

- C. Provisions on the engine compartment label and the product information label that were originally made available for public comment were changed without making the changes available for public comment.
- D. A number of provisions are unclear: (1) The criteria for evaluating performance and driveability for off-road aftermarket parts are not included in the regulation; (2) The provisions on labeling requirements in the procedure for exemption of add-on and modified parts for off-road vehicles are confusing; (3) Regulation section 2427 does not specify that a manufacturer may determine the form in which records regarding replacement parts may be maintained; (4) The regulatory effect of the list of emission components is unclear.
- E. The rulemaking record does not demonstrate that the Board delegated to the Executive Officer the responsibility to adopt these regulations.

DISCUSSION

The adoption of regulations by the Air Resources Board must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency (APA).¹ Any rule or regulation adopted by a state agency² 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 coverage.³

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for regulations in Government Code Section 11349.1.⁴ Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review, OAL is limited to the record of the rulemaking proceeding⁵ and may not substitute its judgment for that of the rulemaking agency as expressed in the substantive content of the regulation.⁶ This 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 affecting the public and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.⁷

A.

The Board has not prepared an estimate of the costs that the Board may incur as the result of adopting these regulations

In conducting a rulemaking action under the APA, a rulemaking agency must prepare an estimate in accordance with instructions from the Department of Finance of the "cost or savings" that state government, including the rulemaking agency itself, may incur as a result of a regulation the agency proposes to issue.⁸

It is apparent that the regulations adopted in this rulemaking action will result in costs to the Board. The regulations establish procedures and standards for Board approval of the use of aftermarket parts that alter or modify a pollution control device or system on an off-road motor vehicle. Under existing law, the use of such parts is illegal. Under the regulations, the Board will necessarily incur costs in evaluating applications for approval of add-on and modified parts.

The rulemaking record, however, does not indicate that the Board has prepared an estimate of the costs the Board will necessarily incur in enforcing and administering the regulation. The STD. 399 (Fiscal Impact) form included in the rulemaking record, indicates that the Board anticipates that the regulation will have no fiscal impact on state government because "this regulation does not effect any State agency or program." Also, the STD. 399 form is not signed by the Department of Finance Program Budget Manager, which is required, in part, if a rulemaking agency projects state costs or savings.⁹ Since the Board has not prepared an estimate of the costs that the Board may incur as the result of adopting these regulations, OAL must disapprove this rulemaking action.¹⁰

B.

The procedure on conversion of off-road vehicles to use alternative fuels is not set out in, or incorporated by reference into a regulation.

It appears from the rulemaking record that the Board intends to give the force of law to a document entitled, "California Certification and Installation Procedures for Systems Designed to Convert Off-road Vehicles, Engines, and Equipment to Use Alternative Fuels." The document is adopted by the Board in Resolution 98-56,¹¹

and a copy is included in that part of the rulemaking record labeled "Documents Incorporated by Reference."¹² However, one cannot understand this intent from reading the text of the regulations adopted in this rulemaking action.

The document is not incorporated by reference into a regulation. A key requirement that must be satisfied to incorporate a document by reference into a regulation is the requirement that the regulation text must identify the document by title and date and state that the document is "incorporated by reference."¹³ Here, no regulation indicates that any version of "California Certification and Installation Procedures for Systems Designed to Convert Off-road Vehicles, Engines, and Equipment to Use Alternative Fuels" is incorporated by reference. Consequently, the requirements of California Code of Regulations, Title 1, Section 20 and the Clarity standard of Government Code Section 11349.1 have not been satisfied.

Also, use of this procedure without adopting it as a regulation would violate the prohibition on the use of "underground regulations" established in Government Code Section 11340.5.

In addition, the omission of this procedure from these regulations makes the definitions set out in regulation section 2471 that are related to the procedure superfluous, and thus lacking in necessity. OAL reserves jurisdiction to review the procedure and the related definitions upon resubmission of these regulations.

C.

Provisions on the engine compartment label and the product information label that were originally made available for public comment were changed without making the changes available for public comment.

A substantial change to the text of proposed regulation (or document incorporated by reference) that has been made available for public comment for 45 days must be made available for public comment for 15 days before it is adopted.¹⁴

The procedure as originally proposed required applicants to provide, in part, the following:

A facsimile or prototype engine compartment plate or label *located adjacent to, but not covering, the vehicle/engine/equipment manufacturer's Vehicle Emission Control Information (tune-up) label*

or Important Engine Information Label. This plate or label is only required if a change is recommended to vehicle/engine/equipment manufacturer's tune-up parameters. In addition to the recommended tune-up parameter changes, the plate or label must contain the same information as the device label. [Italic added. Rulemaking record, tab 8, Staff Report, Procedures for Exemption of Add-on and Modified Parts of Off-road Categories, Appendix A, 10.(e), p. iii.]

