided by AB 8 2X signed by the Governor on February 20, 2009, provides insufficient relief with "some relief to some contractors, but not to others, and certainly not to all [a]nd even those relieved of the initial burdens will find that that [sic] their relief is fleeting. . . ."⁴

³ Petition at p. 6.

⁴ *Id.*

AGC further argues that current economic conditions in the construction industry will not improve over the next two years,⁵ and that reduced emissions resulting from the current economy gives the Board flexibility to delay the regulation and thereby reduce the financial burdens that it will impose, while still meeting the goals of the State Implementation Plan.⁶

Background of the Regulation

The Board approved the regulation for adoption on July 26, 2007, and formally adopted it on April 4, 2008. In adopting the regulation the Board specifically found that the regulation was necessary, technically feasible, and cost effective.⁷ In finding that the regulations were necessary, the Board determined that in-use off-road diesel-fueled vehicles are significant contributors of emissions of oxides of nitrogen (NOx), particulate matter (PM), including PM2.5, and diesel exhaust, the last of which has been identified as a toxic air contaminant. The Board further found that the regulation would result in reductions in emissions that would prevent approximately 4,000 premature deaths and other harmful health impacts and would help California meet National Ambient Air Quality Standards (NAAQS) for ozone and PM2.5.

Subsequently, California, the nation, and the international community, in general, experienced a serious economic recession that has undisputedly impacted California businesses, including the State's construction industry. In response, as part of the 2009-2010 State budget, the California Legislature passed, and the Governor signed, AB 8 2X. Codified in Health and Safety Code section 43018.2, ARB was directed to amend the regulation to provide specified relief to affected stakeholders who have been negatively impacted by the State recession. Specifically, the legislation directed the Board to modify the NOx and PM credit provisions of the regulation to reflect vehicle retirements that reduce total fleet horsepower between March 1, 2006 and March 1, 2010, and reduced fleet activity between March 1, 2007, and March 1, 2010. It further directed the Board to amend the total cumulative NOx turnover and PM retrofit requirements for the years 2011 through 2013, to provide fleets with greater compliance flexibility with the regulation's requirements over the next three years.

Pursuant to the legislation's directives, the Board approved amendments to the regulation on July 23, 2009, with the amendments formally adopted and operative on December 3, 2009.

After adoption of the regulation in 2008, but before the enactment of AB 8 2X, AGC filed on December 15, 2008, the first of its two petitions, and requested that ARB amend and/or repeal the regulation. ARB and AGC agreed on February 4, 2009, to hold the

⁵ *Id.*, at p. 7.

⁶ *Id.*, at p. 5.

⁷ Resolution 07-19, a copy of which is attached as Attachment 1.

petition in abeyance as the parties evaluate data to determine the recession's impacts on construction fleets. With notice from either party, the petition could once again be activated and require an ARB response. To date, neither party has sought to activate the first petition.

On December 3, 2009, AGC presented ARB staff with its 2009 emissions inventory modeling analysis using the Diesel Off-Road On-Line Reporting System (DOORS)⁸ data collected by ARB staff. The analysis was subsequently sent to the Board and made a part of the record of the December 11, 2009, Board hearing. At the hearing, the Board directed staff to return at its April and July 2010 Board hearings with an assessment of how the recession has impacted stakeholders subject to the regulation, using such information that is available, including the most recent fleet data that fleets are required to report no later than April 1, 2010.

Response to Petition

A. Actions Warranted by the Petition

Pursuant to the authority provided under Government Code section 11340.7, I am granting the following relief and finding the actions described below to be warranted.

1. Enforcement Advisory

I have determined that issuance of an enforcement advisory is warranted. The advisory will notify all stakeholders affected by the regulation that ARB will not take any enforcement action for noncompliance with the regulation's emission standards or other emission related requirements before ARB receives authorization from U.S. EPA.

2. Hearing before the Executive Officer to Determine Need for Further Relief from the Impacts of the Recession

I am scheduling a hearing to be held on March 11, 2010 before the Executive Officer for the purpose of receiving testimony and other relevant information on the question of whether the regulation needs to be further amended to provide additional mitigation for stakeholders that have been adversely impacted by the recession and for whom the compliance relief provided by the AB 8 2X amendments has not been adequate. At the hearing, the petitioner and affected stakeholders will be provided the opportunity to fully present information on the effects of the recession on the construction industry and other industrial sectors of the economy, in general, and off-road fleets in particular. They will also be able to present testimony and information on how the recession has

⁸ DOORS is an online reporting tool designed to help fleet owners report their off-road diesel vehicle inventories and actions taken to reduce vehicle emissions to ARB, as required by the regulation.

affected emissions in the State, and why further delay of the regulation's compliance schedule is necessary and will not affect California's continuing efforts to improve air quality within its borders. I am also requesting that AGC and other stakeholders provide concrete and verifiable information to support any claims that the economy, in general, and the construction industry, specifically, will not have sufficiently rebounded from the recession by 2013.⁹ The collected information will assist ARB staff in determining whether additional amendments to the regulation beyond those already adopted should be proposed to the Board.

In holding the hearing, I recognize that the present recession is the deepest recession since the Great Depression of the 1930s, that it has adversely impacted many fleets covered by the regulation, and that recovery from this recession is taking longer than many expected. I also recognize that the recession has resulted in reduced activity for many fleets and that, as a consequence, emissions are lower than forecasted in 2007, when the regulation was initially approved. However, what must be determined is the adequacy of the amendments already in place. The Executive Officer hearing will provide the best means of collecting information to make that determination.

