STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

In re:	)	
AIR RESOURCES BOARD	)	DECISION OF DISAPPROVAL OF REGULATORY ACTION
REGULATORY ACTION:	)	(Gov. Code, sec. 11349.3)
Title 13, California Code of Regulations ADOPT SECTIONS: 1956.1, 1956.2, 1956.3, 1956.4, 1956.8, 1965	)	OAL File No. 00-1208-03 S

DECISION SUMMARY

The regulatory action deals with public transit bus fleets and emission standards for new urban buses. The regulations incorporate by reference "California Certification Procedures for PM Retrofit Devices For On-Road Heavy-Duty Diesel Engines" (adopted November 22, 2000), "California Exhaust Emission Standards and Test Procedures for 1985 and Subsequent Model Heavy-Duty Diesel Engines and Vehicles" (adopted April 8, 1985 and last amended November 22, 2000) and "California Motor Vehicle Emission Control and Smog Index Label Specifications" (adopted March 1, 1978 and last amended November 22, 2000). Please Note: On January 23, 2001 the Office of Administrative Law ("OAL") notified the Air Resources Board ("Board") that OAL approved Title 13, California Code of Regulations ("CCR"), sections 1956.1, 1956.2, 1956.3, 1956.4, 1956.8, and 1965 as meeting all applicable legal requirements except for subsection (c)(8) of section 1956.2 and the cross references to subsection (c)(8) contained in subsection (a)(11) of section 1956.1, subsection (c)(5) of section 1956.2 and subsection (3)(a) ix of the incorporated by reference "California Motor Vehicle Emission Control and Smog Index Label Specifications" (adopted March 1, 1978 and last amended November 22, 2000) which were disapproved for incorrect procedure.

INCORRECT PROCEDURE

OAL must review rulemaking records submitted to it in order to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code, sec. 11349.1, subd. (a).) Government Code section 11346.8, subdivision (c) mandates that:

"No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to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 the 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.)

Subsection (c)(5) of section 1956.2 which was approved by OAL on January 23, 2001 requires that:

"Transit agencies on the alternative-fuel path shall not purchase any diesel-fueled, dual-fuel, or bi-fuel buses with 2004 – 2006 model year engines certified to emissions levels in excess of those specified in paragraph (a)(11) of section 1956.1, Title 13, CCR, except as provided in paragraph (c)(8) of this section." (Emphasis added.)

Subsection (a)(11) of section 1956.1 which was approved by OAL on January 23, 2001 mandates that:

"(a) The exhaust emissions from new 1985 and subsequent model heavy-duty diesel cycle urban bus engines and vehicles fueled by methanol, natural gas, liquefied petroleum gas, and petroleum shall not exceed the following, by model year . . .

(11) 2004-2006 - For diesel-fueled, or dual-fuel, and bi-fuel urban bus engines, the standards are 0.5 g/bhp-hr NOx, 0.01 g/bhp-hr PM, 0.05 g/bhp-hr NMHC, 5.0 g/bhp-hr CO, and 0.01 g/bhp-hr formaldehyde. As an option, manufacturers may choose to meet NOx and PM standards with a base engine that is certified to the standards in paragraph (10) above, equipped with an aftertreatment system that reduces NOx to 0.5 g/bhp-hr and PM to 0.01 g/bhp-hr standards. The NMHC, CO, and formaldehyde standard in this paragraph (11) shall still apply. Manufacturers shall be responsible for full certification, durability, testing, and warranty and other requirements for the base engine. For the aftertreatment system, manufacturers shall not be subject to the certification durability requirements, or in-use recall and enforcement provisions, but are subject to warranty provisions for functionality.

In addition, engine manufacturers may sell diesel-fueled, dual-fuel, or bi-fuel engines to any transit fleet exempted by the Executive Officer under paragraphs (c)(8) and (d)(7) of section 1956.2 Title 13, CCR, from the requirements of paragraphs (c)(5) and (d)(4) of section 1956.2, certified to the standards in either

> paragraphs (9) or (10) above, provided that engines certified to the standards in paragraph (10) must be certified to a 0.01 g/bhp-hr PM standard." (Emphasis added.)

Please note that the 2 phrases underlined in section 1956.2, subsection (c)(5) and section 1956.1, subsection (a)(11) quoted above were disapproved by OAL because they cross reference section 1956.2, subsection (c)(8) which was disapproved. OAL also disapproved for the same reason the following cross reference contained in subsection (3)(a) ix of the incorporated by reference "California Motor Vehicle Emission Control and Smog Index Label Specifications": ". . . any transit agency exempted under paragraphs (c)(8) and (d)(7), section 1956.2 . . ." The approved portion of text reads ". . . exempted under paragraph (d)(7) . . ."

There was a 15 day public availability period of changed text from August 16, 2000 through August 31, 2000. The following language was not part of the 15 day availability but was submitted as part of the final adopted text. Section 1956.2, subsection (c)(8) declares that:

> "The Executive Officer may exempt transit agencies on the alternative-fuel path from the requirements of paragraph (c)(5) of section 1956.2, Title 13, CCR, provided that:
>
> (A) A transit agency applies to the Executive Officer for such exemption by June 30, 2001;
>
> (B) A transit agency demonstrates to the Executive Officer that it will achieve Nox emissions benefits through 2015 greater than what would have been achieved through compliance with paragraph (c)(5); and
>
> (C) The Executive Officer finds that transit agencies, after consulting with the Engine Manufacturers Association, have demonstrated, or are contractually committed to demonstrate, advanced NOx aftertreatment technology."

Section 42 of Title 1 of the CCR states that:

> "Changes to the original text of a regulation shall be deemed to be 'sufficiently related,' as that term is used in Government Code Section 11346.8, if a reasonable member of the directly affected public could have determined from the notice that these changes to the regulation could have resulted."

Because this language is sufficiently related to the Notice of Proposed Action that was published on December 10, 1999 a 15 day rather than a 45 day public availability period is needed in order for the Board to adopt it. (See section 42 of Title 1 of the CCR.)

Only if the proposed sufficiently related text was a nonsubstantial change could it be adopted without a 15 day public availability period. Section 40 of Title 1 of the CCR specifies the following criteria:

> "Changes to the original text of a regulation shall be deemed to be "nonsubstantial," as that term is used in Government Code Section 11346.8, if they clarify without materially altering the requirements, rights, responsibilities, conditions, or prescriptions contained in the original text." (Emphasis added.)

Proposed subsection (c)(8) creates a new right for transit agencies on the alternative-fueled path to apply for an exemption and it places conditions on the transit agency that are prerequisites (i.e., criteria) to receiving approval from the Executive Officer. Therefore it does not meet the "nonsubstantial" standard of Section 40 and a 15 day public availability period must be held prior to adopting this provision.

CONCLUSION

For the reasons set forth above, OAL has disapproved subsection (c)(8) of section 1956.2 of Title13 of the California Code of Regulations and the cross reference to subsection (c)(8) specified in this disapproval. If you have any questions, please contact me at (916) 323-6809.

January 25, 2001

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