

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:

AIR RESOURCES BOARD

REGULATORY ACTION:
Title 17, California Code of
Regulations

ADOPT SECTION 95550

DECISION OF DISAPPROVAL
OF REGULATORY ACTION
(Gov. Code, sec. 11349.3)

OAL File No. 2010-0204-03S

SUMMARY OF REGULATORY ACTION

The Air Resources Board (Board) proposed to adopt section 95550 in title 17 of the California Code of Regulations requiring automotive service providers to check and inflate the tires of each passenger car brought in for service to the recommended tire pressure rating in order to reduce green house gas emissions from underinflated tires. On February 4, 2010, the Board submitted the proposed adoption to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On March 19, 2010, OAL disapproved the proposed adoption. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

The Office of Administrative Law disapproved the above referenced regulatory action for the following reasons: failure to comply with the clarity and necessity standards of Government Code section 11349; failure to follow the required procedure; the regulatory file did not contain all required documents, and/or required documents included in the file are defective; and the agency failed to adequately respond to each comment made regarding the proposed action.

DISCUSSION

The adoption of regulations by the Board must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency 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. (Gov. Code, sec. 11346.)

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 record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies 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.

1. CLARITY

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The following provisions fail to comply with the clarity standard:

- a. Subsection (c)(7) of section 95550 of title 17 as proposed by this rulemaking would have provided:

“Automotive Service Provider (ASP)” is any **business** that performs or offers to perform automotive maintenance or repair services....” (Emphasis added.)

In response to a comment that it is not clear whether the tire inflation requirement would apply to government maintenance providers and government fleets, the Board responded in the Final Statement of Reasons (FSOR) that it does. “Government and private fleets and garages are considered to be ‘businesses that perform automotive maintenance and repair services,’ even if the services are performed on their own vehicles....” A person directly affected by the regulation would not easily understand from the use of the word “business” that the regulation applies to such public sector operations.

- b. Subsection (d)(1)(B) of section 95550 of title 17 as proposed by this rulemaking would have provided that all automotive service providers indicate on the vehicle service invoice that a tire inflation service was conducted and record the tire pressure measurements after the service was performed.

Subsection (d)(2) of section 95550 of title 17 as proposed by this rulemaking would have provided:

Notwithstanding subsection (d)(1), an automobile service provider need not meet the requirements set out therein if the automotive service provider is performing only a free check and inflate service at the customer’s request....

However, subsection (d)(6) of section 95550 of title 17 as proposed by this rulemaking would have provided:

If a tire inflation service was not performed as provided in subsections (d)(2-4), the automotive service provider must indicate on the vehicle service invoice why the service was not completed.

Since subsection (d)(2) appears to exempt automotive service providers from complying with the invoice requirement in subsection (d)(1)(B) when performing only a free check and inflate service at the customer's request, a person directly affected by the regulation would not easily understand how subsection (d)(6), which appears to require an invoice for those same customers, effects this.

2. THE REGULATIONS SUBMITTED TO OAL FOR FILING WITH THE SECRETARY OF STATE CONTAIN A CHANGE THAT WAS NOT MADE AVAILABLE TO THE PUBLIC

Subdivision (c) of Government Code section 11346.8 requires that substantial changes to the original text be made available to the public for comment before the changes are adopted:

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. **If a sufficiently related change is made, the full text of resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends or repeals the resulting regulation.** Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9. (Emphasis added.)

Section 44 of title 1 of the California Code of Regulations specifies how such sufficiently related changes are to be made available:

(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
- (2) all persons who submitted written comments at the public hearing; and
- (3) all persons whose comments were received by the agency during the public comment period; and

(4) all persons who requested notification from the agency of the availability of such changes.

(b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period.

The text of the regulations submitted to OAL for filing with the Secretary of State in this rulemaking contained a change from the texts that were made available to the public during the initial 45 day and subsequent 15 day comment periods.

