

**STATE OF CALIFORNIA
AIR RESOURCES BOARD**

PUBLIC HEARING TO CONSIDER THE)
ADOPTION OF A PROPOSED)
REGULATION FOR IN-USE OFF-ROAD)
DIESEL VEHICLES)

Agenda Item: 07-5-6

**SUPPLEMENTAL “SOON” PROGRAM COMMENTS OF
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA**

March 6, 2008

On behalf of—
Associated General Contractors of America

Michael E. Kennedy
General Counsel
Associated General Contractors of America
Telephone: (703) 837-5335
Fax: (703) 837-5401
Email: kennedym@agc.org

Leah Wood Pilconis
Consultant on Environmental Law & Policy
Senior Environmental Advisor to AGC
Telephone: (703) 837-5332
Fax: (703) 837-5401
Email: pilconisl@agc.org

TABLE OF CONTENTS

Glossary i

Introduction.....1

I. Comments on Underlying ORD Regulation1

II. Comments on SOON Program.....2

 A. APA and Substantive Issues2

 1. SOON Program Not an Outgrowth of ORD Rule2

 2. ARB Must Assess Cost Effectiveness and Feasibility of SOON Program.....2

 3. ARB’s SOON Approval Process Requires an ARB Rulemaking.....3

 4. ARB’s SOON Approval Process Requires an EPA Waiver.....3

 5. SOON Program’s Burdens for Contractors Operating in Multiple SOON Jurisdictions.....3

 6. SOON Program Undermines Cost-Effectiveness Analysis for Underlying ORD Rule.....5

 7. Clarity Needed on SOON Program’s Applicability to Retrofits.....5

 8. SOON Program Should Fully Fund Covered Projects6

 9. SOON Program Should Not Undermine ORD Rule’s Flexibility.....6

 10. SOON Program Should Not Burden Fleets with Fictitious Tier 0 Emissions for Covered Units.....6

 11. SOON Program’s Contract Period Imposes Unrealistic Residency Requirements on Equipment.....7

 12. ARB Should Confirm that Air Districts’ Implementing Policies and Forms May Exempt Paperwork Requirements for Designated Equipment7

 B. CEQA Violations.....8

Conclusion8

GLOSSARY

AGCAssociated General Contractors of America

APA.....California Administrative Procedure Act

ARBCalifornia Air Resources Board

CEQA.....California Environmental Quality Act

NOx.....Oxides of Nitrogen

ORDIn-Use Off-Road Diesel Rule

PM.....Particulate Matter

INTRODUCTION

The Associated General Contractors of America (“AGC”) respectfully submits these supplemental comments to the California Air Resources Board (“ARB”) on its amendments to its proposed in-use off-road diesel (“ORD”) rule and particularly to the addition of the Surplus Offroad Opt-in for NOx (“SOON”) Program. These comments follow those that AGC previously submitted, dated May 23, 2007, July 25, 2007, and January 8, 2008, which AGC incorporates by reference.

To summarize its interest in this rulemaking, AGC is the largest and most diverse trade association in the construction industry, with more than 32,000 members and 96 state and local chapters throughout the United States. Among AGC’s members are more than 7,000 of the nation's leading general construction contractors and approximately 25,000 specialty contractors and other firms engaged in the construction of highways, bridges, tunnels, airport runways and terminals, buildings, factories, warehouses, shopping centers, and both water and wastewater treatment facilities. While AGC is a nationwide organization, with a national presence and perspective, AGC developed these comments in close cooperation with its California chapters and members, and with the considerable assistance and support of the California Industry Air Quality Coalition (“CIAQC”).

As with the underlying ORD rule, AGC respectfully submits that the SOON Program would fundamentally change the regulation of construction equipment and, far more importantly, that ARB has adequately analyzed neither the environmental nor the economic consequences of this new program. Because it would impose additional financial burdens on the construction industry, on top of those of the underlying ORD rule and ARB’s regulation of portable and on-road equipment, ARB’s new regulations will impose unsustainable burdens on the construction industry.

