

**State of California
Office of Administrative Law**

In re:
Department of Water Resources

Regulatory Action:

Title 23, California Code of Regulations

Adopt sections: 600.1, 600.2, 600.3, 600.4,
603.5, 607.1, 607.2, 607.3,
608.1, 608.2, 608.3, 610.1,
610.2, 610.3, 610.4, 610.5,
610.6, 610.7, 610.8, 610.9,
610.10, 610.11, 612.1,
612.2, 612.3, 612.4, 612.5,
612.6, 612.61, 612.62,
612.63, 612.64, 612.65,
612.66, 612.67, 615.1,
615.2, 615.3, 618, 625.1,
625.2, 625.3, 625.4, 625.5,
625.6, 625.7, 635.0

Amend sections: 600, 601, 602, 603, 604,
605, 606, 620

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2014-1024-01 SR

SUMMARY OF REGULATORY ACTION

On October 24, 2014, the Department of Water Resources (Department) submitted to the Office of Administrative Law (OAL) its proposed regulatory action to adopt and amend various sections in title 23, division 2, chapter 6 of the California Code of Regulations (CCR). The proposed regulations set forth the requirements for obtaining an Encroachment Permit. They also outline the Department's review process, establish associated costs to the applicant, and implement the enforcement provisions of the Water Code in order to allow the Department to limit unauthorized encroachments and control access to its right-of-way.

On December 10, 2014, OAL notified the Department that OAL disapproved the proposed regulations because the regulations failed to comply with the clarity standards of Government Code section 11349.1 and the Department failed to follow procedures required by the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action for the following reasons:

1. The proposed regulations failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3); and
2. The Department failed to follow the required APA procedures by omitting to:
 - a. identify in the second 15-day notice of modification the added documents relied upon and state the place and business hours that the documents are available for public inspection, pursuant to Government Code section 11347.1, subdivision (b);
 - b. include in the rulemaking file all data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying, pursuant to Government Code section 11347.3, subdivision (b)(7); and
 - c. transmit to OAL for filing with the Secretary of State a certified copy of every regulation adopted or amended by the California Water Commission, pursuant to Government Code section 11343, subdivision (a).

All APA issues must be resolved prior to OAL's approval of any resubmission.

DISCUSSION

The above regulatory adoption and amendments by the Department must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency 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 coverage. (Gov. Code, sec. 11346.)

Before any regulation subject to the APA may become effective, the 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 regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. Clarity Standard

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340, subd. (b).)

Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines “clarity” to mean “written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them.”

The “clarity” standard is further defined in section 16, title 1, of the CCR, OAL's regulation on “clarity,” which provides:

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 exists:
 - (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or...
 - (5) the regulation presents information in a format that is not readily understandable by persons “directly affected;”....
- (b) Persons shall be presumed to be “directly affected” if they:
 - (1) are legally required to comply with the regulation; or
 - (2) are legally required to enforce the regulation; or
 - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
 - (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this regulatory action, the Department failed to comply with the clarity standard of the APA.

1.1. Proposed section 612.4, subdivision (c)

Prior to submitting to OAL this rulemaking file (OAL File No. 2014-1024-01SR), the Department submitted a prior regulatory package (OAL File No. 2014-0530-03S), in which the Initial Statement of Reasons (ISOR) was lacking necessity for a number of regulatory provisions. To remedy this deficiency, the Department withdrew its initial regulatory action (OAL File No. 2014-0530-03S) drafted a Supplement to the ISOR with the intent to make it available to the public for a 15-day comment period, and subsequently resubmitted the action in this regulatory package (OAL File No. 2014-1024-01SR).

The regulations resubmitted to OAL contain a number of clarity issues. For proposed section 612.4, subdivision (c), the language of the regulation conflicts with the agency’s description of the effect of the regulation in the Supplement to the ISOR. This regulatory provision states:

Temporary or permanent placement of excavated materials within the Department’s right-of-way shall be subject to review and approval by the

Department to ensure that it does not obstruct or damage any portion of the State Water Project or Department's right-of-way. [Bold added]

However, the Supplement to the ISOR provides a slightly different standard of approval. It states that the "department's approval of excavated material is necessary **to confirm the composition of fill or borrow material that is being placed on the right of way.**" (bold added.)

