STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

AGENCY: AIR RESOURCES BOARD	)	DECISION OF DISAPPROVAL
	)	
ACTION: Amend Sections 2450, 2451	)	(Government Code Section 11349.3)
2452, 2453, 2454, 2455, 2456, 2457,	)	
2458, 2459, 2460, 2461, 2462, 2463,	)	OAL File No. 05-0107-04 S
2464 and 2565 and Repeal Section	)	
2466 of Title 13 of the California	)	
Code of Regulations	)	
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BACKGROUND

The Air Resources Board proposed amendment and repeal of the above-captioned regulations in order to update its rules for the Portable Equipment Registration Program ("PERP"). On January 7, 2005, these changes were submitted to OAL for review, and on February 18, OAL disapproved the proposed changes. This Decision of Disapproval explains the reasons for OAL's action.

DECISION

OAL disapproved the Board's proposed amendment and repeal of regulations because some of the changes are unclear, and because the Board's responses to public comments that were submitted to it concerning the proposed changes are inadequate.

DISCUSSION

CLARITY & RESPONSES TO COMMENTS ON SECTION 2451, SUBDIVISION (c)

The record of this rulemaking proceeding reveals substantial public interest in the Board's proposed amendments to the PERP. The changes described in the public notice prompted the submission of quite a few written comments during the 45 day comment period, significant participation in the public hearing on February 26, 2004, and additional comments during two subsequent 15 day comment periods. The commenters expressed a variety of concerns, but the ones heard most often concern newly proposed limitations on participation in the program set forth in Section 2451, subdivision (c), paragraph (5). The commenters generally opposed changes that they believed could preclude their participation the PERP, and in this context, many of them asked the Board for clarification of the meaning of this section. The Board did remove or limit two of the exclusions in response to some of the public comments, but declined these invitations to clarify the description of the equipment that this paragraph would authorize the Executive Officer to exclude from the PERP. The commenters who said this regulation is unclear are correct.

Health and Safety Code section 41751 defines "portable equipment" for purposes of the PERP. Proposed Section 2451 of the Board's regulations, appropriately entitled "Applicability," attempts to make this concept more specific. Proposed subdivision (c), as submitted for OAL review, provides:

> "The following are not eligible for registration under this program:
> (1) . . . .
> (2) . . . .
> (3) . . . .
> (4) . . . .
> (5) operation of an engine or equipment unit at any location determined by the Executive Officer to require permits from a district. Examples include but are not limited to:
>> (A) . . . .
>> (B) . . . .
>> (C) generators used for power production into the grid, except to maintain grid stability during an emergency event or other unforeseen event that affects grid stability;
>> (D) generators used to provide primary or supplemental power to a building, facility, stationary source, or stationary equipment, except during unforeseen interruptions of electrical power from the serving utility, maintenance and repair operations, and remote operations where grid power is unavailable. For interruptions of electrical power, the operation of a registered generator shall not exceed the time of the actual interruption of power; and
>> (E) any equipment unit determined by the Executive Officer to qualify as part of a stationary source permitted by a district, and its associated engine."

We note that the proposed rule vests the Executive Officer with broad discretion to make a decision concerning any engine or equipment unit and uses examples to set forth the implied standards. It is not clear how this will work in practice, particularly for rental equipment that is put to many uses during its period of registration. One possibility might be that every use would be authorized until the Executive Officer rules that it is not. How the equipment users would learn of these decisions is a mystery. If these decisions would be standards that apply generally to members of a class, they would be regulations that can only be lawfully adopted in accordance with the Administrative Procedure Act. In the hearing transcript, on page 343, beginning on line 15, there is some discussion concerning the possible use of a "guidance document" to explain, or list ineligible equipment. To the extent the guidance would interpret, implement or make specific the provisions of the regulation, this approach is specifically prohibited by Government Code section 11340.5. The use of examples suggests that they describe the characteristics of ineligible equipment, and that the ineligibility of other equipment would be determined using the examples as standards. For this purpose, the examples may be

inadequate. The rule has to be clear enough so that people who utilize registered engine powered generators and enforcement personnel of the districts can easily understand it and reasonably determine if a permit is required [Government Code section 11349(c)].