I. COMMENTS ON UNDERLYING ORD REGULATION

Although ARB’s supplemental notice primarily concerns the SOON program, ARB makes one significant change to the underlying ORD rule: the addition of a severability clause. Without a severability clause, ARB could not enforce any of its ORD rule until ARB receives a waiver of preemption from the U.S. Environmental Protection Agency. *See Pacific Merchant Shipping Assoc. v. Goldstene*, ___ F.3d ___, 2008 WL 509213 (9th Cir. 2008) (“*PMSA*”). Having now added its severability clause, ARB may argue for the authority to enforce elements of the ORD rule that are not “standards,” “other requirements,” or “accompanying enforcement procedures” under Clean Air Act §209. Before ARB can enforce such non-preempted stand-alone elements of the ORD rule, however, the California Administrative Procedure Act (“APA”) requires ARB to assess the need for and burden of such non-preempted stand-alone elements of the ORD rule. *See, e.g.*, Cal. Gov’t Code §11346.3(a).¹

¹ The *PMSA* decision also underscores why ARB’s current ORD rule fails to provide adequate leadtime, which ARB should compute from the point that the federal EPA grants a waiver in order to ensure adequate leadtime for affected fleets. Otherwise, fleets will face a retroactive standard, based on the date that the federal EPA grants a waiver.

II. COMMENTS ON SOON PROGRAM

A. APA and Substantive Issues

The following twelve sections identify problems with the SOON program under the APA and under ARB's enabling legislation for standard-setting.

1. SOON Program Not an Outgrowth of ORD Rule

The APA requires supplemental proposals undergo a "15-day" notice process where the change is "sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action." Cal. Gov't Code §11346.8(c)(2). Where a revision does not meet the "sufficiently related" test, the APA requires agencies to recommence the full APA process for that new rule (*e.g.*, an initial statement of reasons, the opportunity for a hearing, etc.). The SOON program is in no way an outgrowth of the underlying ORD proposal, and ARB must recommence the full APA rulemaking process for the SOON program.

2. ARB Must Assess Cost Effectiveness and Feasibility of SOON Program

As explained in AGC's prior comments, ARB's enabling legislation, the APA, and CEQA impose various requirements on ARB's setting of emission standards (*e.g.*, cost effectiveness, feasibility, considering alternatives). When ARB adopts a new or revised standard, ARB must comply with these requirements anew. *See, e.g.*, Cal. Gov't Code §11346.5(a)(4) (notice of proposed adoption shall include other information required by statute). Here, ARB must comply with the full range of information required for a new emission standard.

Because the SOON program requires certain fleets to achieve emission reductions beyond what is already required by the baseline off-road rule, ARB must compute and demonstrate (via its technical supporting documents) the overall cost-effectiveness of the SOON program. To date, ARB has not adequately described the model that it uses to assess cost-effectiveness of the additional - or "surplus" - NO_x reductions called for by the SOON program. As such, neither the public generally nor industry specifically can intelligently comment on ARB's modeling.

ARB states in Attachment 2: Description of Surplus Off-Road Opt-in for NO_x (SOON) Program ("Attachment 2") that "staff expects that the regulation remains cost-effective and is still within the cost-effectiveness range of previous measures adopted by ARB." Attachment 2 goes on to state that staff has "not quantified emission benefits of the SOON program in air districts other than the South Coast..." The fact remains, neither the public generally nor industry specifically has enough information to intelligently comment on ARB's modeling.

3. ARB's SOON Approval Process Requires an ARB Rulemaking

The SOON proposal contemplates that opt-in air districts will decide whether and on what terms to participate in the SOON program at duly noticed public hearings (§2449.3(f)(1)-(2)). By contrast, the ARB's approval of an air district's program – which is the step that makes the opt in effective – does not require a rulemaking (§2449.3(f)(3)-(4)). Specifically, ARB retains sole authority to approve each air districts administrative guidelines and, in that regard, to modify the proposed local rules in any way the Executive Officer sees fit (§2449.3(f)(4)). ARB also has sole authority to enforce the “SOON” program (*see* §2449.3(f)(4)) at the local level. AGC respectfully submits that ARB's action constitutes the amendment of a regulation, Cal. Gov't Code §11342.600, and thus requires a rulemaking (*i.e.*, an opportunity for comment and full APA compliance at the ARB level).

