

**State of California
Office of Administrative Law**

In re:
Department of Food and Agriculture

Regulatory Action:

Title 04, California Code of Regulations

Adopt sections: 4002.10, 4206, 4207

Amend sections: 4001, 4200, 4201

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2017-0623-01

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

On June 23, 2017, the Department of Food and Agriculture (Department) submitted to the Office of Administrative Law (OAL) a proposed regulatory action to adopt and amend regulations in title 4 of the California Code of Regulations (CCR) pertaining to the retail sale of natural gas motor vehicle fuels in California. On August 7, 2017, OAL notified the Department of the disapproval of this regulatory action.

DECISION

The reasons for the disapproval were because the Department did not meet the necessity, clarity, and consistency standards set forth in Government Code section 11349.1 and the procedural requirements of the California Administrative Procedure Act (chap. 3.5 (commencing with sec. 11340) of tit. 2, div. 3, of the Gov. Code; hereinafter APA). This Decision of Disapproval of Regulatory Action details the reasons for OAL's disapproval of the Department's regulatory action. The Department will have 120 days from receipt of this written decision to remedy the issues set forth herein and resubmit this regulatory action to OAL. OAL reserves the right to conduct a complete review for compliance with the procedural and substantive requirements of the APA upon resubmission.

DISCUSSION

These regulations adopted by the Department must be adopted pursuant to the rulemaking provisions of the APA. Pursuant to Government Code section 11346, 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 APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA. Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed by OAL for

compliance with the substantive standards and procedural requirements of the APA, in accordance with Government Code section 11349.1.

I. NECESSITY.

OAL must review regulations for compliance with the “necessity” standard of Government Code section 11349.1. Government Code section 11349, subdivision (a) defines “necessity” as follows:

(a) “Necessity” means 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 purposes 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 title 1 of the CCR provides:

(b) 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 regulation 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 need for a regulation, the APA requires a rulemaking agency to describe the need for the regulation and identify documents relied upon in proposing the regulation in the initial statement of reasons (ISR), pursuant to Government Code section 11346.2, subdivision (b). In this regulatory action, the Department did not provide sufficient necessity for subdivision (a) of section 4206, either in the ISRs,¹ the final statement of reasons, or anywhere else in the rulemaking file. The Department must resolve the necessity issues with subdivision (a) of section 4206 by adding a supplement to the ISR to the rulemaking file and making it available for public comment for a minimum 15-day comment period, pursuant to Government Code section 11347.1, before resubmittal to OAL.

¹ The Department had two ISRs in this regulatory action, the original ISR that was available upon request as of the date of publishing the 45-day notice, pursuant to Government Code sections 11346.2, subdivision (b) and 11346.5, subdivision (b), and a revised ISR that was added to the rulemaking file pursuant to Government Code section 11347.1. The two documents are referred to as the “original ISR” and the “revised ISR” in this disapproval decision, as needed, or, alternatively, as the “ISRs” when there is no material difference between the two documents.

Section 4206, subdivision (a) provides as follows:

(a) Definitions Used in This Section

(1) “Methane Number” means a rating expressing the resistance to auto ignition (knock) of a gaseous fuel. The Methane Number of a gaseous fuel is determined by its composition, including inert components.

(2) “MWM Method” means the method of calculation of the Methane Number of a natural gas fuel from its composition. The MWM Method algorithm is presented in the latest version of the European Committee for Standardization (CEN) standard EN16726 “Gas infrastructure - Quality of gas - Group H”.^[2] An MWM Method calculator is available for download at no cost at:
http://euromot.org/media_and_events/publications/mn

The original ISR merely explains that section 4206 “is necessary for the Department to be clear and consistent with AB 1907 that amends the units of measurement for the sale and dispenser labeling of natural gas as a motor vehicle fuel.” The revised ISR provides a little more information in the necessity statements. The necessity statements for section 4206 in the revised ISR include the following:

New § 4206. Labeling and Price Sign Advertising Requirements for Compressed Natural Gas and Liquefied Natural Gas. The Department proposes to add this section to: 1) require the display on natural gas fuel dispensers of the minimum methane number of the fuel offered for sale; 2) require the display on natural gas fuel dispensers of the minimum percent methane of the fuel offered for sale; and 3) to ensure that labeling of natural gas fuel dispensers conforms with the language required by AB 1907.