No proposed changes to this section were made available for public comment. See rulemaking record, tab 12.

The final text of this provision provides as follows:

A facsimile or prototype engine compartment plate or label. This plate or label is only required if a change is recommended to vehicle/engine/equipment manufacturer's tune-up parameters. *The product information label shall provide a complete description of the required changes and the new tune-up specifications.* In addition to the recommended tune-up parameter changes, the plate or label must contain the same information as the device label. [Italic added. Rulemaking record, tab 14, Procedures for Exemption of Add-on and Modified Parts of Off-road Categories, Appendix A, 10.(e), p. iii.]

The italicized text indicates text deleted from, and text added to the final text of this provision. These changes were not made available for public comment. Consequently, the requirements of Government Code Section 11346.8(c) have not been satisfied.

D.

A number of provisions are unclear: (1) The criteria for evaluating performance and driveability for off-road aftermarket parts are not included in the regulation; (2) The provisions on labeling requirements in the procedure for exemption of add-on and modified parts for off-road vehicles are confusing; (3) Regulation section 2427 does not specify that a manufacturer may determine the form in which records regarding replacement parts may be maintained; (4) The regulatory effect of the list of emission components is unclear.

A regulation must satisfy the Clarity standard of Government Code Section 11349.1(a). "'Clarity' means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." Government Code Section 11349(c). A number of provisions in this rulemaking action fail to satisfy this standard.

- (1) The criteria for evaluating performance and driveability for off-road aftermarket parts are not included in the regulation.

The procedures establish a standard for evaluation of the effects of an add-on or modified part on a vehicle's driveability or performance:

The Executive Officer shall evaluate the effects of the add-on or modified part on the vehicle's driveability or performance. If the add-on or modified part degrades the driveability or performance such that owners may be encouraged to adjust the engine settings or tamper with required emission control systems to improve driveability or performance, the Executive Officer may find that the add-on or modified part will increase emissions. [Procedures for Exemption of Add-on and Modified Parts of Off-road Categories, IV.C. Adopted: October 1, 1999.]

However, the criteria for evaluating performance and driveability are not included in this provision or elsewhere in the procedure or regulations. In response to a comment on this omission, the Board explains:

This section was modeled after an analogous provision regarding evaluation of on-road aftermarket part effects on vehicle performance and driveability. *It is anticipated that staff will initially base their evaluations using the criteria they currently use in evaluating performance and driveability for on-road aftermarket parts, and eventually develop criteria specific to off-road categories as they gain experience in implementing these regulations.* [Italic added. Rulemaking record, tab 4, Final Statement of Reasons for Rulemaking, Including Summary of Comments and Agency Responses, p. 13, response 19.]

The response indicates that the Board has criteria that will be used in evaluating performance and driveability. The failure to include the criteria in the regulation violates the Clarity standard. In addition, since the response does not explain a reason for making no change to the regulation, the response fails to satisfy the response requirements of Government Code Section 11346.9.

(2) The provisions on labeling requirements in the procedure for exemption of add-on and modified parts for off-road vehicles are confusing.

The "Labeling Requirements" part of the procedure requires a manufacturer to provide a "product information label," specifies the minimum contents of such a label, and specifies additional contents under specific circumstances:

When the installation of the add-on or modified part requires removal of any emission control component, re-routing of any vacuum hose, or changes to the vehicle manufacturer tune-up specifications, the product information label shall provide a complete description of the required changes and the new tune-up specifications. [Rulemaking record, tab 14, Documents Incorporated by Reference, Procedures for Exemption of Add-on and Modified Parts of Off-road Categories, as adopted October 1, 1999, part VII.B., p.10.]

This provision makes no mention of an "identification plate or label" or an "engine compartment plate or label."

Another part of the procedure, parts 10(d) of Appendix A, requires the manufacturer to provide an "identification plate or label" which has the same minimum content requirements as the "product information label." And part 10(e) requires:

A facsimile or prototype engine compartment plate or label. This plate or label is only required if a change is recommended to vehicle/engine/equipment manufacturer's tune-up parameters. *The product information label shall provide a complete description of the required changes and the new tune-up specifications.* In addition to the recommended tune-up parameter changes, the plate or label must contain the same information as the device label. [Italic added. Rulemaking record, tab 14, Documents Incorporated by Reference,

Procedures for Exemption of Add-on and Modified Parts of Off-road Categories, as adopted October 1, 1999, Appendix A, 10.(e), p. iii.]

