

**State of California  
Office of Administrative Law**

**In re:**  
**California Energy Commission**

**Regulatory Action:**

**Title 20, California Code of Regulations**

**Adopt sections:**

**Amend sections: 1601, 1602, 1604,  
1605.1, 1605.2, 1605.3,  
1606, 1607**

**Repeal sections:**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL Matter Number: 2016-0210-02**

**OAL Matter Type: Regular Resubmittal  
(SR)**

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**SUMMARY OF REGULATORY ACTION**

On October 9, 2015, the California Energy Commission (Commission) submitted to the Office of Administrative Law (OAL) its initial proposed regulatory action (OAL File No. 2015-1009-04S) to amend existing sections of Title 20 of the California Code of Regulations (CCR) in order to add and update definitions, test methods, standards, data submittal requirements, and marking requirements for numerous appliances, such as air filters, deep-dimming fluorescent lamp ballasts, refrigerators, freezers, among others. On November 20, 2015, the Commission withdrew this initially submitted file.

On February 10, 2016, the Commission resubmitted the proposed regulatory action to OAL for review. Although some of the issues identified in the initial submission were corrected, the rulemaking action still does not satisfy all of the APA requirements. On March 24, 2016, OAL notified the Commission that OAL disapproved the proposed regulations because the Commission failed to follow procedures required by the APA. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

**DECISION**

OAL disapproved the above-referenced regulatory action because the Commission did not meet APA procedural requirements due to its failure to:

1. accurately indicate changes to the regulations, pursuant to Government Code section 11343 and California Code of Regulations, title 1, section 8;

2. include in the final statement of reasons an update of the information contained in the initial statement of reasons, pursuant to Government Code section 11346.9, subdivision (a)(1);
3. transmit to OAL for filing with the Secretary of State a certified copy of every regulation, amended by the Commission, including all documents incorporated by reference, pursuant to Government Code section 11343, subdivision (a), and California Code of Regulations, title 1, section 6;
4. include in the rulemaking file all the required documents, pursuant to Government Code section 11347.3;
5. properly incorporate the prior withdrawn file, pursuant to California Code of Regulations, title 1, section 84;
6. include the required information in the updated informative digest, pursuant to Government Code section 11346.9, subdivision (b);
7. include in the final statement of reasons the summary and response to each objection or recommendation made regarding the specific proposed amendment, pursuant to Government Code section 11346.9, subdivision (a)(3);
8. identify each item in the rulemaking file on the Table of Contents, pursuant to Government Code section 11347.3, subdivision (b)(12);
9. include in the Table of Contents an affidavit or declaration under penalty of perjury stating that the rulemaking file is complete, pursuant to Government Code section 11347.3, subdivision (b)(12); and
10. include in the rulemaking file an adequate mailing statement for its 15-day notice of public availability dated April 23, 2015, pursuant to California Code of Regulations, title 1, section 44.

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

### **DISCUSSION**

The adoption, amendment, or repeal of regulations by the Commission 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 the APA. (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.

The Commission failed to comply with the following APA procedures:

**1. Failure to accurately indicate modifications to the regulations**

Government Code section 11343, subdivision (a)(1) requires every state agency to transmit to OAL for filing with the Secretary of State a certified copy of every regulation adopted or amended by it. Title 1, section 8, subdivision (b) of the CCR provides that the “final text of the regulation shall use underline or italic to accurately indicate additions to, and strikeout to accurately indicate deletions from, the [CCR].” The term “final text” is defined as the certified copy of the regulation transmitted to OAL for filing with the Secretary of State. (1 Cal. Code Regs., sec. 8, subd. (a)(2).)

The Commission’s final text of the regulations contained a significant amount of additions to and deletions from the CCR that were not accurately indicated. For example, proposed section 1602, subdivision (s) is amended to add a definition for the term “Accreditation.” The entire definition was underlined, except for a portion of it that was not underlined. To further illustrate, Table X in proposed section 1606 provides modifications to the “Required Information” and “Permissible answers” for the fluorescent lamp ballasts section. However, the changes do not clearly show where the additions are to be inserted and which deletions are to be removed.

Further, the underlying text of the proposed regulations does not match what is currently printed in the CCR in a large number of provisions. (Gov. Code, sec. 11343.) In some proposed regulations, the existing text is underlined. For instance, the final text of proposed section 1605.3, subdivision (j)(2) shows the following existing text in underline: “See section 1605.1(j) for energy efficiency standards for fluorescent lamp ballasts that are federally regulated consumer products.” This text should not have been underlined as it has already been adopted into the CCR and is existing text.