[Revised ISR, pg. 20.]

None of these statements provide necessity for subdivision (a) of section 4206. The only other place in the ISRs where section 4206 is discussed is in a discussion of alternatives to the sections, where the following relevant statements are made about section 4206:

Alternatives Considered for Proposed Addition of CCR Title 4, Division 9, Chapter 7, § 4206 Labeling and Price Sign Advertising Requirements for Compressed Natural Gas and Liquefied Natural Gas.

Alternative 1 - Do nothing.

If the Department chooses to do nothing, there would be no specific or enforceable requirements for the dispenser labeling and price sign advertising of natural gas motor vehicle fuels. **The Department believes that regulations for the retail sale of natural gas fuels should be consistent with those that apply**

² Hereinafter referred to as the “European Committee for Standardization document.”

to other motor vehicle fuels sold in California. These regulations ensure that retailers provide accurate information to consumers, give buyers a basis for making value comparisons for their purchases, ensure minimum quality and performance specifications, and provide a basis for fair competition among suppliers and retailers. ...

For these reasons, the Department cannot accept the “Do nothing” alternative.

Alternative 2 - Add § 4206, Labeling and Price Sign Advertising Requirements for Compressed Natural Gas and Liquefied Natural Gas without the requirements as stated in § 4206 subsections (c) and (d) for labeling dispensers with the minimum methane number and minimum percent methane of the fuel offered for sale.

The Department has determined that the minimum methane number and minimum percent methane are key qualities of natural gas fuels, comparable to the specification of an octane rating for gasoline fuel. The posting of these values on fuel dispensers would provide transparency in the sale of natural gas fuels and give buyers a basis for making value comparisons for their purchases without imposing an undue burden on retailers.

[Revised ISR, pg. 24; bold emphasis added.]

This emphasized language in the above-quoted alternatives discussion for section 4206 does not provide necessity for subdivision (a)(2) of the section. Specifically, there is no rationale for why the provision in subdivision (a)(2) that references the MWM Method algorithm presented in the European Committee for Standardization document is needed to effectuate the purpose of the statute.

The Department must provide necessity for subdivision (a)(2) of section 4206 in a supplement to the ISR and add the document to the rulemaking file in a notice and comment period for a minimum of 15 days pursuant to Government Code section 11347.1

II. CLARITY.

OAL must review regulations for compliance with the “clarity” standard of the APA, as required by Government Code section 11349.1. Government Code section 11349(c) defines “clarity” as meaning “...written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The clarity standard is further defined in CCR, title 1, section 16, which provides the following:

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:

...

(2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; ...

...

(b) Persons shall be presumed to be “directly affected” if they:

(1) are legally required to comply with the regulation; or

(2) are legally required to enforce the regulation; or

(3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or

(4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

A number of proposed regulatory provisions in sections 4206 and 4207 fail to comply with the clarity standard. These regulatory provisions are discussed below in the order in which they appear in the regulation text. All clarity concerns must be addressed by the Department prior to resubmission of this regulatory action to OAL.

A. Section 4206, Subdivisions (a) and (b).

Subdivisions (a) and (b) of section 4206 provide the following:

(a) Definitions Used in This Section

(1) “Methane Number” means a rating expressing the resistance to auto ignition (knock) of a gaseous fuel. The Methane Number of a gaseous fuel is determined by its composition, including inert components.

