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Enforcement

EPA's Latest Truck Rule Has Broader Effect on Mobile Source Compliance and Enforcement

BY BRUCE PASFIELD AND ELISE PAEFFGEN



Bruce Pasfield is a partner in Alston & Bird's Environment, Land Use & Natural Resources group, where he focuses on environmental and business litigation and assisting companies in developing compliance programs that meet both corporate governance and government standards.

Elise Paeffgen is a senior associate in Alston & Bird's Environment, Land Use & Natural Resources group, where she focuses on environmental enforcement defense; financial assurance related to the Resource Conservation and Recovery Act; Comprehensive Environmental Response, Compensation, and Liability Act; Safe Drinking Water Act; chemicals management; pharmaceutical and hazardous waste; and carbon and Clean Air Act mobile source regulation.

On Oct. 25, the Environmental Protection Agency and the National Highway Traffic Safety Administration published more stringent greenhouse gas emissions standards and fuel efficiency requirements for medium- and heavy-duty engines and vehicles. These "Phase 2" standards apply to combination tractors, trailers pulled by combination tractors, heavy-duty pickup trucks and vans, and vocational vehicles such as buses, garbage trucks and concrete mixers, as well as engines that power combination tractors and vocational vehicles. The rules cover model years 2021 through 2027.



The Phase 2 standards also regulate—for the first time—emissions and fuel-efficiency standards for certain trailers used with heavy-duty combination tractors. The greenhouse gas emissions standards for these trailers take effect in 2018, and the fuel-efficiency standards take effect in 2021.

As part of the Phase 2 rulemaking, the EPA is extending the general Clean Air Act compliance and enforcement provisions of 40 C.F.R. Part 1068 to heavy-duty engines and vehicles and also is promulgating significant amendments to that section. The EPA goes as far as stating in the preamble to the Phase 2 rule that it is making "adjustments based on lessons learned from implementing these regulatory provisions" (71 Fed. Reg. 73478, at 73529).

This article discusses some of the more significant amendments to 40 C.F.R. Part 1068 such as to the stockpiling, tampering and defect reporting provisions; how these amendments appear to address issues in recent enforcement cases; and implications for engine, vehicle and equipment manufacturers.

The amendments to Part 1068 will have widespread impacts because that section applies to many other categories of engines, vehicles and equipment, specifically:

- locomotives;
- land-based nonroad compression-ignition engines;
- stationary compression-ignition engines;

- marine compression-ignition engines;
- marine spark-ignition engines;
- large nonroad spark-ignition engines;
- stationary spark-ignition engines;
- recreational engines and vehicles; and
- small nonroad spark-ignition engines.

Part 1068 is divided into seven subparts that apply to these categories of engines, equipment and vehicles, and now also apply to heavy-duty engines and equipment:

Subpart A—Applicability and Miscellaneous Provisions

Subpart B—Prohibited Actions and Related Requirements

Subpart C—Exemptions and Exclusions

Subpart D—Imports

Subpart E—Selective Enforcement Auditing

Subpart F—Reporting Defects and Recalling Engines/Equipment

Subpart G—Hearings

Subparts A and B apply both to engines and equipment/vehicles containing those engines, while Subparts C, D, E and F generally apply either to the engine or the equipment/vehicles, whichever must be certified under EPA regulations, i.e., “subject to certification requirements in the standard-setting part” (40 C.F.R. § 1068.1(a)). So engine, equipment and vehicle manufacturers will be affected by the amendments to Part 1068.

While the application of the Phase 2 emissions and fuel-efficiency standards is at least a couple of years away, the amendments to Part 1068 will become effective Dec. 24.

Through a broader application of 40 C.F.R. Part 1068, the EPA is attempting to take a uniform approach to compliance across categories of engines, equipment and vehicles (71 Fed. Reg. 73478, at 73939). A uniform approach to compliance does have benefits for regulated entities in that it should bring consistency and predictability across categories of engines, equipment and vehicles.

Changes for Heavy-Duty Highway Engines and Vehicles.

Before the Phase 2 final rule, the EPA applied the exemption, importation and selective enforcement auditing provisions (Subparts C, D and E) to heavy-duty highway engines and vehicles. These subparts include exemptions from emissions standards for special purposes, such as engines/equipment for display or export; general import requirements and exemptions; and audit provisions that enable the EPA to require a manufacturer to test its engines/equipment.

The Phase 2 final rule now applies the other subparts in Part 1068 to heavy-duty highway engines and vehicles. Notably, through the Phase 2 rule, the EPA is applying new definitions in Subpart A, prohibited acts and penalties in Subpart B and defect reporting requirements in Subpart F to heavy-duty highway engines and vehicles.

Definitions of ‘Engine’ and ‘Date of Manufacture.’

The definitions of “engine” and “date of manufacture” in Section 1068.30—which are not changing in this rule-making but now will be applied to heavy-duty engines—make clear that the triggering event for determining an engine’s model year, and therefore when certification requirements apply, is the installation of the crankshaft in the engine block. The EPA defines “engine” as an “engine block with an installed crankshaft.”

