

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

AGENCY: Department of Fish and Game	)	DECISION OF DISAPPROVAL
	)	OF PROPOSED CHANGES
	)	WITHOUT REGULATORY
	)	EFFECT
ACTION: Amend section 228 of title 14	)	
of the California Code of Regulations	)	(Gov. Code, sec. 11349.3 and
	)	Cal. Code Regs., tit. 1, sec. 100)
	)	
	)	OAL File No. 07-1102-06 NR
	)	

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**DECISION SUMMARY**

The Department of Fish and Game (“Department”) proposed to amend California Code of Regulations (“CCR”), title 14, section 228, subdivision (b)(1) (hereafter “section 228(b)(1)”) regarding the issuance of special permits for using vacuum or suction dredges in closed seasons or closed waters. The Department proposed to delete language in section 228(b)(1) based on the ruling of the Sacramento County Superior Court in *Eason v. California Department of Fish and Game, et al.*, Sacramento County Superior Court Case No. 06CS00768 (“*Eason*”), which found that there is a conflict as a matter of law between Fish and Game Code section 5653, subdivision (d) and section 228(b)(1). On November 2, 2007, the Department submitted this proposed change to the Office of Administrative Law (“OAL”) as a change without regulatory effect pursuant to section 100, title 1, of the CCR (hereafter “section 100”). On December 19, 2007, OAL disapproved the proposed changes.

OAL has 30 working days to review a file submitted as a change without regulatory effect, pursuant to Section 100, subdivision (c) and Government Code section 11349.3, subdivision (a). Within those 30 working days, OAL may either approve or disapprove the submitted file. If a submittal is disapproved, the adopting agency is sent a notice indicating that the file has been disapproved. A written decision detailing the reasons for disapproval (Decision of Disapproval) must then be provided to the agency within seven calendar days. (Gov. Code, sec. 11349.3, subd. (b).) This Decision of Disapproval explains the reasons for OAL’s disapproval in this matter.

**DECISION**

OAL disapproved the Department’s proposed amendment of the regulation because the judgment in *Eason* has not become final as required by section 100, subdivision (a)(3). In addition, the other justifications for adoption as a change without regulatory effect cited by the Department are insufficient pursuant to section 100. Therefore, the proposed amendment cannot be approved as a change without regulatory effect under the limitations set forth in section 100.

## DISCUSSION

The adoption, amendment or repeal of regulations is ordinarily accomplished by following the rulemaking procedural and substantive requirements of the Administrative Procedure Act (“APA”). In 1986, OAL adopted a regulation to create a procedure for allowing certain changes that are without regulatory effect in regulations published in the CCR without following the notice and procedural requirements of the APA. OAL’s regulation, found at section 100, is based upon the rationale that changes to rules that have no regulatory effect do not involve rulemaking and the belief that following the APA for such changes imposes an unnecessary burden with no corresponding benefit.

Section 100 filings are, of necessity, limited to changes that “do not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision.” (Section 100(a) and (b)(3).)

Section 100, subdivision (a), includes a list of changes that OAL may deem as “changes without regulatory effect.” Section 100, subdivision (a)(3) allows for such a change when an agency proposes the deletion of a “regulatory provision held invalid in a judgment that has become final, entered by a California court of competent jurisdiction, ...; however, OAL shall not approve any proposed change without regulatory effect if the change is based on a superior court decision which invalidated the regulatory provision solely on the grounds that the underlying statute was unconstitutional.”

Deleting a regulatory provision held to be invalid by a California court of competent jurisdiction is permissible as a change without regulatory effect pursuant to section 100, subdivision (a)(3) only if the judgment has become final. The statute of limitations for an action on a judgment does not accrue until the judgment is final. The judgment is not final until the time within which to appeal the judgment has expired. (*Turner v. Donovan* (1942) 52 Cal.App.2d 236, 238.) Unless extended by California Rules of Court, rule 8.108, the time within which to appeal this superior court judgment is described in rule 8.104(a)(1):

(a) Normal time

Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be filed on or before the earliest of:

- (1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled “Notice of Entry” of judgment or a file-stamped copy of the judgment, showing the date either was mailed; ....

