



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 26 2014

OFFICE OF
AIR AND RADIATION

Mr. Dennis J. Slater, President
Association of Equipment Manufacturers
6737 West Washington Street
Suite 2400
Milwaukee, Wisconsin 53214

Re: Corporate Acquisitions as a Basis for a Hardship Application

Dear Mr. Slater:

This letter is in response to your letter dated July 15, 2014 in which you request information on EPA policy related to corporate mergers and acquisitions when considered under the Transition Program for Equipment Manufacturers (TPEM) at 40 CFR § 1039.625.

As background, the TPEM regulatory provisions provide a single allowance for exempted engines per parent company/corporation. The following regulatory language was promulgated by EPA in June 2004 (69 FR 39213, 39238) (emphasis supplied):

40 CFR § 1039.625 - "(a) General. If you are an equipment manufacturer, you may introduce into commerce in the United States limited numbers of nonroad equipment with engines exempted under this section. You may use the exemptions in this section only if you have primary responsibility for designing and manufacturing equipment and your manufacturing procedures include installing some engines in this equipment. Consider all U.S.-directed equipment sales in showing that you meet the requirements of this section, including those from any parent or subsidiary companies and those from any other companies you license to produce equipment for you."

Upon entering into the TPEM program, an existing company with multiple business units or subsidiaries is thus provided one allowance for exempted engines and must manage that allowance across all of its business units. After entering into the TPEM program, existing companies with individual allowances have occasionally merged or one company has acquired another. In those situations, EPA has interpreted the language above, and responded that post-merger or acquisition, the controlling or parent company must manage the new subsidiaries under the existing TPEM allowance for the parent company. If the subsidiary previously had a TPEM allowance, it does not get added to the parent company's balance such that the parent company now has the equivalent of two TPEM allowances.

We have consistently provided this guidance to equipment manufacturers on numerous occasions dating back to the Tier 2 and 3 TPEM program under 40 CFR Part 89. This policy serves to ensure that companies do not attempt to circumvent TPEM requirements by starting separate companies prior to the start of the transition period and then subsequently merge them. It also serves to ensure that companies are treated equitably if they grow internally by creating new product lines and brands or grow externally through acquisitions.

In your letter, you made reference to preamble language in the June 2013 Direct Final Rule/Notice of Proposed Rulemaking discussing the potential for a merger or acquisition to present a situation where hardship relief may be warranted (78 FR 36383). As we have discussed with you previously, the inclusion of this topic in the preamble was inadvertent and is not reflective of the Agency's long-standing regulatory interpretation regarding mergers and acquisitions. Equally important, EPA never proposed or finalized an amendment to the requirements of 40 CFR § 1039.625(m). We do not consider the preamble language to be constraining on the circumstances the Agency must weigh in determining whether or not an equipment manufacturer qualifies for hardship relief. The key regulatory language continues to state that allowances apply to all entities under a corporate umbrella ("parents and subsidiaries"). This language is not limited to a moment in time, but rather encompasses situations where corporate structure changes. Such changes do not generate additional allowances, as explained above.

The overriding requirements in being eligible for hardship relief under 40 CFR § 1039.625(m) are that the extreme and unusual circumstances are clearly outside the company's control and could not have been avoided with reasonable discretion, and that the company exercised prudent planning and has taken all reasonable steps to minimize the scope of the request. We believe that EPA has been clear to industry that any hardship relief application must reflect these circumstances. EPA stated as early as September 2007 that any cause of hardship requiring additional TPEM allowance must be outside the control of the equipment manufacturer (72 FR 53133):

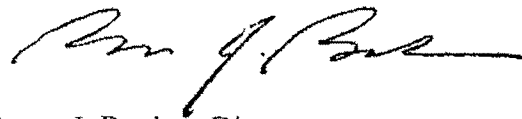
"The equipment manufacturer would have the burden of demonstrating existence of an extreme technical or engineering hardship condition that is outside its control, i.e. is essentially due to conduct of the (nonintegrated) engine supplier and therefore out of the equipment manufacturer's control. The equipment manufacturer must also demonstrate that it has exercised reasonable due diligence to try to avoid being in the situation."

EPA views a merger or acquisition as an internal business decision completely within the control of the equipment manufacturer that should be taken with due diligence of any possible changes to an existing TPEM program, and thus, standing alone, would not qualify as an extreme or unusual circumstance outside the control of the acquiring company. If a company is experiencing other circumstances creating hardship, those may be appropriate for the Agency to consider in determining whether to grant hardship relief.

As you are already aware, the Agency maintains a website concerning hardship relief applications. Given that some equipment manufacturers have expressed uncertainty on the topic of mergers and acquisitions, we plan to update our existing guidance materials on this website to

provide mergers and acquisitions as one example of something that, standing alone, would not meet the regulatory criteria for hardship relief. We welcome your feedback on additional ways we can clearly communicate this message, or other guidance we can provide to industry. We are also happy to meet with you to provide further explanation of our policy. Please contact me or Justin Greuel of my staff if you'd like to set up such a meeting.

Sincerely,

A handwritten signature in black ink, appearing to read "Byron J. Bunker". The signature is fluid and cursive, with a long horizontal stroke at the end.

Byron J. Bunker, Director
Compliance Division
Office of Transportation and Air Quality