The text of the regulations made available during the second 15 day comment period included a new subsection (d)(5) which provided:

A customer may decline the check and inflate service **under the following conditions:**

- (A) **The automotive service provider proposes a separate discrete charge for the service; and**
- (B) He or she has performed (or had performed) a tire pressure check and inflate service within the last 30 days **and has provided supporting documentation to the ASP,**
or
- (C) He or she will perform (or will have performed) a tire pressure check and inflate service within the next 7 days. (Emphasis added.)

Following the receipt of public comment on this 15 day change, the final text of subsection (d)(5) submitted to OAL in this rulemaking for review and filing with the Secretary of State provides simply:

A customer may decline the check and inflate service **if the customer affirms one of the following:**

- (A) He or she has performed (or had performed) a tire pressure check and inflate service within the last 30 days, or
- (B) He or she will perform (or will have performed) a tire pressure check and inflate service within the next 7 days. (Emphasis added.)

This final version of subsection (d)(5) submitted to OAL for review and filing with the Secretary of State includes changes in the regulation language as indicated in bold above. These changes are required to be made available for comment pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.

3. THE RULEMAKING FILE DOES NOT INCLUDE A COPY OF ALL OF THE REQUIRED DOCUMENTS.

Subdivision (b)(7) of Government Code section 11347.3 requires that the rulemaking file include:

All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency

is relying in the adoption, amendment, or repeal of a regulation....

The “Staff Report: Initial Statement of Reasons” for this regulatory action includes in “XIV. References”, a two page reference list. Tab 16 of the rulemaking file, entitled “References”, includes a three page reference list and a compact disc with an extensive collection of documents. This writer was unable to locate one of the documents listed as a reference in the “Staff Report: Initial Statement of Reasons” on the compact disc: EMFAC2007. Air Resources Board, Emissions Factors Model (EMFAC2007 version 2.3), 2007.

4. THE FINAL STATEMENT OF REASONS DOES NOT CONTAIN A RESPONSE TO ONE OF THE COMMENTS SUBMITTED DURING THE PUBLIC COMMENT PERIOD.

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA currently requires that rulemaking agencies provide notice and at least a forty-five day comment period prior to adoption of a proposed regulatory action. (Gov. Code, secs. 11346.4 and 11346.5). By requiring the state agency to summarize and respond in the record to comments received during the comment period, the Legislature has clearly indicated its intent that an agency account for all relevant comments received, and provide written evidence of its meaningful consideration of all timely, relevant input. Section 11346.9(a)(3) of the Government Code requires that the adopting agency prepare and submit to OAL a final statement of reasons which shall include a “. . . summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reason for making no change.”

Subsection (g) of section 95550 of title 17 as proposed in this rulemaking would have provided that if any portion of the regulation is held invalid such holding will not affect the validity of the remaining portions of the regulation. A commenter stated that such a provision is inappropriate in regulatory proposals subject to the Administrative Procedure Act in that regulatory proposals must be analyzed in their entirety. The commenter stated that such a provision impermissibly expands the scope of authority granted by the Legislature and that if a court declares a provision of the regulation invalid, the Board must adopt a replacement regulation. The response in the Final Statement of Reasons for this regulatory action is simply that the Board disagrees and that OAL will make the determination. This response is inadequate in that it does not give the reason why the Board disagrees and is making no change to the regulation.

5. NECESSITY

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean “. . . the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that

the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of the Title 1 of the California Code of Regulations provides:

In order to meet the ‘necessity’ standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) a statement of the specific purpose of each adoption, amendment, or repeal; and
- (2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An ‘expert’ within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons. (Gov. Code, sec. 11346.2(b).) The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1).) The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably. The “Staff Report: Initial Statement of Reasons” submitted with this proposed regulatory action did not contain an explanation of the need for the severability provision in subsection (g) of proposed section 95550 described above.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. Please also note that the rulemaking file is (1) missing the statement of mailing required by section 44(b) of title 1 of the California Code of Regulations for the second 15 day availability period and that (2) the local mandate statement in the Final Statement of Reasons required by Government Code section 11346.9(a)(2) should be for the entire regulatory proposal, not just the changes made in the 15 day availability periods. If you have any questions, please contact me at (916) 323-6808.

Date: March 22, 2010

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