

**State of California
Office of Administrative Law**

In re:
Department of Parks and Recreation

Regulatory Action:

Title 14, California Code of Regulations

Adopt section: 4970.25.3
Amend sections: 4970.01, 4970.04,
4970.05, 4970.06.01,
4970.07, 4970.08,
4970.10.4, 4970.17,
4970.23, 4970.24.1,
4970.25.1

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2015-0930-01

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

The Department of Parks and Recreation proposed to adopt section 4970.25.3 and amend sections 4970.1, 4970.05, 4970.06.1, 4970.07, 4970.08, 4970.09, 4970.10.4, 4970.17, 4970.23, 4970.24.1, and 4970.25.1 of title 14 of the California Code of Regulations concerning Off-Highway Motor Vehicle Recreation Grants and Cooperative Agreements Program.

DECISION

OAL disapproved the above-referenced regulatory action for incorrect procedure (failure to make changes available for comment), failure to comply with the clarity and necessity standards of Government Code section 11349.1, failure to respond to comments, and because required documents were missing or defective.

DISCUSSION

The adoption of regulations by the Department must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any rule or regulation adopted 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 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 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 rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

1. THE REGULATION TEXT MADE AVAILABLE TO THE PUBLIC AND SUBMITTED TO OAL FOR REVIEW AND FILING WITH THE SECRETARY OF STATE CONTAINS CHANGES TO THE REGULATIONS THAT WERE NOT PROPERLY MADE AVAILABLE TO THE PUBLIC FOR COMMENT

Subdivision (a) of Government Code section 11346.2 requires that an agency proposing to make changes to the California Code of Regulations make the proposed changes available to the public for comment:

Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:

(a) A copy of the express terms of the proposed regulation.

...

(3) The agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.

The text of section 4970.01 made available to the public for comment during the 45 day availability period contained changes from section 4970.01 as it currently exists in title 14 of the California Code of Regulations. The following changes were not shown in underline or italics and strikeout so as to make the public aware of the changes proposed:

a. The following definition of “Good Standing” was added as subdivision (u) without being shown in underline as new text:

“Good Standing” means that the grantee is at all times adhering to the statues [sic] and regulations governing the Grants and Cooperative Agreements Program.

b. Existing subdivision (z) of section 4970.01 of title 14 provides:

“Indirect Costs” means expenses incurred for the management and administration of a project (e.g., utility costs, accounting services, contract administration, postage, management personnel, telephone bills, etc.)

The text of section 4970.01(z) made available to the public for comment during the 45 day availability period provided:

“Indirect Costs” means ~~expenses incurred for the management and administration of a project~~ the cost of any activity that does not directly result in the completion of the project and/or the management or administration of a project. (e.g., utility costs, accounting services, contract administration, postage, management personnel, telephone bills, etc.)

The new language being added to this definition following the words shown in ~~strikeout~~ was not shown in underline as new text.

- c. The words “(see Appendix)” were added to subdivision (g) of section 4970.05 without being shown in underline as new text.

For this reason, a member of the affected public would not reasonably have known that this language was being proposed for adoption and for this reason never had an opportunity to comment on these proposed changes. These changes to section 4970.01 will need to be accurately illustrated in underline or italics and ~~strikeout~~ in the text of the regulation and then made available to the public before being adopted by the Department. At that time, the word “statues” in the definition of “Good Standing” in subdivision (u) could also be corrected to read “statutes.”

Subdivision (c) of Government Code section 11346.8 requires that substantial changes to the original text be made available to the public for comment for at least 15 days before the changes are adopted by the agency:

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 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.

Prior to resubmission to OAL, the changes to section 4970.01 not previously shown in underline or italic and strikeout will need to be shown in underline or italic and strikeout and made available to the public for at least 15 days prior to adoption by the Department pursuant to Government Code section 11346.8(c) and section 44, title 1, California Code of Regulations.

Similarly, please note that the text of the regulations attached to the STD 400 submitted to OAL for review and filing with the Secretary of State also did not accurately illustrate in underline or italic these changes to section 4970.01 as it appears in the California Code of Regulations. (Cal. Code Regs., tit.1, sec. 8.)

Please also note that a page attached to the STD 400 submitted to OAL for review and filing with the Secretary of State indicates that nine documents incorporated by reference are being amended by this rulemaking. None of these documents are attached to the STD 400, nor are they included anywhere in the rulemaking file, so OAL does not know if any of these changes have been properly made available. Any changes proposed to documents incorporated by reference must also be made available to the public in underline or italic and strikeout in the same manner as changes being made to regulatory text. (Cal. Code Regs., tit. 1, sec. 20.)

