

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

In re:)	
)	
AGENCY: AIR RESOURCES)	DECISION REGARDING
BOARD)	DISAPPROVAL OF A
)	RULEMAKING ACTION
)	
RULEMAKING ACTION: Adopt)	(Gov. Code Sec. 11349.3)
2303.5, 2311.5, and 2318; Amend 2300,)	
2302, 2303, 2304, 2306, 2307, 2308, 2309)	OAL File No. 00-0601-01 S
2310, 2311, 2312, 2313, 2314, 2315, 2316,)	
and 2317; repeal 2301 and 2305 of Title)	
13 of the California Code of Regulations)	

SUMMARY OF RULEMAKING ACTION

This rulemaking action concerns the number of gasoline stations that must be equipped by their owner/lessors to dispense a designated clean fuel once a certain number of California vehicles are certified to the Low Emission Vehicle standard on that fuel. The rulemaking action modifies how the number of clean fuel outlets required each year would be determined, allows the Executive Officer to adjust the calculated number of clean fuel outlets up or down, revises the schedule for siting new clean fuel outlets, repeals obsolete sections of the Clean Fuels Regulations, delays reporting requirements until needed, and revises notification requirements.

SUMMARY OF DECISION

On July 13, 2000, the Office of Administrative Law (OAL) disapproved the above-referenced rulemaking action because a key provision purports to authorize the Executive Officer of the Air Resources Control Board (ARB) to adjust the number of required retail clean fuel outlets without complying with the procedural requirements of the Administrative Procedure Act. A detailed explanation of the reasons for this decision by OAL follows below.

DISCUSSION

The adoption of regulations by the Air Resources Control 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.

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 administrative regulations in Government Code Section 11349.1. 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 rulemaking record³ and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation.⁴ 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 that implement, interpret and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

THE AMENDMENTS TO RULE 2304 THAT AUTHORIZE THE EXECUTIVE OFFICER TO ADJUST THE NUMBER OF REQUIRED RETAIL CLEAN FUEL OUTLETS WITHOUT COMPLYING WITH THE PROCEDURAL REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT ARE INCONSISTENT WITH THE PROHIBITION IN GOVERNMENT CODE SECTION 11340.5 AGAINST ISSUING OR USING "UNDERGROUND" REGULATIONS.

Each regulation must satisfy the Consistency standard.⁵ "Consistency" means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."⁶

Existing provisions in rule 2304 (California Code of Regulations, Title 13, Section 2304) require the Executive Officer of the ARB to determine the number of retail clean fuel outlets required for a year in which the number of low-emission vehicles certified on a clean fuel exceeds a threshold number of vehicles determined in accordance with the Clean Fuels Program regulations (California Code of Regulations, Title 13, sections 2300--2317). Other existing provisions require the use of a specified formula to calculate the number of clean fuel outlets required for each designated fuel for each year. Other existing provisions then specify a method for allocating the determined number of outlets among owner/lessors of retail gasoline outlets and require the owner/lessors to provide the clean fuel outlets allocated to them through this process.

The amendments added by subsection (a)(3) of rule 2304 purport to authorize the Executive Officer to change the number of required clean fuel outlets without adopting the changed number as a regulation pursuant to the APA. Consequently the amendments are inconsistent with the prohibition on the issuance or use of an "underground" regulation established by Government Code Section 11340.5. These amendments provide:

- (A) *Permitted adjustments.* The executive officer may adjust the number of retail clean fuel outlets otherwise required for a given year pursuant to this section 2304(a) based on the likelihood of vehicles to use the particular clean fuel, the fueling patterns of fleet vehicles, the potential for the operational range of fleet vehicles to be expanded by use of retail clean fuel outlets, and related factors. The maximum permitted upward adjustment would require the number of outlets resulting from the formula in section 2304(a)(1) without subtracting the discounted clean fuel volume for fleet vehicles. The maximum permitted downward adjustment would require the number

of stations equal to the total projected clean fuel volume for dedicated non-fleet vehicles only.