4. ARB's SOON Approval Process Requires an EPA Waiver

ARB's adoption, acceptance, or amendment of local SOON programs will constitute the adoption of an emission standard and other requirements for the control of emissions from off-road equipment under Clean Air Act §209(e). As such, ARB will need to seek EPA's waiver of federal preemption (or, at the very least, EPA's “within the scope” determination) before ARB can enforce the SOON program in an air district. *See* 42 U.S.C. §7543(e)(2)(A) (waiver); *see, e.g.*, 64 Fed. Reg. 42,689, 42,691 (Aug. 5, 1999) (“within the scope” determination).

5. SOON Program's Burdens for Contractors Operating in Multiple SOON Jurisdictions

Local air districts that “opt-in” to the SOON program must develop their own “administrative provisions...including, but not limited to, funding guidelines..., compliance planning requirements, and reporting and monitoring requirements” to reduce NOx emissions from construction equipment operating in their district beyond what is required under the statewide off-road rule (§24493(f)(2)). This provision appears to give local governments (*i.e.*, air districts) new authority to set their own unique emissions standards for off-road construction equipment. Allowing local governments within California to set engine emission standards could lead to dozens of different standards being used throughout the state (and hundreds of different standards being used throughout the nation if other states can adopt California's off-road rules).

To this end, the SOON rule states that local air district funding guidelines “may include limitations on the cost-effectiveness of projects that may be funded and must include the method used for prioritizing projects based on cost-effectiveness.” This provision appears to grant the local air districts unlimited authority to control - and potentially even restrict - a fleet owner's emissions reduction strategy. This conflicts with the underlying objective of the off-road rule, which “contains flexibility provisions to allow each fleet to find its own most cost-effective way to comply and allow[s] fleets to... choose its own best, most cost-effective path toward compliance” (*see* ISOR, p. 4). What is more, AGC maintains that local governments may not

have the latest information on the best strategies and technologies for the construction fleet operating within their jurisdiction. In fact, there is a danger that the best technologies would not be chosen, but instead the best salesman may get their strategy adopted whether it is appropriate for the locality or not.

AGC believes it is inappropriate to give air districts that participate in the SOON program such broad authority to essentially create their own unique emission programs for off-road construction equipment. Contractors working across the state of California will face multiple compliance plan and reporting requirements and it will become unduly burdensome (and unnecessarily complicated) for construction companies to demonstrate multi-district compliance. In addition, a patchwork of different emission reduction requirements would undermine the ability of manufacturers of equipment, engines and emissions control devices to produce effective products and to meet customer demand. Contractors working in more than one jurisdiction may not be able to use particular pieces of equipment in other jurisdictions.

AGC requests that ARB amend the SOON rule to mandate that district plans be compatible.² As currently written, the rule requires only that ARB “consider...uniformity of district guidelines between air districts.” AGC also requests that the SOON rule clearly state that air districts do not have the authority to dictate the best strategies and/or technologies for the construction fleet operating within their jurisdiction. In addition, AGC believes that the statewide opt-in framework is overly broad. Because the excess NOx reductions are only needed in two air districts – South Coast Air Quality Management District (SCAQMD) and San Joaquin Valley Pollution control District (SJVAPCD) - ARB should limit the SOON program to only those areas. A more tailored and narrowly focused SOON program would decrease the rule’s burden on contractors who operate throughout the state.

² To provide just a single example, the equipment eligibility requirements differ in the SOON provisions proposed by SCAQMD and SJVAPCD. San Joaquin proposes that only equipment operating more than 50 percent of the time in their air district will be required to participate in their SOON program. The South Coast proposal would include any equipment operating most of the time in the South Coast District, even if the percentage of time is less than 50 percent. This will result in nearly impossible compliance burden where equipment owners will have equipment sitting idle in one air district while renting equipment to perform work in another air district only because the SOON restricts the operation of a significant portion of their fleet.

6. SOON Program Undermines Cost-Effectiveness Analysis for Underlying ORD Rule

Recognizing that the SOON program may “increase the estimated cost of the off-road regulation in its initial years of implementation,” ARB must revisit its cost-effectiveness calculation for the off-road rule (*see* Attachment 2, p. 6). This is because the SOON program will fund the most cost-effective projects in a fleet earlier than they would be controlled by the statewide requirements in the off-road rule. As ARB explains in Attachment 2, p. 6, footnote 3—

Older Tier 0 vehicles are the more cost-effective relative to newer vehicles to turn over because they have less useful life remaining and because of large emission reductions associated with repowering Tier 0 engines to a Tier 3 level. Tier 0 vehicles are required to be turned over first in the off-road regulation if a fleet is on the BACT path. Therefore, when the cost analysis was performed for the off-road regulation, it was assumed that these vehicles were turned over first at little cost to the fleet.