In other provisions, the existing text is missing from the proposed regulatory language. For example, Table X in proposed section 1606 lists the following appliance:

Self-contained Commercial Refrigerators with or without doors, Self-contained Commercial Refrigerator-Freezers *with doors*, Self-contained Commercial Freezers with or without doors, Self-contained Commercial Refrigerators specifically designed for display and sale of bottled or canned beverages *without doors*,... [Emphasis added.]

However, the *existing text* in the CCR lists that appliance as follows:

Self-contained Commercial Refrigerators with or without doors, Self-contained Commercial Refrigerator-Freezers *with or without doors*,

Self-contained Commercial Freezers with or without doors, Self-contained Commercial Refrigerators specifically designed for display and sale of bottled or canned beverages *with or without doors*,...  
[Emphasis added.]

Before these regulations can be resubmitted to OAL for another review, the Commission must ensure that the underlying text matches the text printed in the CCR and the additions and deletions are accurately indicated.

**2. Failure to include in the final statement of reasons an update of the information contained in the initial statement of reasons**

The APA requires the final statement of reasons to include an update of the information contained in the initial statement of reasons. (Gov. Code, sec. 11346.9, subd. (a)(1).) In its second 15-day notice, the Commission made some updates to the information contained in the initial statement of reasons (ISOR) in a Supplement to the ISOR. However, because the Supplement to the ISOR did not address all the updates, the missing updates should have been included in the final statement of reasons but were not. In particular, there was no update of information or explanation provided for text modifications that appear to be nonsubstantive.

Before the regulatory action can be resubmitted to OAL for another review, the Commission must correct its final statement of reasons to add the missing information.

**3. Failure to transmit to OAL for filing with the Secretary of State a certified copy of every regulation amended by the Commission**

Every agency is required to transmit to OAL for filing with the Secretary of State a certified copy of every regulation adopted or amended by it. (Gov. Code, sec. 11343, subd. (a).) This includes documents incorporated by reference.

Title 1, section 20, subdivision (a) of the CCR defines “incorporation by reference” as the “method whereby a regulation printed in the [CCR] makes provisions of another document part of that regulation by reference to the other document.” These documents incorporated by reference are required to be reviewed in accordance with procedures and standards for a regulation published in the CCR. (1 Cal. Code Regs., sec. 20, subd. (b).)

Further, all regulatory actions submitted to OAL for publication in the CCR and for transmittal to the Secretary of State for filing are required to include the required number of copies of the regulations. (1 Cal. Code Regs., sec. 6, subd. (a).)

In this regulatory action, the Commission incorporated several documents by reference. However, the Commission failed to include any of the required copies of the documents incorporated by reference with the original or any of the six copies of the final regulation text

submitted to OAL. Upon resubmittal of these regulations to OAL for another review, the Commission must submit the required number of copies of the final regulations, including the documents incorporated by reference. (1 Cal. Code Regs., sec. 20; see 20(d) for limited number of copies needed, if applicable.)

**4. Failure to include in the rulemaking file all the required documents**

On January 21, 2016, the Commission made available for a 15-day comment period several documents relied upon which were not previously noticed to the public. Consequently, the APA requires the rulemaking file to include a statement confirming that the Commission complied with the notice requirements of Government Code section 11347.1 and stating the date on which the notice was mailed. (Gov. Code, sec. 11347.1, subd. (e).) However, this required mailing statement for the 15-day comment period of January 21, 2016 through February 5, 2016 is not included in the rulemaking file. Upon resubmittal of these regulations, the Commission must include the required mailing statement in the rulemaking file.

**5. Failure to properly incorporate the prior withdrawn file**

Title 1, section 84 of the California Code of Regulations provides:

In re-submitting to OAL a regulation previously withdrawn... an agency may incorporate by reference all or any part of the withdrawn... file. To incorporate such files, the agency shall submit a transmittal memo identifying the prior rulemaking file by date of submission and specifying that portion of the prior file that is incorporated by reference.

In this regulatory action, the Commission withdrew its initially submitted regulations (OAL File No. 2015-1009-04S), but it did not include a transmittal memo in the resubmitted file to incorporate its prior file. The resubmittal rulemaking file alone constituted an incomplete rulemaking file. Upon resubmittal to OAL for another review, the Commission must include a transmittal memo in the rulemaking file identifying the prior rulemaking file by date of submission and specifying the portion of the prior file that is incorporated by reference.

