



## **California Formally Proposes Sweeping Amendments To Controversial Rule on Off-Road Diesel Emissions**

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Consistent with its prior agreement with AGC, the California Air Resources Board (“CARB” or “Board”) has formally proposed a series of sweeping amendments to its controversial rule on off-road diesel emissions. The amendments will push the original deadlines for construction contractors and other fleet owners to meet the rule’s emission standards and/or turnover requirements back a total of four years. They will also cut the percentage of the total horsepower that the rule requires construction contractors and other fleet owners to turn over (i.e. retire, repower, rebuild, retrofit or declared to be “low use”) in any one year, and they will expand an existing exemption for low-use vehicles.

The amendments will be out for public comment for a period of 45 days. At the close of that period – on either the first or the second day of the two-day meeting that the Board has scheduled for mid-December – the amendments will go back to the Board for its final approval.

When it proposed the rule, CARB estimated that the total cost of compliance would be somewhere between \$3 and \$3.4 billion. CARB now estimates that the cost would only be \$2.15 billion. Nevertheless, it also estimates that the amendments to the original rule will still save the regulated fleets \$1.5 billion. The construction industry’s original estimate of the total cost of compliance was close to \$13 billion, and if that number was anywhere close to accurate, then the amendments to the rule will actually save far more.

And that is just in California. AGC believes that approximately 30 other states may well have interest in adopting the California rule. If they succeeded in doing so – in accordance with the federal Clean Air Act – then the total savings to the construction industry would be even greater.

These amendments are the direct result of AGC’s success in challenging the “emissions inventory” that formed the foundation for the original rule. In 2010, after several years of frequently intense debate, the Board came to agree that its original estimates of the emissions from the regulated fleets were far too high, and changes were in order. To its credit, however, the Board has now acknowledged its mistake and begun the process of amending the rule.

### **I. Background**

CARB adopted the rule in July of 2007, and as a matter of California law, the rule took effect in June of 2008. CARB could not, however, enforce the emission standards included in the rule, or the related requirements for the turnover of existing equipment, until the U.S. Environmental Protection Agency (“EPA”) approved of those standards. CARB sought EPA’s approval in August of 2008, but AGC strongly objected, and in response, EPA has delayed any decision and CARB has remained without the authority to enforce the standards or turnover requirements.

The rule seeks to reduce emissions of both particulate matter (PM) and nitrogen oxides (NOx) from existing fleets off-road diesel equipment primarily in the construction industry. To that end, the rule gives

construction contractors and other fleet owners two sets of steadily declining emission standards – one for PM and the other for NOx. Each year, the regulated fleets have to either meet the standards or turn over a certain percentage of their horsepower. The rule also imposes recordkeeping, reporting and labeling requirements, and restricts idling time.

## II. Major Amendments

As noted, the amendments are sweeping. They will change the rule in fundamental ways, redirecting its various incentives and requirements. In sum, the amendments will reduce the incentives and limit the requirements for reducing PM emissions, but maintain, and in later years, increase, the incentives and requirements for reducing NOx emissions.

Among the very basic changes that are now on the table is a change in the “accounting year” for the rule’s various incentives and requirements. Currently, that year runs from March 1 of each year to the end of the following February. The amendments will change that year to run from January 1 of each year to the end of the following December, bringing the “accounting year” for the rule into line with the calendar year. The amendments will also change the annual reporting deadline for all fleets to March 1.

Following is a brief summary of the other major changes to the rule.

- **Deadlines for Meeting Emission Targets** – The amendments will push the deadlines for large (over 5,000 hp), medium (between 2,500 and 5,000 hp) and small (under 2,500 hp) fleets to meet the rule’s emission standards and/or turnover requirements back a total of four years.

The changes to the first of the deadlines will be these:

- Large Fleets: from March 1 of 2010, to January 1 of 2014.
- Medium Fleets: from March 1 of 2013, January 1 of 2017.
- Small Fleets: from March 1, 2015, to January 1, 2019.

And the changes to the final deadlines will be these:

- Large Fleets: from March 1 of 2020, to January 1 of 2023.
- Medium Fleets: from March 1 of 2020, to January 1 of 2023.
- Small Fleets: from March 1 of 2025, to January 1 of 2028.

- **Number and Level of Emission Standards** – The amendments will delete the PM emission standards included in the original rule and leave it to the remaining standards to drive future reductions of both PM and NOx emissions.

