

**State of California
Office of Administrative Law**

In re:
California Air Resources Board

Regulatory Action:
Titles 13 and 17, California Code of Regulations

Amend sections: 2299.5, 93118.5

DECISION OF DISAPPROVAL OF REGULATORY ACTION

Government Code Section 11349.3

OAL Matter Number: 2022-0721-09

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This regulatory action by the California Air Resources Board (CARB) proposed to amend existing regulations regarding Commercial Harbor Craft (CHC) emissions by establishing stricter requirements for CHC engines and mandates for accelerated deployment of Zero-Emission and Advanced Technologies (ZEAT). These amendments would apply more stringent requirements to in-use and new vessels, extend regulatory requirements to vessel categories previously exempt from in-use vessel requirements, and apply reporting, infrastructure, and other requirements to facilities that conduct business with CHC, such as seaports, terminals, marinas, and harbors.

On July 21, 2022, CARB submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On September 1, 2022, OAL notified CARB that OAL disapproved the proposed regulatory action pursuant to the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action because the proposed regulatory changes failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3).

DISCUSSION

CARB's regulatory action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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 APA coverage. (Gov. Code, sec. 11346.) No exemption applies to the present regulatory action under review.

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the APA standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review, OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency regarding the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. Clarity Standard

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. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines "clarity" to mean "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 section 16 of title 1 of the California Code of Regulations (CCR), which provides:

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:
- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
 - (3) the regulation uses terms which do not have meanings generally familiar to those “directly affected” by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
 - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
 - (5) [...]
 - (6) [...]
- (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.

The following provisions in CARB’s proposed regulatory action do not satisfy the clarity standard.

1.1 Proposed Subsection (k)(1)(C) of Section 93118.5

Proposed subsection (k)(1)(C) reads, in part:

Individuals conducting opacity tests must have completed applicable training from the California Council on Diesel Education and Technology and obtained certification on the proper administration of the specified test procedure.

This subsection is unclear because the language of the regulation conflicts with CARB's description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).) Appendix E to the ISOR states:

CARB is proposing that vessel owner operators may opacity test their engines after completing a course offered by CCDET. CARB staff has met with CCDET, and is anticipating to collaborate to create a marine-specific course. Anybody performing opacity testing would be required to take this training course, regardless if the individual is the owner or operator of the vessel, or a third-party for-hire company. If, during implementation of the Amended Commercial Harbor Craft Regulation, there are challenges associated with consistent application of the proposed CHC opacity testing methodology, this course would provide guidance to assist with meeting proposed opacity testing requirements. (ISOR, App. E, p. E-92.)

The language of the proposed subsection implies that training courses and certification on the specified opacity test procedure are available from the California Council on Diesel Education and Technology. However, Appendix E to the ISOR indicates that no such training yet exists. Because the language of the regulation conflicts with CARB's description of the effect of the regulation, the training requirement is unclear.

1.2 Proposed Subsection (l)(4) of Section 93118.5

Proposed subsection (l)(4) reads:

Fees are nonrefundable except in circumstances as determined by the E.O.

This subsection is ambiguous and can be reasonably and logically interpreted to have more than one meaning. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(1).) The circumstances under which the E.O. may decide to refund fees are not described, and neither is the method of determination, including any relevant factors, criteria, or other information the E.O. may consider. In the absence of any factors, criteria, or explanation of other criteria to be considered by the E.O., it is unclear to those directly affected whether previously submitted fees will be refunded.

1.3 Proposed Subsection (e)(11)(A) of Section 93118.5

Proposed subsection (e)(11)(A) reads:

Applicability. If a person adopts ZEAT on new or newly acquired excursion vessels or short-run ferries three years prior to compliance dates shown in Table 14, or at any time for any other category of vessel, a person may be granted additional compliance time set forth in Table 15 for another excursion vessel or short-run ferry subject to subsection (e)(10), for each in-use engine to meet performance standards in subsection (e)(12) on another vessel in any regulated in-use category, or for each in-use engine to meet the requirements for commercial fishing vessels in subsection (e)(13) that is under a person's direct control and operating within the same California air basin.