(2) “MWM Method” means the method of calculation of the Methane Number of a natural gas fuel from its composition. The MWM Method algorithm is presented in the latest version of the European Committee for Standardization (CEN) standard EN16726 “Gas infrastructure - Quality of gas - Group H”. An MWM Method calculator is available for download at no cost at:
http://euromot.org/media_and_events/publications/mn

(b) Beginning October 1, 2017, all dispensers of natural gas motor vehicle fuel shall display a label similar to the example below. The label shall comply with the following requirements:

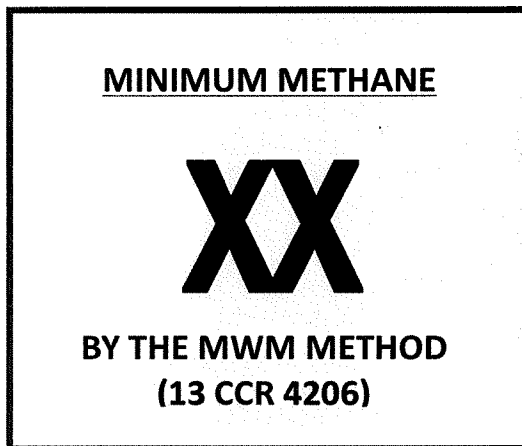
(1) The label shall be conspicuously displayed on each customer side of the dispensing device.

(2) The label shall state: “MINIMUM METHANE NUMBER XX by the MWM Method (13 CCR 4206)” where XX is the MWM methane number of the

dispensed natural gas fuel expressed in a number rounded down to a whole number.

(3) The words “MINIMUM METHANE NUMBER” AND “BY THE MWM METHOD (13 CCR 4206)” shall be in Helvetica Black or equivalent font type, in all capital letters, centered, and not less than 3/16 inch (0.48 cm) in height.

(4) The MINIMUM METHANE NUMBER “XX” shall be displayed in Helvetica Black or equivalent font type, centered, and not less than 1 inch (2.54cm) in height.



....

Subdivisions (a) and (b) of section 4206 are unclear for the following reasons:

1. They do not specify who is required to perform the calculation for the methane number in subdivision (a).
2. They do not specify how often the calculation for the methane number needs to be done. The ISRs indicated that the composition of natural gas from suppliers varies over time, which likely means the methane number fluctuates and needs to be re-calculated periodically to be accurate.
3. They do not specify who is required to place labels on all dispensers of natural gas motor vehicle fuel in subdivision (b).
4. They do not specify what the *minimum* methane number is or why it is required after the methane number is calculated pursuant to subdivision (a).
5. The citation to “13 CCR 4206” is incorrect in three places, two in the text of subdivisions (b)(2) and (b)(3) and once in the example label. There is no section 4206 in title 13 of the CCR. As written, it would be unclear where an affected person is supposed to locate the “MWM Method” based on the label specifications.
6. The word “NUMBER” after the words “MINIMUM METHANE” is missing from the example label in the final text. Subdivision (b) specifies that the label be similar to the example, but also specifies that the label state “MINIMUM METHANE NUMBER”, so it is unclear from the example label what is required. Moreover, “MINIMUM METHANE NUMBER” in the example label was always part of the proposed text. The

word “NUMBER” was never illustrated as being removed in any of the versions of modified text.

B. Section 4207.

Section 4207 provides as follows:

The labeling of all natural gas dispensers shall meet the requirements of the following rules of the Federal Trade Commission (FTC) 16 CFR for the natural gas fuel rating:

(a) FTC 16 CFR Part 306 “Automotive Fuel Ratings, Certification and Posting” Rule for liquid automotive fuels and certain alternative liquid automotive fuels.

(b) FTC 16 CFR Part 309 for non-liquid alternative vehicle fuels, and for certain vehicles powered in whole or in part by alternative fuels.

The ISRs do not provide any discussion of section 4207 in the section-by-section necessity statements for the sections subject to this regulatory action. The only place in the ISRs where section 4207 is mentioned is in a discussion of alternatives to the sections, where the following statement is made about section 4207:

Alternatives Considered for Proposed Addition of CCR Title 4, Division 9, Chapter 7, § 4207, Additional Posting and Labeling Requirements for Compressed Natural Gas and Liquefied Natural Gas.

