



Gray Davis
Governor

David B. Judson
Deputy Director and
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2002 OAL DETERMINATION NO. 4-L
(Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 123(c))

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April 22, 2002

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Re: Request for Determination concerning the Office of
Emergency Services document entitled "Sequence of Steps in
Inundation Map Preparation"; OAL File No. 01-001

Dear Ms. McKeith:

You have requested the Office of Administrative Law ("OAL") to issue a determination as to whether certain rules set forth in the Office of Emergency Services ("OES") document titled "Sequence of Steps in Inundation Map Preparation" are "regulations" which must be adopted pursuant to the Administrative Procedure Act ("APA"; Government Code section 11340 et seq.).

In order to facilitate the development of emergency procedures for the evacuation and control of populated areas in the event of the failure of dams, Government Code section 8589.5 generally provides that local government organizations, utilities, and other owners of dams must prepare "inundation maps" showing the areas of potential flooding in the event of dam failures. This statute further provides that the proposed inundation maps are to be submitted to OES for review, possible revision, and approval. The rules set forth in the OES document titled "Sequence of Steps in Inundation Map Preparation" (the "challenged rules") have essentially provided OES' guidelines and requirements for the preparation of inundation maps by those organizations and entities required to prepare the inundation maps pursuant to Government Code section 8589.5.

In issuing a determination, OAL renders an opinion as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not, adopted pursuant to the APA.

Government Code section 11342.600 defines “regulation” to mean “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.” For an agency rule 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.¹

We think that, at the time your request for determination was submitted to OAL, the challenged rules of OES included provisions which met the definition of “regulation.” These rules applied generally to all members of the open class of local government organizations, utilities, and other owners of dams that were required to prepare inundation maps and submit those inundation maps to OES for review and approval under Government Code section 8589.5. These challenged rules further implemented, interpreted, or made specific Government Code section 8589.5.

However, since the time of the original request for determination, the challenged rules as contained in the document “Sequence of Steps in Inundation Map Preparation” have been declared by OES to no longer be in effect.² In addition, OES has now adopted emergency regulations under the APA with respect to many of the dams subject to inundation mapping requirements.

In a letter to OAL dated March 22, 2002, the Director of OES stated and certified (in accordance with Code of Civil Procedure section 2015.5) as follows:

“At this time, OES has taken two actions that address the Request for Determination and the fundamental need for standards for developing inundation maps. First, . . . OES proposes to adopt emergency regulations consistent with Government Code Section 11349.6 for developing inundation maps and related administrative actions for dams that are not designed primarily for the control of debris flows OES will follow this emergency rulemaking with the adoption of permanent regulations for non-debris dams, consistent with the Administrative Procedure Act[.]”

“Second, OES has discontinued the use of its “Sequence of Steps in Inundation Map Preparation” as a standard for all dams, including those dams whose primary purpose is retention of debris. Since the engineering methodologies for inundation mapping for debris basins are still undergoing development, OES will hold in abeyance rulemaking and inundation map review for, those dams denoted as ‘debris basins’ in Department of Water Resources Bulletin 17-00, published in July 2000. [Emphasis added.]”

In addition, on March 22, 2002, OES submitted to OAL for review emergency regulations dealing with “Dam Inundation Mapping Procedures.” These regulations were approved by OAL and filed with the Secretary of State on April 2, 2002, became operative upon filing with the

1. *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 (a standard of general application applies to all members of any open class).

2. Letter submitted by the Director of OES, dated March 22, 2002.

Secretary of State, and have been published as subchapter 4 (sections 2575 through 2578.2), chapter 2, division 2, title 19, of the California Code of Regulations (“CCR”). These regulations now establish the required dam inundation mapping procedures for many of the dams in this state (in lieu of the challenged rules formerly set forth in the OES document “Sequence of Steps in Inundation Map Preparation”).³

Thus, as discussed above, OES has declared that it has discontinued the use of the document titled “Sequence of Steps in Inundation Map Preparation” as a standard for mapping procedures for all dams (i.e., the document is no longer in effect). Furthermore, OES has now adopted emergency regulations that establish the required inundation mapping procedures for many of the dams formerly subject to the rules contained in “Sequence of Steps in Inundation Map Preparation.” Consequently, the matter having been disposed of, we contemplate no further action in its regard.⁴

3 . The regulations by their terms (CCR, title 19, section 2575.1) do not apply to “those structures identified as Debris Basins in Department of Water Resources Division of Safety of Dams Bulletin 17-00 dated July 2000 and incorporated by reference herein.” CCR, title 19, section 2575.2, subsection (j), defines “Debris Basin” as follows: “A permanent flood control facility that has the primary purpose of separating debris from the floodwaters and storing the debris for future removal.” Furthermore, CCR, title 19, section 2575.2, subsection (k), defines “Debris Dam” as: “A dam that has the primary purpose of holding back debris captured in, and stored by the debris basin.” As indicated above, OES stated in its March 22, 2002 letter to OAL that engineering methodologies for inundation mapping for debris basins are still undergoing development and that OES will hold in abeyance rulemaking and inundation map review for those dams denoted as “debris basins” in Department of Water Resources Bulletin 17-00, published in July 2000.

4. Section 123 of title 1 of the CCR provides in part the following:

“(b) OAL shall not accept for filing any request for determination if OAL finds that the state agency rule being challenged:

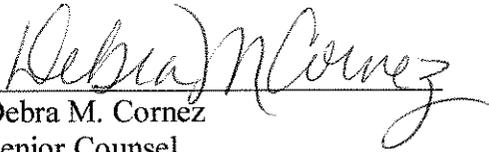
- (1) has been superseded;
- (2) has expired by its own terms;
- (3) *has been declared in writing by the state agency under penalty of perjury, in accordance with Code of Civil Procedure Section 2015.5, to have been rescinded or to no longer be in effect;*
- (4) has been nullified by a court in a judgment that has become final;
- (5) *is contained in a regulation adopted pursuant to the APA;*
- (6) is contained in a California statute;
- (7) is clearly within the scope of an express statutory exemption from the APA; or
- (8) is the same rule, or is substantially the same (i.e., has the same effect) as a rule from the same state agency, on which OAL has already issued a determination.

“(c) If, after accepting a request for determination, OAL finds that the challenged state agency rule falls within subsection (b), OAL may at any time issue a summary determination letter instead of a determination pursuant to sections 124, 125, and 126. Any summary determination letter shall be issued pursuant to section 127. [Emphasis added.]”

This summary determination letter is being issued pursuant to section 123, subsection (c), because the challenged agency rules fall within section 123, subsections (b)(3) and (b)(5).

Sincerely,

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