To ensure that there is no obstruction or damage to any portion of the State Water Project or Department's right-of-way is not the same standard of approval as to confirm the composition of fill or borrow material that is being placed on the right of way. Thus, the regulation is unclear. The Department must correct either its regulatory language or the description of the effect of the regulation in the Supplement to the ISOR so they are consistent. Such a correction would require a 15-day notice to make the correction available to the public for comment.

1.2. Proposed section 612.63, subdivision (f)

Proposed section 612.63, subdivision (f) states:

Flexible single and expansion type coupling (such as Smith Blair Type 611 or Dresser Style 63, or equivalent) for the casing should be utilized to account for differential temperature range of 140 degrees Fahrenheit.

This provision is unclear for two reasons. First, the use of the term "should" makes the regulation unclear because it could be reasonably and logically interpreted to have either a mandatory or a permissive meaning. If the regulation is intended to impose a mandatory requirement, the Department would have to change the term to word "must" or "shall." If the regulation is intended to be permissive, the Department would have to replace the term with the word "may."

Second, the Supplement to the ISOR states, on page 61 of 90, that the "[s]tandards for expansion couplings are included in the documents relied upon." This description of the effects of the regulation conflicts with the regulatory language. The text of the regulation provides "Smith Blair Type 611 or Dresser Style 63, or equivalent" as standards for expansion coupling. However, the Supplement to the ISOR indicates that there are other standards which are found in some documents relied upon. Even more, the fact that these documents are not identified by title and date makes it difficult to determine which standards are to be used. The Department must identify the documents relied upon by title and date, pursuant to Government Code section 11347.1 and make them available to the public during a 15-day comment period.

1.3. Proposed Form DWR 33A (Rev. 9/14)

Proposed section 610.1 incorporates by reference the Encroachment Permit Application Form 33A. There are three issues related to this form. First, the regulation text identifies the form as "Form 33A" but the title of the form itself is "DWR 33 (Rev. 9/14). The title of the form must be consistent with the form identified in the regulation text. The Department must either correct the text or correct the form.

Second, this form requires applicants to submit with the application a “site specific safety plan.” On its face, this phrase is not easily understood by the affected public because it is not defined anywhere. This phrase must be clarified in the text and the rationale for requiring the site specific safety plan along with the application needs to be included in the Supplement to the ISOR and made available to the public for comment pursuant to a 15-day notice.

And third, the form requires applicants to provide “engineer’s drawing nos.” This phrase is also not easily understood by the affected public because it is not defined anywhere. It must be clarified in the text and the rationale for requiring the engineer’s drawing numbers in the application form needs to be included in the Supplement to the ISOR and made available for a 15-day comment period.

2. Failure to Follow Required APA Procedures

The Administrative Procedure Act (APA) requires agencies to follow specific procedures. In this rulemaking action, the Department failed to follow the required procedures.

2.1. Failure to Identify Documents Relied Upon in the 15-day Modification Notice

Government Code section 11347.1, subdivision (a) states that when an “agency adds any... document to the rulemaking file after the publication of the notice of proposed action and relies on the documents in proposing the action shall make the documents available [to the public for a 15-day comment period].”

Government Code section 11347.1, subdivision (b) further requires that the agency mail a notice of modification to all interested persons. This notice must identify the added document and state the place and business hours that the document is available for public inspection.

As discussed above, the Department supplemented the information in the ISOR in order to provide necessity for various proposed regulations. These additional necessity statements are included in the Supplement to the ISOR. Because the Department relied on these necessity statements in proposing the regulatory action, the Supplement to the ISOR must be made available to the public for a 15-day comment period.

