

State of California
Office of Administrative Law

In re:

Department of Water Resources

**Regulatory Action: Title 23
California Code of Regulations**

**Adopt sections: 570, 571, 572, 573, 574,
575, 576**

Amend sections:

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2009-0417-02 S

DECISION SUMMARY

On April 17, 2009, the Department of Water Resources (“Department”) submitted to the Office of Administrative Law (“OAL”) a proposed action to adopt Chapter 4.5 of Division 2 of Title 23 (commencing with section 570) regarding Financial Assistance for Flood Management Projects and Small Flood Management Projects.

On June 1, 2009, OAL notified the Department that OAL disapproved this regulatory action for failure to comply with specified standards and procedures of the California Administrative Procedure Act (“APA”). The reason for the disapproval is failure to make changes to the regulations available to the public for comments as required by Government Code section 11346.8.

BACKGROUND

In 2000 the Legislature passed (and the Governor signed) AB 1147 which added a new section 12585.7 to the Water Code and provided for revised local and state cost sharing for certain flood management projects. The statute requires the Department to establish criteria and a process for determining the percentage of state financial assistance in flood management projects based upon stated statutory objectives. The Disaster Preparedness and Flood Prevention Bond Act of 2006, a bond act approved by the voters, authorized the issuance of over four billion dollars worth of bonds for financing disaster preparedness and flood prevention projects (three million of which, upon appropriation, will be available to the Department for flood control and reduction of levee failure). On April 17, 2009, the Department submitted to OAL proposed regulations to implement

section 12585.7 of the Water Code. As noted above, OAL disapproved the proposed regulations.

DISCUSSION

Any regulation adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA review (Gov. Code, secs. 11340.5 and 11346). The adoption of regulations by the Department must satisfy requirements established by the part of the APA that governs rulemaking by a state agency.

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code Section 11349.1. Generally, to satisfy the standards, a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret and make specific statutory law, and to ensure that required procedures are followed in order to provide the meaningful opportunity to comment on rules and regulations before they become effective.

THE REGULATIONS SUBMITTED TO OAL FOR FILING WITH THE SECRETARY OF STATE CONTAIN CHANGES THAT WERE NOT MADE AVAILABLE TO THE PUBLIC

Subdivision (c) of Government Code section 11346.8 requires that substantial changes to the original text be made available to the public for comment before the changes are adopted:

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. *If a sufficiently related change is made, the full text of resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends or repeals the resulting regulation.* Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9. (Emphasis added.)

Section 44 of Title 1 of the California Code of Regulations (“CCR”) specifies how such sufficiently related changes are to be made available:

(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking

agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
 - (2) all persons who submitted written comments at the public hearing; and
 - (3) all persons whose comments were received by the agency during the public comment period; and
 - (4) all persons who requested notification from the agency of the availability of such changes.
- (b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period.

As discussed below, the text of the proposed regulations in this rulemaking contained changes from the texts that were made available to the public during the initial 45-day and subsequent 15-day comment periods. This disapproval decision contains examples of identified changes in the proposed rulemaking submitted by the Department, but this is not an exhaustive list. Many changes were identified to and discussed during a meeting with Department staff. All APA issues must be resolved before the regulations can be approved by OAL. OAL reserves the right to conduct a complete review for compliance with both the procedural and substantive requirements of the APA upon resubmittal of this regulatory action by the Department.

EXAMPLES OF CHANGES MADE TO THE PROPOSED REGULATIONS WITHOUT NOTICE TO THE PUBLIC AND THE OPPORTUNITY TO COMMENT:

Subsection (a) of section 571:

The original text was changed from, “‘Average family size’ means the average family size for a block group...” to “‘Average family size’ means the average family size for the benefited area...” Pursuant to the Department’s definitions in this proposed rulemaking a “block group” is “...a cluster of blocks within a census geographic tract while a “benefited area” is “...the geographical area that is protected by a flood management project.” This change is substantive because the “average family size” is used to determine the poverty level of an area. The poverty level is an important component in these regulations for determining if a project is eligible for funding beyond the minimum.

Subsection (h) of section 572:

The original text was changed from, “The Department or Board will submit a report to the Legislature.” to “The Department or Board will submit a Report to the Legislature except in the case of small flood management projects for which the authority to approve has been delegated to the Director of the Department.” The text originally required a report in all cases and the change to the text now provides an exception. This is a substantive change that “...materially alters the requirements, rights, responsibilities, conditions, or prescriptions contained in the original text.” (Cal. Code Regs., tit. 1, §40.)

Subsection (b)(4)(B)2 of section 573:

The original text read, “...a Sponsor may elect to use an alternative method that has been used or reviewed by the Department of Finance, such as the American Community Survey. All data that

is used for evaluation must be applicable to the same year, originate from reliable sources and have details down to the census block group level or better.” The text submitted to OAL read, “...a Sponsor may propose an alternative calculation method that has been used or reviewed by the Department of Finance. All data that is used for evaluation must be applicable to the same year, originate from reliable sources and have details down to the Census Geographic Unit (for example, block group, tract, city, county, etc.).” This change is substantive because it removes the ability of a Sponsor to “elect to use an alternative method” and instead indicates that the Sponsor “may propose” an alternative method.

Subsection (e)(4)(B) of section 574:

The original text read, “For the applicable block groups, the median household income and average family size will be determined.” The text submitted to OAL read, “For a single Census Geographic Unit, the median household income will be obtained from the U.S. Census Bureau website. For a benefited area larger than a single Census Geographic Unit or smaller than a block group, the median household income may be determined by a special tabulation prepared by the U.S. Census Bureau upon request and payment of a fee.” This change impacts the median household income determination which is important within these regulations to determine if a project is eligible for additional funding.

The substantive changes made without notice to the public must be made available for comment pursuant to Government Code section 11346.8(c) and section 44 of Title 1 of the California Code of Regulations.

CONCLUSION

For these reasons OAL disapproved the above-referenced rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-6805.

Date: June 8, 2009


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