2. CLARITY

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity”

as defined by Government Code section 11349(c) means “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

- a. Subdivision (b)(3) of section 4970.08 as amended by the Department would provide in part:

Stipends paid as per diem costs to volunteers only when a volunteer is working at a remote location for three or more consecutive days. A remote location is considered to be further than 50 miles from volunteers **home/headquarters**.... [Emphasis added.]

A person directly affected by this provision would not easily understand whether a location would be considered remote if the volunteer’s home and headquarters were different distances from the worksite.

- b. Subdivision (e)(4) of section 4970.05 was amended by the Department as follows:

Public comments received shall be submitted no later than 5:00 pm Pacific standard time on the first Monday in April.

A person directly affected by the regulation would not easily understand whether the comment must be received, or just submitted, by the stated deadline. Perhaps the word “received” was intended to replace the existing word “submitted.”

- c. New subdivision (b)(13)(e) of section 4970.08 as proposed by the Department would provide:

The cost of equipment by a Grantee shall be necessary for, **materials to**, and appropriate for the length of anticipated use.... [Emphasis added.]

This may just be a typographical error.

- d. Subdivision (e)(2) of section 4970.10.4 as amended by the Department would provide in part:

...Federal agencies to the maximum extent consistent with federal law, shall use and manage the property for OHV Recreation in accordance with the controlling Federal Agency’s **and use plan**.... [Emphasis added.]

This also appears to be a typographical error.

Any changes made to the regulation text to address the clarity concerns discussed above should 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.

3. NECESSITY/DEFECTIVE INITIAL STATEMENT OF REASONS

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean “. . . the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of title 1 of the California Code of Regulations provides:

In order to meet the ‘necessity’ standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) a statement of the specific purpose of each adoption, amendment, or repeal; and
- (2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An ‘expert’ within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons (ISOR). (Gov. Code, sec. 11346.2(b).) The ISOR must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1).) The ISOR must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

The discussion in the ISOR submitted with this regulatory action for the changes in sections 4970.08(b)(3), 4970.09(b)(10), 4970.23, 4970.24.1(d), 4970.25.1(e), and 4970.25.3 is inadequate. In some cases the ISOR describes the effect of the new or revised provisions in the

regulations rather than explaining the reasons for the various provisions. This does not meet the necessity standard of Government Code section 11349 and section 10 of title 1 of the California Code of Regulations. In that the ISOR is required to include an explanation of the need and the rationale for each proposed new provision or change to the existing regulations and this document is required to be made available to the public with the 45 day notice, any addition to the statement of reasons now providing the necessity missing from the existing ISOR must be made available to the public for at least 15 days prior to adoption of the regulations by the Department pursuant to Government Code section 11347.1.

Government Code section 11347.1 provides in part:

- (a) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action shall make the document available as required by this section.
- (b) At least 15 calendar days before the proposed action is adopted by the agency, the agency shall mail to all of the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:
 - (1) Persons who testified at the public hearing.
 - (2) Persons who submitted written comments at the public hearing.
 - (3) Persons whose comments were received by the agency during the public comment period.
 - (4) Persons who requested notification from the agency of the availability of changes to the text of the proposed regulation.
- (c) The document shall be available for public inspection at the location described in the notice for at least 15 calendar days before the proposed action is adopted by the agency.

4. THE FINAL STATEMENT OF REASONS FAILED TO INCLUDE AN ADEQUATE RESPONSE TO EVERY COMMENT SUBMITTED DURING THE PUBLIC COMMENT PERIODS HELD ON THE PROPOSED REGULATORY ACTION

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA requires that rulemaking agencies provide notice and at least a forty-five day comment period prior to

adoption of a proposed regulatory action. (Gov. Code, secs. 11346.4 and 11346.5). By requiring the state agency to summarize and respond in the record to comments received during the comment period, the Legislature has clearly indicated its intent that an agency account for all relevant comments received, and provide written evidence of its meaningful consideration of all timely, relevant input. Section 11346.9(a)(3) of the Government Code requires that the adopting agency prepare and submit to OAL a final statement of reasons which shall include a “. . . summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reason for making no change.”

Tab 4 in the rulemaking file contains written comments submitted during the 45 day comment period and Tab 9 contains written comments submitted during a subsequent 15 day comment period. The Final Statement of Reasons (FSOR) includes the Department’s summary and response to these comments. A common response used in the FSOR is that the Department is taking no action on the comment and considers it irrelevant to any specific regulation or proposed revision. All of the comments for which this response is utilized should be checked, but this response is clearly inadequate as applied to at least the comments numbered 5.19, 5.30, 12.2, 12.25, and 2.3.