The Department has determined that there is not a reasonable alternative to the proposed additional language for § 4207. All fuels must comply with the Federal Trade Commission (FTC) labeling requirements. FTC regulations 16 CFR 306 and 309 require retailers to post the minimum percentage of the primary component of alternative motor vehicle fuels. **The proposed requirement would benefit fuel buyers by giving California weights and measures officials’ clear authority to enforce the FTC regulations as they apply to natural gas fuels. As part of its research to write the proposed regulations, the Department discovered that some natural gas fuel retailers are not complying with the FTC posting requirements.**

[Revised ISR, pg. 24; bold emphasis added.]

The emphasized language in the above-quoted alternatives discussion for section 4207 states that the language of section 4207 gives officials “clear authority to enforce the FTC regulations as they apply to natural gas fuels.” (Emphasis added.) However, nothing in the text of section 4207 says anything about providing the Department with authority to enforce label requirements cited in the Code of Federal Regulations. The language of the regulation conflicts with the Department’s description of the effect of the regulation in the record, resulting in a clarity problem pursuant to CCR, title 1, section 16, subdivision (a)(2).

For the reasons provided above, subdivisions (a) and (b) of section 4206 would not be easily understood by those persons directly affected by the regulation, and section 4207 violates CCR, title 1, section 16, subdivision (a)(2).

III. CONSISTENCY.

OAL is mandated by Government Code section 11349.1(a)(4) to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “consistency” standard. Government Code section 11349(d) defines “consistency” to mean “being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” As discussed below, subdivisions (b)(3), (c)(2), and (d)(2) of section 4206 fail to comply with the consistency standard of the APA.

Subdivision (b)(3) of section 4206 specifies the height of the font type for the labels required by the subdivision. However, these specifications are inconsistent with the lettering height and width specifications for these labels provided in Business and Professions Code section 13480, subdivision (e). Subdivision (b)(3) of section 4206 provides the following labeling requirements for the minimum methane number:

(3) The words “MINIMUM METHANE NUMBER” AND “BY THE MWM METHOD (13 CCR 4206)” shall be in Helvetica Black or equivalent font type, in all capital letters, centered, and not less than 3/16 inch (0.48 cm) in height.

[Emphasis added.]

Business and Professions Code section 13480, subdivision (e) provides:

(e) All signs or labels required by this section for retail motor vehicle fuel dispensers and containers of more than one gallon capacity shall be in letters and numerals not less than one-half inch (12.70 mm) in height.

[Emphasis added.]

The lettering specification in subdivision (b)(3) of section 4206 is inconsistent with the lettering specification in Business and Professions Code section 13480, subdivision (e). The Department must revise the “not less than 3/16 inch (0.48 cm) in height” to “not less than one-half inch (12.70 mm) in height” to be consistent with Business and Professions Code section 13480, subdivision (e).

Subdivisions (c)(2) and (d)(2) of section 4206 specify the height of the font type for the labels required by each subdivision. However, these specifications are inconsistent with the lettering height and width specifications for these labels provided in Business and Professions Code section 13473. For example, section 4206(c)(2) states the following labeling requirement for dispensers of compressed natural gas:

(2) The statement “1 Gasoline Gallon Equivalent (GGE) is equal to 5.66 lb of Natural Gas” shall be in letters of Helvetica black or equivalent font type, centered, in all capital letters, no less than 1/4 inch in height, and on a contrasting background.

[Emphasis added.]

Business and Professions Code section 13473 states:

Unless otherwise provided, all letters, figures, or numerals on each sign required by this article, however affixed, marked, imprinted, placed, or embossed, shall be at least three-fourths of an inch in height and all lines or marks used in the making or forming of all the letters, figures, or numerals which are a part of the sign shall be at least one-eighth of an inch in width.

[Emphasis added.]

