State of California
Office of Administrative Law

In re:	**DECISION OF DISAPPROVAL OF REGULATORY ACTION**
California Air Resources Board	
Regulatory Action: Title 13 California Code of Regulations	**Government Code Section 11349.3**
Amend Sections: 2403, 2405, 2406, 2408, 2409	**OAL File No. 2009-0908-03 S**

DECISION SUMMARY

On September 8, 2009, the California Air Resources Board (ARB) submitted to the Office of Administrative Law (OAL) the proposed amendment of sections 2403, 2405, 2406, 2408, and 2409 of Title 13 of the California Code of Regulations (CCR) regarding modification of the production and certification emission credits program for small off-road engines and the establishment of a zero-emission small off-road equipment emission credits program, and related provisions.

On October 20, 2009, OAL notified the ARB that OAL disapproved the proposed amended regulations for failure to comply with specified standards and procedures of the California Administrative Procedures Act (APA). The reasons for the disapproval are summarized below:

A. the proposed regulation fails to comply with the clarity standard of Government Code sections 11349.1(a)(3) and 11349(c);

B. the proposed regulation fails to comply with the consistency standard of Government Code sections 11349.1(a)(4) and 11349(d); and

C. the agency failed to comply with the APA procedural requirements regarding the contents of the Final Statement of Reasons pursuant to Government Code section 11346.9(a)(3).

All APA issues must be resolved prior to OAL approval of any resubmission.

BACKGROUND

In 1999, emission standards were established by ARB for small off-road engines. Due to anticipated compliance difficulties, ARB created an emissions credit program consisting of Certification Credits and Production Credits. Under the program, a manufacturer earned Certification Credit by certifying an engine family of similar sized engines or uses to an emission limit below the applicable emission standard for that engine family and could use the credit earned to certify an engine family that would require more in the way of technological innovation in order to comply with more stringent emissions standards. A manufacturer could also earn a Production Credit for the amount that an emission test result for an engine produced by that manufacturer fell below the minimum compliance level for that engine. Production Credits could be converted to Certification Credits at a 1.1 to 1 ratio.

The rulemaking action which is the subject of this disapproval proposed to revise the credit program by: 1) placing a five-year expiration on Certification Credits; 2) eliminating the Production Credit in 2009 (manufacturers would have until December 31, 2010 to convert their existing Production Credits to Certification Credits); and 3) encouraging the development of cleaner technology by creating a zero emission credit (ZEE) program for small off-road equipment engines that resulted in sufficiently commercially viable equipment which performed as well as gas-powered engine equipment so as to replace a portion of those in use.

DISCUSSION

Any regulation amended or adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA review. (Government Code sections 11340.5 and 11346.) OAL reviews regulatory actions for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret and make specific statutory law, and to ensure that required procedures are followed in order to provide meaningful public opportunity to comment on rules and regulations before they become effective.

A. CLARITY

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Government Code section 11340(b).) Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Government Code

section 11349(c) defines "clarity" to mean "...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them." Title 1 CCR section 16 states in part that:

> In examining a regulation for compliance with the 'clarity' requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:
>
> > (a) A regulation shall be presumed not to comply with the 'clarity' standard if any of the following conditions exist:
> >
> > > (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
> > >
> > > (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; ...

As discussed below, both public commenters and the ARB staff acknowledged, during the rulemaking process and prior to submitting the proposed regulatory amendments to OAL, that the ZEE credit provisions were unclear and in need of revision.

Proposed Section 2508(f)(7). Proposed section 2508(f)(7) specifies the requirements which small zero-emission off-road equipment must meet in order to qualify for ZEE credits. During the 45-day public comment period and at the public hearing in this rulemaking action, manufacturer representatives commented that phrases such as: "performing at a level equivalent to that of professional equipment" and "professional performance level" were ambiguous and required further definition in order to be functional. In its written response to these comments, ARB's Final Statement of Reasons states in part as follows:

> Based on these comments, staff realized that some further development work was necessary on the Zero Emission Equipment (ZEE) regulations. Staff had expected that the necessary modifications could be adopted under a 15-day comment Notice. However, this course of action was not possible once the Board officially closed the Hearing Record on the day of the Hearing. Therefore, any additional modifications to the ZEE regulations, such as those expressed in the comments, will be proposed for adoption at a future Hearing. In this effort, staff will work to develop comprehensive modifications in collaboration with engine and equipment manufacturers, and other stakeholders. In the interim, staff does not expect that manufacturers will submit any certification applications requesting ZEE credits until these modifications have been adopted.

At the public hearing, in responding to similar public comments about the ZEE Credit regulations being unclear, ARB staff stated to the Board:

> As staff has continued discussion with industry, we found that there is a need to provide more specificity to the definition of what is considered to be a professional level of performance. Specifically, a comparison of zero emission equipment to existing professional level equipment with spark ignition engines needs to be defined with more detail. Thus, staff intends to work with industry to develop the needed specificity and subsequently propose and make available for public comment modifications to the regulation as part of the 15-day process.

