

**State of California
Office of Administrative Law**

**In re:
Air Resources Board**

**Regulatory Action: Title 17
California Code of Regulations**

**Adopt sections:
Amend sections: 94010, 94011, 94016,
94150, 94168**

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2012-0730-01 S

SUMMARY OF REGULATORY ACTION

The Air Resources Board (Board) proposed this action to amend sections 94010, 94011, 94016, 95150, and 94168 of title 17 of the California Code of Regulations and related incorporated by reference documents. The incorporated documents provide definitions, certification procedures, and test procedures for the testing and certification of vapor recovery systems and system components used in underground and aboveground gasoline storage tanks. Among other things, the proposed amendments to two of the certification procedure documents included the addition of a section 2.4.5 that purported to clarify the term “effective date” as meaning the date when the first system meeting a new or revised standard or specification is certified.

DECISION

On September 11, 2012, OAL disapproved the proposed regulatory action because the regulations failed to meet the clarity standard of Government Code section 11349.1.

DISCUSSION

Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the Administrative Procedure Act (APA) unless a statute expressly exempts or excludes the act from compliance with the APA. (Gov. Code, sec. 11346.) Accordingly, regulations adopted by the Board must be adopted pursuant to the APA. No exception or exclusion applies to the regulatory action under review. Thus, before the proposed regulatory action may become effective, it is subject to a review by OAL for compliance with the procedural requirements and substantive standards of the APA. (Gov. Code, sec. 11349.1(a).)

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.” “Clarity” is further defined in California Code of Regulations, title 1, section 16(a):

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

- (a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:
- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or

....

The two certification procedure documents in which the Board added section 2.4.5 were *Certification Procedure for Vapor Recovery Systems at Gasoline Dispensing Facilities, CP-201* (CP-201) and *Certification Procedure for Vapor Recovery Systems at Gasoline Dispensing Facilities Using Aboveground Storage Tanks, CP-206* (CP-206). Section 2.4.5 was identical in CP-201 and CP-206, and provided:

2.4.5. Any performance standard or specification with an effective date of January 1, 2012 or later shall become effective on the date when the first system is certified to meet the performance standard or specification. The Executive Officer shall maintain, and make available to the public, a current list of effective and operative dates for all standards and specifications.

First, section 2.4.5 can, on its face, be reasonably and logically interpreted to have more than one meaning, which makes it fail the clarity standard based on title 1, California Code of Regulations, section 16(a)(1). The section uses the term “effective date” twice in the first sentence in a manner that reads as if there are two effective dates resulting from the regulation. The first effective date is based on any performance standard or specification made effective on January 1, 2012 or later, and the second effective date is “the date when the first system is certified to meet the performance standard or specification.”

Section 2.4.5 purports to alter the first effective date by the occurrence of the second effective date. This raises the question of when the actual date a new performance standard or specification is effective. Is it determined by the date that the new regulations are filed with the Secretary of State,¹ or the date when the first system is certified to meet the performance

¹ Generally, under Government Code section 11343.4, the effective date of a regulation is related to the date the regulation is filed with the Secretary of State or “[a] later date [if it] is prescribed by the state agency in a written instrument filed with, or as part of, the regulation or order of repeal.” (Gov. Code, sec. 11343.4(b).)

standard or specification? It cannot be both. As written, section 2.4.5 would lead to confusion as to when the actual effective date would be for a new performance standard or specification.

Other reasons that section 2.4.5 is unclear on its face and not readily understandable include the use of the term “any performance standard or specification.” It is unclear whether the Board means the effective date to apply to “any” performance standard or specification adopted by the Board or just those that pertain to vapor recovery systems. Additionally, the term “is certified to meet the performance standard or specification” leaves open the question by whom the performance standard or specification is to be certified. Finally, in the last sentence of section 2.4.5, the provision indicates that Board’s executive officer will maintain a current list “of effective and operative dates” for all standards and specifications. Having used the term “effective date” twice in the first sentence, section 2.4.5 introduces another term, “operative dates,” as relating to the effective date in the provision. It is unclear what is intended by this term and how it is supposed to relate to the effective date provided by section 2.4.5.

