

State of California
AIR RESOURCES BOARD

Addendum to the Final Statement of Reasons for Rulemaking

PUBLIC HEARING TO CONSIDER THE AMENDMENTS TO THE CURRENT
SMALL OFF-ROAD ENGINES REGULATIONS

Public Hearing Date: November 21, 2008

Agenda Item No.: 08-10-03

Addendum Prepared: February 24, 2010

I. BACKGROUND

On September 8, 2009, the California Air Resources Board (ARB) staff submitted the Final Statement of Reasons (FSOR), a Final Regulation Order containing proposed amendments to the Small Off-Road Engine (SORE) regulations, and the incorporated SORE test procedures to the Office of Administrative Law (OAL) for review and approval.

On October 20, 2009, OAL disapproved the proposed amended regulations because the modifications to the regulations did not comply with the California Administrative Procedures Act (APA) required standards for clarity and consistency, and ARB did not comply with the APA procedural requirements for FSOR content. Although staff did not agree with all of OAL's determinations, staff has addressed these concerns in this addendum.

A. Failure to comply with the clarity standard.

In its disapproval, OAL noted that during the public comment period and at the hearing, manufacturer representatives indicated that the zero emission equipment (ZEE) credit provisions proposed in section 2508(f)(7) were unclear and in need of revision. Staff acknowledged the lack of specificity and necessity for further clarifications at the hearing and in the FSOR. The clarity standard specified in California Government Code Section 11349(c) requires that regulations be written so that they will be understood by those directly affected by them. Accordingly, OAL did not approve the unclear and unfinished ZEE credit program regulations for codification into the California Code of Regulations (CCR).

B. Failure to comply with the consistency standard.

OAL also noted that the amendment proposed in section 2403(i) did not comply with the consistency standard specified in Government Code section 11340.5(a). Specifically, proposed section 2403(i) granted the Executive Officer the discretion to make technical changes to the incorporated test procedures in order to

enhance alignment with similar federal regulations promulgated after October 3, 2008. Because of this limited authorization, OAL did not approve this amendment.

C. Failure to follow procedural requirements of APA.

Lastly, OAL noted that ARB's FSOR contained inadequate summaries and responses to some of the comments as required under Government Code section 11346.9(a)(3). OAL determined that the FSOR did not adequately summarize or respond to the following comments.

1. The Outdoor Power Equipment Institute (OPEI) commented that: "under ARB's credit life proposal, ARB's ABT [Average Banking and Trading] credit program will not be consistent with the federal program (which does not impose a credit life on Phase 3 credits). Consequently, manufacturers would have to develop and implement unique ARB vs. EPA ABT-compliance strategies. This could require separate product lines for the California market. In turn, this will add cost-inefficiencies and higher prices for California consumers with no environmental benefits."

2. The Engine Manufacturers Association (EMA) commented as follows: "Agency concerns regarding delayed implementation of product meeting the latest standard level due to credits banked from prior standard levels should be segregated from concerns regarding credits generated from products that emit at lower levels than the current standard requirements. EMA has proposed that ARB pursue an approach similar to EPA to segregate credits generated by manufacturers when building products to meet prior standard requirements from credit potential for products meeting the current stringent ARB standard levels."

In addition, OAL noted that there were comments to which the responses did not address the substance of the comments on the grounds of timeliness of the comments' submission. This Addendum to the FSOR for the 2008 Amendments to the SORE Regulations lists, describes, and provides reasoning for the changes that ARB made to the FSOR, and the Final Regulation Order. Many of these changes were made in response to concerns raised by OAL, as well as typographical errors and oversights subsequently discovered. ARB is submitting this addendum to the FSOR for insertion in OAL File Number 2009-0908-03S.

II. ADDITIONAL MODIFICATIONS

To address OAL's concerns, staff made clarifying revisions, developed collaboratively with manufacturers, to the ZEE credit program regulations, removed adopted language for allowing Executive Officer discretion in making technical amendments to the test procedures, and revised responses to comments received in the 45-day public comment period.