Table 15. ZEAT Credit Time for Surplus ZEAT Deployment

<u>Marine Technology Type</u>	<u>Maximum Additional Compliance Time</u>
<u>Zero-Emission Capable Hybrid</u>	<u>3 Extra Years</u>
<u>Zero-Emission</u>	<u>7 Extra Years</u>

For example, consider the scenario in which a pilot boat, which is not subject to ZEAT requirements as set forth in subsection (e)(10), but must meet Tier 4 + DPF performance standards as set forth in subsection (e)(12) by December 31, 2027 is removed from service and replaced with a zero-emission vessel December 31, 2026. In that scenario, the owner or operator of the pilot boat may request that CARB grant up to seven additional years to the compliance date for another vessel in the owner or operator's fleet that is operating in the same air basin, to comply with requirements of subsection (e)(12).

Proposed subsection (e)(11)(A) is unclear for two reasons.

1.3.1 “Three Years Prior”

This subsection is unclear because the language of the regulation conflicts with CARB's description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec.

16, subd. (a)(2).) The ISOR provides: “New and in-use short-run ferries and new excursion vessels are eligible for this additional compliance time credit if ZEAT is adopted at least three years prior to the ZEAT compliance date.” (ISOR, p. III-9.) The proposed regulation text limits ZEAT credit eligibility to ZEAT adopted exactly three years prior to the compliance dates in Table 14, while the ISOR explains that ZEAT credits are available to owners or operators who adopted ZEAT at least three years prior to the compliance dates in Table 14. As a result of this disparity, the phrase “three years prior” is unclear.

1.3.2 “Maximum Additional Compliance Time”

This subsection is unclear because the language of both the regulation and Table 15 conflict with CARB’s description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).) Use of the word “maximum” in Table 15 and the phrase “up to” in the example following Table 15 conveys to the directly affected reader that, depending on the type of early-adopted ZEAT, ZEAT credits in amounts less than three years or seven years may be requested by a person or granted by CARB. However, various statements in the ISOR support the alternate interpretation that ZEAT credits are only available in three- or seven-year increments. For example:

Three extra years would be granted for zero-emission capable hybrid vessel deployment, and seven years would be granted for full zero-emission vessel deployment, as shown in Table III-6. (ISOR, p. III-8; OAL notes that Table III-6 in the ISOR mirrors Table 15 in the regulation text, including use of the word “maximum.”)

[Proposed subsection (e)(11)(B)2.] is necessary to prevent vessel owners and operators from using a single ZEAT deployment to generate more additional compliance time than the intended three or seven years per vessel. (ISOR, p. IV-61.)

CARB staff is not requiring an emissions analysis to demonstrate that delaying compliance three or seven years on another vessel in the fleet does not increase emissions overall. (ISOR, p. IV-62.)

Because the regulation and Table 15 conflict with statements in the ISOR, it is unclear whether ZEAT credits are available in only two possible amounts (as

described in the ISOR) or a range of amounts up to and including the stated maximums (as indicated in the text and Table 15). As such, the three- and seven-year maximum ZEAT credit amounts in the proposed regulation text conflict with CARB's description of the effect of the regulation and, therefore, this subsection is unclear.

1.4 Proposed Subsection (f)(1)(K) of Section 93118.5

Proposed subsection (f)(1)(K) reads:

Applicants shall demonstrate that their ACE will not result in a higher burden to DACs relative to other communities impacted by the emissions from their vessel operations.

