

**State of California
Office of Administrative Law**

**In re:
Department of Parks and Recreation**

**Regulatory Action: Title 14
California Code of Regulations**

**Adopt sections: 4870, 4871, 4872, 4873,
4874, 4875, 4876, 4877**

Amend sections:

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2011-1025-03 S

SUMMARY OF REGULATORY ACTION

The Department of Parks and Recreation (Department) submitted this rulemaking action to establish the Habitat Conservation Fund (HCF) Program by adopting guides for seven funding categories under the program and an administrative guide. The HCF Program is contained in these eight guides, which are incorporated by reference in eight new sections to title 14 of the California Code of Regulations. The guides establish eligibility, application, grant selection, and grant administration requirements for funding from the HCF Program. The HCF Program allocates approximately \$2 million per year to provide grants to local entities to protect fish, wildlife, and native plant resources, to acquire or develop wildlife corridors and trails, and to provide for nature interpretation programs and other programs which bring urban residents into park and wildlife areas.

DECISION

On December 9, 2011, the Office of Administrative Law (OAL) disapproved the Department's rulemaking action because the rulemaking record did not contain sufficient evidence that the Department had complied with the Administrative Procedure Act (APA). Specifically, the record of the Department's rulemaking proceedings did not demonstrate compliance with the required procedures for modifying the regulatory text contained in the guides, pursuant to Government Code section 11346.8(c) and title 1, California Code of Regulations, sections 44 and 46. Additionally, the Department did not comply with the "reference" standard of the APA, pursuant to Government Code section 11349.1(a)(5).

DISCUSSION

Regulations adopted, amended or repealed by the Department must be adopted pursuant to the APA. Any regulatory act a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the APA unless statutorily exempt or excluded. (Gov. Code, sec. 11346.) As no exemption applies in this instance, OAL reviewed this regulatory action for compliance with both the procedural and substantive requirements of the APA. (Gov. Code, sec. 11349.1.)

A. NOTICE OF MODIFIED TEXT

The Department published notice for the eight guides in the November 5, 2010 publication of the California Regulatory Notice Register. During March 2011 and July 2011, the Department made substantive revisions to many of the regulatory provisions in the guides. On or about March 4, 2011, the Department posted the eight guides on its web site, which contained its initial set of modifications to the regulatory text, but did not mail notice to anyone. On or about July 15, 2011, the Department re-posted the eight guides on its web site, which contained additional modifications to the regulatory text. On July 15, 2011 the Department sent an e-mail to interested persons informing them that the modified guides could be viewed on its web site. The e-mail included the following statement:

This notification, as required by the Office of Administrative Law, hereby starts the 15-day regulatory public comment period on the modified text of the Habitat Conservation Fund Application and Administrative Guides. The modified guides can be found at: http://www.parks.ca.gov/default.asp?Page_id=21361

Send comments via email to [contact information omitted]

When a rulemaking agency makes substantive modifications to its regulations after the initial proposed text was noticed and made available for comment, Government Code section 11346.8(c) requires that

... the full text of the 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.

Title 1, California Code of Regulations, section 44 implements Government Code section 11346.8(c) by specifying notice requirements related to any modifications to the initial proposed text. Title 1, California Code of Regulations, section 44 provides in pertinent part:

(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.

....
(Emphasis added.)

The Department's statement quoted above contained in the July 15, 2011 e-mail does not state the period within which comments will be received, and therefore does not meet the requirement for a notice of modification of text pursuant to title 1, California Code of Regulations, section 44.

B. CLEAR INDICATION OF MODIFICATIONS MADE TO THE TEXT

When an agency makes modifications to its regulatory text, both Government Code section 11346.8(c) and title 1, California Code of Regulations, section 44 require that all changes to the text be "clearly indicated" to show additions to or deletions from the original text.

Title 1, California Code of Regulations, section 46 describes the requirement for clearly indicating text modifications as follows:

- (a) Changes to regulations in accordance with Government Code Section 11346.8(c) shall be made using a uniform method and shall illustrate accurately all changes to the original text.
- (b) Methods for illustrating such changes may include but are not limited to the following:
 - (1) annotations which specify the added or deleted language; or
 - (2) footnotes which specify the added or deleted language; or
 - (3) double strikeout and double underline; or
 - (4) for changes to newly proposed text, strikeout and double underline or strikeout and italics.
- (c) A written description of the method used shall appear as the first page of the changed text.

Illustrating modified text in accordance with title 1, California Code of Regulations, section 46 is typically done by using text annotations such as underlining to show additions to the text and strikeout to show deletions. Any modifications to the initial proposed regulation text needs to be made part of the rulemaking file to demonstrate compliance with this requirement. (Gov. Code,

sec. 11343.7(b)(10).) The Department apparently lost all of its files and copies of documents showing the modifications to the text made in March 2011 and in July 2011. To demonstrate compliance with the APA, the Department used handwritten text annotations and separate appendix pages to show all of the changes to the initial proposed regulation text that were made during the rulemaking period. However, this handwritten version of the modified text failed to capture all of the changes that were made to the initial proposed text. As a result, the handwritten version of the modified text that was submitted for OAL review did not clearly indicate all of the modifications that were made to the initial proposed text.

C. REFERENCE CITATIONS

Government Code section 11349.1(a)(5) requires that an agency meet the "reference" standard when adopting regulations. Government Code section 11349(e) defines reference as follows:

(e) "Reference" means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.

Reference citations are noted after the end of any regulation section. (See Gov. Code, sec. 11346.2(a)(2).) The Department adopted eight new sections for the purpose of incorporating by reference the eight guides, and for each section provided very broad citations, including section ranges, as reference citations. OAL determined that many of the reference citations were not provisions of law that the Department implements, interprets, or makes specific in the adoption of the eight new sections. Accordingly, the Department needs to review the reference citations, and only provide the pertinent provisions of law that are being implemented, interpreted, or made specific in the adoption of the eight new sections.

CONCLUSION

For the reasons described above, OAL disapproved the Department's rulemaking action.

Date: December 16, 2011



Richard L. Smith
Staff Counsel

FOR: DEBRA M. CORNEZ
Assistant Chief Counsel/
Acting Director

Original: Ruth Coleman
Copy: Cristelle Taillon