



**THE FLORIDA LEGISLATURE  
JOINT ADMINISTRATIVE  
PROCEDURES COMMITTEE**



# **Report on DEP Rule 62-285.400**

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# REPORT ON DEP RULE 62-285.400

## *SUMMARY*

Department of Environmental Protection (DEP) rule 62-285.400, Adoption of California Motor Vehicle Emission Standards, violates the rulemaking provisions of Florida's Administrative Procedure Act (APA) and the nondelegation doctrine of the Florida Constitution.

State adoption or enforcement of any standard relating to the control of emissions from new motor vehicles is preempted by 42 U.S.C. 7543, a section of the federal Clean Air Act. However, this section goes on to provide that the U.S. Environmental Protection Agency (EPA) can waive this preemption for the State of California. Once such a waiver is granted, other states are given the option to either follow federal standards<sup>1</sup> or to adopt their own standards identical to California's, but they are limited to these two options. Florida could not adopt standards that would be stricter than California's.

On July 13, 2007, Governor Crist issued Executive Order 07-127, "Establishing Immediate Actions to Reduce Greenhouse Gas Emissions within Florida." Among other actions, it directed the Secretary of the Department of Environmental Protection to develop rules under Chapter 403, Florida Statutes, to adopt the California motor vehicle emission standards found in Title 13 of the California Code of Regulations (CCR), which includes emission standards for greenhouse gases, upon approval by the EPA.<sup>2</sup>

Chapter 2008-227, Laws of Florida, became effective July 1, 2008. Section 115 of that law, now codified as Section 316.2937, Florida Statutes, provides that a DEP rule adopting the California emission standards shall not be implemented until ratified by the Legislature.

DEP noticed proposed rule 62-285.400, adopting Florida vehicle emission standards identical to California's standards, on August 29, 2008. The rule incorporates several California regulations by reference, which referenced materials in turn incorporate numerous other standards and regulations. The Florida rule provides that motor vehicles will not be subject to the rule standards until two model years<sup>3</sup> after the EPA has granted the waiver and Florida legislation ratifying the rule becomes effective. The staff of the Joint Administrative Procedures Committee (JAPC) conducted a close review of the rule and corresponded with the DEP about several concerns. No changes to the rule to address these concerns were made, and the rule was filed for adoption with the Department of State on January 26, 2009.

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<sup>1</sup> The Federal Government has adopted some emission standards, but to date has not adopted standards relating to greenhouse gas emissions.

<sup>2</sup> The EPA initially denied California's request for waiver. On January 26, 2009, President Obama directed the EPA to reconsider the waiver request.

<sup>3</sup> The two year delay is a federal restriction.

Rule 62-285.400 adopts by reference not only the portions of the California emission standards applicable to Florida, but also numerous provisions that have no applicability to this state.<sup>4</sup> A reader of the rule is therefore required to guess as to which portions of the voluminous referenced materials are actually Florida requirements and which are meaningless verbiage. Rule 62-285.400 adopts not only the codified emission standards contained in the California regulations, but also adopts portions of these regulations which vest authority in California officials to craft numerous accommodations or variations of these standards for certain model years. These variations are to be made in the future under generally unspecified conditions. Even assuming a California official could be empowered to act on Florida's behalf in such circumstances, Florida's Administrative Procedure Act would require that the criteria governing such future decisions be set forth in the rule, which they are not. More importantly, the vesting of authority in a California official to make decisions that would be automatically enforceable under Florida law constitutes a violation of the nondelegation doctrine of Florida's Constitution.

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## ***DISCUSSION***

### **Federal Clean Air Act**

The Clean Air Act (CAA or act) was originally adopted by Congress in 1955. At that time, there were no provisions for federal motor vehicle emission standards. As a result, a number of states began to develop their own motor vehicle emission standards. To avoid the possible confusion resulting from numerous emissions standards, Congress amended the act in 1967 to specifically prohibit states from “adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.” 42 U.S.C.A. s. 7543(a). Although the act was amended to impose a single national standard, it also allowed an exception or opportunity for waiver from the preemption for “any state which has adopted standards (other than crankcase emissions standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966.” This exception applied only to California.