The term "demonstrate" is vague, can be reasonably and logically interpreted to have more than one meaning, and does not have a meaning generally familiar to those "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(3).) "Demonstrate" is not defined in regulation or the governing statutes and CARB did not provide any additional clarification in the proposed regulation text. Despite describing this subsection in the ISOR as "a key provision ... include[d] to promote environmental justice and ensure that cost effective alternatives do not result in unintentional impacts for communities already experiencing cumulative exposure burden," CARB did not denote the scope, manner, or level of detail of demonstration necessary to accomplish these identified goals. (ISOR, p. IV-100.) Because the term "demonstrate" can be reasonably and logically interpreted to have more than one meaning, the proposed language is unclear.

1.5 Proposed Subsection (m)(19)(G) of Section 93118.5

Proposed subsection (m)(19)(G) reads:

If a ZEAT temporary replacement vessel operates on a zero-emission short-run ferry route, activity data of (C) and (D) above operating on a short-run ferry route shall be retained and reported separately from annual reporting[.]

This subsection is ambiguous, can be reasonably and logically interpreted to have more than one meaning, and the language of the regulation conflicts with CARB's description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(2).) The regulation does not specify when or how frequently the activity data must be reported. The ISOR states that the activity data "shall be reported ... within 30 days of the initial operation," but the absence of this 30-day requirement from the regulation text renders the subsection unclear to those directly affected. (ISOR, p. IV-131.)

1.6 Proposed Subsection (k)(1)(F) of Section 93118.5

Proposed subsection (k)(1)(F) reads:

CARB may perform confirmatory opacity testing in the field, or audit opacity test records at any time. Additionally, upon having information that an engine may be operating with emission control malfunctions, the E.O. can request for an engine or emission control system inspection report from a certified dealer/distributor engine within 30 days. The owner/operator is responsible for performing any corrective action and reporting to CARB within 30 days of receiving an engine or emission control system inspection.

The term "engine or emission control system inspection report" does not have a meaning generally familiar to those "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(3).) Neither the proposed regulations nor the ISOR describes the required contents of this report, and it is unlikely that directly affected individuals are already familiar with the report because it appears to be new and is not referenced in existing CARB regulations in titles 13 and 17 of the CCR. Additionally, this subsection includes vague terms and uses language incorrectly. (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(4).) It is unclear whether the "reporting" requirement placed on the owner/operator refers to the engine or emission control system inspection report completed by a third party or a separate and distinct report indicating, e.g., that the owner/operator corrected the malfunction and successfully retested the engine or system. It is also unclear what CARB means by "certified dealer/distributor engine." Because proposed subsection (k)(1)(F) includes terms not generally understood by those directly affected, can be reasonably and logically interpreted to have more than one meaning, and uses language incorrectly, this subsection is unclear.

1.7 Proposed Subsection (h)(1)(E) of Section 93118.5

Proposed subsection (h)(1)(E) reads:

[The idling and operational limits in (h)(1) do not apply to:] Idling or operation for up to 30 consecutive minutes for the initial start-up of a vessel each day, or when a shift or crew change occurs on any vessel type.

This subsection is unclear because the language of the regulation conflicts with CARB's description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).) The term "shift or crew change" is not expressly defined in the regulation and CARB did not establish any restrictions on the number of times per day, or other period of operation, that a shift or crew change may occur. However, the ISOR provides:

This concept allows 30 minutes of idling after coming to dock at the end of a work period, and 30 additional minutes prior to initial operation in a subsequent work period after engines are restarted. CARB defines a new work period to begin when main engines have been shut off for 4 hours or longer. (ISOR, p. III-17.)

Because the term "work period" and CARB's definition of that term are provided in the ISOR but not included in the regulation text, the regulation is unclear.

1.8 Proposed Subsection (e)(12)(B)1. of Section 93118.5

Proposed subsection (e)(12)(B)1. reads, in part:

On and after January 1, 2023, a person who owns, operates, sells, purchases, offers for sale, leases, rents, imports, or otherwise acquires a regulated in-use vessel with any marine or off-road engines may not operate, sell, purchase, offer for sale, lease, rent, import, or otherwise acquire an in-use vessel, unless the engine or engine system on the vessel complies with at least one of the compliance methods set forth in subsection (e)(12)(C) by the compliance date.