From these provisions, it is not easy to understand how many different labels are required and when different labels are required. Consequently the labeling requirements in the procedure fail to satisfy the Clarity Standard.

- (3) Regulation section 2427 does not specify that a manufacturer may determine the form in which records regarding replacement parts may be maintained.

Regulation section 2427 requires a replacement part manufacturer to maintain records substantiating compliance with the regulations for four years from the year of the manufacture of the replacement part.

In response to a comment urging that manufacturers should have the option to maintain such records in electronic form, the Board indicated: "The ARB leaves it to the manufacturer to determine in what form it will maintain its records. The records must be viewable upon request by the ARB." Rulemaking record, tab 4, Final Statement of Reasons for Rulemaking, Including Summary of Comments and Agency Responses, p. 20, response 5. The text of the regulation, however, does not specify that a manufacturer may determine the form in which records regarding replacement parts may be maintained. Consequently, regulation section 2474 cannot be easily understood.

In addition, since the response does not explain how the regulation has been modified in response to the comment or a reason for making no change to the regulation, the response fails to satisfy the response requirements of Government Code Section 11346.9.

- (4) The regulatory effect of the list of components in the appendix to the procedure which are examples of emissions-related parts is unclear.

The procedure for exemption of add-on and modified parts for off-road vehicles specifies that any add-on or modified part will be categorized according to its "Generic Category" according to a list of generic categories, then states the following:

Appendix B outlines a list of components which are examples of emissions-related parts (as defined in Section 1900(b)(3), Chapter 3,

Title 13, California Code of Regulations), for on-road vehicles.
[Rulemaking record, tab 14, Documents Incorporated by Reference, Procedures for Exemption of Add-on and Modified Parts of Off-road Categories, as adopted October 1, 1999, part D., p. 3.]

Appendix B then sets out a list of components, *as amended June 1, 1990*. In contrast, Section 1900(b)(3), Chapter 3, Title 13 as currently printed in the California Code of Regulations incorporates by reference a list of components, *as amended May 19, 1981*. This discrepancy is confusing.

Also, in response to a comment about the contents of the list of components the Board states: "Appendix B was included into the Rule package as a reference only." Rulemaking record, tab 4, Final Statement of Reasons for Rulemaking, Including Summary of Comments and Agency Responses, p. 21, response 9. This response makes the regulatory effect of the list unclear.

E.

The rulemaking record does not demonstrate that the Board delegated to the Executive Officer the responsibility to adopt these regulations.

The Executive Officer purports to adopt the regulations pursuant to a delegation from the Board which is not documented in the rulemaking record. Executive Order G-99-070, the adoption order for these regulations, states that the executive officer was directed by Resolution 98-56 to adopt the regulations, or bring them back to the Board after making the modified language available for public comment and considering the input. Rulemaking record, tab 2, Executive Order G-99-070. Board Resolution 98-56, however, does not include such a delegation to the Executive Officer. Rulemaking record, tab 3. Consequently, the rulemaking record does not demonstrate that the Board delegated to the Executive Officer the responsibility to adopt these regulations.

FOR THESE REASONS OAL disapproved the above-referenced rulemaking action.

We also note that numerous underline/strikeout and underlying text errors in the final regulations must be corrected before the regulations can be approved. The specific errors were explained to the Board's contact person via a telephone conversation.


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DATE: November 23, 1999

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ENDNOTES

- 1 Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2 of the Government Code.
- 2 The California Air Resources Board is a state agency. Several statutory provisions define the term "state agency." Government Code Section 11000 provides that as used in the part of the Government Code on the government of the state of California, which includes the Administrative Procedure Act, "'state agency' includes every state office, officer, department, division, bureau, board, and commission." Government Code Section 11342(a) provides that for purposes the part of the Administrative Procedure Act on rulemaking "'state agency' and 'agency' does not include an agency in the judicial or legislative departments of the state government."
- 3 Government Code Section 11346.
- 4 Government Code Section 11349.6(d).
- 5 Government Code Section 11349.1(a).
- 6 Government Code Section 11340.1.
- 7 Government Code Section 11340.1.
- 8 Government Code Section 11346.5(a)(6) and State Administrative Manual, sections 6601--6680.
- 9 State Administrative Manual, section 6660.

- 10 Government Code Section 11349.1(d)(1).
- 11 Rulemaking record, tab 3, Resolution 98-56, p. 4.
- 12 Rulemaking record, tab 14.
- 13 California Code of Regulations, Title 1, Section 20(c)(4).
- 14 Government Code Section 11346.8(c).