The label required in section 4206(c)(2) is a label that is “required by this article” under Business and Professions Code section 13473 because of the requirement in Business and Professions Code section 13470(b)(1) to display and label the “Gasoline gallon equivalent” on a compressed natural gas dispensing apparatus. Business and Professions Code section 13470 is under the same article as Business and Professions Code section 13473. Accordingly, the specifications of the label in Business and Professions Code section 13473 apply to the label required by section 4206(c)(2), and the lettering height and width specifications in Business and Professions Code section 13473 need to be followed instead of the “no less than 1/4 inch in height” specification for the regulation to satisfy the consistency standard. Similar reasoning applies for the lettering height specification in section 4206(d)(2), although this specification is subject to the lettering height and width specifications in Business and Professions Code section 13473 because of the labeling requirement provided in Business and Professions Code section 13470(b)(2) to display and label the “Diesel gallon equivalent” on a liquefied natural gas dispensing apparatus. The Department must modify the lettering specifications in subdivisions (c)(2) and (d)(2) of section 4206 so they are consistent with the lettering height and width specifications in Business and Professions Code section 13473.

V. FAILURE TO COMPLY WITH APA PROCEDURES.

A. Incorporation by Reference.

In its December 1, 2016 version of modified text, the Department completely replaced section 4206(a) with the following language:

(a) Definitions Used in This Section

(1) “Methane Number” means a rating expressing the resistance to auto ignition (knock) of a gaseous fuel. The Methane Number of a gaseous fuel is determined by its composition, including inert components.

(2) “MWM Method” means the method of calculation of the Methane Number of a natural gas fuel from its composition. The MWM Method algorithm is presented in the latest version of the European Committee for Standardization (CEN) standard EN16726 “Gas infrastructure - Quality of gas - Group H”.

[Emphasis added.]

In its March 6, 2017 version of modified text, the Department added the following language to subdivision (a)(2), after the language that references the European Committee for Standardization document:

(2) “MWM Method” means the method of calculation of the Methane Number of a natural gas fuel from its composition. The MWM Method algorithm is presented in the latest version of the European Committee for Standardization (CEN) standard EN16726 “Gas infrastructure - Quality of gas - Group H”. An MWM Method calculator is available for download at no cost at: http://euromot.org/media_and_events/publications/mn

[Emphasized text denotes added language.]

The above-quoted language for section 4206(a)(2) is what ended up in the final text for OAL review.

The language in subdivision (a)(2) that references the “latest version of the European Committee for Standardization (CEN) standard EN16726 ‘Gas infrastructure - Quality of gas - Group H’” is an incorporation by reference of a document that is subject to the requirements of CCR title 1, section 20. Subdivision (c) of section 20 provides the following:

(c) An agency may “incorporate by reference” only if the following conditions are met:

(1) The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations.

(2) The agency demonstrates in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained.

(3) The informative digest in the notice of proposed action clearly identifies the document to be incorporated by title and date of publication or issuance. If, in accordance with Government Code section 11346.8(c), the agency changes the

originally proposed regulatory action or informative digest to include the incorporation of a document by reference, the document shall be clearly identified by title and date of publication or issuance in the notice required by section 44 of these regulations.

(4) The regulation text states that the document is incorporated by reference and identifies the document by title and date of publication or issuance. ...

....

[Emphasis added.]

The Department failed to meet the section 20, subdivision (c) requirements for incorporation by reference of the European Committee for Standardization document referenced in section 4206(a)(2). The Department must do the following to satisfy the incorporation by reference requirements:

1. In a notice of 15-day modified text, the Department must
 - a. Clearly identify the European Committee for Standardization document by title and date of publication or issuance to satisfy section 20(c)(3), and
 - b. Revise the reference to the European Committee for Standardization document by deleting the “latest version of the” language and identifying the document by its date of publication or issuance to satisfy section 20(c)(4). The modified text must also state that the document is incorporated by reference.
2. In a revised final statement of reasons (FSR), the Department must add the two statements required by section 20(c)(1) and (2).