Because older Tier 0 vehicles will now be included in the SOON program, fleets will be forced to control less cost-effective vehicles (such as newer Tier machines) for compliance with the off-road rule. Accordingly, the SOON program’s addition requires ARB to update its cost-effectiveness determinations for the underlying ORD rule.

7. Clarity Needed on SOON Program’s Applicability to Retrofits

ARB’s “fact sheet” on the SOON program, Attachment 2: Description of Surplus Off-Road Opt-in for NOx (SOON) Program, is unclear on whether or not the program requires and/or provides funds for diesel retrofit. The fact sheet indicates that “fleets can apply for funding for NOx exhaust retrofits...” (Attachment 2, p. 2), but it then goes on to state that **“the SOON program will not fund, and will not require VDECS installations on SOON vehicles”** (Attachment 2, p. 7). The latter statement seems to contradict the text of the SOON rule, which includes retrofit in the definition of “project” and also references retrofit in the section that covers funding application procedures (*see* §§2449.3(c)(3) and 2449.3(d)(1)(D)).

Indeed, even the air districts appear to be confused as both the SCAQMD and SJVAPCD SOON guidelines indicate the retrofit devices are eligible for SOON funding. In addition, SCAQMD states that “for all repower projects, fleets must install the highest level VDECS...” and SOON funded projects will be required to install verified particulate traps (if available) that must be funded by the fleet owner.

AGC request further clarification on how the SOON program applies to diesel retrofit.

8. SOON Program Should Fully Fund Covered Projects

The SOON rule states that local air district guidelines “must include...a description of any requirements on fleets that received SOON funding to pay part of the SOON project cost.” AGC requests that the SOON program must fully fund all emissions reduction strategies - including diesel retrofit - where such actions decrease a participating fleets overall NOx emissions beyond what is required by the off-road in-use diesel rule. Most contractors working in California will find it challenging, if not impossible, to finance the cost of complying with baseline rule. It follows that it will be economically infeasible for many companies to also absorb fees under the SOON program (*i.e.*, matching funds, cost of DPF installation, etc.).

By allowing air districts to make the program mandatory, “eligible fleets” will be forced to apply for funds even when they know they do not have the matching dollars needed to participate. For example, Carl Moyer funds (which will be a revenue stream for some participating districts) may only be used to pay the portion of the repower cost beyond the assumed cost of a normal engine rebuild. ARB assumes that rebuild costs are equal to about 15% of the total cost of the repower. However, under the 2008 Moyer Guideline Revisions the minimum co-fund is proposed to be 15% of the full Tier 3 repower costs (*see* SCAQMD Draft Staff Report - Proposed Rule 2449 – Control of Oxides of Nitrogen Emissions from Off-Road Diesel Vehicles, Jan. 2008).

9. SOON Program Should Not Undermine ORD Rule’s Flexibility

The SOON rule states that “vehicles that are replaced or repowered with SOON program funds” cannot take advantage of the ORD rule’s “exemption from [PM exhaust] retrofit requirements for vehicles less than 5 years old” (*see* §2449.3(e)(6)(a)). Similarly, vehicles that are covered by the SOON rule cannot take advantage of the off-road rule’s exemption from turnover requirements that is afforded to “vehicles less than 10 years old” (*see* §2449.3(e)(2)). It is inappropriate for ARB staff to take away, via a SOON provision, flexibility that ARB’s Board approved into the baseline off-road rule. Indeed, it exceeds ARB’s staff’s permissibly delegated authority to take these actions in the SOON program without returning the issue to the ARB Board.

