State of California
Office of Administrative Law

In re: **Air Resources Board**	**DECISION OF DISAPPROVAL OF PART OF A REGULATORY ACTION**
Regulatory Action: Title 17 California Code of Regulations	**Government Code Section 11349.3**
Adopt sections: 95366 and 95367	**OAL File No. 2009-0721-01 S**

SUMMARY OF REGULATORY ACTION

The Air Resources Board proposed to limit sales of small containers of automotive refrigerant that have high global warming potential by restricting the containers to approved designs that have a valve to prevent the escape of unused refrigerant, establishing a deposit and refund system to stimulate return of containers after use, requiring the recovery of residual refrigerant from the small containers, and establishing record keeping and periodic reporting requirements for data that can be used to assess the success of the regulatory program in limiting the escape of refrigerants. On July 21, 2009, the Air Resources Board ("Board") submitted the proposed regulations to the Office of Administrative Law ("OAL") for review in accordance with the Administrative Procedure Act ("APA"). On September 1, 2009, OAL approved the majority of the regulations, but disapproved the portion of the regulatory filing providing for adjustment of the refrigerant container deposit. This Decision of Disapproval explains the reason for OAL's action.

DECISION

OAL disapproved a portion of proposed section 95366, subdivision (a), paragraph (2) and proposed section 95367, subdivisions (d) through (g), for failure to comply with the consistency standard of Government Code section 11349.1, subdivision (a). The disapproved provisions would have prescribed a procedure for the amendment of the regulation specifying the amount of the deposit on small containers of automotive refrigerant that does not comply with the requirements of the APA.

DISCUSSION

The approved portion of new section 95366, subdivision (a)(2), sets the initial deposit on each small container of automotive refrigerant at $10.00. The proposed regulation also provided for

the possibility of $5.00 increments or decreases of no particular amount in the deposit in accordance with the procedure specified in proposed section 95367, subdivision (d). The Board's intention is to achieve an initial recycling rate of at least 90%, and later 95% to assure the maximum feasible recovery of the unused refrigerant that tends to remain in the small containers after use of the product. The reason for adjusting the deposit in the future would be to set it high enough to motivate most consumers to return the cans to receive return of their deposits, and no higher than it needs to be to attain the target recycling rates. OAL notes that the proposed procedure is intended as an alternative to the APA, and has determined that any attempt to amend the deposit in accordance with this alternative approach would not comply with the minimum requirements for rulemaking.

Government Code section 11346, subdivision (a) provides:

> It is the purpose of this chapter to establish *basic minimum procedural requirements* for the adoption, amendment, or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this chapter repeals or diminishes additional requirements imposed by any statute. This chapter shall not be superseded or modified by any subsequent legislation except to the extent that the *legislation* shall do so expressly. (Emphasis added.)

From the foregoing, it follows that when rulemaking is required to amend a regulation, the Board cannot utilize an alternative procedure, and that any attempt to prescribe such a procedure in a regulation is not consistent with the APA. Thus we have the question of whether the Executive Officer's decision to change the amount of the deposit in accordance with the proposed regulation would involve rulemaking.

The procedure proposed by the Board for amending the amount of the deposit specifies some of the parameters for making an adjustment. The time when adjustment would be considered, the data the need for adjustment would be based upon, the target recycling rate, and the amount of an increment have all been specified. To the extent these matters have already been determined it would be possible for the Executive Officer to follow the directives in the regulation without making new law. On the other hand, the Board's proposed procedure calls for the use of discretion by the Executive Officer when evaluating the adequacy of the $10.00 deposit. Proposed section 95367, subdivision (d) provides that "the Executive Officer or his or her designee *may revise* the deposit . . ." and while the amount of an increase has been set at $5.00, the amount of a decrease, if any, and the determination of relevant considerations would be left to the Executive Officer's good engineering or scientific judgment. The amount of the deposit is a standard that applies generally to all purchasers of small containers of automotive refrigerant. The decision to amend the regulation by changing the deposit would be subject to the requirements of the APA, including an opportunity for public participation in the rulemaking and review by OAL. The proposed alternative is not legally sufficient.

CONCLUSION

Proposed section 95366, subdivision (a), paragraph (2) and proposed section 95367, subdivisions (d) through (g) are not consistent with the APA, and for this reason they were disapproved by OAL. The remaining regulations meet all applicable legal requirements, are severable from the disapproved regulations, and were approved by OAL.

Date: September 8, 2009

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