In 1977, the act was further amended to add s. 177, which allowed other states to adopt the California standards, thereby avoiding the federal preemption, so long as the standards adopted by the other states were identical to those of California for a particular model year, and the standards were adopted at least two years before commencement of such model year.

What constitutes the California “standards” has been the subject of much litigation. The definition of “standards relating to the control of emissions” is generally accepted “as

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<sup>4</sup> The DEP has acknowledged that the referenced regulations address matters that will not be implemented or enforced by DEP, but have suggested that it is not possible to safely exclude them.

describing regulatory measures intended to lower the level of auto emissions, while ‘enforcement mechanisms’ describe regulatory devices intended to ensure that the ‘standards’ are effective. For example, the LEV Program is clearly a ‘standard,’ whereas periodic testing and maintenance requirements are ‘enforcement mechanisms.’” *American Automobile Manufacturers Association v. Cahill*, 152 F.3d 196, 200 (2d Cir. 1998).

The CAA was again amended in 1990 to significantly reduce the exhaust emissions levels allowed by federal regulations and to ensure that manufacturers were limited to meeting only two emissions standards, federal and California’s. No standards higher than those of EPA or California, which would require the manufacture of a “third vehicle,” would be allowed.

In 1991, California adopted its initial Low-Emissions Vehicle program, currently known as LEV I. It was generally applicable to model years beginning in 1994. California revised and adopted its LEV II program in 1996 for model years beginning in 2004. Waivers for both the LEV I and LEV II programs were granted by the EPA. The EPA’s emissions standards (Tier 2) were adopted in December 1999, and became effective with model year 2004 vehicles. Today, the LEV II standards are the vehicle emissions standards in effect in California and in the other states that have adopted those standards. The Tier 2 standards are the vehicle emissions standards in effect in all other states.

California has now taken its vehicle emissions standards a step further by adopting rules that would regulate the emissions of greenhouse gases (GHG) in addition to the non-methane organic gases regulated by the LEV II standards. Those greenhouse gases include carbon dioxide, methane, nitrous oxide and hydro fluorocarbons. (Title 13, 1961.1, CCR). California’s application for a waiver from the federal preemption statute that would allow these rules to take effect was submitted to the EPA, but was denied. Litigation challenging that denial is in progress. On January 26, 2009, President Obama directed the EPA to reconsider California’s request for a waiver to allow the regulation of greenhouse gases. In the event that the preemption waiver is granted, California’s GHG standards will take effect in California and in the other states that have adopted standards identical to California’s.

### **DEP’s Rule**

Florida Department of Environmental Protection rule 62-285.400, F.A.C., incorporates the California vehicle emissions regulations, both the LEV II and the GHG standards, and makes those regulations part of Florida’s rule. The rule defines “affected vehicles” as a passenger car, light-duty truck or medium-duty vehicle from any model year that is two model years after the model year in existence when California has been granted a waiver from the EPA for the greenhouse gas standards, and any legislation ratifying the rule adopted by the Florida Legislature becomes effective. The rule also exempts certain vehicles, requires compliance with certain specific provisions of the California regulations, requires submission of copies of California Executive Orders and Certificates of Conformity relating to certification of new motor vehicles, and specifically

incorporates each section of the California Code of Regulations that will comprise the Florida low vehicle emissions program.

In letters dated November 17 and December 16, 2008, and January 21, 2009, the Joint Administrative Procedures Committee staff expressed concerns with DEP's rule. The concerns related to compliance with s. 120.52(8), F.S., which provides in part that a rule is an invalid exercise of delegated legislative authority if it is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency, and the nondelegation doctrine of the Florida Constitution.

### **Invalid Exercise of Delegated Legislative Authority**

In its letters of January 12 and 23, 2009, DEP disagreed with the Committee's analysis, stating that s. 177 of the federal Clean Air Act requires Florida to adopt standards "identical" to those adopted by California, and that the method of adoption "preferred" by the EPA is incorporation by reference. DEP further stated that when materials are incorporated in a Florida rule, the provisions of chapter 120 do not apply to the incorporated text.