In order to develop more refined ZEE credit program provisions, staff held several conference calls with OPEI, EMA and equipment manufacturer Stihl. On November 17, 2009, staff held a workshop to present its proposal for amending the ZEE credit program regulations. One month after the workshop, staff posted a draft of the proposed ZEE credit program modifications to the SORE regulations. After addressing additional concerns from manufacturers, staff published the "Notice of Public Availability of Modified Text" on February 4, 2010. Listserve notices were also sent out on ARB's MSPROG and ORSPARK electronic mailing lists, and Board hearing commenters were individually provided with the Notice, as well. The comment period ended on February 19, 2010.

The Notice of Public Availability of Modified Text included the following modifications, and the Final Statement of Reasons was amended as follows:

A. Modifications to Regulatory Text of California Code of Regulations, Title 13, Chapter 9, Article 1, sections 2401, 2403, 2404, 2405, 2406, 2408, and the addition of section 2408.1.

1. Section 2401 was modified by adding definitions of "eight-hour workday" in order to establish a basis of comparison of ZEE operation with that of conventional equipment; "professional level" to establish a basis of equipment performance comparisons; "standard battery package" to establish a basis for quantifying battery capacity delivered in a one-hour period; "zero-emission equipment credits" to identify emission reductions achievable by ZEE; and, "zero-emission equipment engine family" to identify specific ZEE that generate credits.

2. Section 2403(b)(3) was modified by adding "subsection 2403(b)" to clarify the existing citation for subsection (2)(B), adding ".1" to the existing citation for section 2408 to correctly indicate the new section, and deleting "above" to eliminate redundancy.

3. Section 2403(i) was removed per OAL's concern that it did not comply with the Government Code's consistency standard and, in effect, would allow the Executive Officer regulatory authority outside of the APA process.

4. Sections 2404(m)(1) and (2) were added to provide manufacturers the option of adding labels to ZEE that meet professional-level ZEE requirements. The labels may encourage and facilitate environmentally conscious commercial consumers to purchase ZEE over conventional equipment. Staff made this label optional because some of the small-sized equipment lack available space due to the other labeling requirements.

5. Section 2405(h)(1) was added to ensure that warranties for ZEE, including batteries and battery chargers, would be warranted against defects for

at least two years. Although the ZEE credit program is optional, staff believes that the equipment needs to remain usable for the same amount of time as conventional equipment. The consumer purchasing the product also needs protection from defective products.

6. Section 2405(h)(2) was added to explicitly indicate the allowance for equipment manufacturers to make contractual agreements with battery manufacturers to provide warranty coverage for the batteries. However, the equipment manufacturer is ultimately responsible for covering all of the consumer's warranty needs. This section was added at the specific request of the manufacturers, even though manufacturers could have done this on their own.

7. Section 2406(b)(2) was modified by changing "call" to "calls" to make the sentence grammatically correct.

8. Section 2408(f)(7) was deleted. Staff introduced provisions for a more defined ZEE credit program in section 2408.1.

9. Section 2408(i)(3) was modified by correcting the mailing address for the end-of-year and final reports.

10. Section 2408.1(a) was added as part of the collaborative revisions developed with manufacturers to the ZEE credit program. As with the certification emission credit program, the credit program for ZEE is a voluntary program. Staff is proposing that ZEE may begin to generate ZEE credits with the 2010 model year, and ZEE credits may be used to offset negative credits from any SORE family beginning with the 2011 model year. However, any equipment that receives funding by any emission reduction program funded by ARB (e.g., Assembly Bill 118 funding), or a manufacturer participating in the Blue Sky program, may not generate ZEE credits. Accordingly, staff is adding language to address the applicability issue.

11. Section 2408.1(b)(1) was added to set a starting point for the ZEE credit program. Basically, ZEE credits may be used to offset exhaust emissions for "carryover engine families" or engine families that meet the current tier 3 emission standards.

12. Section 2408.1(b)(2) was added so that only ZEE sold and used in California would generate ZEE credits.

13. Section 2408.1(b)(3) was added to allow manufacturers that find it difficult to separate out exact sales of an engine family in California, to use their entire production of that engine family when calculating the usage of ZEE credits. This option is only allowed for the usage of credits, and not for the generation of credits.

14. Section 2408.1(b)(4) was added as a requirement that manufacturers that wish to generate ZEE credits must certify the ZEE and the ZEE engine family would obtain a Family Emission Limit (FEL) of zero grams per kilowatt-hour.

