

**State of California
Office of Administrative Law**

In re:	DECISION OF DISAPPROVAL OF REGULATORY ACTION
California Air Resources Board	
Regulatory Action:	
Title 13, California Code of Regulations	Government Code Section 11349.3
Adopt sections: 2416, 2417, 2418, 2419, 2419.1, 2419.2, 2419.3, 2419.4.	OAL File No. 2014-0606-03S

DECISION SUMMARY

On June 6, 2014, the California Air Resources Board (Board) submitted to the Office of Administrative Law (OAL), this rulemaking action which concerns the adoption of new regulations to reduce evaporative emissions from Off-Highway Recreational Vehicles (OHRVs). The regulations establish a maximum organic gas emission standard and adopt a new test procedure for OHRVs beginning with the 2018 model year. The proposed regulations also include anti-tampering provisions, provisions for labeling and warranty of OHRV emission control system parts, and provisions for the recall of OHRVs that do not meet required evaporative emissions standards.

OAL disapproved the proposed regulations for the Board's failure to comply with the clarity standard of the California Administrative Procedure Act (APA), Government Code sections 11349(c) and 11349.1(a)(3).

BACKGROUND

The Board conducted this rulemaking action to address the problem of excessive evaporative reactive organic gas (ROG) emissions from OHRVs, which include motorcycles, off-road sports vehicles, and off-road utility vehicles. ROGs are ozone precursors. OHRVs emit ROGs from fuel systems, including from fuel tanks, lines, vents, and connectors, and from carburetors. Several regions of the state are currently in non-attainment status for ozone. The proposed regulations will establish a maximum evaporative emission standard of one gram per day of organic gas beginning with the 2018 model year. The proposed regulations phase in the new standard and require only 75% of total vehicles to comply with this standard during the first four years of implementation (2018-2021). The proposed regulations also incorporate by reference

Test Procedure 933, *Test Procedure for Determining Evaporative Emissions from Off-Highway Recreational Vehicles* (TP-933), for use in determining and establishing compliance with the new standard.

DISCUSSION

Any regulation amended or adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute 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 the APA. Government Code sections 11340.5 and 11346. OAL reviews regulatory actions for compliance with the standards for administrative regulations in Government Code section 11349.1.

Generally, to satisfy the standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL 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 regulations that implement, interpret, and make specific statutory law, and to ensure that required procedures are followed in order to provide a meaningful opportunity for public comment on regulations before they become effective.

A. Clarity.

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. Government Code section 11340(b). Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Section 11349(c) of the Government Code defines "clarity" to mean "...written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them." Moreover, it shall be presumed that a regulation does not comply with the clarity standard if any of the following conditions exist: the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; the regulation uses terms which do not have meanings generally familiar to those directly affected by the regulation, and those terms are not defined in the regulation or the governing statute; or the regulation uses language incorrectly. Title 1 California Code of Regulations (CCR) section 16(a). As a result of its review, OAL found that a number of proposed provisions failed to meet the clarity standards of Government Code section 11349(c) and/or section 16(a) of Title 1 of the CCR.

(1) Proposed section 2419.4(b)(1)(F).

This proposed subparagraph requires manufacturers to submit an OHRV certification application to the Board's Emissions Compliance, Automotive Regulations and Science Division (ECARSD) Chief electronically as specified by the ECARSD Chief. It is unclear

what this application must consist of and how it must be submitted electronically. The provision is not, therefore, easily understood by those persons directly affected by it.

(2) Proposed sections 2419.1(i) and 2419.2(a).

These proposed subdivisions are unclear in combination with one another because they contain lists of exclusions to manufacturer warranty coverage of emission control system parts, but the lists differ. Section 2419.1(i) authorizes warranty coverage exclusion for abuse, neglect, or improper maintenance of warranted parts. Section 2419.2(a), which specifies the contents of the manufacturer's Owner's Warranty Responsibilities statement, adds a fourth exclusion for unapproved modifications. It is unclear, because of the differing lists of exclusions, whether manufacturers are authorized to exclude parts from warranty coverage because of unapproved modifications of the emission control system. The provisions are not, therefore, easily understood by those persons directly affected by them and could be interpreted to have more than one meaning.