Incorporation by reference is defined as:

The method of making one document of any kind become a part of another separate document by referring to the former in the latter, and declaring that the former shall be taken and considered as a part of the latter the same as if it were fully set out therein. Black's Law Dictionary, Revised Fourth Edition (1968).

The effect of incorporation by reference is to make the incorporated material an enforceable part of the document into which it has been incorporated. In this instance, the materials incorporated into the DEP rule, the California vehicle emissions regulations, become the text of the department's rule. The incorporated language therefore is subject to all requirements of Florida law, including chapter 120 and the Constitution of the State of Florida. DEP's contention that the use of incorporation by reference as a drafting technique somehow expands its legal authority or eliminates the requirement that it comply with all applicable Florida law to the same extent as if the referenced words were written out verbatim is simply untenable.

Certain provisions of the California text made a part of Florida's rule by reference violate requirements of Florida's Administrative Procedure Act, specifically paragraph 120.52(8)(d), F.S., which provides that a rule that is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency is invalid.

DEP's rule incorporates numerous California regulations which in turn incorporate a second tier of regulations and documents. In many instances, these second tier regulations incorporate still other documents. These second and third tier documents are not expressly incorporated by DEP, yet it is often impossible to impart any meaning to

the documents that are expressly incorporated without consulting them. For example, 13 CCR § 1961.1(a)(1)(B)1.a., incorporated in rule subsection 62-285.400(9), F.A.C., states in part, “Greenhouse Gas emissions used for the ‘city’ CO<sub>2</sub> – equivalent value calculation shall be measured using the ‘FTP’ [Federal Test Procedure] test cycle (40 CFR, Part 86, Subpart B).” It is therefore impossible to understand or comply with DEP’s rule without consulting Subpart B. Florida’s APA requires that such material be specifically identified and filed with the Department of State as part of the rule, but DEP has not done so. Subpart B of 40 CFR 86 contains 84 subsections; without additional guidance, it is impossible for the reader to determine what or where the FTP test cycle is.

Conversely, the DEP rule expressly incorporates numerous provisions of the California regulations that have no applicability to Florida. For example, the rules expressly adopt California regulations prescribing procedures applicable to the determination of individual vehicle make and model emissions values. Yet DEP concedes that it has not been involved in that process in the past, and will not be involved in it in the future.<sup>5</sup> The provisions governing these procedures have absolutely no applicability in Florida, yet the rule purports to give them the force and effect of law.

The extensive material incorporated by reference in DEP’s rule that has no application to Florida and the equally extensive material not incorporated by it that does, makes it impossible to decipher the actual emissions program that DEP intends to administer. A reader of the rule could carefully examine all of the rule and its incorporated material from cover to cover, and still have no idea what the actual provisions applicable to Florida were. Such vagueness renders the rule as written invalid under Florida’s Administrative Procedure Act.

DEP is aware that the rule does not clearly describe the California regulations that are, and are not, the law in Florida, noting in correspondence to the Committee, “The CCR, as you may have noted, has a number of intertwined and cross-referenced provisions that makes isolation of standards difficult if not impossible without inclusion of some provisions that are obsolete or not useful to DEP.” But the burden to isolate the provisions actually applicable to Florida lies with DEP, and cannot be shifted to the reader of the rule.

DEP also specifically disagreed with the Committee’s concern that the incorporated regulations fail to include adequate standards for decision making or vest unbridled discretion in the California Air Resources Board (CARB) and its Executive Officer, stating that when materials are incorporated in a Florida rule, the provisions of chapter 120 do not apply to the incorporated text.<sup>6</sup> To the contrary, as discussed above, material incorporated by reference is part of the rule and subject to the requirements of Florida law. JAPC staff identified a number of provisions that impermissibly vest discretion by stating that an action “may” be taken (necessarily implying that it may not) or by

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<sup>5</sup> DEP letter to JAPC of January 12, 2009.

