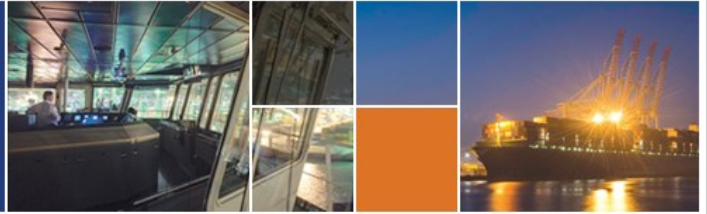




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California - Enforcement of CARB Regulation Discontinued ... Again ... for Now

May 2008

The enforcement status of the Californian Ocean-Going Vessel Auxiliary Diesel Engine Regulation has proved to be a moving target in recent months. As litigation continued over the question of whether federal law pre-empts the regulation, the California Air Resources Board (CARB) tried to maintain its enforcement regime whenever possible.

With effect from 1 January 2007 the regulation required all ocean going vessels calling at Californian ports to use Marine Gas Oil (MGO) or Marine Diesel Oil (MDO) with 0.5% or lower sulfur content by volume for powering diesel electric engines and diesel auxiliary engines. A lawsuit was brought against CARB by the Pacific Merchant Shipping Association (PMSA) on the basis that the Federal Clean Air Act pre-empts regulations adopted by individual states and that California had developed and implemented these regulations without the consultation and authorisation of the U.S. Environmental Protection Agency (EPA).

On 30 August the U.S. District Court ruled in the favor of the PMSA and ordered an injunction preventing CARB from enforcing the regulations. The ruling did, however, recognise that CARB could proceed with the regulations if they received authorisation from the U.S. EPA. CARB appealed the decision and on 24 October 2007 the Ninth Circuit Court ordered a hold on the District Court's injunction, thereby allowing CARB to enforce their regulations pending the appeal.

On 27 February 2008, a three-judge panel of the Ninth Circuit issued a ruling holding that the regulation was pre-empted by federal law. At that time, CARB temporarily suspended enforcement of the regulation in order to determine its next course of action. CARB subsequently sought to appeal the panel decision and, taking advantage of a period when reinstatement of the district court's injunction had not yet become effective, issued a Notice to Ship Owners on 10 March 2008 announcing its decision to continue to enforce the regulation while the litigation remained active.

The Ninth Circuit did not grant CARB's petition for a re-hearing of the panel decision with the effect that the injunction was reinstated. Accordingly, on 7 May 2008 CARB issued a further Notice to Ship Owners stating that enforcement of the regulation would be discontinued. The Notice can be found at: www.arb.ca.gov/ports/marinevess/documents/Auxenforce050708.pdf

However, CARB plans to submit a request seeking authorisation from the U.S. EPA to enforce the existing regulation. The district court's opinion made it clear that the injunction may be dissolved upon CARB's receipt of such authorisation.

In the meantime, CARB encourages ship operators to use 0.5% sulfur MDO or MGO within 24 nautical miles of California to reduce the significant adverse health impacts from human exposure to the air pollutants emitted by ocean-going vessels in California waters.