

**State of California  
Office of Administrative Law**

In re:

**Board of Forestry and Fire Protection**

**Regulatory Action:**

**Title 14, California Code of  
Regulations**

**Adopt sections: 1299.03(b)(2)(A), and  
portion of General  
Guidelines for  
Creating Defensible  
Space, 2/8/13,  
incorporated by  
reference by section  
1299.03(b)(1)**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL File No. 2013-0122-02SR**

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**DECISION SUMMARY**

On January 22, 2013, the Board of Forestry and Fire Protection (BOFFP) submitted to the Office of Administrative Law (OAL) the proposed adoption of section 1299.03(b)(2)(A), among other sections, of Title 14 of the California Code of Regulations (CCR), which included the adoption of a document, *General Guidelines for Creating Defensible Space (General Guidelines)*, which was incorporated by reference in proposed section 1299.03(b)(1). These regulations specify rules for vegetation clearance and maintenance around buildings and structures in State Responsibility Areas to ensure fire-defensible space.

OAL disapproved proposed section 1299.03(b)(2)(A) and a portion of the *General Guidelines* because they conflict regarding the allowable depth of "surface litter," which was defined in the *General Guidelines* as consisting of fallen leaves or needles, twigs, bark, cones, and small branches. Section 1299.03(b)(2)(A) permitted surface litter to a maximum depth of four inches. The *General Guidelines* permitted surface litter to a depth of three inches. The conflict in this requirement within the regulations results in a failure of the regulations to meet the Clarity standard of Government Code section 11349.1(a)(3) of the Administrative Procedure Act (APA).

On March 6, 2013, OAL notified the BOFFP that OAL had disapproved a portion of this regulatory action because it failed to comply with the Clarity standard of the APA.

## BACKGROUND

This proposed rulemaking action was proposed to address wildfire conditions that are a threat to homes, resources, and the overall public health and safety of California residents. According to the BOFFP, the combination of overstocked forests, dense brush, and increased human habitation in the 31 million acres of State Responsibility Areas has resulted in substantial fire hazards to California residents and over 800,000 homes. The purpose of the regulations is to provide guidance for implementation of the defensible space requirements of Public Resources Code section 4291 and to minimize the spread of wildfires to within 100 feet of buildings and structures.

On March 6, 2013, OAL approved most of the provisions of the regulations submitted by BOFFP concerning these defensible-space requirements, but did not approve two provisions which conflicted with one another regarding the allowable depth of surface litter as described above.

## DISCUSSION

### I. The Clarity standard of the APA.

Any regulation amended or 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.) OAL reviews regulatory actions for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards, a 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 meaningful public opportunity to comment on rules and regulations before they become effective.

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with them. (Gov. Code, sec. 11340(b).) Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the Clarity standard. Section 11349(c) of the Government Code defines "clarity" to mean "...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them." Title 1 CCR section 16 states in pertinent part that:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exist:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning[.]

## II. The failure of BOFFP to meet the Clarity standard.

The BOFFP proposed adoption of, among other provisions, section 1299.03. Section 1299.03(b)(1) incorporated by reference the BOFFP’s *General Guidelines*. The General Guidelines provide, on page 4, no. 2, that:

Dead and dying woody surface fuels and aerial fuels within the Reduced Fuel Zone [from 30 to 100 feet from a building or structure] shall be removed. Loose surface litter, normally consisting of fallen leaves or needles, twigs, bark, cones, and small branches, shall be permitted to a depth of 3 inches. This guideline is primarily intended to eliminate trees, bushes, shrubs and surface debris that are completely dead or with substantial amounts of dead branches or leaves/needles that would readily burn.

BOFFP also proposed adoption of section 1299.03(b)(2)(A), which specified Zone 2 (30 to 100 feet from a building or structure) vegetation treatment requirements. Section 1299.03(b)(2)(A) provided that:

All dead and dying surface and aerial fuels must be removed with the exception of surface litter which, unless stated otherwise, may be retained to a maximum depth of four inches (4 in.).

Section 1299.03(b)(2)(A) does include the phrase “unless stated otherwise,” which could be interpreted as subordinating the 4-inch depth maximum in section 1299.03(b)(2)(A) to what is stated otherwise in the incorporated *General Guidelines*, and establishing, therefore, that the rule is actually the 3-inch depth stated in the *General Guidelines*. This interpretation, however, would make the inclusion of subdivision (b)(2)(A) superfluous to the regulation. There is a strong presumption against construing provisions of laws so as to render them superfluous. *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4<sup>th</sup> 381. Moreover, the “unless stated otherwise” phrase could instead be interpreted as recognizing what might be stated otherwise by state fire officials pursuant to section 1299.05 of these regulations, which provides:

The provisions of these regulations are not intended to exclude alternative methods not specifically prescribed by these regulations. A fire expert

designated by the Director may approve alternative practices which provide for the same practical effects as those stated in these regulations.

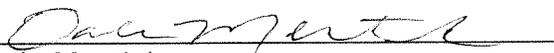
This interpretation would leave the conflicting surface-litter-depth standard of either three or four inches unresolved.

Government Code section 11349(c) requires that regulations be written so that their meaning is easily understood by those persons directly affected by them, and Title 1 CCR section 16(a)(1) creates a presumption of a failure of clarity if a regulation can, on its face, be reasonably and logically interpreted to have more than one meaning. OAL determined that property owners directly affected by these defensible space regulations would not easily understand whether surface litter was permitted to a depth of three or four inches and could reasonably interpret the regulation as permitting either depth.

### CONCLUSION

For the foregoing reasons, OAL disapproved the proposed adoption of section 1299.03(b)(2)(A) and that portion of the incorporated *General Guidelines* which conflicts with it. Prior to any resubmission of these provisions to OAL for review, BOFFP must reconcile the conflict created by them and make any revised text of proposed section 1299.03(b)(2)(A) and that portion of the *General Guidelines* not approved by OAL available pursuant to Government Code section 11346.8(c) and Title 1 CCR section 44. Pursuant to Government Code section 11349.4(a), BOFFP shall have 120 days from the date of receipt of this Decision of Disapproval to resubmit this matter to OAL for review.

Date: March 12, 2013

  
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Senior Staff Counsel

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Director

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