5. REQUIRED DOCUMENTS INCLUDED IN THE FILE WERE MISSING OR DEFECTIVE.

- a. OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “authority” and “reference” standards. (Gov. Code, sec. 11349.1(a)(2) and (a)(5).) “Authority” as defined by Government Code section 11349(b) means “. . .the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.” “Reference” as defined by Government Code section 11349(e) means “. . .the statute, court decision, of other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.”

Subdivision (a) of Government Code section 11346.2 requires that the adopting agency submit to OAL the express terms of the proposed regulation. Subdivision (a)(2) of Government Code section 11346.2 provides:

The agency shall include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations.

The regulation text of proposed section 4970.25.3 adopted by the Department and submitted to OAL for review and filing with the Secretary of State in this regulatory

action did not contain any “authority” and “reference” citations as required by Government Code section 11346.2(a)(2). For this reason, OAL will reserve its authority to review for the “authority” and “reference” standards upon resubmission.

b. Subdivision (b) of section 8 of title 1 of the California Code of Regulations provides:

The final text of the regulations shall use underline or italic to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations.

The final regulation text attached to the STD 400 and submitted to OAL for review and filing with the Secretary of State did not accurately indicate the changes being made in underline or italic or strikeout.

c. Subdivision (b) of section 20 of title 1 of the California Code of Regulations provides in part:

Material proposed for “incorporation by reference” shall be reviewed in accordance with procedures and standards for a regulation published in the California Code of Regulations....

The regulation text attached to the STD 400 submitted to OAL for review and filing with the Secretary of State did not include the documents incorporated by reference that were being amended by this rulemaking. Neither did the rulemaking file include a copy of these documents with the text being made available for comment during the public comment periods. (See Gov. Code, sec. 11347.3(b)(10) discussed in issue 5(d) below.) For this reason, OAL will reserve its authority to review the changes being made to these incorporated documents for the six standards of Government Code section 11349.1 upon resubmission. Please also note that if these changes were not made available to the public for comment with the rest of the regulation text, they must be made available pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.

Please also be advised that subdivision (c)(4) of section 20 of title 1 of the California Code of Regulations requires that:

The regulation text states that the document is incorporated by reference and **identifies the document by title and date of publication** or issuance....
[Emphasis added.]

Documents referred to as incorporated by reference on the page attached to the STD 400 were not identified by title and date.

In the event any of these documents are being incorporated by reference for the first time by way of this rulemaking, please also be advised that subdivision (c)(1) of section 20 of title 1 of the California Code of Regulations requires that:

The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations.

- d. Subdivision (b)(10) of section 11347.3 of the Government Code requires that the rulemaking file include:

The text of regulations as originally proposed and the modified text of regulations, if any, that were made available to the public prior to adoption.

The rulemaking file submitted with this regulatory action does not include a copy of the modified text made available to the public for comment between August 15, 2015 and August 30, 2015.

- e. Subdivision (b)(12) section 11347.3 of the Government Code requires that the rulemaking file include:

An index or table of contents that identifies each item contained in the rulemaking file. The index or table of contents shall include an affidavit or a declaration under penalty of perjury in the form specified by Section 2015.5 of the Code of Civil Procedure by the agency official who has compiled the rulemaking file, specifying the date upon which the record was closed, and that the file or the copy, is complete.

The rulemaking file submitted with this regulatory action contains no such affidavit or declaration.

- f. Subdivision (b) of Government Code section 11346.9 requires that the rulemaking agency:

Prepare and submit to the office with the adopted regulation an updated informative digest containing a clear and concise summary of the immediately preceding laws and regulations, if any, relating directly to the adopted, amended, or repealed regulation and the effect of the adopted, amended, or repealed regulation....

Although the Updated Informative Digest included in the rulemaking file submitted with this regulatory action describes the changes that have been made to the regulations since the proposed changes were made available to the public with the original notice, it does not address whether there have been any changes to the laws and regulations relating to the adopted regulations.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. Please also note that the Fiscal Impact Statement, Form STD 399, prepared by the Department for this regulatory action which is contained in the rulemaking file binder at Tab 12 has been punched out where Box A.5 was presumably checked. Please include a new copy of the STD 399 upon resubmission.

If you have any questions, please contact me at (916) 323-6808.

Date: November 18, 2015

/s/ Craig Tarpenning

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