A commenter, the Motion Picture Association of America (2/18/04) was interested in assuring that its members would continue to be able to use portable generators registered in the PERP without the need to secure a district permit when shooting movies at locations such as a warehouse or airport hangar. Shannon S. Broome (G.E. Energy Rentals) described several common situations where the generators G.E. rents have been used to provide temporary service, and expressed concern that the language of Section 2451(c)(5)(D) may preclude that use without a district permit. Citing the limited duration of these uses, typical lack of available power, and their need to quickly respond, they explained that their activities are not amendable to a district's lengthy permitting process. The Board agreed, and provided this response:

> "ARB staff believes that the applications using portable generators to power dehumidification equipment, off-site film shoots, and equipment at concerts are appropriate uses under the Statewide Program, especially in the cases were the voltage requirements (50 megahertz instead of 60 megahertz) can only be supplied by portable generators."

While OAL does not disagree with the decision that this would be an appropriate use of PERP registered equipment, we must point out that the language of the proposed rule, including its examples, does not clearly authorize such use. The example in paragraph (D), excludes generators used to provide primary or supplemental power, and limits exceptions to unforeseen interruptions, maintenance and repair, and remote operations, none of which would apply in the situations of concern to these commenters. The Board's response suggests that in these cases some consideration would be given to the availability of suitable power, and perhaps other factors, however these factors are not included in the proposed rule.

The Pacific Gas and Electric Company is another commenter concerned with the use of portable generators registered in the PERP, and concerned that the language of Section 2451(c)(5)(D) seems to preclude their use in certain applications that the company has historically used them for. The company raised this concern in letters submitted during the first and second comment periods, and at the hearing. One use in particular involves supplying electrical power to a building or facility for up to two days while the electrical service to the building is upgraded. Upgrading the service at a supermarket and at an ice cream plant were offered as examples. PG&E was concerned that the exceptions for unplanned interruption of service and for maintenance might not apply, and that under the rule a permit might be necessary. Pointing to the recurring nature of this need, the mobility of the equipment, the short duration and low impact of the use, and the company's need to respond faster than the district permitting process generally allows, PG&E urged a clarification of the rule that would allow this type of use.

The Board declined to make such a change, and in its response to comments, offered its explanation of why a local permit should be obtained. The Board pointed out that upgrades are planned operations and stated that they "can involve the use of large generators for a significant period of time to feed the electrical grid." Then, assuming use for a significant period of time, the Board continued "it is appropriate to require engine operators to obtain permits from the local air district. The districts can then evaluate and require mitigation measures to minimize air quality impacts where necessary." [Final Statement of Reasons, pages 11, 12, 30, 31.]

The fault with this response is that it discounts PG&E's description of the service upgrade problem that it asked the Board to address with a change in the rule, by lumping several of the utility's requests together and rejecting them as a group. While it is true that PG&E also sought a change in the rule that would allow use of generators to supplement the supply of power to the gird for an indefinite period, its request in connection with electrical upgrades to buildings or facilities was for a use that might last 45 minutes to two hours in one example [hearing transcript, page 334, line 4] and less than 48 hours in another [letter of 6/1/04]. A request to change the rule so that it will clearly allow for the use a use of a PERP generator that will require from 45 minutes to 48 hours of operation cannot be rejected with reasons that rely upon a potential for long-term use at a site. If, as it appears, the duration is of concern to the Board, then perhaps the rule should set a standard for the duration of this type of use. On the surface, it appears that the use of a portable generator for a concert, or the duration of a movie shoot, both deemed by the Board to be acceptable, is comparable to the use described by PG&E in connection with upgrading the electrical service to a facility. The distinctions the Executive Officer would rely upon to allow one and deny the other are not set forth in the rule, and their omission makes the rule unclear.