The “date of manufacture” must correspond to the date of installation of the crankshaft or a date later in the assembly process, if selected by the engine manufacturer; selection of a date earlier than the installation of the crankshaft is not allowed.

With the application of Part 1068 to heavy-duty engines through the Phase 2 rule, these definitions will apply to all heavy-duty engines. Previously, such definitions, hinging on the installation of the crankshaft, applied to heavy-duty engines only if a heavy-duty manufacturer supplied replacement engines under the replacement engine exemption in Section 1068.240. Now, the EPA has made clear that a heavy-duty engine is subject to the emissions standard applicable on the date when the crankshaft is installed in the engine block.

While this change may provide needed clarity and certainty to engine manufacturers, it also may require some planning and changes to production processes given the application of the stockpiling provision, Section 1068.103(g) (formerly (f)), to heavy-duty engine manufacturers.

Engine Manufacturers—Stockpiling Provision. Section 1068.103(g) contains the stockpiling prohibition applicable to engine manufacturers. The EPA prohibits engine manufacturers from stockpiling engines with a date of manufacture before a change in emissions standards that were produced by deviating from normal production and inventory practices.

The EPA defines “normal production and inventory practices” to mean the practices an engine manufacturer typically follows for similar families in years when emissions standards do not change. This is to prevent engine manufacturers from manufacturing or installing a large number of crankshafts right before the emissions standards change. The EPA will, however, allow the completion of an engine to be assembled into its compliant or certified configuration no more than 30 days after a change in emissions standards for engines with per-cylinder displacement below 2.5 liters and in no more than 60 days for engines with a per-cylinder displacement at or above 2.5 liters.

The agency amended this stockpiling provision to explicitly state that engines that are completed after this time period are not covered by a certificate of conformity for the preceding model year. This is significant because it is a violation to introduce into commerce or import into the U.S. an engine that is not covered by a valid certificate of conformity for its model year (40 C.F.R. § 1068.101(a)(1)).

The EPA may have added this clarification based on lessons learned from recent enforcement cases. For example, in the recent Detroit Diesel Corp. case, *U.S. v. Detroit Diesel Corp.*, No. 16-1982 (D.C. Cir 2016), the government alleged that Detroit Diesel violated the Clean Air Act by introducing into commerce more than

7,000 heavy-duty diesel engines without a valid certificate of conformity.

According to the complaint, Detroit Diesel installed crankshafts in the engine blocks in 2009, but in 2010 “completed other, remaining manufacturing and assembling processes . . . including the installation of pistons, cylinder heads, fuel systems, and full emission control systems.” If similar allegations arise for heavy-duty engines after the amendments to Part 1068 take effect, then the EPA will apply a bright-line test of 30 or 60 days, based on the size of the engines, after which the completion of the engine manufacturing and assembling process will not be covered under a certificate of conformity for the preceding model year.

Heavy-Duty Vehicle Manufacturers—Stockpiling Prohibition. The EPA isn’t just applying the general stockpiling prohibition Section 1068.105(a) to heavy-duty vehicle manufacturers. The agency has further limited the “normal inventory” period for heavy-duty vehicle manufacturers to three months, with a possible extension to six months, to allow for up to 50 additional normal inventory engines in months three through six in “unforeseeable circumstances.” This is set in Section 1037.601(a)(2), which applies only to heavy-duty highway vehicle manufacturers.

Defect Reporting. As part of the application of Part 1068 to heavy-duty engines and vehicles, heavy-duty highway vehicle manufacturers must now comply with the defect-reporting provisions in Section 1068.501. These provisions are detailed and require manufacturers that are the certificate holder to track, investigate and report possible defects. Investigations are required based on production volume and are similar to the rules that apply to the heavy-duty sector in California.

In the past several years, the EPA has brought civil enforcement cases against motor vehicle manufacturers that failed to promptly notify it of emissions-related defects in catalytic converters, on-board diagnostic systems, oxygen sensors and air pumps. Section 1068.501 requires manufacturers to report defects that exceed a specified threshold within 21 calendar days of identification. This is slightly longer than the period for reporting motor vehicle emissions defect information, which is 15 working days after an emissions-related defect is found to affect 25 vehicles or engines of the same model year (40 C.F.R. § 85.1903(b)). Emissions-related defect reporting has been on the EPA’s enforcement radar. As the timing for reporting is relatively short, and violations come with substantial penalties, manufacturers should ensure that they have a robust emissions defect investigation and reporting system.

Changes for All Engines, Equipment and Vehicles Covered by Part 1068. The EPA made further amendments to the general anti-stockpiling prohibitions applicable to equipment and vehicle manufacturers (Section 1068.105(a)). The new language allows the agency to request documentation related to normal inventory practices dating back eight years. Previously, Section 1068.105(a) did not contain language allowing the EPA to request documentation of normal inventory periods for any length of time. This eight-year look-back aligns with the engine manufacturer stockpiling provision.

