State of California
Office of Administrative Law

In re: **Air Resources Board**	**DECISION OF DISAPPROVAL OF REGULATORY ACTION**
Regulatory Action: Title 13 California Code of Regulations	**Government Code Section 11349.3**
Adopt sections: 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630	**OAL File No. 2010-0504-02 S**

SUMMARY OF REGULATORY ACTION

The Air Resources Board ("Board") proposed the adoption of eleven new sections in title 13 of the California Code of Regulations to implement the Enhanced Fleet Modernization Program ("EFMP"), encouraging the voluntary retirement of older passenger automobiles and light and medium duty trucks to help lessen the air pollution that results from their operation. On May 4, 2010, the Board submitted the proposed regulations to the Office of Administrative Law ("OAL") for review in accordance with the Administrative Procedure Act ("APA"). On June 16, 2010, OAL disapproved the proposed regulations. This Decision of Disapproval explains the reasons for OAL's action.

DECISION

OAL disapproved the proposed regulations for failure to meet the consistency standard of Government Code section 11349.1, subdivision (a). Proposed section 2624, subdivision (b) limits participation in the EFMP to a person who is the owner of a vehicle that is registered as an operable vehicle at the time of application. The record of the rulemaking does not support this interpretation of the Legislature's mandate that the Board adopt guidelines for a program allowing for the voluntary retirement of high polluting vehicles. Additionally, proposed section 2627, subdivision (a), would have provided a rudimentary procedure for the amendment of the geographic scope of the voucher program that is unauthorized because it would fall far short of compliance with the requirements of the APA applicable to the amendment of the regulation.

DISCUSSION

OAL reviews proposed regulations for compliance with the consistency standard pursuant to Government Code section 11349.1 Consistency is defined in Government Code section 11349,

subdivision (d) to mean "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."

1) REGISTRATION WITH DMV REQUIRED

The Board proposed these regulations, or "guidelines" to implement a portion of A.B.118 (Chapter 750, Statutes of 2007) as codified in Health and Safety Code sections 44125 and 44126 and more commonly known as the Enhanced Fleet Modernization Program or EFMP. Health and Safety Code section 44125 provides as follows:

> (a) No later than July 1, 2009, the state board, in consultation with the Bureau of Automotive Repair (BAR), shall adopt a program to commence on January 1, 2010, that allows for the voluntary retirement of passenger vehicles and light-duty and medium-duty trucks that are high polluters. The program shall be administered by the BAR pursuant to guidelines adopted by the state board.
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> (b) The guidelines shall ensure all of the following:
> (1) Vehicles retired pursuant to the program are permanently removed from operation and retired at a dismantler under contract with the BAR.
> (2) Districts retain their authority to administer vehicle retirement programs otherwise authorized under law.
> (3) The program is available for high polluting passenger vehicles and light-duty and medium-duty trucks that have been continuously registered in California for two years prior to acceptance into the program *or otherwise proven to have been driven primarily in California for the last two years and have not been registered in another state or country in the last two years.*
> (4) The program is focused where the greatest air quality impact can be identified.
> (5) Compensation levels for retired vehicles are flexible, taking into account factors including, but not limited to, the age of the vehicle, the emission benefits of the vehicle's retirement, the emission impact of any replacement vehicle, and the location of
> vehicles in areas of the state with the poorest air quality.
> (6) Cost-effectiveness and impacts on disadvantaged and low-income populations are considered. (Emphasis added.)

Closely tracking the language of subdivision (b), paragraph (3) above, the Board's original proposal for section 2624 as made available during the 45 day public comment period described the vehicles eligible for participation. It would have allowed a vehicle that is "currently registered with the DMV as an operable vehicle" that has been "registered continuously for at least 24 months prior to the date of application . . ." and, in subdivision (b)(2)(D), would have also allowed:

> An unregistered vehicle may also be eligible if proven to have been driven primarily in California for the last two years and not have been registered in any other state or country in the last two years.

The Board's Staff Report - Initial Statement of Reasons explained:

> AB 118 provides flexibility by specifically expanding eligibility to unregistered vehicles that can otherwise prove to have been driven primarily in California for two years and not registered in any other state.