15. Section 2408.1(b)(4)(A) was added to clarify that ZEE credits may be used for averaging, banking or trading, or a combination of these three actions.

16. Section 2408.1(b)(4)(B) was added to set the durability requirement at the maximum durability period to ensure that only higher durability professional-level equipment can generate ZEE credits. This is meant to encourage new technology that may not yet be in production. The durability periods would be different for each engine displacement category. The displacement designation would correspond to the displacement of the engine in the conventional equipment.

17. Section 2408.1(b)(4)(C) was added to allow a reduced ZEE durability requirement with a corresponding reduction in credit generation. A ZEE certified at the lower durability level may generate only seventy-five percent of the ZEE credits that the engine family would have generated at the normal durability period. To generate reduced ZEE credits, the engine family must meet a minimum durability period of 225 hours for engines with a displacement under or equal to 80cc or 375 hours for engines with displacement greater than 80 cubic centimeters (cc) and less than 225cc. This provision would be allowed through the 2012 model year. This section was added in response to comments made at the board hearing requesting "some interim period of time for equipment that may not entirely meet the proposed performance standards."

18. Section 2408.1(b)(4)(D) was added to state the minimum professional-level requirements. Conventional professional-level lawn and garden equipment are generally expected to provide one hour of continuous use before refueling is required. A similar one-hour operating period expectation will apply to professional-level ZEE. However, because current battery technology does not enable a single battery to power equipment constantly for one hour, staff is allowing up to four batteries to be used. If multiple batteries are necessary to meet this requirement, they must be provided with the equipment. Minimum specifications are stated in Table 1 of this section. Additional requirements are also included for durability testing and minimum battery durability.

19. Section 2408.1(b)(4)(E) was added to clarify the requirement that enough batteries be provided to the ultimate purchaser to allow for one hour of continuous operation.

20. Section 2408.1(b)(4)(F) was added to require manufacturers to demonstrate as part of the certification process, that a commercial operator could use the equipment through a typical “8-hour” workday without difficulty. The manufacturer must show that this is possible with the limitations of the battery charging and recharging times.

21. Section 2408.1(b)(4)(G) was added to clarify that manufacturers must demonstrate compliance with the use of ZEE credits within 270 days after the end of the model year.

22. Section 2408.1(b)(4)(H) was added to state requirements for the manufacturer to track batteries originally sold with ZEE for credit generation. This requirement would be useful for both consumers and manufacturers to identify which batteries are covered under warranty. This section also clarifies that replacement batteries cannot generate ZEE credits.

23. Section 2408.1(c)(1) was added to establish ZEE credit use requirements. Specifically, only up to fifty percent of the negative emission credits from a particular engine family can be offset by ZEE credits. The remaining credit balance must be offset by positive certification credits. Requiring the use of certification emission credits, in addition to ZEE credits, encourages manufacturers to use other advanced emission control technologies in addition to the zero emission technology.

24. Section 2408.1(c)(2) was added to require that ZEE credits be banked before they can be used to offset emissions from other equipment. Requiring that ZEE credits be banked ensures that any ZEE credits being used are legitimate.

25. Sections 2408.1(c)(3) and (4) were added to keep ZEE credits separated by displacement categories. This requirement, which was requested by manufacturers, is beneficial because of the differential in the emission standards for each displacement category. In addition, ZEE is expected to replace equivalently performing conventional equipment, so the credits should be used only within the respective displacement category. Accordingly, language that specifies this requirement has been included.

26. Sections 2408.1(d)(1) and (2) were added to provide the provisions for banking ZEE credits. Specifically, while actual generation of these credits may begin with the 2010 model year, these credits can be banked only at the end of the model year.

27. Section 2408.1(d)(3) was added to indicate that ZEE credits can be banked for a maximum of five years. This is consistent with the same limits for certification emission credits.

28. Section 2408.1(d)(4) was added to clarify that after five years, ZEE credits would expire and would no longer be usable for offsetting negative certification emission credits.