(3) Proposed section 2419.4(b)(1).

This subdivision lists things a manufacturer must do to obtain an Executive Order of Certification for OHRVs and consists of subparagraphs (A) through (H). The subdivision is unclear for several reasons.

First, because of the placement of the word "or" after subparagraph (A), the subdivision could be interpreted as requiring a manufacturer to satisfy either (A) or subparagraphs (B) through (H), or it could be interpreted, which may have been the Board's intent, as requiring a manufacturer to satisfy either subparagraph (A) or (B) and subparagraphs (C) through (H).

Second, subdivision (b)(1) is purportedly a list of things which a manufacturer must do to obtain an Executive Order of Certification for OHRVs, but items (G) and (H) are things which the Executive Officer must do. Subparagraphs (G) and (H) are, therefore, misplaced within subdivision (b)(1).

Subdivision (b)(1) is not, therefore, easily understood by those persons directly affected by it and could be interpreted to have more than one meaning.

(4) Proposed section 2419.4(d)(1)(A) and (C).

Proposed section 2419.4(d)(1)(A) lists the records a manufacturer must establish, maintain, and retain for each evaporative family. Proposed subdivision (d)(1) contains a broader collection of maintenance-of-records provisions than just the list in subparagraph (A) of which records must be retained. Subdivision (d)(1) includes provisions defining the term "actual sales," provisions regarding how long records must be retained, and provisions specifying remedies which the Executive Officer may pursue

for a manufacturer's failure to retain records as required. However, subdivision (d)(1) also contains subparagraph (C), which states: "Records appropriate to establish the quantities of OHRVs that constitute actual sales for each evaporative family." It is unclear if subparagraph (C) is a statement of another type of record that manufacturers must retain or of records that the Board will establish and retain. Because it can be reasonably assumed by persons affected by these regulations that subdivision (d)(1)(A) contains the entire list of types of records which manufacturers must retain, subparagraph (C), or the placement of the contents of subparagraph (C) within subdivision (d)(1) as opposed to within subparagraph (d)(1)(A), is not easily understood by affected entities and could be interpreted to have more than one meaning.

(5) Proposed section 2419.4(d)(1)(E).

Proposed section 2419.4(d)(1)(E) specifies that the Executive Officer may suspend or revoke an Executive Order of Certification if a manufacturer fails to retain records as required by this section and goes on to state that no new Executive Orders of Certification will be issued to the manufacturer until the requested records are made available and/or a plan that describes the records to be retained as required by this section is approved by the Executive Officer. It is unclear to persons affected by these regulations and who may be required to submit plans pursuant to this subparagraph what criteria must be met for approval of these plans by the Executive Officer. The subparagraph is not, therefore, easily understood by affected entities.

(6) Proposed section 2419.4(g)(6).

Proposed section 2419.4(g)(6) specifies that if an Executive Order of Certification has been revoked and a manufacturer implements changes to remedy a nonconformity, the manufacturer must have five OHRVs from the modified evaporative family tested under TP-933, unless such testing is waived by the Executive Officer. It is unclear to a person affected by these regulations under what circumstances further testing of a modified evaporative family might be waived by the Executive Officer. The subdivision is not, therefore, easily understood by affected entities.

(7) Proposed section 2419.4(b)(2)(F)2.

Proposed section 2419.4(b)(2)(F)2. provides as follows:

Component Executive Orders can be obtained by following the procedures outlined in Cal. Code Regs., tit. 13, Sec. 2767.1, replacing all references to 'section 2754' with 'Cal. Code Regs., tit. 13, Sec. 2418(b),' incorporated by reference herein.

Because of the way the paragraph is written, it could be interpreted as incorporating by reference herein section 2418(b) or, possibly, section 2767.1. The subparagraph is not,

therefore, easily understood by affected entities. It is unlikely that the Board is incorporating section 2418(b) into section 2419.2(b)(2)(F)2. However, incorporation by reference of section 2767.1 into section 2419.4(b)(2)(F)2. is unnecessary in this context, because section 2767.1 is simply cross referenced as containing the process people may follow to obtain Component Executive Orders.