The Department proposes to delete the following italicized portion of section 228(b)(1):

- (1) Submission of Written Plan. Any person may apply for a special suction dredge permit to operate a suction dredge with a nozzle larger than prescribed in subsections 228(e)(1), 228.5(c) or 228.5(d) *or during the closed season or in a closed water for suction dredging* by submitting a written plan detailing the proposed operation. If the department determines that no deleterious effect to fish may occur, the special permit shall be issued with conditions prescribed by

the department to protect fish resources. A special permit will be issued or denied within 30 days upon receipt of a complete written plan detailing the proposed operation unless the time is intended by mutual agreement. If the special permit is denied, the justification for denial will be provided.

The Department cites four different justifications for claiming that this amendment is a change without regulatory effect pursuant to section 100. They are as follows:

**1. An Order in Eason became Final on April 23, 2007.** The Department states that a February 13, 2007 order by the court in *Eason* invalidated, on non-constitutional grounds, that part of section 228(b)(1) that allows the Department to issue special permits for suction dredging during closed seasons or in closed waters. The Department further asserts that the plaintiff “did not appeal the February Order and the 60-day time period to do so expired on April 23, 2007, resulting in the February Order becoming final.” However, the pertinent part of the February Order was an order sustaining the Defendant’s demurrer without leave to amend. Such orders are non-appealable. The appeal is only from the subsequent order of dismissal or final judgment. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4<sup>th</sup> 1684, 1695.)

**2. A Final Judgment in Eason was Filed on October 24, 2007.** The Department states that the court in *Eason* entered a final judgment on October 24, 2007, disposing of the Plaintiff’s remaining causes of action so that the trial court proceedings are complete. The court ordered the Department to take “appropriate administrative action” within ten days from entry of the Final Judgment. The Final Judgment affirms the February order regarding a conflict as a matter of law between Fish and Game Code section 5653, subdivision (d) and section 228(b)(1). However, this judgment does not become final until the 60-day appeal period has run. This period will not expire until December 24, 2007.

**3. OAL Should Approve the Change Regardless of the Appeal Period.** The Department states that “[a]lthough the period to appeal the Final Judgment has not yet expired, OAL should approve the Department’s proposed amendment” pursuant to section 100 because:

- A. The February Order has been final since April 23, 2007;
- B. The Attorney General’s Office issued an informal opinion in January 2000 addressing the invalidity of special suction dredge permits and the *Eason* court adopted this opinion as its own decision;
- C. The Final Judgment entered on October 24, 2007 ordered the Department to address the conflict within ten days from the entry of judgment; and
- D. The examples of changes without regulatory effect described in section 100 are not exclusive.

In A. and C. above, the Department points to the same reasons cited in 1. and 2. above, which have already been discussed.

The informal opinion from the Attorney General’s Office referenced in B. above concludes that “[i]t is thus likely that a court would strike down that part of section 228(b) that allows the issuance of special permits for otherwise closed waters or at times when a water is otherwise closed....” This conclusion was adopted by the court in *Eason*. However, an informal opinion by the Attorney General’s Office which has been adopted by a court of competent jurisdiction does

not meet the regulatory standard for a change without regulatory effect. Section 100 requires that a court of competent jurisdiction invalidate a regulatory provision and that the court's judgment has become final in order for deletion of such a regulatory provision to be considered a change without regulatory effect.

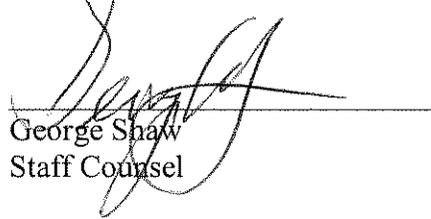
The examples cited in section 100 are not exclusive as the Department correctly states in D. above. However, since public comment is not required for section 100 filings, they are, of necessity, limited to a few very specific circumstances. In this instance, the regulatory requirements regarding invalidation of a regulatory provision by a court have not been met in regard to the portion of section 228(b)(1) that the Department proposes to delete.

**4. The Amendment does not Alter any Requirement, Right, Responsibility, Condition, Prescription, or Other Regulatory Element of any CCR Provision.** The Department states that this amendment would not alter any requirement, right, responsibility, condition, prescription, or other regulatory element of any CCR provision. However, the phrase that is proposed to be deleted appears on its face to include substantive prescriptions and rights that would be materially altered by such an amendment. The Department does not explain how deleting this language does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any CCR provision.

#### **CONCLUSION**

Thus, OAL has determined that the deletion of language from section 228(b)(1), pursuant to section 100(a)(3), as proposed by the Department is not a change without regulatory effect. For the reasons stated above, OAL disapproved the Department's proposed action as a "change without regulatory effect" pursuant to section 100, title 1, of the CCR.

Date: December 21, 2007

  
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