Further, the Supplement to the ISOR mentions documents relied upon on two occasions. First, on page 61, for proposed regulation section 612.3, the Supplement to the ISOR states that “[s]tandards for expansion couplings are included in the *documents relied on*.” (italics added.) Second, on page 90 of the Supplement to the ISOR, a document entitled “Encroachment Permit Guidelines” was identified as a document relied on.

However, the notice of modification does not identify these documents relied upon as required by Government Code section 11347.1, subdivision (c). A new notice of modification containing the required information in compliance with the APA will have to be mailed out to persons required pursuant to section 11347.1, subdivision (b) of the Government Code.

2.2. Documents Relied Upon to be Included in the Rulemaking File

Government Code section 11347.3, subdivision (b)(7), requires that the rulemaking file include:

(7) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation....

As discussed above, a number of documents were relied upon by the Department in proposing the action. However, the documents relied on that contains the standards for expansion couplings, as mentioned on page 61 of the Supplement to the ISOR, and the document entitled "Encroachment Permit Guidelines," identified on page 90 of the Supplement to the ISOR, are not included in the file.

The Department is required to add the omitted documents mentioned above to the rulemaking file upon resubmitting the regulatory action to OAL.

2.3. Board Resolution

Government Code section 11347.3, subdivision (b)(6), requires the rulemaking file to include "[a]ll data and other factual information, any studies or reports, and written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation."

Water Code section 161 states, in relevant part, that "[a]ll rules and regulations of the department, other than those relating exclusively to the internal administration and management of the department, shall first be presented by the director to the [California Water Commission] and shall become effective only upon approval thereof by the commission."

Thus, the Department is statutorily required to include in the file factual information demonstrating compliance with Water Code section 161. The file contains a document entitled "Resolution to Adopt the Encroachment Permit Regulation," which states, in relevant part:

WHEREAS, immediately upon adoption by the California Water Commission, these Regulations may be submitted to the Office of Administrative Law for review and considered for acceptance into the California Code of Regulations, Title 23, Division 2, Chapter 6, Sections 600-630.

NOW, THEREFORE, LET IT BE RESOLVED that the California Water Commission:

Adopts the Encroachment Permit Regulation, as approved at their meeting of October 15, 2014.

However, the Commission's resolution only adopted regulation sections "600-630." This regulatory action includes proposed sections that are numbered up to number "635.0." Thus, according to the resolution, the Commission did not approve proposed section 635.0. Upon re-submittal of this regulatory action, the file must contain a resolution demonstrating that the Commission approved every proposed regulation, including section 635.0.

3. Miscellaneous

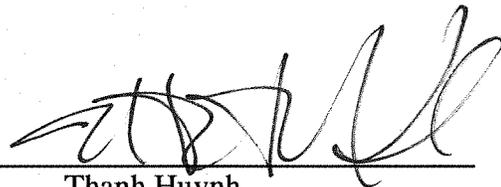
The following issues must be addressed prior to resubmitting its rulemaking action to OAL:

- A) The Form 400 must be correctly filled out in compliance with title 1, section 6, of the California Code of Regulations. Section 1b of the form must include the OAL file numbers associated with previously submitted files. Section 2 of the form must list each proposed regulatory provision adopted, amended, or repealed. If additional space is needed, the Department may use a separate page and attach it to the form. Section 4 of the form must include all beginning and ending dates of notice of modification periods provided to the public. And section 6 of the form must indicate the regulations require approval from California Water Commission pursuant to section 161 of the Water Code.
- B) All documents incorporated by reference must be attached to the Form 400, pursuant to the California Code of Regulations, title 1, section 20.
- C) The confirming mailing statement for each notice of 15-day comment period must include the information required pursuant to California Code of Regulations, title 1, section 44.
- D) The Table of Contents must identify each item contained in the rulemaking file, pursuant to Government Code section 11347.3, subdivision (b)(12).
- E) The Final Statement of Reasons must contain all the information required pursuant to Government Code section 11346.9.

CONCLUSION

For the reasons stated above, OAL disapproved this regulatory action proposed by the Department. If you have any questions, please contact me at (916) 323-6824.

Date: December 17, 2014



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