(8) Proposed section 2419.3.

Proposed section 2419.3 provides as follows:

Commencing with model year 2018, an OHRV is subject to Appendix A to Article 2.1, Cal. Code Regs., tit. 13, Sections 2111-2149, including the incorporated Appendix A, "California In-Use Vehicle Emission-Related Recall Procedures, Enforcement Test Procedures, and Failure Reporting Procedures for 1982 and Subsequent Model-Year Passenger Cars, Light-Duty Trucks, Medium-Duty Vehicles, Heavy Duty Vehicles and Engines, and Motorcycles."

The section is unclear for several reasons.

First, it is written in such a way as to suggest that, beginning in 2018, OHRVs are subject to Appendix A to Article 2.1... including incorporated Appendix A. Regulated entities could reasonably understand this provision to mean that their OHRVs are subject to an Appendix A which is incorporated within Appendix A to Article 2.1. However, there is only one Appendix A to Article 2.1 in the CCR.

Second, the section suggests that sections 2111 through 2149 are within Article 2.1, but they are not.

Third, the section sets out only a portion of the title of Appendix A to Article 2.1, i.e., "California In-Use Vehicle Emission-Related Recall Procedures, Enforcement Test Procedures, and Failure Reporting Procedures for 1982 and Subsequent Model-Year Passenger Cars, Light-Duty Trucks, Medium-Duty Vehicles, Heavy Duty Vehicles and Engines, and Motorcycles." However, the full title of Appendix A is: "California In-Use Vehicle Emission-Related Recall Procedures, Enforcement Test Procedures, and Failure Reporting Procedures for 1982 and Subsequent Model-Year Passenger Cars, Light-Duty Trucks, Medium-Duty Vehicles, Heavy Duty Vehicles and Engines, and Motorcycles, 1997 and Subsequent Model-Year Off-Road Motorcycles and All-Terrain Vehicles, 2000 and Subsequent Model-Year Off-Road Compression-Ignition Engines, and 2008 and Subsequent Model-Year Spark-Ignition Sterndrive/Inboard Marine Engines." The listing of only a portion of the title of Appendix A could be interpreted as suggesting that OHRVs are not subject to all of Appendix A.

For these reasons, section 2419.3 is not easily understood by affected entities and could be interpreted to have more than one meaning.

(9) Proposed section 2419.4(g)(1).

Proposed section 2419.4(g)(1) provides as follows: "The Executive Officer shall not revoke or suspend the Executive Order of Certification, [sic] without considering any information provided by the OHRV manufacturer of such certification pursuant to subdivision (b)." By the way it is written, the subdivision suggests that it is manufacturers who create these certifications. The subdivision is not, therefore, easily understood by affected entities.

B. Miscellaneous.

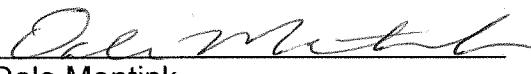
The OAL also notes that the Board must reexamine its listings of Authority and Reference citations after each of these proposed regulations and consider the addition of Health and Safety Code section 43824 as an Authority and Reference citation for some or all of these regulations and must eliminate Health and Safety Code sections 43204 and 44004 through 44017, as well as Title 13 CCR section 2474, from any Reference citations.

The OAL further notes that the proposed regulations and incorporated Test Procedure contain numerous punctuation and grammatical errors, as well as one cross-reference error in the incorporated test procedure, which have been separately listed for the Board by the OAL.

CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced rulemaking action. All items listed above and separately shall be corrected in any resubmission of this rulemaking action to OAL for review. Pursuant to Government Code section 11349.4(a), the Board may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval. The Board shall make all substantial regulatory text changes, which are sufficiently related to the original text, available for at least 15 days for public comment pursuant to Government Code section 11346.8. The OAL reserves the right to review the Board's resubmitted regulations and rulemaking file for compliance with all substantive and procedural requirements of the APA.

Dated: July 28, 2014


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