In directing that an Executive Officer hearing be held, I have determined immediate Board action is not necessary since no emergency exists. The petition argues that the regulation must be immediately delayed by two years to prevent immediate and irreparable harm to fleets, in large part because the fleets have been adversely impacted by the current severe recession.¹⁰ There is no dispute that a severe recession exists and that fleets have been negatively impacted. However, the AB 8 2X amendments, which became operative on December 3, 2009, have averted the need for immediate emergency action. The amendments adopted by the Board address the petition's concerns by providing a two-year delay, except for the largest fleets that were able to sustain revenues at pre-recession 2007 levels. Any fleet that has reduced its horsepower through retirement of vehicles between March 1, 2006 and March 1, 2010 will receive compliance credit for that horsepower reduction. Similarly, any fleet that has reduced its operational activity over the last several years (i.e., the difference in fleet activity between calendar year 2007 and the 12-month period bounded by March 1, 2009 to February 28, 2010) will also receive compliance credit. This effectively provides immediate compliance relief in the first years of the regulation's implementation for most fleets that have been adversely affected by the recession. For example, any fleet that has reduced its horsepower through retirements or reduced the amount that it operates by 32 percent or more will be COMPLETELY exempt from any compliance actions in 2010 or 2011 (i.e., will not be required to turn over any vehicles or install any retrofits). Fleets that have been more modestly impacted by the recession will be able to offset some of their 2010 and 2011 compliance requirements.

⁹ See Petition at pages 4 and 6

¹⁰ Petition at page 6

The AB 8 2X amendments also allow all fleets, even those unaffected by the recession, to postpone much of the compliance actions originally required for 2011 and 2012 until 2013. Fleets whose business has not been adversely impacted should financially be in position to meet the regulation's immediate 2010 requirements.¹¹ Moreover, it is reasonable to assume that at least some of these fleets will take advantage of the regulation's early action credit provisions.¹² This relief along with the compliance relief provided in the above-referenced advisory preclude my finding that an emergency exists. For these reasons, I cannot accept AGC's characterization that most, if not all, fleets need immediate further relief to avoid irreparable harm.¹³

Immediate action is also not required even though the AB 8 2X amendments do not address the fleet average requirements of the regulation. The petition essentially argues that the remedy provided in AB 8 2X is insufficient in that it does not address the fleet average requirements of the regulation.¹⁴ The argument is unsupportable because AB 8 2X specifically provides relief to fleets from the regulation's best available control technology (BACT) requirements, which are a compliance alternative to the fleet average requirements. Thus, to the extent that fleets achieve compliance by meeting the regulation's BACT requirements through credits for vehicle retirements and fleet inactivity, they are under no obligation to meet the fleet average requirements. Consequently, the AB 8 2X relief effectively addresses all of the regulation's performance requirements.

B. No Action is Warranted for ARB to Request that U.S. EPA Delay Issuing California an Authorization for the Regulation

The petition requests that ARB inform U.S. EPA that it should not issue the authorization that California has requested for the regulation. I have determined that such a request is outside of the scope of the APA petitioning process, which is directed at requests for adoption, amendment, or repeal of a regulation.¹⁵ Accordingly, no action on the request is warranted.

C. Conclusion

In conclusion, for the foregoing reasons, I am granting the following relief: ARB will issue an advisory no later than February 28, 2010, notifying stakeholders that ARB will not take any enforcement action for noncompliance with the regulation's March 1, 2010 emission standards or other emission related requirements before it receives authorization from U.S. EPA. I have further determined that an Executive Officer

¹¹ See e.g., title 13, Cal. Code Regs., §§ 2449(d)(1), 2449.1(a)(2)(A)2., and 2449.2(a)(2)(A)2.

¹² Title 13, Cal. Code Regs., § 2449(g)(1)(G).

¹³ Petition at page 4.

¹⁴ Petition at pages 1 and 4.

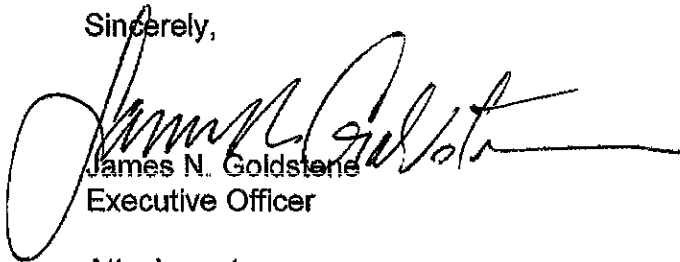
¹⁵ Govt. Code § 11340.7.

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hearing to take testimony and receive information on the question of whether further amendments to the regulation, beyond those that have been adopted to date, is warranted. At the hearing, AGC and other stakeholders will have the opportunity to present testimony and documentation on the recession's impact and what additional relief stakeholders need to address those impacts.

If you have questions regarding the decision on this petition or would like to discuss the regulation, please contact Mr. Erik White, Chief, Heavy-duty Diesel In-Use Strategies Branch, at (916) 322-1017 or ewhite@arb.ca.gov or Mr. Michael Terris, Senior Staff Counsel, Office of Legal Affairs, at (916) 445-9815 or mterris@arb.ca.gov.

Sincerely,



James N. Goldstone
Executive Officer

Attachment

cc: Tom Cackette,
Chief Deputy Executive Officer

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Heavy-Duty Diesel In-Use Strategies Branch

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