For the first three years, the new emission standards will be the same as the NOx emission standards included in the original rule. In later years, the emission standards will fall farther and faster, but in the final year, the standards will still be “tier equivalent” to the standards in the original rule. In other words, if a fleet consisted of a single vehicle, and that vehicle met the final standards in the current rule, that vehicle would still meet the final standards in the amended rule.

- **Turnover Requirements** – Like the original rule, the amended rule will require fleets to turn over (i.e. retire, repower, rebuild, retrofit or declared to be “low use”) a certain percentage of their total horsepower in any year in which they fail to meet their emission standards. The amendments will, however, make dramatic cuts in the percentage of the horsepower that fleets may have to turn over in any one year.

Several amendments will have the net effect of reducing the percentage of the total horsepower that large fleets will have to turn over in any one year in the following ways:

- Year One: down from 28% to 4.8%
- Years Two and Three: down from 16.8% to 8%
- Years Four and Five: down from a minimum of 28% to 10%
- All Subsequent Years: down from 30% to 10%

Though the amended rule will give greater weight to reducing NOx emissions, it will also seek to reduce PM emissions, and for that reason, PM retrofits will count toward the turnover requirements included in the amended rule.

- **Early Action Credits** – The amendments will make several changes to the early action credits that construction contractors and other fleet owners will retain and may accumulate in the future. These changes will include the following:
  - The amendments will entitle fleets to retain their **“early retirement” credits** for any reductions in their total horsepower between March 1 of 2006 and March 1 of 2010, but cut those credits by 50% (to account for the more dramatic drop in the turnover requirements) and provide that fleets may not use to such credits in 2014 (when California will have to undertake its next round of ambient air quality testing).
  - The amendments will enable fleets to earn **“reduced horsepower” credits** for reducing their total horsepower between March 1 of 2010 and February 28 of 2011 – and those credits will be full credits, unreduced by any amount, and available for fleets to use in 2014.
  - The amendments will entitle fleets to retain any **“early repower” credits** they earned under the original rule for repowering Tier 0 vehicles equipment to a higher tier by March 1 of 2009 – and those credits will be full credits, unreduced by any amount, and available for fleets to use in 2014.
  - The amendments will enable fleets to earn **“repower and rebuild” credits** in the future for repowering or rebuilding their Tier 0 and Tier 1 equipment to a Tier 2 or higher standard by the following deadlines – and those credits will be full credits, unreduced by any amount, and available for fleets to use in 2014:
    - Large fleets: January 1 of 2013
    - Medium Fleets: January 1 of 2016
    - Small Fleets: January 1 of 2018
  - The amendments will entitle fleets to retain any **“early replacement” credits** that they earned under the original rule for replacing Tier 0 equipment between March 1 of 2006 and March 1 of 2009 (in accordance with the formula included in the original rule) – and those credits will be full credits, unreduced by any amount, and available for fleets to use in 2014.
  - The amendment will entitle fleets to earn **“early replacement” credits** in the future (in accordance with the similar formula included in the amended rule) for replacing Tier 0 and Tier 1 equipment during the following periods – and those credits will be full credits, unreduced by any amount, and available for fleets to use in 2014:
    - Large Fleets: between March 1 of 2011 and December 31 of 2012
    - Medium Fleets: between March 1 of 2011 and December 31 of 2015
    - Small Fleets: between March 1 of 2011 and December 31 of 2017
  - The amendments will entitle fleets to retain any **“early retrofit” credits** that they earned under the original rule for applying Verified Diesel Emission Control Strategies (“VDECS”) to their equipment by January 1 of 2010 – and those credits will remain double credits, unreduced by any amount, and available for fleets to use in 2014.

- The amendments will enable fleets to earn “**early retrofit**” credits in the future by applying either PM or NOx VDECS to their equipment by the following deadlines – and those credits will also be double credits, unreduced by any amount, and available for fleets to use in 2014:
  - Large fleets: January 1 of 2013
  - Medium Fleets: January 1 of 2016
  - Small Fleets: January 1 of 2018
- **Reduced Activity Credits** – While the amended rule will retain and even extend the early action credits included in the original rule, the amended rule will omit the reduced activity credits similarly included in the rule.

When questioned about this change, CARB has responded that it inserted the reduced activity credits into the rule for the limited purpose of providing relief to large fleets in 2010 and 2011. Now that CARB is pushing the first of the deadlines for large fleets to meet the emission standards and/or turnover requirements back to 2014, CARB maintains that it is already providing more relief than the reduced activity credits were intended to provide.

