

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

AGENCY: DEPARTMENT OF)	
FOOD AND AGRICULTURE)	DECISION OF DISAPPROVAL
)	OF REGULATORY ACTION
ACTION: Adoption of sections 4147 and)	(Government Code Section 11349.3)
4148 of title 4 of the California Code of)	
Regulations)	OAL File No. 04-0310-01 S
_____)	

BACKGROUND

The Department of Food and Agriculture (“Department”) proposed the amendment of section 4140 conforming its standard limiting the vapor pressure of fuel for spark-ignition engines with the standard set by the Air Resources Board and the adoption of ASTM standards for blends of gasoline and methanol and ethanol, and for bio-diesel blending stock that is blended with diesel fuel. This rulemaking action was submitted for OAL review on March 10, 2004, and, with the exception of the bio-diesel standards, was approved on April 22, 2004. The proposed specifications for bio-diesel blending stock and labeling were disapproved. The following decision explains the reasons for OAL’s action disapproving sections 4147 and 4148, which contained these standards.

DECISION

OAL disapproved the proposed biodiesel blending stock specifications and labeling requirement because the text of the text of the labeling requirement submitted for review contains two substantial changes from the version originally made available for public comment, that were not made available for additional public comment. In addition, we note that the file’s updated informative digest does not include the necessary description of the effect of these and other changes made during the rulemaking process, and an ASTM standard relied upon was omitted from the file.

DISCUSSION

1) OPPORTUNITY FOR COMMENT

An opportunity to comment on proposed substantial changes to regulations is central to the purposes of the Administrative Procedure Act (“APA”). Government Code Section 11346.8, subdivision (c), limits the scope of changes that may be made to an originally proposed regulation to those changes that are “sufficiently related,” and further provides:

“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.”

In accordance with the APA’s notice requirements, the Department provided a comment period of more than 45 days for its original proposal to adopt these regulations, and an additional comment period of more than 15 days for a group of substantial changes to the original proposal, made largely in response to public comments. After these comment periods were concluded, and in response to comments received, the Department made additional substantial changes to labeling requirements and adopted them without further public notice.

(A) The original labeling requirement proposed for section 4148 required identification of 100 percent pure biodiesel fuel as follows:

“Labeling and Price Advertising Sign Requirements for Biodiesel Fuel. The words ‘Biodiesel (B100)’ shall be used to describe the 100 percent pure biodiesel product as required by Section 13480 and 13532 of the Business and Professions Code.”

The Department proposed a change to the original proposal that combined the identification requirement above with a similar provision applicable to biodiesel blends originally proposed as section 4149, and added a warning requirement. This version made available for public comment on September 25, 2003, provides in part:

“Fuel that is being represented as biodiesel fuel shall have the words ‘Biodiesel fuel (BXX)’, where XX represents the volume percent biodiesel in the fuel, used to describe the name of the product as required in Section 13480 and 13532 of the Business and Professions Code.”

Under this proposal, as in the original, the 100 percent pure biodiesel product would be subject to the labeling requirement.

The final version of section 4148 submitted for OAL review provides, in pertinent part:

“Biodiesel *blends* shall have the words ‘Biodiesel fuel (BXX)’, where XX represents the volume percent biodiesel in the fuel, used to describe the name of the product on all dispensers, advertising signs, and storage tank labels as required in Section 13480 and 13532 of the Business and Professions Code.” (Emphasis added.)

The change limiting the application of this regulation to biodiesel blends (of biodiesel and petroleum diesel fuel) eliminates the label identification requirement for the 100 percent pure biodiesel product. This final change is a substantial one that makes an additional comment period of at least 15 days

necessary before the Department can amend this regulation as described in the final version above.

(B) An additional substantial change was made without notice and opportunity for comment. The original labeling requirements proposed in sections 4148 and 4149 did not require any warning of the possible incompatibility of biodiesel fuel with some diesel engine vehicles. The version made available for comment on September 25, 2003, added the following:

“Every Biodiesel fuel dispense dispensing blends greater than 5 volume percent (B5) of Biodiesel shall display on each customer side, as required by Section 13484 of the Business and Professions Code, a sign clearly visible which reads as follows:

“CAUTION: THIS FUEL MAY NOT BE SUITABLE FOR USE IN ALL DIESEL ENGINE VEHICLES. ITS USE MAY VOID YOUR WARRANTY. CHECK WITH YOUR ENGINE MANUFACTURER BEFORE USING.”

After receiving comments protesting the addition of this warning, the Department modified the language of the label to provide:

“THIS FUEL CONTAINS BIODIESEL. CHECK THE OWNER’S MANUAL OR WITH YOUR ENGINE MANUFACTURER BEFORE USING”

The final version does not require a warning with respect to warranty coverage, and its effect is therefore substantially different than that of the earlier proposals the public received notice of. It must likewise be made available for public comment pursuant to the APA before adoption by the Department.

2) OMITTED DOCUMENTS:

(A) An original notice of rulemaking must include an informative digest, containing “a concise and clear summary . . . of the effect of the proposed action.” [Government Code section 11346.5, subdivision (a)(3)(A).] In addition, Government Code section 11347.3, subdivision (b)(2), requires the file of a rulemaking proceeding to include an updated informative digest. The Department included a document bearing this title, but it does not include a description of the changes described above in Part (1) of this decision, and other changes that were made to sections 4147 and 4148 during the rulemaking process. It is important for the Department provide in this file, an update to the original description of its intentions with respect to regulation of the 100 percent pure biodiesel product.

(B) Proposed section 4147 incorporates the latest version of ASTM standard D 975 by reference for diesel fuel blending stock and finished diesel fuel. While we

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recognize that the Department's current regulation section 4143 already makes this ASTM standard applicable to diesel fuel, the new regulation is a more specific application of the standard, in that it applies to blending stock. A copy of the ASTM D975 standard should therefore be added to the rulemaking record as a document relied upon, and made available for comment in accordance with Government Code section 11346.8, subdivision (d), and section 11347.1.

For these reasons, OAL disapproved the Department's proposed adoption of sections 4147 and 4148.

Date: April 29, 2004

David Potter
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Director

Original: Valerie Brown, Deputy Secretary
cc: David Lazier, Branch Chief, Division of Measurement Standards