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BILL JONES
SECRETARY OF STATE

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2000 OAL Determination No. 10

June 6, 2000

Requested by: LAWRENCE FAFARMAN

Concerning: **BUREAU OF AUTOMOTIVE REPAIR rules prohibiting modification of emission control equipment on an out-of-state, federally-certified vehicle or recertification of these vehicles under California standards**

Determination issued pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3

ISSUE

Does a statement issued by the Bureau of Automotive Repair prohibiting either modification of emission control equipment on federally certified motor vehicles brought into the State of California or recertification of these vehicles under California standards constitute a "regulation" as defined in Government Code section 11342, subdivision (g), which is required to be adopted pursuant to the Administrative Procedure Act (Chapter 3.5, Division 3, Title 2, Government Code (commencing with section 11340); hereafter, "APA")? [1]

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1. This request for determination was filed by Lawrence Fafarman, 5298 ½ Village Green, Los Angeles, Ca. 90016, (323) 293-6029. The Bureau of Automotive Repair's response was filed by Robert A. Miller, Legal Counsel, Dept. of Consumer Affairs, Legal Office, 400 R St., Sacramento, Ca. 95814. This request was given a file number of 99-012. In December 1999, Mr. Fafarman withdrew his challenge to a related rule issued by the Department of Motor Vehicles. This determination may be cited as "**2000 OAL Determination No. 10.**"

CONCLUSION

The website statement issued by the Bureau of Automotive Repair ("BAR") prohibiting recertification or conversion of emission control equipment on federally certified motor vehicles brought into the State of California is not a "regulation" subject to the APA because it is a restatement of existing legal requirements.

ANALYSIS

Background – California Emissions Control Certification

Under the Clean Air Act (Title 42 U.S.C. section 7401 et seq.), all new motor vehicles are required to meet certain emission standards. The State of California, however, has been perennially granted a waiver by Congress and thus permitted to impose its own standards. Because of California's stringent emission control laws, its residents are prohibited from bringing new motor vehicles into the State unless those vehicles have received a California emissions control certification. (Health & Safety Code section 43151, subdivision (a).) There are two major exceptions to this rule. One permits replacement of a vehicle which was stolen or significantly damaged when the owner was outside California and the other permits importation of new motor vehicles by a former resident of another state moving to California. (Health & Safety Code section 43151, subdivisions (b) & (c).)

A new motor vehicle is defined for these purposes as one that has been driven less than 7,500 miles. (Health & Safety Code sections 39042, 39055.5, and 43156, subdivision (a).) Generally, only new motor vehicles and new motor vehicle engines certified under California emission standards can be sold or registered in this state. (Health & Safety Code section 43151.) The result of this regulatory scheme is that "[g]enerally, only California certified vehicles may be sold or registered in California as new motor vehicles." (*Jordan v. California Dept. of Motor Vehicles* (1999) 75 Cal.App.4th 449, 89 Cal.Rptr.2d 333, 337.)

No new motor vehicle can be sold in California unless it has been certified for emission control and the *manufacturer's* emission decal has been "securely affixed" to it. (H & S Code § 43200.5, subdivision (a), 43210, subdivision (b).) Thus, conversion of a new motor vehicle by anyone *other than the manufacturer* in an attempt to achieve California certification would be a legally futile act.

The Smog Impact Fee

In 1990, legislation was enacted imposing a $300 smog impact fee on vehicles which could *legally* be brought into the State of California, but which had not been certified under California standards. This meant that a resident of another state could move to California and bring along a new federally-certified vehicle. Alternately, any federally-certified vehicle with more than 7,500 miles could be brought into California. However, such vehicles had to pass the California smog test and their owners were required to pay the $300 smog impact fee *in addition to* other normal registration and licensing fees. (See *Jordan v. Department of Motor Vehicles*, 75 Cal.App.4th at 456, 89 Cal.Rptr.2d at 337.)

Under such circumstances, it was probably understandable that owners might consider converting the emissions control equipment on their vehicles in order to achieve California certification. In this way, the $300 smog impact fee could possibly be avoided.

The BAR website message, which is the subject of this current request for determination, warned against such action. It stated in part the following:

> "Do not add additional emissions control equipment to your federally certified vehicle in order to bring it to California. Do not attempt to make a federal vehicle conform to California standards."[2]

In 1999, the California Court of Appeal struck down the smog impact fee, finding it unconstitutional. (*Jordan v. California Dept. of Motor Vehicles* (1999) 75 Cal.App. 4th 449, 89 Cal.Rptr.2d 333.) In the aftermath of *Jordan,* there was probably little incentive for motorists with federally-certified vehicles to attempt to achieve California certification. They are no longer subject to the $300 smog impact fee. The invalidation of the smog impact fee, however, did not eliminate BAR's independent policy concerning non-conversion of emissions control equipment. That policy has continued to be displayed on BAR's website.