This subsection can be reasonably and logically interpreted to have more than one meaning and uses language incorrectly. (Cal. Code Regs., tit. 1, sec. 16,

subds. (a)(1) and (a)(4).) It is unclear whether this subsection applies only to a person who already owns at least one regulated vessel, or also applies to all persons who are not registered vessel owners. It is also unclear whether compliance under subsection (e)(12)(C) is a precondition for obtaining additional vessels, applies to a person's currently owned vessels, or both. Therefore, proposed subsection (e)(12)(B)1. is unclear to those directly affected.

1.9 Proposed Subsection (h)(1) of Section 93118.5

Proposed subsection (h)(1) reads, in pertinent part:

Beginning on January 1, 2024, no vessel subject to this subsection shall idle propulsion engines, or idle or operate auxiliary engines with a power rating of 99 kW or less for more than 15 consecutive minutes when docked, berthed, or moored at any facility.

This subsection is ambiguous and can be reasonably and logically interpreted to have more than one meaning. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(1).) The ISOR provides: "Quick engine accelerations or restarting the engine while otherwise idling in order to circumvent this requirement would still be considered idling." (ISOR, p. III-17.) Without these caveats in the regulation text, a vessel operator could shut down and restart their engines, or increase engine speed above idle, every 15 minutes and remain idling nearly continuously in frustration of this rule. Because the clarifying language in the ISOR is missing from the regulation, this subsection is unclear to those directly affected.

1.10 Proposed Subsection (e)(2) of Section 93118.5

Proposed subsection (e)(2) reads:

Beginning January 1, 2023, in the event the hour meter fails to operate properly or is replaced, a person subject to this subsection must also within 30 days, replace the hour meter and report to CARB the date the hour meter stopped working, the date it was replaced, and the current hour readings of both the original and replacement meter.

Proposed subsection (e)(2) is unclear for several reasons.

1.10.1 “Is Replaced; Must Replace”

This subsection uses language incorrectly. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(4).) According to this provision, a vessel owner must replace the hour meter within 30 days after replacing the hour meter. Because the proposed language is grammatically flawed, the regulation is unclear to those directly affected.

1.10.2 “Current Hour Readings”

The word “current” is vague, can be reasonably and logically interpreted to have more than one meaning, and does not have a meaning generally familiar to those “directly affected.” (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(3).) It is unclear whether “current” refers to the date of meter replacement, date of reporting the replacement to CARB, or another date. Therefore, proposed subsection (e)(2) is unclear to those directly affected.

1.10.3 “Original Meter”

The word “original” is vague, can be reasonably and logically interpreted to have more than one meaning, and does not have a meaning generally familiar to those “directly affected.” (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(3).) It is unclear whether “original” refers to the hour meter first installed on the vessel when constructed, or to the hour meter being replaced at the time of reporting, regardless of whether the hour meter was first installed as an original or a replacement. Because “original” is subject to more than one reasonable and logical interpretation, proposed subsection (e)(2) is unclear.

1.11 Proposed Subsection (e)(12)(E)3.d.iv. of Section 93118.5

Proposed subsection (e)(12)(E)3.d.iv. reads:

Applications must describe how owners and operators are preparing and planning financially to meet requirements of subsection (e)(12) by December 31, 2034.

The phrase “preparing and planning financially” is vague, can be reasonably and logically interpreted to have more than one meaning, and does not have a meaning generally familiar to those “directly affected.” (Cal. Code Regs., tit. 1,

sec. 16, subds. (a)(1) and (a)(3).) An applicant may not comprehend the type, extent, or level of detail of preparation and planning that CARB considers the acceptable minimum. The regulation also does not provide any criteria, explanations, examples, or other clarifying information. For these reasons, proposed subsection (e)(12)(E)3.d.iv. is unclear.