29. Section 2408.1(e) was added to provide the provisions for trading ZEE credits. Specifically, ZEE credits that are available for trading are credits that were banked in previous model years, and these credits can be used for averaging and banking purposes for up to five years from the time they were generated.

30. Section 2408.1(f) was added to provide clarifying language for the calculation of ZEE credits.

31. Section 2408.1(g) was added to provide the certification requirements for equipment that generate ZEE credits. These requirements mirror the requirements for certification emission credits.

32. Section 2408.1(h) was added to explain the maintenance of records requirements for ZEE credits. These requirements also mirror the requirements for certification emission credits. The records for ZEE credits must include maintaining records for the batteries, as well.

33. Section 2408.1(i) was added to provide the requirements for the end-of-year and final reports for ZEE credits. These requirements are also similar to the reports required for certification emission credits.

In developing the ZEE credit program provisions, one aspect that concerned staff involves the possibility that commercial operators of ZEE may use portable generators or parked motor vehicle motive power sources for recharging ZEE batteries, instead of recharging through the electric power grid itself. However, staff currently believes that this kind of recharging activity will not be wide spread because of the additional costs and effort associated with owning, handling, and transporting the generators, or the fuel costs associated with motor vehicle engine idling. In the future, staff may consider monitoring and determining the emissions benefits associated with any battery recharging activities performed by operators of ZEE during a typical eight-hour workday, that rely either partially or completely on non-electric power grid sources.

B. Modifications to the Final Statement of Reasons for Rulemaking.

1. Inadvertently omitted written comments.

On page 3, Final Statement of Reasons, Section II, SUMMARY OF COMMENTS AND AGENCY RESPONSE, the following comments and Agency Responses are hereby added in their entirety, which includes

inadvertently omitted written comments received during the initial 45-day public comment period.

15. Comment: Under ARB's credit life proposal, ARB's ABT [Average Banking and Trading] credit program will not be consistent with the federal program (which does not impose a credit life on Phase 3 credits). Consequently, manufacturers would have to develop and implement unique ARB vs. EPA ABT-compliance strategies. This could require separate product lines for the California market. In turn, this will add cost-inefficiencies and higher prices for California consumers with no environmental benefits. (OPEI)

Agency Response: Previous to the changes made in these proposed amendments to the SORE regulation, ARB's evaporative and exhaust emission standards, as well as its emission credit programs, had already differed from the United States Environmental Protection Agency's (U.S. EPA) corresponding rules. Consequently, manufacturers had already developed and implemented unique California compliance strategies. Manufacturers have not provided any new or additional information to indicate that there would be any significant costs beyond those that already exist. In addition, although ARB prefers to align with U.S. EPA when possible, in this case, staff believes that the proposed changes will improve California's emission credit program. Accordingly, no changes were made to the regulations in response to the comment.

16. Comment: Agency concerns regarding delayed implementation of product meeting the latest standard level due to credits banked from prior standard levels should be segregated from concerns regarding credits generated from products that emit at lower levels than the current standard requirements. EMA has proposed that ARB pursue an approach similar to EPA to segregate credits generated by manufacturers when building products to meet prior standard requirements from credit potential for products meeting the current stringent ARB standard levels. (EMA)

Agency Response: Although staff agrees that giving more weight to credits generated under the more stringent standards than credits generated under previous less stringent standards would be ideal, in practice, this would not be feasible. ARB exhaust emission standard changes took place in model years 2005, 2007, and 2008 for SORE with engine displacements less than 80cc, 80cc to 225cc, and over 225cc, respectively. Staff would not expect

manufacturers to determine which of their remaining credits were generated before the changes in the emission standards because of the impracticality involved in retroactively establishing the proper accounting of emission credits to specific emission standards. Staff will, however, remember this comment when considering any modifications to the SORE regulations in the future.

2. Comments that were responded to incompletely.

On page 3, Final Statement of Reasons, Section II, SUMMARY OF COMMENTS AND AGENCY RESPONSE, the following responses to comments are hereby modified as indicated below.

10. Comment: Here are several examples of needed amendments that ARB should adopt to harmonize with the new EPA Phase 3 regulations:

1) EPA's new engine test procedure (Part 1065) needs to be an option for certification ASAP (by 2013 at the latest when EPA mandates it for new families).