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2. Request for Determination, p. 1.

Applicability of the APA to the BAR Policy

A determination of whether BAR's policy is a "regulation" subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the board, (2) whether the challenged policy contains "regulations" within the meaning of Government Code section 11342, and (3) whether the challenged policy falls within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly or specifically exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Government Code sections 11342, subdivision (a); 11346.) In this connection, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Government Code section 11000.) BAR is in neither the judicial nor legislative branch of state government, and therefore, unless expressly or specifically exempted therefrom, the APA rulemaking requirements generally apply to BAR.

In addition, Business and Professions Code section 9882 provides as follows:

> "There is in the Department of Consumer Affairs a Bureau of Automotive Repair under the supervision and control of the director. The duty of enforcing and administering this chapter is vested in the chief who is responsible to the director. The director may adopt and enforce those rules and regulations that he or she determines are reasonably necessary to carry out the purposes of this chapter and declaring the policy of the bureau, including a system for the issuance of citations for violations of this chapter [Chapter 20.3 – Automotive repair] as specified in Section 125.9. These rules and regulations shall be adopted pursuant to [the APA]."[3]

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3. Business and Professions Code section 9882 provides that BAR's regulations "shall be adopted pursuant to Chapter 4.5 (Section 11371 et seq.) of Part 1 of Division 3 of Title 2 of the Government Code." The reference should be updated because Chapter 4.5, was repealed by Statutes of 1979, Chapter 567, Section 2. Chapter 567 also enacted as the replacement for Chapter 4.5, new Chapter 3.5 (commencing with section 11340) which created OAL and which is the core of the legislation which makes up the modern APA.

OAL concludes that APA rulemaking requirements generally apply to BAR. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).)

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

Government Code section 11342, subdivision (g), defines "regulation" as follows:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]"

Government Code section 11340.5, subdivision (b), authorizes OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements. It reads as follows:

> "(b) If [OAL] is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (g) of Section 11342."[4]

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4. See also *California Coastal Com'n v. OAL* (1989) 210 Cal.App.3d 758, 763, 258 Cal.Rptr. 560, 563 (OAL is empowered "to issue advisory opinions as to whether or not a particular action or rule is a regulation.")

OAL's regulations define "determination" as follows:

> "(a) 'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code Section 11342(g), which is invalid and unenforceable unless
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> (1) It has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
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> (2) It has been exempted by statute from the requirements of the APA." (Title 1, CCR, section 121, subdivision (a).)

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274 -275, agencies need not adopt as regulations those rules contained in a "'statutory scheme which the Legislature has [already] established . . . .'" But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ."

Similarly, agency rules properly adopted *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon." For example, *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 891 held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation. Statutes may legally be amended only through the legislative process; duly adopted regulations—generally speaking—may legally be amended only through the APA rulemaking process.

In *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251[5] the California Court of Appeal upheld OAL's two-part test as to whether a challenged

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5. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of Grier in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g).

Under this test, a rule is a "regulation" for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule has been adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency's procedure.

If an uncodified rule satisfies both parts of the two-part test, it is a "regulation" subject to the APA. In applying the two-part test, we are mindful of the admonition of the *Grier* court:

> "[B]ecause the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]" (219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.)

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).)

A review of the policy in question clearly indicates that it is a standard of general application. It appeared on the Bureau's website and applies to all "federally certified vehicles" for which California registration is sought throughout the state.[6]

In defense of this policy statement, BAR cites the following language from Vehicle Code section 27156, subdivision (c). It provides that:

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6. Revised request for determination, p. 3.

> "No person shall install . . . any device . . . intended for use with, or as a part of, any required motor vehicle pollution control device or system which alters or modifies *the original design or performance* of any such motor vehicle pollution control device or system." [Emphasis added by BAR.]

BAR appears to be taking the position that its website message is merely a restatement of existing law. In this respect, agencies need not adopt as regulations those rules which are "'essentially . . . a reiteration of [an] extensive statutory scheme which the Legislature has [already] established . . . .' But to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations . . . ." (*Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274 –275.)

Thus, one of the key issues addressed in this determination is whether the BAR web-site message "essentially reiterates" an already established statutory scheme. If it does, then it is not a "regulation" that is subject to the APA.

The primary intent of the BAR website message appears to be to warn vehicle owners about attempting to convert their motor vehicles to conform to California certification standards. This is sound advice. As discussed earlier, such a conversion would be a futile act from a legal standpoint. Vehicle certification is established at the time of manufacture. *New* motor vehicles *not certified under California standards* are generally prohibited from being brought into this State. This prohibition has nothing to do with whether the motor vehicle could pass a California smog test. It has to do with its original certification. Therefore, if the BAR website message is interpreted as merely containing a warning to motorists about attempting to recertify their vehicles, it is essentially nothing more than a restatement of current legal requirements.

