

Tiffany

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:	)	DECISION RE DISAPPROVAL
	)	OF A RULEMAKING ACTION
AGENCY: AIR RESOURCES	)	(Gov. Code Sec. 11349.3)
BOARD	)	
	)	
RULEMAKING ACTION:	)	OAL File No. 99-0702-06
Amend 94101, 94102, 94103,	)	
94104, 94106, 94107, 94108, 94110,	)	
94111, 94112, 94113, 94117, 94118,	)	
94119, 94120, 94121, 94122, 94123,	)	
94124, and 94137 of Title 17 of the	)	
California Code of Regulations.	)	

SUMMARY OF RULEMAKING ACTION

This rulemaking action revises twenty existing California Air Resources Board test methods for measuring emissions from stationary sources.

SUMMARY OF DECISION

On August 16, 1999, the Office of Administrative Law (OAL) disapproved this rulemaking action for the reasons summarized here and explained in detail below.

1. The rulemaking record does not contain a demonstration of necessity for the changes to the test methods not made to conform to corresponding provisions in the Code of Federal Regulations.
2. The summary and response to comment is inadequate.
3. The relationship between a new provision and an existing provision in Method 1 regarding Executive Officer approval is unclear.

4. The test methods now in effect were not available to allow OAL to complete its review.
5. The final version of each test method as incorporated by reference into the California Code of regulations has not been provided for filing with the Secretary of State.
6. The final version of each test method as incorporated by reference into the California Code of Regulations has not been included in the rulemaking record.

DISCUSSION

The adoption of regulations by the Air Resources Board must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency (APA).¹ Any rule or regulation adopted by a state agency² 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.³

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for regulations in Government Code Section 11349.1.⁴ Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review, OAL is limited to the record of the rulemaking proceeding⁵ and may not substitute its judgment for that of the rulemaking agency as expressed in the substantive content of the regulation.⁶ This review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations affecting the public and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.⁷

1. The rulemaking record does not contain a demonstration of necessity for the changes to the test methods not made to conform to corresponding provisions in the Code of Federal Regulations.

Necessity must be demonstrated for all the changes to the test methods. All

regulatory changes must satisfy the Necessity standard of Government Code Section 11349.1.

"Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation 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. [Government Code Section 11349.]

Many changes have been made by this rulemaking action to conform the affected test methods to corresponding provisions in the Code of Federal Regulations (CFR). Necessity has been demonstrated for such changes by the inclusion of the corresponding CFR provisions in the rulemaking record. However, other changes have also been made to the affected test methods.

The rulemaking record does not contain a demonstration of necessity for the changes to the test methods not made to conform to corresponding provisions in the CFR. One example of such a change is the deletion in Method 12 of the requirement for the use of deionized distilled water. The rulemaking record does not explain specifically the purpose and reason for this change. Notably the corresponding CFR method continues to require the use of deionized distilled water.

With regard to necessity for changes not made to conform to the CFR, the initial statement of reasons says only that the test methods have been revised:

to reflect advances in emission measurement technology, and to improve the accuracy and precision of source test data. The proposed changes correct a variety of minor defects in existing methods and address comments from U.S.EPA requesting improvements and corrections."

Transcript also indicates that changes were made in response to comments from the San Diego APCD. The U.S.EPA and the San Diego APCD comments, however, are not included in the rulemaking record. Because the rulemaking record does not address the specific purpose and rationale and include material relied upon⁸ (if any) for the changes to the test methods not made to conform to corresponding provisions in the CFR, such changes fail to satisfy the Necessity standard of Government Code Section 11349.1.

2. The summary and response to comment is inadequate.

Government Code Section 11346.9(a)(3) provides that a rulemaking agency must summarize and respond to comments directed at the proposed rulemaking. A response must either explain how the rule was amended to accommodate the comment, or explain a reason for rejecting the comment. The purpose of this requirement is to ensure that an agency considers the input it receives as required by Government Code Section 11346.8(a) and to ensure that rulemaking agency decision making is based in reason.

In this rulemaking action, Quanterra Inc. submitted the following comments regarding Method 12, "Determination of Inorganic Lead Emissions from Stationary Sources":

- 1) Page 2 of the method currently requires the use of an acetylene flame AA for the analysis of lead. Since most labs including ours no longer use this instrument I would like to see Graphite furnace (7421), ICP (6010), and ICPMS (6020) added as options.
- 2) Page 8 section 5.4.1 requires each sample to be analyzed in duplicate. The sample should be analyzed at most 2X. This would bring it in line with other source methods ie CARB 436.
- 3) Section 5.3.2 and 5.3.5 states that the solution should be taken to dryness. It is never a good idea to take a solution to dryness as analytes of interest may be lost. It should state to near dryness.
- 4) Section 5.3.3-The laboratory would not have the information required to add HNO₃ based upon particulate determination. Specify a volume of HNO₃ to add.
- 5) Sections 5.3.3-5.3.5 -Why do the final volumes of the blanks differ from that of the samples? This results in different reporting Limits (since the final volume is used in determining the RLs). It also makes it more confusing for the analyst. Why not make all final volumes 250 ml?

and last but not least-why not discard the entire method and substitute

CARB 436 for lead only. At a minimum CARB 436 should be inserted as an optional sampling method.

These comments are directed at the proposed rulemaking. The notice of proposed rulemaking broadly states in part:

The proposed revised test methods reflect improvements in emissions sampling and laboratory analysis techniques, introduce more complete quality assurance procedures, and make ARB methods more compatible with the applicable United States Environmental Protection Agency (U.S. EPA) test methods, addressing a number of issues raised by the U.S. EPA with respect to ARB test methods.

