

# MEMORANDUM

State of Alaska

Department of Environmental Conservation

Division of Air Quality

TO: Air Permit Program Staff                      DATE: September 2, 2009

FROM: John Kuterbach   
Air Permit Program Manager

Subject: Interpretation of the term “non-road engine” with respect to pre-construction permitting requirements in AS 46.14 and 18 AAC 50.

A recently concluded enforcement case has revealed a misunderstanding some members of the regulated community may have when determining if a preconstruction permit is required prior to installing an engine at a location. Under 18 AAC 50.100, the emissions of non-road engines are not counted when determining the classification of a modification. As a result, the installation of a non-road engine often avoids classification as a modification that requires a minor or construction permit before beginning construction or installation<sup>1</sup>. Owners and operators sometimes presume that an engine they intend to be temporary is a non-road engine, and do not count its emissions.

If the engine meets the definition of nonroad engine, then this approach is consistent with permitting rules, and no permit is required. If the engine does not meet the definition of nonroad engine, then this approach may circumvent the requirement to obtain a preconstruction permit. Everyone understands that intentional circumvention is unlawful. The situation is less clear when an owner or operator intends to meet the definition of nonroad engine, but fails to do so.

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<sup>1</sup> The requirement to obtain a permit before commencing construction or installation is known as a preconstruction permit requirement.

At issue are the following provisions in the federal definition 40 CFR 89.2, adopted by reference under 18 AAC 50.990 (highlights and footnote added):

Nonroad engine means:

(1) ...

(2) An internal combustion engine is not a nonroad engine if:

(i) ...

(ii) ...; or

(iii) the engine otherwise included in paragraph (1)(iii) of this definition remains or will remain at a location for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source. A location is any single site at a building, structure, facility, or installation. Any engine (or engines) that replaces an engine at a location and that is intended to perform the same or similar function as the engine replaced will be included in calculating the consecutive time period. An engine located at a seasonal source is an engine that remains at a seasonal source during the full annual operating period of the seasonal source. A seasonal source is a stationary source that remains in a single location on a permanent basis (i.e., at least two years) and that operates at that single location approximately three months (or more) each year. This paragraph does not apply to an engine after the engine is removed from the location<sup>2</sup>.

The Department interprets this definition as follows: An engine that actually remains at a location for more than 12 months never qualified as a nonroad engine, regardless of whether the owner or operator intended this result. The phrase “or will remain” demonstrates that the rule does not exempt the first 12 months of residence at a location. Furthermore, the definition does not explicitly consider the owner’s or operator’s intent. The Department will, however, consider the owner’s or operator’s intent in determining the appropriate enforcement response for installing an engine without proper permits.

The definition does not rely on operation at the site. Therefore, the strategy of shutting down an engine before the 12<sup>th</sup> month, getting a permit, and resuming operation does not make the engine a nonroad engine during the first operational period. If the engine remains at the location more than 12 months, then it is not, and never was, a nonroad engine per paragraph (2)(iii) of the nonroad engine definition.

Some owners or operators have proposed removing the engine from the site before the 12<sup>th</sup> consecutive month, getting the necessary permits, and returning the engine to the site. The Department looks at the phrase “Any engine (or engines) that replaces an engine at

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<sup>2</sup> 40 CFR 89.1003(a)(5) states that it is a prohibited act to circumvent or attempt to circumvent the residence time requirements of paragraph(2)(iii) of the nonroad engine definition.

a location and that is intended to perform the same or similar function as the engine replaced will be included in calculating the consecutive time period.” This means that removing and returning an engine is treated the same as though the engine was never removed. As discussed earlier, the Department finds that the engine in this case was never a nonroad engine; therefore, the original installation should have met the applicable preconstruction permitting requirements for a stationary source. While the subsequent permitting corrects the violation, it does not excuse it. Again, the owner’s or operator’s intent and specific circumstances would be examined to determine the appropriate response to the violation.

One may note that the definition specifies 12 *consecutive* months. If an engine is removed from a site for a full calendar month, one could argue that it did not remain at the location for more than 12 consecutive months. Upon the engine returning to the location, a new 12 consecutive month period would begin. This, however, ignores the prohibition in 40 CFR 89.1003(a)(5). Under 89.1003(a)(5), a person may not circumvent or attempt to circumvent the residence time in the nonroad engine definition. Removing the engine for a calendar month and returning it to the same location could be an attempt to circumvent the residence time, and must be carefully scrutinized. There is no clear rule on the amount of time that an engine must remain off-site before circumvention is no longer an issue. The basic rule of thumb is that an engine must be removed for at least one calendar month before the clock could be reset, and an engine removed for an entire year definitely resets the clock without a concern about circumvention.

A similar concern arises if an engine is moved to different locations within a stationary source. The purpose of moving the engine must be examined to confirm that the engine was moved for operational needs and not merely to circumvent the 12 consecutive month residence time at a location.

A final source of confusion is the last sentence highlighted from the definition. “This paragraph does not apply to an engine after the engine is removed from the location.” This sentence merely states that the 12 month time limit applies to the location, not the specific engine. Removing an engine from a location does not reset the time limit for the location, but the time expended at a location does not follow an engine to a new location.

#### Examples:

1. Installing and operating an engine for twelve months, shutting it down, and then obtaining a permit to authorize continued operation.
  - a. As noted above, the initial installation of the engine must be evaluated as installation of a stationary engine.

- b. If the original installation evaluated under (a) required a permit, then failure to obtain that permit is a violation. The violation is corrected by the receipt of the subsequent permit; however, the initial installation is still unlawful and subject to compliance penalties.
2. Installing and operating an engine for less than twelve months, shutting it down, removing it from the site, obtaining a permit to authorize operation of a stationary engine intended to perform the same or similar function, and installing that engine at the location.
  - a. As noted above, this situation is legally indistinguishable from Example 1.
  - b. Installing and operating an engine without a permit for more than twelve months at different locations to serve the same function, without a legitimate business purpose. If it is concluded that this action circumvents or attempts to circumvent the residence time, then this would be a violation of 40 CFR 89.1003(a)(5).
3. Stationary engines include:
  - a. Engines fixed to one location
  - b. Portable engines used at one location, moved to a storage site while not in use.
  - c. Portable engines which reside at one location for 12 consecutive months or more.
4. Any engine such as backup or stand-by engine, that replaces a non-road engine at a location and is intended to perform the same or similar function as the engine being replaced, will be included in calculating the consecutive time period. In that case, the cumulative time of both engines, including the time between the removal of the original engine and installation of the replacement engine, will be counted toward the consecutive time period.
5. An engine will be considered to reside at a location for 12 consecutive months or more at a seasonal source if:
  - a. the engine is located at a seasonal source and operates during the full annual operating period of the seasonal source, where a seasonal source is a stationary source that remains in a single location on a permanent basis (i.e., at least two years) and that operates at that single location at least three months each year or,
  - b. the engine is moved from one location to another in an attempt to circumvent the residence time violation of 40 CFR 89.1003(a)(5).

## **Summary**

Owners and operators may install engines without preconstruction permits based on their intent to operate as nonroad engines, but the owners and operators do so at their own risk. If the engine fails to comply with the time limitation in the definition of nonroad engine, the department will evaluate the initial installation as a stationary engine. Any enforcement response for installing an engine without proper permits will consider the specific circumstances of the case, including evidence of the owner or operator's original intent.

Removing an engine temporarily from a site does not reset the 12 consecutive month clock unless 1) the engine is removed for at least one full calendar month AND 2) the engine was not removed to circumvent the residence time requirements of the non-road engine definition.