Alternatively, the BAR web-site message could be interpreted as prohibiting the conversion or alteration of emission control equipment regardless of whether there is any attempt at vehicle recertification. In this respect, Vehicle Code section 27156, subdivision (b), states that:

> "No person shall disconnect, modify, or alter any such required device."

Section 27156, however, does not contain an absolute prohibition concerning the modification of emission control equipment as could be implied from the web-site message. Subdivision (h) of this code section states as follows:

"(h) *This section shall not apply to an alteration, modification, or modifying device, apparatus, or mechanism found by resolution of the State Air Resources Board to do either of the following*:

(1) Not to reduce the effectiveness of any required motor vehicle pollution control device.

(2) To result in emissions from any such modified or altered vehicle which are at levels which comply with existing state or federal standards for that model year of the vehicle being modified or converted." [Emphasis added.]

Alteration of emission control equipment is permissible as long as the alteration or the equipment is approved by the State Air Resources Board ("ARB"). Nothing in the BAR website message appears to allow for such variations.

The website message, however, should not be read in isolation. On the home page menu at the BAR website is a category entitled "Smogcheck." When "Smogcheck" is accessed, another menu appears. Listed on this menu is the following category:

"Air Resource Board-approved aftermarket parts."

Accessing this category reveals a well-organized, extensive list of parts which have been approved by the ARB. This website explains the following:

"Exempted parts are add-on or modified parts that have undergone an ARB engineering evaluation. If the part or modification is shown to not increase vehicle emissions, it is granted an exemption to emission control system anti-tampering laws. This exemption is called an Executive order (EO) and allows the modification to be installed on specific emission controlled vehicles. Every Executive Order part or modification has an assigned number that can be verified by Smog Check stations, BAR Referee stations, or by the ARB."[7]

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7. (See http://www.arb.ca.gov/msprog/aftermkt/devices/devices.htm.)

These provisions are consistent with Vehicle Code section 27156 as well as existing ARB regulations. (See Title 13, CCR, sections 2220 - 2222.) For instance, Section 2222, subdivision (c), provides as follows:

> "No person shall advertise, offer for sale, or install a part as a motor vehicle pollution control device or as an approved or certified device, when in fact such part is not a motor vehicle pollution control device or is not approved or certified by the state board." (Title 13, CCR, section 2222, subdivision (c).)

Subdivision (b)(1) provides as follows:

> "Except for publishers as provided in subsection 3, no person or company doing business solely in California or advertising only in California shall advertise any device, apparatus, or mechanism *which alters or modifies the original design or performance of any required motor vehicle pollution control device or system unless such part, apparatus, or mechanism has been exempted from Vehicle Code section 27156 . . . .* " [Emphasis added.]

BAR's own regulations also provide legal support for these policies. Title 16, CCR, section 3362.1 states as follows:

> "An automotive repair dealer shall not make any motor vehicle engine change *that degrades the effectiveness of a vehicle's emission control system.* Nor shall said dealer, in the process of rebuilding the original engine or while installing a replacement engine, effect changes that would degrade the effectiveness of the original emission control system and/or components thereof. [Emphasis added.]"

Title 16, CCR, section 3340.41.5 also states as follows:

> "A tampered emissions control system is an emissions control system which is missing, modified or disconnected. . . .
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> * * * *

"(b) Modified. An emissions control system is deemed to have been modified if:

(1) the system has been disabled even though it is presently and properly connected to the engine and/or vehicle.;

(2) an emissions related component of the system has been replaced by a component not marketed by its manufacturer for street use on the vehicle; or

(3) an emissions related component of the system has been changed such that there is no capacity for connection with or operation of other emission control components or systems."

The above language and authorities strongly suggest that motor vehicle emission control devices can be modified or replaced as long as this is done in accordance with the exemptions and standards established by both BAR and the Air Resources Board.

The BAR website message, while perhaps not a model of clarity, does not appear to constitute a departure from or addition to these existing legal authorities. This is particularly true considering the fact that there is a direct connection on the website to the ARB list of approved parts and equipment which can be utilized to alter or modify emission control devices. Within this context, the BAR website is therefore restating existing legal requirements. As such, it is not a "regulation" which is subject to the APA.

Consequently, the website statement issued by the Bureau of Automotive Repair ("BAR") prohibiting recertification or conversion of emission control equipment on federally certified motor vehicles brought into the State of California is not a "regulation" subject to the APA because it is a restatement of existing legal requirements.

DATE: June 6, 2000

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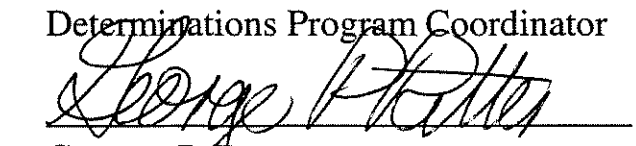

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