1.12 Proposed Subsection (e)(12)(E)3.b.vi. of Section 93118.5

Proposed subsection (e)(12)(E)3.b. reads, in relevant part:

Eligibility and Application Package (does not apply to ten-year extensions available to commercial passenger fishing vessels as set forth in subsections (e)(12)(E)3.a. and (e)(12)(E)3.d.): The applicant must demonstrate that no suitable engines (Tier 3 or Tier 4 marine, or Tier 4 Final off-road) or DPFs physically fit within the existing vessel structure, and no amount of modifications can be made to the vessel structure without compromising its structural integrity or stability, to meet requirements of subsection (e)(12). The applicant must also demonstrate that removing the vessel from service and replacing it with a newly acquired vessel with compliant engines is not financially possible. The application package must be supplied to the E.O. no later than 18 months before the compliance date of the engine(s) or vessel(s) for which the extension is requested or as specified in subsection (e)(12)(E)3.c. for a renewal, or no later than 9 months before the December 31, 2023 compliance date, and must include:

i.-v. [...]

vi. A list of actions that the applicant has taken to comply or in anticipation to comply with the regulation at the earliest compliance date and supporting documentation to demonstrate that these actions have been taken [...]

Subsection (e)(12)(E)3.b.vi. is unclear because the language of the regulation can be reasonably and logically interpreted to have more than one meaning. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(1).) The ISOR provides:

This subsection is necessary to demonstrate to CARB that vessel owners and operators have tried to comply with the Proposed Amendments. A key

action is whether vessel owners and operators developed a new business structure after Board approval of the Proposed Amendments in 2022 to pass costs onto consumers or entities receiving their services in order to generate sufficient capital to comply. Other actions may include engine upgrades, and other technical, financial, or environmental assessments to assist CARB staff with evaluating the extension request. (ISOR, p. IV-82.)

The word "actions" in this subsection is vague. It is unlikely that a directly affected person will know that compliance with this subsection requires, at minimum, restructuring their business to pass increased regulatory costs on to other entities. The absence of these clarifying examples and explanations from the text renders the subsection unclear to those directly affected.

1.13 Proposed Subsection (e)(12)(E)5.b.i. of Section 93118.5

Proposed subsection (e)(12)(E)5.b.i. reads:

For equipment manufacturer delays or installation difficulties, all of the following: the applicant ordered the new replacement engine or other equipment necessary to comply with the requirements of subsection (e)(12), (e)(13) or (e)(10) at least 6 months prior to the compliance date set forth in subsection (e)(12)(D), (e)(13) or (e)(10); and, the new engine or equipment has not been received or installed since it was ordered due to manufacturing delays or excessive difficulties encountered by the engine or equipment installer. The applicant must provide a copy of the purchase order or contract for the new equipment, and identify in-use engine(s) that the applicant chooses to receive the extension.

The term "excessive difficulties" is vague, can be reasonably and logically interpreted to have more than one meaning, and does not have a meaning generally familiar to those "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subs. (a)(1) and (a)(3).) Without additional clarifying information, it is unlikely that an applicant will know what information must be included in the extension request. As such, proposed subsection (e)(12)(E)5.b.i. is unclear.

1.14 Proposed Subsection (m)(21)(C) of Section 93118.5

Proposed subsection (m)(21) reads, in relevant part:

For commercial passenger fishing vessels receiving a one-time, ten-year extension as set forth in subsections (e)(12)(E)3.a. and (e)(12)(E)3.d. the following information shall be kept for each vessel:

(A)-(B) [...]

(C) Number of passenger-days by calendar year. A passenger-day is considered a person sportfishing for a full day or multiple people sportfishing for shorter periods summing to a full day. For example, an owner offering: a 4-hour trip to 20 anglers would be 10 passenger-days; a 6-hour trip to 20 anglers would be 15 passenger-days, and a 3-day trip to 20 anglers would be 60 passenger-days.