<sup>6</sup> In its letter of Jan. 23<sup>rd</sup>, DEP asserts, “The only restriction placed on the referenced material is that it be incorporated as it exists.”

referring to “approval” by the CARB Executive Officer without also including standards to guide the exercise of such discretion. Under Florida law, these provisions are invalid.

### **Nondelegation Doctrine of the Florida Constitution**

The Florida Constitution provides that no person belonging to one branch of government shall exercise any powers belonging to either of the other branches unless expressly provided in the constitution.<sup>7</sup> This fundamental principle is known as the nondelegation doctrine. DEP’s rule violates the doctrine by delegating to a California official the authority to make decisions in the future that will be binding in Florida.

The Clean Air Act permits states other than California to adopt standards relating to the control of emissions from new motor vehicles or engines under state law only if those standards are identical to the California standards. The sale of a motor vehicle or engine that meets California standards cannot be prohibited in any other state, that is, manufacturers cannot be compelled to create a “third vehicle.” Not just the basic standards of the California regulations, but the California executive’s determination of individual vehicle make and model emissions values constitute such standards. If the California executive gives certain accommodations from the basic standards for the 2013 Ford Focus, for example, Florida is bound to offer the same accommodation to avoid preemption. Presumably to avoid any possibility of deviation, under DEP’s rule Florida applies no standards and makes no independent determinations, but instead simply accepts the determinations of California officials. The rule might (though it doesn’t) expressly incorporate such determinations that have been made in the past, but to the extent that the rule purports to accept and be bound by decisions to be made in the future by California executives, it violates Florida’s nondelegation doctrine.

An example of such a future decision can be found at Title 13, CCR 1961.1(a)(1)(B)2.a., which states:

Optional Alternative Compliance Mechanisms. Beginning with the 2010 model year, a manufacturer that demonstrates that a bi-fuel, fuel-flexible, dual-fuel, or grid-connected hybrid electric GHG vehicle test group will be operated in use in California on the alternative fuel shall be eligible to certify those vehicles using this optional alternative compliance procedure, *upon approval of the Executive Officer.* (e.s.)

The decision of the Executive Officer to allow the use of an optional alternative compliance procedure alters the applicable standards for that vehicle make and model year. In its rule, DEP automatically adopts for Florida whichever standard the Executive Officer may approve, thereby delegating its responsibility to regulate the air quality in Florida to an administrator in another state.

In Florida, neither the Legislature nor any executive agency of the state can delegate its authority to fulfill its responsibilities to another entity without specific authority to do so.

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<sup>7</sup> Fla. Const. art. II, sec. 3.

[I]t is within the province of the legislature to approve and adopt the provisions of federal statutes, and all of the administrative rules made by a federal administrative body, that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or such administrative body might see fit to adopt in the future. *Florida Indus. Com'n v. State ex rel. Orange State Oil Co.*, 155 Fla. 772, 780; 21 So. 2d 599, 603 (Fla. 1945); quoted in *State of Florida, Department of Children and Family Services, Petitioner v. L.G.*, 801 So. 2d 1047, 1052 (Fla. 1<sup>st</sup> DCA 2001).

By incorporating regulations that bind Florida to future rulings of the Executive Officer of CARB, DEP has impermissibly delegated its authority and responsibility to adopt rules to implement the provisions of chapter 403, Florida Statutes.

## **Conclusion**

Rule 62-285.400 was adopted by the Department of Environmental Protection to establish Florida motor vehicle emission standards identical to standards adopted by California. In attempting to do so, the DEP rule violates provisions of Florida's Administrative Procedure Act and the nondelegation doctrine of the Florida Constitution.

A rule is an invalid exercise of delegated legislative authority if it is vague or fails to establish adequate standards for agency decisions. By adopting a rule that incorporates by reference numerous California regulations, some applicable to Florida and some not, DEP has made it practically impossible to determine with certainty which provisions apply. In other instances, the incorporated provisions do not include criteria necessary to guide decision making.

Most significantly, the rule violates the nondelegation doctrine by vesting authority in a California official to make future decisions that will be automatically enforceable in Florida.