In connection with the use of a portable generator in support of a service upgrade, PG&E also requested the allowance of a reasonable period of use for engine start-up and shut-down. Having determined that it would not allow the use of PERP registered generators for service upgrades, the board responded to this comment as if it pertained only to supplying power during unforeseen interruptions. The Board indicated that with start-up occurring after the interruption of power, it would be included within the allowable period of use [final statement of reasons, p. 31]. It appears that the comment requesting time for start-up, shut-down, and testing actually pertained to use of a generator in connection with a service upgrade to a facility, and that start-up time would occur before, and as a prelude to the interruption of power occasioned by the planned upgrade work. If the Board's final rule will preclude such use of generators, then the start-up issue will be covered by that response as well, however if the Board decides to clarify the rule and allow the use in upgrades requested by PG&E, then the start-up, shut-down and testing issue should be addressed in some manner as well.

In any event, the regulation must be clarified so that people who depend upon portable equipment units to perform their work can reasonably determine from the rule whether they will need a local permit, or can rely upon the permit exemption for registered equipment set forth in Health and Safety Code section 41753. The many questions of

interpretation presented to the Board in public comments highlight the proposed rule's inadequacy as a standard of general application. The shortcomings must be addressed in the rule itself, and cannot be resolved through the use of a guidance document or executive decisions based upon standards that are not included in the law.

OTHER CLARITY & RESPONSE TO COMMENT ISSUES

Home District

The Board proposed changes to the text of the rules on December 17, 2004, and mailed a notice advising commenters of the opportunity to comment. The changes proposed at this time included an amendment to the definition of the term "Home District" in section 2452, and the requirement to indicate the home district in an application for registration set forth in section 2453. In comments dated December 31, 2004, PG&E asked for a change in the definition that would allow for designation of the district in which the unit resides for the largest percentage of time as the home district. The change was suggested to avoid "excess and unnecessary 5-day district relocation reporting and an additional and unnecessary tracking and record-keeping burden for the operator." PG&E also said this change would simplify inspections. The Board did not make the suggested change, and did not summarize or respond to this comment.

Daily Record

Section 2458 requires owners of registered portable engines not exempt from its requirements to keep specified records. Subdivision (b), and newly proposed subdivision (g), require maintenance of a "daily record." The Department of the Navy (letter of 12/24/04) and PG&E (letter of 2/18/04) requested a change in the regulation so that record keeping would only be required during days of operation. They explained that equipment may sit idle, sometimes in remote locations, for extended periods of time; that the record of operation is kept with the equipment; and that it would be costly and wasteful to send a person to update the record each day when the equipment is not being used. Set forth below is the Board's response:

> "No changes were made in response to this comment. ARB staff agrees that the daily log entries only need to be completed on days when the engines are operated. This issue will clarified in an implementation guidance document being developed by ARB staff."

The plain meaning of "daily" is every day, or every weekday. Here the Board believes that daily reporting is not what was intended, but rather than clarify the language of the rule, it proposes to prepare a guidance document to explain what the rule means. As mentioned earlier on page 2 of this decision, the issuance of a document to interpret the meaning of an adopted regulation is prohibited by the APA. For this same reason, the proposal to clarify the rule elsewhere is not a satisfactory response to the concern expressed by these two commenters.

For these reasons, OAL disapproved the Board's proposed action. We also note the following changes that should be made before these regulations are resubmitted:

(A) Five of the proposed rules contain language that indicates they apply or do not apply to a person who held, or did not hold registration "*prior to the effective date of the amendments to this article*." In the context of this rulemaking, the referenced date is clearly the effective date of these amendments, but after publication in the CCR, the reference will become confusing to readers. All but two of the regulations in the article have already been amended once. Thus the question: Which amendments? Each of these can be improved by writing in the projected effective date, or leaving a blank for OAL to fill in this information once the date is ascertained.

(B) An obsolete reference to an exception has been retained in section 2451, subdivision (a), after the exception was eliminated from subdivision (d).

(C) In proposed section 2456, subdivision (d), paragraph (5), 5th line, there is an error in grammar. It appears that the word "shall" should be added before the phrase "meet the most stringent emissions standard."

(D) In section 2457, subdivision (b), paragraph (3)(F), there is a small text discrepancy as compared to the current CCR. The words "~~there are~~" should be added to ensure they are removed from the regulation by the publisher.

Date: February 25, 2005

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