Nevertheless, some members of the Board objected to this last provision at the public hearing and indicated that registration should be required of all participating vehicles to assure that only vehicles that are actually being used and contributing to air pollution qualify for a payment from the state. There was a discussion of whether the language of Health and Safety Code section 44125 obliges the Board to accept unregistered vehicles into the EFMP. After deciding that the program should be limited to registered vehicles, the Board proposed a rule on eligibility that requires current registration with DMV. The final version of section 2624 sets forth proposed participation requirements. Among those eligible it includes vehicles currently and continuously registered with DMV for at least 24 months, and specifies the limitations for vehicles (A) that have been placed in non-operational status or (B) that experienced a temporary lapse in registration that has been remedied. Finally, in subdivision (b), paragraph (2)(D), it provides, in part:

> A vehicle may also be eligible if proven to have been driven primarily in California for the last two years and not to have been registered in any other state or country in the last two years, provided that the vehicle must be registered as an operable vehicle at the postmarked date of application. Documentation of operation in California includes the following.
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> . . .

In support of the change adding the registration requirement above, the Board offered the rationale that proof of use must be a limited adjunct that was included in the legislation to address situations where there had been a past lapse in registration rather than an alternative basis for qualification. The provision addressing the "proof of having been driven primarily in California" option thus morphed into a rule that largely overlaps proposed subdivision (b)(2)(B) (lapsed registration issue resolved 90 days prior to application) with the added burden of proving that the vehicle has been driven primarily in California for the last two years. The effect is that the "proof of having been driven primarily in California" option would have very limited utility, probably limited to a situation where a vehicle's registration had lapsed for a period greater than the 121 days allowed under proposed subdivision (b)(2)(B). The amendment was drafted and the Board complied with the APA's requirements for public notice affording an opportunity for comment and thereafter submitted the proposed regulations to OAL.

Based upon its review of the entire record, OAL believes that this final amendment has altered the effect of the program contemplated by the Legislature. The Legislature has provided only basic guidance here and has clearly left most of the provisions to be developed by the Board, BAR and other interested persons. Still, this program has some distinguishing features. Among them is a provision that offers as an alternative to the requirement for registration, the possibility of offering satisfactory proof of use. The discussion in the Board's hearing record for June 26,

2009 indicates that there was at least a belief by some participants that there was an intention in the Legislature to open this program to vehicles that are being operated without complying with registration requirements. In this respect it was viewed as a departure from other similar programs that may not be reaching vehicles that are operated without complying with the registration and smog test laws that provide the usual lead-in to voluntary vehicle retirement programs. By amending the proposal to require registration with DMV in every case and in so doing eliminating the possibility of participation by owners of vehicles otherwise proven to have been driven primarily in California for the last two years, the Board has impaired the scope of the program contemplated in Health and Safety Code section 44125. It is a well established principle of construction that "[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." Morris v. Williams (1967) 63 Cal.Rptr. 689, 699.

2) VOUCHER PROGRAM

Proposed section 2627 establishes the basic rules of a voucher program within the EFMP. A voucher would be a document with a specified redemption value issued by a district as an incentive to scrap a highly polluting targeted vehicle. A voucher could be used to help purchase a newer replacement vehicle from a participating dealer or perhaps a public transportation pass. Proposed subdivision (a) of section 2627 provides:

> Vouchers will initially be offered in the South Coast and San Joaquin Valley air basins with inclusion of other air districts as determined by the Board. The Bureau shall consult with the Board annually regarding the status and expansion of the voucher program.

OAL notes that the proposed procedure calling for an annual consultation with the BAR and a Board determination appears to be intended as a means of amending the geographic scope of the voucher program, a substitute for the procedures set forth in the APA. If this is actually the Board's intention, we call your attention to Government Code section 11346, subdivision (a) which 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. Here the Board has specified how often the matter shall be considered and has provided for consultation with the BAR but these decisions for the future of the EFMP will clearly be matters of Board discretion. That discretion must be

exercised in accordance with the APA, including an opportunity for public participation in the rulemaking and review by OAL. To the extent proposed section 2627, subdivision (a) is offered as an alternative, it is disapproved.

CONCLUSION

For the foregoing reasons OAL disapproved the Board's proposed adoption of sections 2620 through 2630 of title 13 of the CCR.

Date: June 23, 2010

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