The Board summarized these comments as follows:

Quanterra Inc. commented on various issues which would make Method 12, which is for determination of lead emissions, more consistent with Method 436 which is for determination of multiple metals emissions including lead. Quanterra noted that an alternative to making the methods more similar would be allowing use of inductively coupled plasma atomic emission spectrometry (ICP-AES) as an alternative to atomic absorption spectrometry within Method 12 and use of Method 436 as an alternative to Method 12.

The Board responded to these comments as follows:

Revisions originally proposed to ARB Method 12 were in large part intended to enhance the compatibility of this method with EPA Method 12. This is considered more important than consistency with ARB Method 436. However, the suggestion that ICP-AES be allowed as an alternative analytical technique is consistent with EPA guidance regarding alternatives to EPA Method 12, and ARB Method 12 for measurement purposes. For these reasons, provisions allowing appropriate use of ICP-AES and Method 436 as alternatives to Method 12 procedures were drafted by staff and added to Method 12 as 15-day modifications at the direction of the Board.

This summary and response ignores the particulars of almost all of the suggestions and comments submitted by the commenter. Consequently, the requirements of

Government Code Section 11346.9 have not been satisfied.

3. The relationship between a new provision and an existing provision in Method 1 regarding Executive Officer approval is unclear.

Every regulation must satisfy the Clarity standard of Government Code Section 11349.1. "Clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." Government Code Section 11349(c).

An existing provision in section 1.2 of Method 1, which is incorporated by reference into Section 94101 of Title 17 of the California Code of Regulations provides: "Cases involving variants are subject to approval by the Control Agency's authorized representative." This rulemaking retains this provision, but changes the approval authority to the Executive Officer of the Air Resources Board, then adds the following:

Any modification of this method beyond those expressly permitted shall be considered a major modification subject to the approval of the Executive Officer.

The addition of the new provision appears to supersede and make superfluous the existing provision on "variants" (whatever that means). Consequently, The relationship between the new provision and the existing provision in Method 1 regarding Executive Officer approval is unclear. The clarity of section 2.1 could be improved by somehow combining the two provisions or otherwise making clear their relationship.

4. The test methods now in effect were not available to allow OAL to complete its review.

OAL must have access to the texts of the test methods that are now in effect (the "underlying" texts) to complete a review of this rulemaking action. Each of the twenty test methods being revised here was incorporated by reference into the California Code of Regulations in the early to mid-1980s. Consequently, the underlying texts are not printed in the California Code of Regulation. Neither are the underlying texts available in the OAL library, on the Board's website, or in the rule making record. Without access to the underlying texts, OAL was unable to

determine whether the proposed modifications were made available to the public in underline and strikeout as required by Government Code Section 11346.2.

5. The final version of each test method as incorporated by reference into the California Code of regulations has not been provided for filing with the Secretary of State.

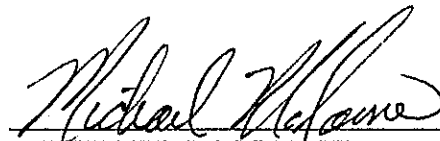
Section 20 of Title 1 of the California Code of Regulations requires a rulemaking agency to attach to the final text of a regulation, for filing with the Secretary of State, a copy of each document that is incorporated by reference into the California Code of Regulations. Here, the final version of each of the twenty test methods as incorporated by reference into the California Code of regulations has not been provided for filing with the Secretary of State. Consequently the requirements of Section 20 of Title 1 of the California Code of Regulations have not been satisfied.

6. The final version of each test method as incorporated by reference into the California Code of Regulations has not been included in the rulemaking record.

The Table Of Contents to the rulemaking record lists as item 14: "Documents Incorporated by Reference," meaning the final version of each test method as incorporated by reference into the California Code of Regulations. However, all of the texts included in the record in tab 14 are labeled "Draft June 26, 1998." To avoid any possibility of confusion, the documents at tab 14 must be correctly labeled as the "final version" of the document incorporated by reference into the California Code of Regulations. In addition, the text of Method 12 which is included at tab 14 does not include revisions proposed to Method 12. (See modified text of Method 12 at tab 13.) Consequently all items in the rulemaking record are not accurately listed in the table of contents as required by Government Code Section 11347.3(b)(12).

FOR THESE REASONS OAL disapproved the above-referenced rulemaking action.

DATE: August 17, 1999


MICHAEL McNAMER
Senior Counsel

for: Charlene G. Mathias
Deputy Director

Original: Michael P. Kenny, Executive Officer
cc: Diane Moritz Johnston

ENDNOTES

- 1 Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2 of the Government Code.
- 2 The California Air Resources Board is a state agency. Several statutory provisions define the term "state agency." Government Code Section 11000 provides that as used in the part of the Government Code on the government of the state of California, which includes the Administrative Procedure Act, "state agency" includes every state office, officer, department, division, bureau, board, and commission." Government Code Section 11342(a) provides that for purposes the part of the Administrative Procedure Act on rulemaking "state agency" and "agency" does not include an agency in the judicial or legislative departments of the state government."
- 3 Government Code Section 11346.
- 4 Government Code Section 11349.6(d).
- 5 Government Code Section 11349.1(a).
- 6 Government Code Section 11340.1.
- 7 Government Code Section 11340.1.

- 8 See Government Code Section 11346.2(b) which provides that an initial statement of reasons must include "the specific purpose" and "the rationale" for a regulation change and Government Code Section 11347.3(b)(7) which requires that material relied upon must be included in the rulemaking record.