- **Exemption from 2014 Requirements** – To reward the large fleets that made a serious effort to meet the turnover and retrofit requirements included in the original rule, the amendments will exempt large fleets from the 2014 emission standards and turnover requirements if the following, taken together, equaled or exceeded 8% of such fleets’ total horsepower as of March 1 of 2009:
  - “Early retirement” credits (reduced in accordance with other amendments to the rule) for any reductions in total horsepower between March 1 of 2006 and March 1 of 2010
  - “Early repower” credits for any vehicles repowered from Tier 0 to a higher tier by March 1 of 2009
  - “Early replacement” credits for any Tier 0 vehicles replaced between March 1 of 2006 and March 1 of 2009 (in accordance with the formula included in the original rule)
  - “Early retrofit” credits for applying either PM or NOx VDECS to equipment by January 1 of 2010
  - Any turnover credits earned between March 1 of 2009 and February 28 of 2010, except to the extent that they include “early retrofit” credits

While the “early retirement” credits that count toward the exemption will be reduced (in accordance with other amendments to the rule), counting such credits toward the exemption will not have the effect of reducing the “early retirement” credits available to fleets in the future. The amendments make it clear that this particular provision will not have the effect of reducing any credit that any fleet would otherwise have the right to use in 2014 or any subsequent year.

- **Exemption for Low-Use Vehicles** – The amendments will double the number of hours that vehicles may operate in any one year and still qualify for special treatment as “low-use” vehicles. The current limit is 100. The amendments will increase that number to 200. In addition, they will clarify the differences between “year-by-year low-use” vehicles and “permanent low-use” vehicles, and the benefits of fitting a vehicle into either category.
- **Restrictions on Adding Vehicles** – The amendments will change the deadlines for regulated fleets to add Tier 0, Tier 1 and Tier 2 equipment.

- First, they will extend the deadline for adding **Tier 0** equipment from March 1 of 2009 to the date on which EPA finally approves the off-road rule and grants CARB the authority to enforce its emission standards.
- Second, they will delete the complex provision that generally prohibits fleets from adding **Tier 1** equipment in any year in which they fail to meet their PM emission targets and replace it with the following:
  - Large and medium fleets may not add Tier 1 equipment after March 1 of 2011 unless that equipment has an EIN number that CARB assigned to the equipment prior to that same date.
  - Large and medium fleets may not add any Tier 1 equipment after January 1 of 2013.
  - Small fleets may not add any Tier 1 equipment after January 1 of 2016.
- Finally, the amendments will make the following changes to the deadlines for adding **Tier 2** equipment:
  - For large and medium fleets, the deadline will move up from March 1 of 2020 to January 1 of 2018.
  - For small fleets, the deadline will move up from March 1 of 2025 to January 1 of 2023.

Whether, on balance, the new restrictions on adding Tier 0, Tier 1 and Tier 2 equipment are more or less stringent than the current restrictions remains a close question. It is, however, clear that the new restrictions are less stringent than the restrictions that CARB “work-shopped” in June and September of 2010, in advance of making any formal proposal to amend the rule.

- **Flex Engines** – The amendments will delete the special provision that now requires fleets to treat “post-2007 flexibly engines” differently from other engines of the same tier. The current rule requires such engines to be “flexed back” to the standard to which they are certified. In September, CARB informally proposed a less complex but still punitive provision that would have required fleets to treat all such engines as if they were “one tier less.” The amendments now on the table will simply delete the special provision on flex engines, and provide that the emission factors for such engines are the same as the emission factors for all other engines of the same tier.

#### IV. Conclusion

Other amendments to the rule would (1) clarify the requirements for new fleets, (2) create a new and much more streamlined option for fleets with 500 or less horsepower, (3) provide that vehicles exempt from the turnover requirements between the first and final deadlines will remain exempt in the years that follow (when fleets that do not meet the final emission standards will have to continue to turn over equipment), and (4) require labeling on both sides of each vehicle.

Depending on its individual circumstances, any one fleet may find these or other changes to the rule to be more significant than the several summarized here. AGC advises and encourages everyone subject to the rule to review it carefully, and if necessary, to seek professional assistance in coming into compliance.

The Board will conduct a public hearing on the amendments in Sacramento on December 16 or 17, and at the close of that hearing, AGC of America expects the Board to vote on the amendments, including any and further changes that the Board staff may recommend on the day of the hearing. AGC also urges all of the California contractors interested in ensuring that the Board approves the amendments to attend that hearing and to express their support for the amendments. CARB will be posting the exact date of the hearing (whether December 16 or 17) and other details on its web site no later than December 6.