Notwithstanding ARB's expectation that manufacturers will not attempt to utilize these admittedly unclear and unfinished regulations prior to any ARB and industry collaborative revisions, OAL cannot approve unclear regulations for codification in the CCR.

B. CONSISTENCY

Government Code section 11349.1(a)(4) requires that OAL review all regulations for compliance with the consistency standard. Government Code section 11349(d) defines "consistency" to mean "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." In this rulemaking, proposed section 2403(i) conflicts with Government Code section 11340.5(a).

In section 2403(i), the agency proposes to establish in the ARB Executive Officer the power to subsequently revise regulatory provisions outside of the APA process. Specifically, proposed section 2403(i) provides:

> The Executive Officer may revise or incorporate specific technical requirements with respect to the test procedures incorporated at Section 2403(d) of these regulations. For the purposes of this subparagraph (i), "technical requirements" includes revisions to test procedures, test methodology, or any requirement to enhance alignment with similar federal regulations promulgated after the amendments to Article 1, as noticed October 3, 2008, are adopted. Such technical requirements shall be electronically noticed to listserv subscribers, shall be made available to the public via appropriate ARB webpage postings, and shall be noticed in the California Regulatory Notice Register. Such technical requirements will become effective 30 days after notice, unless any person notifies the Executive Officer in writing that they object to any part of the technical requirements noticed.

Government Code section 11340.5(a) provides:

> No state agency shall issue, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Proposed section 2503(i) would enable the ARB Executive Officer to engage in rulemaking outside of the APA rulemaking process in violation of Government Code section 11340.5(a) and would create an alternative, abbreviated rulemaking procedure dissimilar to and inconsistent with Title 2, Division 3, Part 1, Chapter 3.5 of the Government Code.

C. PROCEDURAL REQUIREMENTS OF THE APA

Government Code section 11346.9(a)(3) requires that the agency's Final Statement of Reasons contain "a summary of each objection or recommendation made regarding the specific... amendment...proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change." In this rulemaking action, certain comments were not summarized or responded to. Other comments were summarized but the responses failed to address the substance of the comments on the grounds that the comments had not been timely submitted during the notice period, when, in fact, the rulemaking file reflects that the comments were timely submitted.

(1) Public Comments Not Specifically Summarized Or Responded To By ARB In Its Final Statement Of Reasons.

(a) The Outdoor Power Equipment Institute (OPEI) commented that: "under ARB's credit life proposal, ARB's ABT [Average Banking and Trading] credit program will not be consistent with the federal program (which does not impose a credit life on Phase 3 credits). Consequently, manufacturers would have to develop and implement unique ARB vs. EPA ABT-compliance strategies. This could require separate product lines for the California market. In turn, this will add cost-inefficiencies and higher prices for California consumers with no environment benefits."

(b) The Engine Manufacturers Association commented as follows: "Agency concerns regarding delayed implementation of product meeting the latest standard level due to credits banked from prior standard levels should be segregated from concerns regarding credits generated from products that emit at lower levels than the current standard requirements. EMA has proposed that ARB pursue an approach similar to EPA to segregate credits generated by manufacturers when building products to meet prior standard requirements from credit potential for products meeting the current stringent ARB standard levels."

In order to address these procedural deficiencies, ARB must amend or supplement its Final Statement of Reasons with summaries and responses to the above-listed comments.

(2) Public Comments To Which The Responses Did Not Address The Substance Of The Comments On The Grounds Of Untimeliness.

Pursuant to the ARB's public notice in this action, any written comments were to be received no later than 12:00 noon, November 19, 2008.

(a) On pages 7 and 8 of its November 18, 2008 written comments, OPEI recommended five changes to the proposed regulations. The written comments were an attachment to an email message submitted 2008-11-18. Notwithstanding these facts, ARB's response to the OPEI comment, on page 9 of the Final Statement of Reasons, was, in part: "Staff was not able to include the changes suggested because these comments were not presented during the workshop process, but were submitted just prior to the Board Hearing." The ARB hearing in this matter began on November 20, 2008.

(b) On page 8 of its November 18, 2008 written comments, attached to the same November 18, 2008 email, the OPEI also requested that ARB "add language that clarifies that any confirmation or auditing tests that ARB conducts or requires be conducted will use the same, selected certification fuel." ARB's response to the comment was, in part: "staff was not able to include a similar fuel allowance for confirmatory testing because the suggestion was received after the notice period had ended."

In order to address these procedural deficiencies, ARB must amend or supplement its Final Statement of Reasons with responses that address the substance of the above-listed comments.

CONCLUSION

For the foregoing reasons, OAL disapproves the above-referenced rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-4237.

Date: October 27, 2009

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