Tampering. The EPA revised the penalty associated with tampering in Section 1068.101(b)(1) to be an engine-based penalty, rather than per day of engine op-

eration penalty. The agency explains that this change is to align with Clean Air Act Section 205, 42 U.S.C. § 7524, which specifies that tampering violations are a separate offense for each engine. This also is consistent with the EPA’s *Clean Air Act Mobile Source Civil Penalty Policy: Vehicle and Engine Certification Requirements*.

For vehicle and equipment manufacturers that install certified engines, the EPA includes some words of warning in the preamble to the Phase 2 rule: manufacturers are in violation of the tampering prohibition if they do not follow the engine manufacturers’ emissions-related installation instructions. The agency approves these installation instructions as part of the engine certification process. Tampering could arise if, for example, during installation, an equipment manufacturer modified any part of the engine intake, carburetion or exhaust system and that modification changed the engine’s configuration or adversely affected exhaust emissions.

Model Year of Imports. The EPA also clarified the provision applicable to assigning the model year to imported engines and equipment, Section 1068.360(b), to remove a circularity regarding “new” engines and “new” equipment.

Under this provision, engines that have not been placed into service and that are imported in any calendar year that is more than one year after the named model year of the engine, and emissions standards applicable to current engines are different than for engines in the named model year, are deemed to have an applicable model year no more than one year earlier than the calendar year in which they are imported. While this provision previously applied to heavy-duty manufacturers, in light of the model year trigger, i.e., installation of the crankshaft, practical application of this provision may vary for manufacturers in the sector.

Electronic Submission of Import Declarations. The agency is amending Section 1068.301(d) to allow for the electronic submission and storage of EPA Import Declaration Forms. EPA Form 3520-21 applies to the importation of heavy-duty highway engines and nonroad engines (gas, diesel, marine, stationary) into the U.S., including engines already installed in vehicles or equipment.

On this form, an importer has to report information such as details about the engine and equipment and whether the engine is certified or covered under an exemption. Currently, for importations that are covered by EPA Form 3520-21, importers must prepare the form and keep it on file for at least five years from the date of entry 40 C.F.R. § 1068.301(d) and 19 C.F.R. § 12.74(b). Section 1068.301(b) should be read in conjunction with the applicable Customs and Border Protection (CBP) regulations, 19 C.F.R. § 12.74, and especially with the forthcoming amendments to the CBP regulations.

The CBP proposed an amendment in August that will require Form 3520-21 to be submitted to the CBP at the time of entry, unless the importer holds a valid certificate of conformity and the engines are properly labeled. EPA Form 3520-21 may be submitted to the CBP electronically via the Automated Commercial Environment or to any other CBP-authorized electronic data interchange system. Currently, EPA Form 3520-21 may be submitted through the Automated Commercial Envi-

ronment under an optional pilot program, and some importers have elected to participate in this program.

Submission of all import forms through the Automated Commercial Environment could simplify compliance requirements for importers and customs brokers. Importers of vehicles, equipment and engines should tread cautiously, however, and ensure that all Forms 3520-21 are complete and accurate since illegal imports are also a key area of EPA enforcement. The EPA often works with the CBP in such enforcement investigations.

For example, the EPA, through CBP inspections and an EPA information request, discovered that a group of companies, Savoia Inc., BMX Imports LP, BMX Trading LLC, and Terry Zimmer, imported into the U.S. highway motorcycles and recreational vehicles that were not covered by certificates of conformity and violated warranty and labeling requirements. The submission of EPA declaration forms electronically to the CBP could make it easier for the agencies to identify violations such as these.

Identification of Engines Not in Certified Configuration. The EPA is amending Section 1068.260, which pertains to the sale and import of engines that are not yet in their certified configuration.

Generally, all engines must be in their certified configuration before they are sold or imported into the U.S. Under Section 1068.260(a), manufacturers can ship engines without installed or assembled emissions-related components. An exemption is required from the EPA to

ship an engine without emissions-related components, but not if the components are shipped along with the engine. The EPA grants the exemption for separate shipment upon a manufacturer's request at the time of certification (40 C.F.R. § 1068.260(a)(2)).

But the EPA is amending Section 1068.260(a)(2) to explicitly require manufacturers shipping engines without certified emissions-related components to identify the unshipped components by performance specification or specific part numbers. Further, the agency added language stating that an exemption is not needed for exhaust piping before and after after-treatment devices—engines may be shipped without this piping without an exemption. After-treatment devices *do* have to be shipped with engines, unless a manufacturer has an exemption, and the EPA has brought two notable enforcement cases against manufacturers of heavy-duty diesel engines and nonroad engines for shipping engines without after-treatment devices.

Given the level of attention that compliance with emissions standards is garnering these days—from the EPA, Justice Department and mainstream media—it is important that industry stay abreast of these changes to Part 1068. As discussed, these changes affect heavy-duty engines and vehicles, as well as most other categories of engines, equipment and vehicles regulated under the Clean Air Act. All regulated entities must be mindful of the changes and adjust business practices as necessary to ensure compliance.