The language in subdivision (a)(2) of section 4206 that references “An MWM Method calculator is available for download at no cost at: http://euromot.org/media_and_events/publications/mn” may also be an incorporation by reference of a document subject to the requirements of CCR, title 1, section 20; however, it is difficult to determine this since the Department did not provide any information about this language in the rulemaking file. OAL reserves the right to review this language for possible compliance with section 20 upon resubmittal of this regulatory action.

B. Final Statement of Reasons.

The Department’s FSR must be revised to comply with the following APA requirements:

1. Alternatives Statement. Government Code section 11346.9, subdivision (a)(4) requires a statement regarding alternatives to the regulatory action, as follows:

Every agency subject to this chapter shall do the following:

- (a) Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following:

...

(4) A determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. ...

[Emphasis added.]

In its FSR, the Department included an alternatives statement similar to what is required by Government Code section 11346.9, subdivision (a)(4), with the following exceptions:

1. The statement omitted the alternative that “would be as effective and less burdensome to affected private persons than the adopted regulation.”
2. The statement did not include any supporting information.

The Department must add these statements to the FSR prior to resubmission of this regulatory action.

2. Statement Related to Incorporation by Reference of Documents. As discussed above, the Department must include the two statements required by CCR, title 1, section 20(c)(1) and (2) in its FSR for the incorporation by reference of the European Committee for Standardization document in section 4206, subdivision (a)(2).

3. Summary and Responses to Comments. The Department prepared summaries and responses to comments related to a public hearing and related to five separate notices for adding documents to the rulemaking file, but placed these summaries and responses to comments under tabs in the rulemaking file related to the public hearing and the notices for adding documents to the rulemaking file. Government Code section 11346.9, subdivision (a)(3) requires all summaries and responses to comments to be in the FSR, as follows:

Every agency subject to this chapter shall do the following:

(a) Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following:

...

(3) 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 reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency’s proposed action or to the procedures followed by the agency in proposing or adopting the action. ...

[Emphasis added.]

Since the Department placed the above-referenced summaries and responses to comments in other parts of the rulemaking file other than the FSR, the Department must, at a minimum, add language to the FSR that identifies the dates of the comment periods in which comments were received, indicate the tab under which the related summaries and responses to comments are located, and state that these summaries and responses to comments are incorporated by reference into the FSR.

C. Modifications to Proposed Text were not Clearly Illustrated.

The Department modified the originally proposed text six times pursuant to Government Code section 11348.6, subdivision (c). For each of the six versions of modified text, the Department only illustrated changes to the previous version of modified text, not to the originally proposed text as required by CCR, title 1, section 46. Section 46 provides:

(a) Changes to regulations in accordance with Government Code Section 11346.8(c) shall be made using a uniform method and shall illustrate accurately all changes to the original text.

(b) Methods for illustrating such changes may include but are not limited to the following:

(1) annotations which specify the added or deleted language; or

(2) footnotes which specify the added or deleted language; or

(3) double strikeout and double underline; or

(4) for changes to newly proposed text, strikeout and double underline or strikeout and italics.

(c) A written description of the method used shall appear as the first page of the changed text.

[Emphasis added.]

But even with the approach used by the Department, some changes to the previous versions of modified text were illustrated and some were not. Those that were not illustrated appeared in the final text submitted to OAL for review. This made it extremely confusing to follow the modifications the Department made to each section.

For example, in the originally proposed text of section 4001, the Department added the following exceptions to the incorporated by reference National Institute of Standards and Technology Handbook 44:

Appendix D – Definitions: gasoline gallon equivalent (GGE).
Appendix D – Definitions: gasoline liter equivalent (GLE).

But, in the final text submitted to OAL, these two exceptions were stated as follows:

Appendix D – Definitions: Diesel Gallon Equivalent (DGE).
Appendix D – Definitions: Gasoline Gallon Equivalent (GGE).