The term "full day" in subsection (m)(21)(C) does not have a meaning generally familiar to those "directly affected" and is not defined in the regulation or a governing statute. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(3).) The regulation does not clearly and expressly establish the number of hours in a "full day." Nor does the regulation indicate the smallest unit of time to be recorded and used in calculating passenger-days (e.g., hours, half-hours, quarter-hours, minutes), whether rounding is required or allowed, or whether partial or only full passenger-days must be recorded. Because the term "full day" is not defined in the regulation or a governing statute and may not be generally understood by regulated vessel owners and operators, this subsection is unclear.

1.15 Proposed Subsection (e)(12)(D)2.c. of Section 93118.5

Proposed subsection (e)(12)(D)2.c. reads:

Upon receipt of a request, the E.O. will review the information submitted by an applicant and determine, within 30 working days, whether the information meets the criterion set forth in subsection (e)(12)(D)2.a. In making that determination, the E.O. will rely on the information submitted by the applicant and on good engineering judgment.

The reference to "request" is vague and can be reasonably and logically interpreted to have more than one meaning. (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(3).) It is unclear whether the "request" is referring to the demonstration and related documentation specified in proposed subsections

(e)(12)(D)2.a. and (e)(12)(D)2.b., or whether the “request” is an additional, distinct requirement. Because “request” is subject to more than one reasonable and logical interpretation, proposed subsection (e)(12)(D)2.c. is unclear.

1.16 Proposed Definition of “Direct Control” in Subsection (d) of Section 93118.5

The proposed definition of “direct control” in subsection (d) reads:

“Direct Control” means owning, operating, having a contract, lease, or other arrangement to operate a harbor craft. For facilities, “Direct Control” means to control the affairs of facility operations, which includes collecting payment from independent operators for use of dock space, using facility property to moor, dock, service, or maintain a person’s own vessels, and being responsible for the majority of commercial activity at a given location.

The word “responsible” is vague, can be reasonably and logically interpreted to have more than one meaning, and does not have a meaning generally familiar to those “directly affected.” (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(3).) “Responsible” could mean “accountable” or “liable” and be in reference to various financial or legal burdens of facility ownership, or instead mean “source” or “cause,” i.e., that a person or entity has direct control over a facility when that person or entity generates or is otherwise the reason for the majority of the facility’s commercial activity. Because the word “responsible” is ambiguous, the definition of “direct control” in subsection (d) is unclear to those directly affected.

1.17 Proposed Subsection (e)(12)(E)3.d.iii. of Section 93118.5

Proposed subsection (e)(12)(E)3.d.iii. reads:

Applications must include a demonstration that vessels have engaged, and will continue to engage, in commercial passenger fishing vessel activities at least 50 days per calendar year between January 1, 2023 and December 31, 2034.


The phrase “demonstration that vessels ... will continue to engage” is vague, can be reasonably and logically interpreted to have more than one meaning,

and does not have a meaning generally familiar to those "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(3).) An applicant may have difficulty determining how to demonstrate to CARB's satisfaction an intent to engage in certain activities in the future. The regulation does not provide any criteria, explanations, examples, or other clarifying information. Therefore, proposed subsection (e)(12)(E)3.d.iii. is unclear to those directly affected.

CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), CARB may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval of Regulatory Action. A copy of this Decision will be emailed to CARB on the date indicated below. CARB must make any substantive regulatory text changes, which are sufficiently related to the originally noticed text, available for public comment for at least 15 days pursuant to subdivision (c) of Government Code section 11346.8 and section 44 of title 1 of the CCR. Any objections or recommendations raised by the public during the 15-day public comment period must be summarized and responded to in the Final Statement of Reasons. CARB must resolve all issues raised in this Decision of Disapproval of Regulatory Action prior to the resubmittal of this regulatory action. OAL reserves the right to review CARB's resubmitted regulations and rulemaking record for compliance with all substantive and procedural requirements of the APA.

Date: September 8, 2022



Eric Partington
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