Second, in its initial statement of reasons, the Board describes the purpose of section 2.4.5 as follows:²

Four-Year Clock Provision

Section 2.4.5 is added to specify that the effective date of new vapor recovery performance standards or specifications is the date when the system or component is certified. The “effective date” is very important to a regulated GDF [gasoline dispensing facility] because it determines the start of the “four-year clock.” This is the four-year time period when all existing and affected GDFs must replace current equipment with equipment meeting the new standards and specifications. This four-year timeframe for replacing existing equipment is established in California Health and Safety Code, section 41956.1(a), which reads as follows:

“Whenever the state board ... revises performance or certification standards or revokes a certification, any systems or any system components certified under procedures in effect prior to the adoption of revised standards or the revocation of the certification and installed prior to the effective date of the revised standards or revocation may continue to be used in gasoline marketing operations for a period of four years after the effective date of the revised standards or the revocation of the certification.”³

Statutory language and existing language within CP-201 are sufficiently clear on the “four-year clock” in cases where certified equipment is available to meet new standards and specifications prior to the effective date. Unfortunately, the existing language does not address what action is required by an affected GDF when there

² This statement refers to the addition of section 2.4.5 only for CP-201. An explanation for adding section 2.4.5 to CP-206 is provided later in the initial statement of reasons by referring back to this statement.

³ Note that Health and Safety Code section 41956.1(a) ends with the following sentence: “However, all necessary repair or replacement parts or components shall be certified.”

is no certified equipment. Effective dates established in CP-201 are actual calendar dates set by ARB [Air Resources Board] in anticipation of certified systems being available by that stated date. In the past, there have been unexpected delays with development and certification of systems to meet new standards and specifications. This has forced ARB to delay effective dates, often repeatedly, first through administrative actions by the Executive Officer, and then later by Board approval of the Executive Officer's action through a formal rulemaking process. Although ARB has made efforts to promptly revise effective dates as appropriate, the process has led to lack of clear direction and some uncertainty on the part of the regulated community.

The addition of section 2.4.5 to CP-201 re-defining the "effective date" will provide needed clarity and improve the program by ensuring that, in all cases, facilities have adequate time to plan for required vapor recovery equipment upgrades. By clearly establishing that the effective date will be automatically triggered only when a new system is certified by ARB will provide certainty and clarity to the regulated community. The provisions also streamline the administrative actions by the Executive Officer.

The rationale of the initial statement of reasons for supporting the addition of section 2.4.5 in CP-201 and CP-206 is clear, but the language of section 2.4.5 fails to express what the intended purpose is. Without reading the initial statement of reasons, one would not know that section 2.4.5 has anything to do with a "four-year clock" pertaining to Health and Safety Code section 41956.1(a), that certification of a vapor recovery system is to be done by the Board, or that the term "any performance standard or specification" is intended to refer only to the adoption of such standards pertaining to vapor recovery systems. Furthermore, the initial statement of reasons and Health and Safety Code section 41956.1(a) not only refer to vapor recovery systems, but to system components. Section 2.4.5 is silent as to whether it pertains to system components, yet one of the main amendments proposed in this rulemaking action is the establishment of a hose permeability standard for specified gasoline hoses, which would be a system component.

Finally, to further complicate the clarity issue with section 2.4.5, the Board already has a definition for "effective date" as it pertains to Health and Safety Code section 41956.1(a) in another incorporated by reference document, *Definitions for Vapor Recovery Procedures, D-200* (D-200). D-200 contains definitions applicable to the vapor recovery certification and test procedure documents. The D-200 definition of effective date provides:

effective date

the date on which a provision has the effect of state law. The effective date "starts the clock" for the period of continuing use of installed vapor recovery systems/equipment under Health and Safety Code section 41956.1. The period may be up to four years after which the component and/or system may no longer be used.

Because this definition provides for the effective date of a vapor recovery system standard or specification as "the date on which a provision has the effect of state law," Government Code

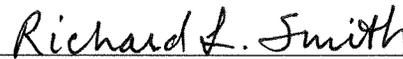
section 11343.4 would dictate that the effective date of a new or revised standard would be related to the filing date of the new regulations or a later date prescribed by the state agency in a written instrument filed with the regulation or as part of the regulation. Because of this, there is an inherent internal inconsistency with the purported effective date in section 2.4.5, resulting in a further clarity issue with the section.

The Board will need to re-write section 2.4.5 to meet the clarity standard or, alternatively, amend the existing definition of “effective date” in D-200 and dispense with the addition of section 2.4.5 in CP-201 and CP-206. In any event, the Board will need to assure that there is no conflict with respect to the existing definition of “effective date” in D-200. Re-writing section 2.4.5 or the existing definition of “effective date” will require the Board to make the modified text available for public comment in a 15-day notice pursuant to Government Code section 11346.8(c) and title 1, California Code of Regulations, section 44.

CONCLUSION

For the reasons set forth above, OAL has disapproved the Board’s rulemaking action because it failed to comply with the “clarity” standard in Government Code section 11349.1.

Date: September 17, 2012



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