2) New 40 CFR §1054.670. ARB should add this language as an option to their current test procedure.

3) ARB should add language for the time to stabilize and the measurement period (for emissions) that is indicated in new section 1054.505(a)(1). EPA requires a 5-minute warm up at each mode (minimum) and a 1-minute measurement period.

4) EPA describes (in detail) the measurement speed of rated WOT (wide open throttle) and Idle. ARB should accept these test points as an alternate to the current specified test speeds in the ARB regulation.

5) Pursuant to (and with the same effective dates as) new 40 CFR §1054.135(c), ARB should revise its label language in section 2759(c)(4)(A) and 2404(C)(4)(A) to read "EMISSION CONTROL INFORMATION" (instead of the current "IMPORTANT EMISSION INFORMATION") in order to harmonize with EPA. ARB should avoid pulling ahead any labeling changes before it is required by EPA – typically in the 2011 and 2012 Model Year. (OPEI)

Original Agency Response: Some of these examples of "needed amendments" can probably be changed using the adopted provision for Executive Officer discretion. However, a determination of that applicability would require a more complete discussion with all manufacturers and stakeholders (see Response to Comment No. 9.). Guidance for such minor changes could also be distributed via MAC's or other documents.

The Board agrees with OPEI that allowing for Executive Officer discretion in making minor changes to the amendments would be a more efficient way of handling such issues. This is something that both staff and stakeholders desire. Staff was not able to include the changes suggested because these comments were not presented during the workshop process, but were submitted just prior to the Board hearing. With an allowance for the Executive Officer discretion, this matter could be handled without the need to go through the full Board Hearing process.

Further Agency Response: As indicated in the Hearing Notice for this regulatory action, the scope of the proposal was limited to amending the emission credit provisions for SORE, along with some other minor regulatory changes. The changes to the SORE test procedures recommended by the comments are beyond the scope of the proposal. Accordingly, no changes were made to the regulations in response to the comments. Nevertheless, staff recognizes the merit of these comments and will consider them for future incorporation into the regulation.

12. Comment: OPEI supports the addition of the EPA Phase 3 approach allowing exhaust certification with fuels up to 10 percent ethanol. We understand ARB staff's intent is to link the selected certification fuel with any confirmatory testing. OPEI requests ARB to add language that clarifies that any confirmation or auditing tests that ARB conducts or requires be conducted will use the same, selected certification fuel. (OPEI)

Original Agency Response: The Board appreciates OPEI's support of this portion of the amendments. The Board approved an allowance for the optional use of this fuel for certification testing. However, staff was not able to include a similar fuel allowance for confirmatory testing because the suggestion was received after the notice period had ended. This is another example of a minor technical change that ARB could possibly make to the test procedures, without returning to the Board, by using the Executive Officer discretion provision, as described in the Response to Comment Number 9.

Further Agency Response: Staff did not modify the existing language in the test procedures because the inherent requirement to perform testing using good engineering practice means that certification confirmatory exhaust emission testing must be conducted with the same fuel that is used for the initial certification exhaust emission testing. In addition, section 2407(a)(7), CCR, title 13, indicates that an engine selected for exhaust emission

compliance testing must be emission tested according to the applicable test procedures (i.e., the same test procedures used for certification of the engine). Further, section 2407(d)(1), CCR, title 13, indicates that the test procedures to be used for engines selected for exhaust emission quality-audit production line testing are specified in conjunction with the “Emission Standards and Test Procedures,” or in other words, the same test procedures used for certification of the engine. Consequently, since the adopted provision for allowing up to a 10 percent (by volume) ethanol fuel is explicitly specific to certification testing, that same test fuel allowance must also pertain to compliance and quality-audit production line testing. Accordingly, no changes to the test procedures were necessary in order for either certification confirmatory testing or compliance and quality-audit production line testing to be conducted with the same test fuel that was used to emission certify an engine.

3. Comments that were received during the 15-day public comment period.

The following includes comments that were received during the 15-day public comment period, and staff’s responses to these comments.