(B) **Notification regarding any adjustment.** If the executive officer makes an adjustment pursuant to section 2304(a)(3) for a given year, he or she shall notify interested parties of the adjustment and the underlying basis for the adjustment, at least fourteen months before the start of the year. The notice shall be provided to trade associations representing gasoline refiners, distributors and retailers, representative environmental groups, and any person who has requested in writing to receive such notices.

(C) **Requests to revise the executive officer's adjustment.** Any interested party may request in writing that the executive officer revise the adjustment, and may submit any relevant information supporting a revised determination. In order to be considered by the executive officer, the written request and supporting information must be received no more than 30 days after issuance of the notice. The executive officer shall consider any requests that are timely submitted, and shall issue his or her final determination no less than twelve months before the start of the year in question. At the same time, the executive officer shall make any resulting modifications to the determinations and notifications made pursuant to sections 2304(b), 2306 and 2307.

These amendments do not establish a formula or other method of calculating the actual number of required clean fuel outlets. They simply specify material that must be considered in adjusting the number of required clean fuel outlets, and specify a range within which the number may be adjusted at the discretion of the Executive Officer. Apparently the revised rule does not require the setting of the actual number of required outlets to be accomplished through the adoption of "regulation" pursuant to the procedural requirements of the APA.

The actual number of required clean fuel outlets, however, is a "regulation" as that term is defined by the Administrative Procedure Act because it satisfies the two part test established by Government Code Section 11342(g) and because there is no express statutory exemption from the mandatory procedural requirements of the APA for the setting of the actual number of required clean fuel outlets.

Government Code section 11342(g), defines "regulation" as follows: "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure,..."

Under this definition, the setting of the actual number of required outlets is a "regulation" if (1) the actual number is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the actual number is adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency's procedure. This two part test was upheld by the Court of Appeal in *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.⁷

If a policy or procedure satisfies both parts of the two-part test, it is a "regulation" subject to the APA. In applying the two-part test, we are mindful of the admonition of the *Grier* court:

"[B]ecause the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]" (219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.)

For an agency policy or procedure to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).)

Here, the actual number of required clean fuel outlets is a standard of general application. The total number is allocated to, and thus applies to the class of owner/lessors of retail gasoline outlets as defined in the Clean Fuels Program regulations. Thus the first part of the test is satisfied. Also, the actual number obviously implements, interprets, or makes specific the law enforced or administered by the ARB. Thus the second part of the test is satisfied..

Consequently, the setting of the actual number is the adoption of a "regulation." OAL is not aware of an express statutory exemption that would allow the adoption of the actual number without complying with the procedural requirements of the APA. Therefore, the setting of the actual number by the Executive Officer using the procedure established by the amendments added by subsection (a)(3) of rule 2304 is the adoption of an "underground" regulation.

The use of an "underground" regulation by a state agency is prohibited by Government Code Section 11340.5, which provides as relevant:

No state agency shall issue, utilize, 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 subdivision (g) of Section 11342, 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. [This section is a codification of the California Supreme Court's decision in *Armistead v. State Personnel Board*.⁸]

Since the setting of the actual number is a "regulation," OAL determined that the amendments added by subsection (a)(3) of rule 2304 are inconsistent with Government Code Section 11340.5.

FOR THESE REASONS OAL disapproved the above-referenced rulemaking action for failing to satisfy the Consistency standard of Government Code Section 11349.1(a).

Date: July 14, 2000



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¹ Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2 of the Government Code.

² The Air Resources Control 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 for purposes of that 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 11349.1(a).

⁴ Government Code Section 11340.1.

⁵ Government Code Section 11349.1(a)(4).

⁶ Government Code Section 11349(d).

⁷ Notably *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198 stated that it "disapproved" of *Grier* in part. *Grier*, however, is still good law, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

⁸ (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1.