



Linda S. Adams
Secretary for
Environmental Protection

Air Resources Board

Mary D. Nichols, Chairman
1001 I Street • P.O. Box 2815
Sacramento, California 95812 • www.arb.ca.gov



Arnold Schwarzenegger
Governor

MEMORANDUM

TO: Susan Lapsley, Director
Office of Administrative Law

FROM: Michael L. Terris
Senior Staff Counsel

DATE: December 3, 2009

SUBJECT: OAL Notice File Numbers Z-2008-1125-07 and Z-2009-0526-17

This memorandum is intended to describe two separate sets of amendments to the In-Use Off-Road Diesel-Fueled Fleets Regulation (In-Use Off-Road regulation), title 13, California Code of Regulations (Cal. Code Regs), section 2449 et seq., that the Air Resources Board (Board or ARB) considered on January 22, 2009 (Office of Administrative Law (OAL) Notice File Number Z-2008-1125-07) and July 23, 2009 (OAL Notice File Number Z-2009-0526-17). Under separate cover, ARB is submitting to OAL for approval the amendments considered and adopted by the Board, in Resolution 09-3 (enclosed herewith), on January 22, 2009. Those amendments are subject to the requirements of the Administrative Procedure Act (APA) (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code). We are also submitting, as explained below, amendments approved by the ARB on July 23, 2003 (Resolution 09-50 enclosed herewith) that are not subject to the APA, pursuant to legislative enactment. These amendments were formally adopted by the Executive Officer, on behalf of the Board, on December 3, 2009, in EO-09-019, a copy of which is enclosed herewith.

On February 20, 2009, the Governor signed Assembly Bill 8 2X (AB 8 2X, which is also sometimes referred to as ABX2 8)) in which the Legislature added Section 43018.2 to the Health and Safety Code, directing the Air Resources Board (the Board or ARB) to amend sections 2449.1 and 2449.2 of title 13, California Code of Regulations. (A copy of AB 8 2X is attached hereto.) Section 2 of AB 8 2X, Health and Safety Code section 43018.2(b), exempted the AB 8 2X amendments from the requirements of the APA and the OAL review process.

On July 23, 2009, the Board approved the proposed amendments of sections 2449.1 and 2449.2, title 13, Cal. Code of Regs., directed by AB 8 2X. The Board concurrently approved other amendments to the In-Use Off-Road Regulation, which were not directed by AB 8 2X and are subject to the APA. These latter amendments will be part

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of a separate submission for approval to OAL, once Board directed modifications to the proposed amendments are publicly noticed for at least 15 days and formally adopted under a separate Executive Order.

After the Board approved the AB 8 2X amendments, staff found several places in the regulatory text that required minor modifications to clarify how low-use vehicles (those used less than 100 hours per year) would be treated under the amendments. The modifications can be found at sections 2449.1(a)(2)(A)2.a.iv., 2449.1(a)(2)(A)2.a.iv.3., 2449.1(a)(2)(A)2.a.v., 2449.2(a)(2)(A)2.a.iii., 2449.2(a)(2)(A)2.a.iii.3., and 2449.2(a)(2)(A)2.a.iv. and are consistent with the intent of AB 8 2X. We have indicated these post-hearing modifications by double underline in the final regulation order.

ARB requests that the AB 8 2X amendments be forwarded directly to the Secretary of State and published in Barclay's Official California Code of Regulations. We also request that the effective date for the regulation be the date that Executive Order R-09-019 was signed, December 3, 2009. This will expedite the adoption of the AB 8 2X amendments and provide as much certainty as possible to affected off-road fleets, which may need the new credits generated via the AB 8 2X provisions as early as March 1, 2010. An early effective date will also alleviate any confusion when OAL considers the January 2009 amendments (OAL File Number Z-2008-1125-07). Because both the AB 8 2X amendments and the amendments approved for adoption at the January 2009 Board hearing amend title 13, Cal. Code Regs., section 2449.2(a)(2)(A)2.b., to provide clarity, ARB has assumed that the AB 8 2X amendments became effective, as stated, with the signing of Executive Order R-09-019. To that end, the final regulation order for the January 2009 amendments incorporates the AB 8 2X amendments as effective. In addition to helping OAL with its review, this approach will hopefully preclude the possibility of Barclay's Official California Code of Regulations making an error when publishing the combined amendments.

Thank you for your assistance in this matter. If you have any questions please feel free to contact me at (916) 322-6533. If you have legal questions, please contact Michael L. Terris, Senior Staff Counsel, at (916) 445-9815 or mterris@arb.ca.gov.

Cc: OAL Attorney Assigned to Review OAL Notice File Number Z-2008-1125-07

Enclosures