17. Comment: [EMA/OPEI recommends that] ZEE credit generating product labeling specified by §2404(m) be mandatory rather than optional as proposed. ARB has traditionally required all products certified by the Air Resources Board to be labeled such that their compliance status can be identified. Because certified ZEE will be generating emission credits utilized to demonstrate compliance with ARB emission standards it is important that these equipment be identifiable for warranty requirements as specified in §2405(h) and to avoid such equipment from being utilized for emission reduction programs as specified in §2408.1(a). Failure to change the labeling requirements from optional to mandatory will result in substantial risk that ARB will provide credits to equipment that either fails to meet warranty requirements or is additionally utilized to generate emission reduction program credits. (EMA, OPEI)

Comment: EMA recommends that the proposed 15-day changes identified in the February 1, 2010 notice of publicly available modified text be adopted as proposed; provided, however, EMA contends that the product labeling specified by §2404(m) should be mandatory rather than voluntary. (EMA)

Agency Response: Staff understands and shares EMA's and OPEI's concerns about the compliance of equipment which will generate ZEE emission credits. However, it should be noted that the intent of the proposed optional ZEE label provisions, specified in section 2404(m), is to facilitate the identification of California-certified ZEE by the ultimate purchasers, and thereby encourage the use of ZEE. The ZEE label was made optional in recognition of the lack of available space on some smaller-sized equipment and of the compliance burden associated with the existing label requirements, as well as the additional cost burden of the newer battery technology itself. If a manufacturer chooses to use a label, it should be noted that only California-certified ZEE can display a label that contains the statement, as specified in section 2404(m)(A), to be "professional-level California-certified zero-emission" equipment. Further, the proposed optional ZEE label is in addition to the existing label requirements contained in section 2404. These existing label requirements already serve to readily identify the compliance status of SORE, specifically through the unique engine family names that must be displayed on labels. Thus, the compliance status of California-certified ZEE can be identified by their unique ZEE-engine family names, the definition of which is also included in the proposal. Accordingly, staff did not make any changes to the proposed regulations in response to these comments.

18. Comment: [EMA/OPEI recommends that] ARB Staff carefully review all applications for certification of ZEE credits generating families to ensure that (i) the equipment is in fact "professional level" meeting the proposed definition in §2401 (a); (ii) the ZEE warranty meets the requirements specified in §2405 (h); and (iii) the credits being generated comply with all of the requirements specified in §2408.1. (EMA, OPEI)

Agency Response: Staff agrees that adherence with these requirements is critical to the success of the ZEE credit program. By virtue of its considerable experience with successfully developing, implementing, and administering mobile source emission control programs, staff is confident that all of the ZEE-engine family applications submitted for certification will undergo the same careful review process that is used with all mobile source categories in order to ensure complete compliance with the regulations. Accordingly, staff did not make any changes to the proposed regulations in response to these comments

19. Comment: [EMA/OPEI recommends that] ARB Staff carefully review any small off-road engine certification application utilizing ZEE credits to demonstrate compliance with ARB regulatory requirements including: (i) §2408.1 (c)(1) which requires that not more than 50% of an engine manufacturers negative credits can be offset by ZEE credits; (ii) all of the provisions specified in §2408.1(g) associated with the use of ZEE credits; and (iii) §2408 (g)(1)(E), which sets the maximum ZEE credit usage for an engine family 40% above the applicable standard. (EMA,OPEI)

Agency Response: Again, as in the previous response, staff has already dealt with certification emission credit provisions, and will continue to review the ZEE credit program requirements with the same level of attention. Accordingly, staff did not make any changes to the proposed regulations in response to these comments.

20. Comment: [EMA/OPEI recommends that if] at a future date it is determined that additional products are capable of generating ZEE credits, a formal rulemaking process would be required before such products could generate ZEE credits. Such a rulemaking process will facilitate the required public participation process required to ensure that ZEE credits are only being generated by viable products. (EMA, OPEI)

Agency Response: Staff agrees with this comment. A formal rulemaking process is the proper method for allowing any ZEE not currently identified in the proposed amendments. However, no changes the regulations were required in response to these comments.