While the exception of “Appendix D – Definitions: Gasoline Gallon Equivalent (GGE)” was essentially the same as the originally proposed text, the exception for “Appendix D – Definitions: gasoline liter equivalent (GLE)” was removed and replaced with the exception for “Appendix D – Definitions: Diesel Gallon Equivalent (DGE).” None of the versions of modified text in the rulemaking file show this change. The modified text noticed on March 6, 2016 shows a slight modification to the exception “Appendix D – Definitions: Diesel Gallon Equivalent (DGE),” but this exception was never added by proper illustration to section 4001, and the exception for “Appendix D – Definitions: gasoline liter equivalent (GLE)” was never deleted with proper illustration from the originally proposed text.

Additionally, in the modified text noticed on May 2, 2017, the following three exceptions were added in section 4001:

Section 3.37. S.5.3. Marking of Equivalent Conversion Factor for Liquefied Natural Gas.

Section 3.37. UR.3.1.1. Marking of Equivalent Conversion Factor for Compressed Natural Gas.

Section 3.37. UR.3.1.2. Marking of Equivalent Conversion Factor for Liquefied Natural Gas.

These three added exceptions in section 4001 were removed from the final text without being noticed to the public or explained in the rulemaking file.

Similarly, three additional exceptions in section 4001 were either never properly noticed or were noticed but were removed from the final text. In the modified text noticed on May 2, 2017, the following exception was added to section 4001:

Gasoline liter equivalent (GLE).

This exception in section 4001 was removed from the final text without being noticed to the public or explained in the rulemaking file. Two other exceptions in section 4001 appear in the final text that were never illustrated as being added to section 4001 in the proposed text or any of the versions of modified text in the rulemaking file. These two exceptions are as follows:

Diesel gallon equivalent (DGE).
Gasoline gallon equivalent (GGE).

Not only were these two exceptions improperly added to section 4001, they are not underlined in the final text to show them as additions to the text of section 4001. Notwithstanding, since these two exceptions were never noticed to the public, the Department will need to properly add them in a 15-day notice of public availability if it wants these exceptions to be added to section 4001.

Thus, the Department failed to clearly illustrate changes in the modified text in compliance with Government Code section 11348.6, subdivision (c) and CCR, title 1, sections 44 and 46, and the final text submitted to OAL for review did not reflect additions and deletions to the CCR as shown in the originally proposed text or the six versions of modified text. To resolve this, the Department must issue another 15-day notice and modified text, pursuant to Government Code section 11346.8, subdivision (c) and sections 44 and 46 of title 1 of the CCR, that properly illustrates all of the changes it wants made to the originally proposed text.

D. Authority and Reference Citations.

Many of the statutes cited as Authority and Reference in the final text of sections 4200, 4201, 4206, and 4207 were either improper Authority and Reference citations that need to be removed or were deleted citations that should be retained. Other statutes discovered by OAL during its review should be added as Reference citations to sections 4206 and 4207. OAL discussed the changes to the Authority and Reference citations for these sections with the Department prior to disapproving this regulatory action. Additionally, depending on what the Department wants to do with section 4207, additional Authority and Reference citations may need to be added. The Department must illustrate the changes to all Authority and Reference citations in a 15-day notice of availability of modified text pursuant to Government Code section 11348.6, subdivision (c).

CONCLUSION

OAL disapproved this regulatory action for the reasons set forth above. Pursuant to Government Code section 11349.4, subdivision (a), the Department may resubmit this rulemaking action to OAL within 120 days of its receipt of this Decision of Disapproval of Regulatory Action. A copy of this disapproval decision will be e-mailed to the Department's contact person on the date identified below.

Any changes made to the proposed regulation text to address the issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11346.8, subdivision (c) and CCR, title 1, section 44, prior to resubmission of this regulatory action. Additionally, the Department must add a supplement to the ISR to the rulemaking file, pursuant to Government Code section 11347.1, to resolve the necessity issue with section 4206 prior to resubmission of this regulatory action. The Department must resolve all other issues raised in this disapproval decision before resubmitting this regulatory action.

If you have any questions, please contact me at (916) 323-6809.

Date: August 14, 2017

Richard L. Smith

Richard L. Smith
Senior Attorney

For: Debra M. Cornez
Director

Original: Karen Ross
Copy: Kevin Schnepf