10. SOON Program Should Not Burden Fleets with Fictitious Tier 0 Emissions for Covered Units

According to ARB, reductions achieved through the SOON program funding cannot be credited toward fleet compliance with the in-use off-road regulation. Instead, action taken using SOON program funding must be ignored (when determining compliance with fleet average targets or minimum BACT requirements) until the contract period has expired for any given piece of equipment. AGC understands that SOON program reductions would not be surplus for fleets that comply via the ORD rule’s BACT option, but that is not true for fleets that comply via the ORD rule’s fleet-average option. It is unfair to force fleets to carry clean units at fictitious “Tier-0” emissions levels for the seven-year life of a SOON program contract, which essentially will

require those fleets to over-control the rest of their fleets to make up for “ghost” emissions that the fleet does not actually emit. To avoid forcing fleets to carry “ghost” emissions from a Tier 0 unit that the fleet does not actually operate, the ORD rule should simply omit SOON program vehicles from the fleet-average calculation.

11. SOON Program’s Contract Period Imposes Unrealistic Residency Requirements on Equipment

The SOON rule defines “contract period” as “the period of time in which the vehicle participates in the program and is under contract to the air district to achieve additional emission reductions.” SCAQMD’s proposed guidelines would require a minimum contract duration (project life) of seven years. Under the framework of a mandatory program, this amounts to a seven-year residency requirement, which is unreasonable and unrealistic given construction project lengths and the multiple air districts within which construction companies typically use their equipment.

SOON contracts will require that equipment operate a vast majority of the time in the air district providing the funding, whether the equipment owner has work in that air district or not. There will be times when the equipment owner has work outside of the air district providing the SOON funding and no work within this air district. The equipment owner will then be faced with renting or purchasing new equipment to perform this work even though he already owns equipment capable of performing the work which is sitting idle and not generating revenue. Contractors need to maintain the flexibility to dispatch equipment to locations where there is work for them to perform. The SOON greatly restricts this flexibility. This represents an additional compliance cost to the equipment owner.

12. ARB Should Confirm that Air Districts’ Implementing Policies and Forms May Exempt Paperwork Requirements for Designated Equipment

Neither air districts nor fleets should have to prepare or process unnecessary paperwork for SOON applications for equipment that could not qualify for SOON funding. The application process will require large time and financial commitments for relatively little funding. Most relevantly from a paperwork-reduction perspective, however, the time and efforts spent by many fleets will be wasted because those fleets will have equipment that not only will not but cannot be funded in the end (*e.g.*, because of equipment types, cost-effectiveness criteria, etc.). Even without amending the SOON program, ARB can and should commit to work with air districts and industry to prepare SOON guidelines, criteria, and forms in ways that minimize the submission of unnecessary paperwork, such as information on equipment that cannot qualify for SOON funding.

B. CEQA Violations

Under CEQA, whether a rule has a significant, non-mitigable and adverse effect on the environment goes to whether the lead agency must prepare an Environmental Impact Report (“EIR”), or may simply make a negative declaration. *See, e.g., Pocket Protectors v. City of Sacramento*, 124 Cal.App.4th 903, 927 (2004).

ARB claims that the SOON program will not result in emissions increases in any participating district - pointing out the rule “includes language to prevent fleets from moving older, higher emitting vehicles into a participating air district simply to seek funding” (*see* Attachment 2, p. 10). The staff analysis fails to consider, however, a more likely scenario in which fleets move older, higher-emitting equipment out of a participating air district to surrounding areas. The latter scenario is likely to occur, especially in districts that make the SOON program mandatory, because vehicles “scheduled to leave the district” do not need to be included in a company’s NOx index calculation, NOx target rate calculation or application for funding. Under CEQA, ARB must consider that the SOON rule will cause an increase in pollution in districts that do not participate in the program.

CONCLUSION

For all the foregoing reasons and those in AGC’s prior comments, the Board should revisit its entire ORD-SOON regulatory proposal, starting with consultation with affected public agencies and stakeholders and opening its consideration of alternatives to include region-specific regulation tied to federal nonattainment status and funding targeted to the federal nonattainment areas.

Respectfully submitted,
On behalf of—
Associated General Contractors of America

Michael E. Kennedy
General Counsel
Associated General Contractors of America
Telephone: (703) 837-5335
Fax: (703) 837-5401
Email: kennedym@agc.org

Leah Wood Pilconis
Consultant on Environmental Law & Policy
Senior Environmental Advisor to AGC
Telephone: (703) 837-5332
Telecopier: (703) 837-5401
Email: pilconisl@agc.org