21. Comment: OPEI recommends adding to §2408.1(c)(1) a clarification statement such as “subject to the limitations in §2408(g)(1)(E).” (OPEI)

Agency Response: The provisions requiring a manufacturer to indicate credit sources and recipients when using certification credits, as specified in §2408(g)(1)(E), pertain only to certification credits, and are not applicable when using ZEE credits. For ZEE credit use, §2408.1(g)(1)(E) requires that only recipients of ZEE credits (i.e., ZEE would not generate negative credits) be specified. The averaging requirements specified in §2408.1(c)(1) are to be allowed, “...under the provisions of section 2408.1.” Thus, the requirements specified in §2408.1(g)(1)(E) are applicable to §2408.1(c)(1). Accordingly, staff did not make any changes to the proposed regulations in response to this comment.

22. Comment: To assure that “professional Level” (sic) performance is not only demonstrated for certification but also provided as part of the actual product sold, §2408.1(b)(4)(E) should be clarified that the 1 hr battery capacity must be supplied with the product. (OPEI)

Agency Response: As specified in §2408.1(b)(4)(E), a manufacturer is required to provide a “standard battery package,” which is defined in §2401 to be sufficient battery capacity to allow equipment to perform one hour of continuous operation. Staff believes that these proposed provisions adequately indicate the requirement that a one-hour battery capacity must be provided with the product. Accordingly, staff did not make any changes to the proposed regulations in response to this comment.

23. Comment: In addition to a unique part number for the manufacturers original battery pack as stated in §2408.1 (b)(4)(H)(1), original batteries should also be labeled “Not for Retail Sale”, to prevent ZEE products from being sold without the intended battery capacity or the original battery capacity from being retailed separately. (OPEI)

Agency Response: As discussed in the Agency Response to Comment No. 22, a manufacturer must provide the ultimate purchasers with a standard battery package. Thus, it is the manufacturer’s responsibility to ensure that the proper number of batteries is sold with the ZEE product. In the interest of providing flexibility in manufacturers marketing concerns, ARB will not dictate how a manufacturer satisfies this requirement. Nevertheless, if ARB discovers that ZEE products are being sold without the standard battery package, then the manufacturer will not generate ZEE credits from the sale of their ZEE product. In addition, staff will not prevent manufacturers from labeling their product with a “Not for Retail Sale” warning in order to protect themselves from the possibility of its original batteries being sold separately from its ZEE product. Accordingly, staff did not make any changes to the proposed regulations in response to this comment.

24. Comment: In §2408.1 (b), Battery Capacity – Add the following clarification – “See minimum supplied battery capacity requirements in §2408.1, Table 1. Additional capacity above minimum may be supplied at the manufacturer’s discretion.” (OPEI)

Agency Response: Staff does not believe that the clarification is necessary. Also, the proposed regulations do not prevent a manufacturer from providing additional battery capacity that is beyond the minimum amount required. Accordingly, staff did not make any changes to the proposed regulations in response to this comment.

25. Comment: In §2408.1, Table 1, for handheld and back pack blowers, the performance criteria references ANSI B175.2. The standard is currently under revision and the performance criteria relied upon within Table 1 has not yet been published in the ANSI B175.2 standard. Current publish date estimated for the new revision of ANSI B175.2 is late 2010. To address this lapse between the ANSI B175.2 standard and the ZEE performance criteria reliance upon the ANSI B175.2 in Table 1, OPEI recommends two possible options:

- a. Inclusion of the performance criteria in §2408.1, or
- b. A temporary guidance document that would expire upon the publish date of ANSI B175.2. (OPEI)

Agency Response: Staff relied on manufacturers' recommendation of the ANSI B 175.2 standard in designating the performance criteria. The fact that the revisions to the ANSI B175.2 standard will not be published until late 2010 means that manufacturers of handheld and backpack blowers that wish to ZEE certify their product would either choose to use the performance criteria from the current version of the ANSI 175.2 standard or choose to wait until the revised standard is published. No changes to the regulations were made in response to the comment.

III. CONCLUSIONS

Staff believes that the regulatory text is sufficiently clarified to be consistent with APA's standards for regulatory consistency and clarity, and with APA's procedural requirements for regulatory actions so that meaningful public opportunity for comment is provided before the regulations become effective. The proposed 2008 amendments to the SORE regulations are necessary, cost-effective, and technologically feasible. The final modifications were adopted by ARB through Executive Order [to be determined], dated [to be determined].