

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:

AIR RESOURCES BOARD

REGULATORY ACTION:
Title 17, California Code of
Regulations
AMEND SECTIONS 94014
AND 94016

DECISION OF DISAPPROVAL
OF REGULATORY ACTION
(Gov. Code, sec. 11349.3)

OAL File No. 2014-0528-04S

SUMMARY OF REGULATORY ACTION

The Air Resources Board (Board) proposed to amend section 94014, Certification of Vapor Recovery Systems for Cargo Tanks, and section 94016, Certification of Vapor Recovery Systems at Gasoline Dispensing Facilities Using Aboveground Storage Tanks, of title 13 of the California Code of Regulations. The proposed amendments would resolve technical problems that currently exist with two test procedures used by Board staff when certifying vapor recovery equipment for aboveground storage tanks, reconcile cargo tank certification and test procedures with current industry practices, and provide additional flexibility for cargo tank owners to remain in compliance with performance standards. On May 28, 2014, the Board submitted the proposed adoption to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On July 10, 2014, OAL sent a Notice of Disapproval of the proposed adoption. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

The Office of Administrative Law disapproved the above referenced regulatory action for the following reasons: failure to comply with the clarity standard of Government Code section 11349 and because the Final Statement of Reasons failed to include a summary and response to every comment made regarding the proposed action.

DISCUSSION

The adoption of regulations by the Board must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency. Any regulation adopted 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.)

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 for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the 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 with regard to 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

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “...written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The following provisions fail to comply with the clarity standard:

- a. Section 94016 of title 17 of the California Code of Regulations is amended by this rulemaking to incorporate by reference TP-206.4, “Volumetric Efficiency of Phase I Vapor Recovery Systems for Aboveground Storage Tanks” (Adopted: May 27, 2014). Subdivision 7.5 of section 7 “Testing” in TP-206.4 provides:

Record the cargo tank CARB decal number and delivery company name on the data sheet where provided.

Pages 15 and 16 of TP-206.4 are entitled: "Form 1: TP-206.4-AST Example Field Data Sheet." There is no entry on this form for the CARB decal number, nor would a person directly affected by this regulation easily understand where the delivery company name is to be recorded.

Also, TP-206.4 in subdivision 3.3.2 refers to the "allowable daily static performance pressure-decay standard as defined in CP-204...." This term is not defined anywhere in CP-204, although subdivision 3.2 provides for a "Daily Static Pressure Performance Standard."

We also note that section 1 of TP-206.4 incorrectly describes the title of CP-206.

- b. Section 94014 of title 17 of the California Code of Regulations is amended by this rulemaking to incorporate by reference May 27, 2014 revisions to CP-204 "Certification Procedure for Vapor Recovery Systems of Cargo Tanks." Subdivision 2.1 of CP-204, as amended, is entitled "Application for Certification of an Individual Cargo Tank." Item 6 in subdivision 2.1 requires:

A declaration under penalty of perjury by the person conducting the test that the information contained in items (5) and (6) is true and correct.

This provision itself is item 6 and item 5 merely states:

The test data acquired in (4) above.

Item 4 in subdivision 2.1 provides:

A statement that the tank has been tested according to the annual test procedures prescribed in section 3.1 of this certification procedure and complies with the corresponding performance standards.

The declaration most likely intended in item 6 was that the information contained in items 4 and 5 is true and correct.

- c. Section 94014 of title 17 of the California Code of Regulations is amended by this rulemaking to incorporate by reference May 27, 2014 revisions to TP-204.1 "Determination of Five Minute Static Pressure Performance of Vapor Recovery Systems of Cargo Tanks." Section 9 of TP-204.1, as amended, is entitled "Alternative Test Procedures." Subdivision 9.1 of TP-204.1 provides that U.S. EPA Method 27 "...may be used as an alternate to the procedure described in Section 6 with the following exceptions...."

Subdivision 9.1.b provides:

Results of each test conducted shall comply with the performance standards reference[sic] in section 3.1 CP-204 without taking the arithmetic mean of two successive results as allowed by section 40 CFR 63.42(e).

Section 63.42 of title 40 of the Code of Federal Regulations does not contain a subdivision (e). Subdivision (e) of section 63.425 of title 40 of the Code of Federal Regulations was most likely intended.

Changes made to the regulations to correct the above described clarity problems must be made available to the public pursuant to section 44 of title 1 of the California Code of Regulations for at least 15 days as required by subdivision (c) of Government Code section 11346.8.

2. THE FINAL STATEMENT OF REASONS DOES NOT CONTAIN A RESPONSE TO ONE OF THE COMMENTS SUBMITTED DURING THE PUBLIC COMMENT PERIOD.

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA currently requires that rulemaking agencies provide notice and at least a forty-five day comment period prior to adoption of a proposed regulatory action. (Gov. Code, secs. 11346.4 and 11346.5). By requiring the state agency to summarize and respond in the record to comments received during the comment period, the Legislature has clearly indicated its intent that an agency account for all relevant comments received, and provide written evidence of its meaningful consideration of all timely, relevant input. Section 11346.9(a)(3) of the Government Code requires that the adopting agency prepare and submit to OAL a final statement of reasons which shall include:

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 reason for making no change....

The last substantive paragraph on page two of the comment dated July 24, 2013 from the Western States Petroleum Association asserts that the Initial Statement of Reasons contains a number of erroneous statements and requests corrections be made. There is no summary or response in the Final Statement of Reasons for this comment.

We also note that the Initial Statement of Reasons indicated that section 9 of TP-204.3, "Determination of Leak(s)," was intended to be repealed by this rulemaking. However, existing subdivisions 9.1 through 9.2.2 did not appear and were not shown in strikeout in the regulation text made available to the public for 45 days as required by Government Code section 11346.2(a)(3). When the 15 day comment period is conducted for the changes made as a result of the clarity problems discussed above, existing subdivisions 9.1 through 9.2.2 in TP-204.3 must also be included and shown in strikeout in the regulation text made available to the public pursuant to section 44 of title 1 of the California Code of Regulations.

Also some corrections were made to the text of TP-204.1, subdivisions 1.1 and 9.1, TP-204.2, subdivision 1.1, TP-204.3, subdivision 1.1 and Figure 1, and TP-206.4, section 1, after the public availability periods had ended. Include these corrections in underline and strikeout with the regulation text being made available pursuant to section 44 of title 1 of the California Code of Regulations.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-6808.

Date: July 15, 2014

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