

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

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| In re: |) | |
| |) | |
| |) | DECISION OF DISAPPROVAL |
| |) | OF REGULATORY ACTION |
| AIR RESOURCES BOARD |) | |
| |) | (Gov. Code, sec. 11349.3) |
| |) | |
| REGULATORY ACTION |) | OAL File No. 07-0810-01S |
| Title 13, California Code of |) | |
| Regulations |) | |
| |) | |
| Amend sections 1968.2, 1968.5, |) | |
| 2035, 2037, 2038 |) | |
| _____ |) | |

DECISION SUMMARY

This proposed regulatory action submitted by the Air Resources Board (ARB) proposes to amend Title 13 of the California Code of Regulations (CCR) to extensively update the On-Board Diagnostic II program (OBD II). The proposed regulatory action includes highly technical revisions to OBD II testing processes and warranty mandates.

On September 24, 2007, the Office of Administrative Law (OAL) notified the Air Resources Board of the disapproval of the above-referenced regulatory action. OAL disapproved the regulations for failure to comply with Administrative Procedure Act (APA) procedural requirements.

DISCUSSION

Regulations adopted by ARB must generally be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act (Gov. Code, secs. 11340 through 11361). 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 action from compliance with the APA. (See Gov. Code, sec. 11346.) No exemption or exclusion applies to the regulatory action here under review. Consequently, before these regulations may become effective, the regulations and the rulemaking record must be reviewed by OAL for compliance with the procedural requirements and the substantive standards of the APA, in accordance with Government Code section 11349.1.

A. FAILURE TO FOLLOW THE REQUIRED APA PROCEDURES.

OAL must review the rulemaking record to determine whether all of the procedural requirements have been satisfied. (Gov. Code, section 11349.1) In this proposed rulemaking, ARB has not complied with the requirements of Title 1 CCR section 8 and has failed to include technical documents incorporated by reference.

1. Rulemaking Text Not in Compliance with APA Requirements. The proposed rulemaking text submitted to OAL by ARB for review fails to comply with the requirements of Title 1 CCR section 8 because the final text attached to the Form 400 and submitted to OAL for filing with the Secretary of State contains hundreds of underline/strikeout errors.

Title 1 CCR section 8 provides:

§ 8. Final Text: Underline and Strikeout.

(a) For the purposes of this section:

- (1) the term ‘regulation’ includes authority and reference citations; and
- (2) the term ‘final text’ means the certified copy of the regulation or order of repeal transmitted to OAL for filing with the Secretary of State and the six copies required by Government Code section 11343.

(b) The final text of the regulation shall use underline or italic to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations. Underline or italic is not required for the adoption of a new regulation or set of regulations if the final text otherwise clearly indicates that all of the final text submitted to OAL for filing is added to the California Code of Regulations. [Emphasis added].

The proposed regulation text submitted consists of 184 single-spaced pages of substantially amended, highly technical regulation text along with a three-plus inch stack of seven incorporated technical documents. The submitted final text fails to accurately show changes to existing regulation text currently printed in the CCR as required by Title 1 CCR section 8(b) as follows:

(a) ARB has decided to make a “global” format change to its regulations by italicizing all first and second level headings. There are several hundred of the headings in this package. Virtually all of these headings do not show the currently printed non-italicized headings as stricken out or the replacement italicized headings as underlined. Confusingly, ARB does show the change in proper underline/strikeout format in apparently random locations. For example, underline/strikeout is improperly shown for subsection 1968.2(e) but properly shown for 1968.2(e)(1).

(b) The final text submitted for sections 2035, 2037, 2038 (totaling 40 pages of regulation text) contains no underline/strikeout at all despite being extensively amended by the rulemaking.

(c) ARB conducted two 15-day notices of availability of modified regulation text. Many of the changes made by those two notices are not accurately reflected in the final text submitted to OAL.

(d) OAL met with ARB staff on September 20, 2007 and identified other additional regulation text errors including punctuation errors not included in (a)-(c), above. ARB should correct these errors as well prior to resubmittal of the rulemaking.

2. The rulemaking file fails to contain copies of all the incorporated technical documents.

ARB incorporated by reference seven technical documents listed in section 1968.2(g). The rulemaking file is missing a copy of one of those documents:

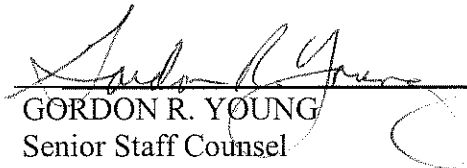
“SAE J1939 March 2005-‘Recommended Practice for a Serial Control and Communications Vehicle Network’ and the associated subparts included in SAE HS-1939, ‘Truck and Bus Control and Communications Network Standards Manual,’ 2005 Edition;”

In addition to the missing technical document, ARB has not attached copies of all seven documents to the regulation text for filing with the Secretary of State as required by Government Code section 11343(c) and Title 1 CCR section 20(d).

CONCLUSION

OAL disapproved this regulatory action for the reasons set forth above. If you have any questions, please contact me at (916) 323-8916.

DATE: September 26, 2007


GORDON R. YOUNG
Senior Staff Counsel

For:

SUSAN LAPSLEY
Director

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