**6. Failure to include the required information in the updated informative digest**

An updated informative digest is required by Government Code sections 11346.9(b) and 11347.3(b)(2) to be in the rulemaking file. Specifically, Government Code section 11346.9, subdivision (b) requires the Commission to submit to OAL a "clear and concise summary of the immediately preceding laws or regulations... relating directly to the adopted, amended, or repealed regulation and the effect of the adopted, amended, or repealed regulation."

The Commission's originally proposed text included regulatory language related to plumbing. In its 15-day notice dated April 23, 2015, the Commission explained that on April 1, 2015, Governor Brown's Executive Order B-29-15, directed the Commission to adopt regulations establishing standards that improve the efficiency of water appliances. In its modified regulation text, the Commission removed its proposed regulatory language related to plumbing in that it was being addressed in an intervening rulemaking action submitted to OAL.<sup>1</sup>

Despite the information noticed to the public, the final statement of reasons states, in a section entitled "Updated Informative Digest (Gov Code Section 11346.9(b))":

In accordance with Government Code section 11346.9(d), the Informative Digest contained in the Notice of Proposed Action [published on February 13, 2015] is incorporated by reference. There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Action relating to dimming ballasts, air filter labeling, heat-pump water chilling packages and federal updates.

The Commission's updated informative digest does not address the Executive Order or the effect it had on the proposed regulations. The rulemaking file must contain an updated informative digest that meets the requirements of Government Code sections 11346.9(b) and 11347.3(b)(2).

**7. Failure to include in the final statement of reasons the summary and response to each objection or recommendation made regarding the specific proposed amendment**

The APA requires the final statement of reasons to include a summary of each objection or recommendation received during a comment period and a response explaining how the proposed regulation was amended to accommodate the comment or explaining a reason for rejecting the comment. (Gov. Code, sec. 11346.9, subd. (a)(3).)

The Commission's final statement of reasons indicates that responses to all comments are located in an "Attachment A" but the file does not contain any document identified as such. Upon resubmittal of the proposed regulations to OAL for another review, the final statement must include a summary and response to all comments as required by Government Code section 11346.9, subdivision (a)(3).

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<sup>1</sup> On April 21, 2015, the Commission submitted to OAL proposed regulatory language pursuant to Executive Order B-29-15 related to plumbing that was exempt from OAL review (OAL File No. 2015-0421-01FP). These regulations were filed with the Secretary of State on May 15, 2015, effective May 15, 2015.

**8. Failure to identify each item in the rulemaking file on the Table of Contents**

The rulemaking file is required to include a Table of Contents (or index) that identifies each item contained in the rulemaking file. (Gov. Code, sec. 11347.3, subd. (b)(12).) As one example, the Commission's Table of Contents omits to identify the comments received during the 15-day public comment period commencing January 21, 2016. The Commission must revise the Table of Contents to ensure all items contained in the rulemaking file are identified.

**9. Failure to include in the Table of Contents an affidavit or declaration under penalty of perjury stating that the rulemaking file is complete**

The APA requires the Commission to include in the Table of Contents an affidavit or a declaration under penalty of perjury, specifying the date upon which the record was closed, and that the file is complete. (Gov. Code, sec. 11347.3, subd. (b)(12).) The Commission's Table of Contents provides the date that the record was closed but it does not state that the file is complete. The Commission must include this statement in its affidavit or declaration under penalty of perjury.

**10. Failure to include in the rulemaking file an adequate mailing statement for its 15-day notice of public availability of April 23, 2015**

The rulemaking file must include a mailing statement confirming that the Commission complied with the requirements of title 1, section 44 of the California Code of Regulations. (Gov. Code, sec. 11347.3, subd. (b)(9); 1 Cal. Code Regs., sec. 44.) The Commission's mailing statement for its 15-day notice of availability dated April 23, 2015, does not include the required statement. The Commission must include a complete mailing statement in its rulemaking file.

**11. MISCELLANEOUS**

There are a number of miscellaneous issues that the Commission will need to address in this regulatory action. Among them are:

- a. Section B.4. of the Form 400 should only include the beginning and ending dates of the 15-day availability periods;
- b. Section B.8. of the Form 400 should include the typed name of the signatory; and,
- c. The final statement of reasons' list of documents incorporated by reference should be revised to include all documents incorporated by reference in the proposed regulations.

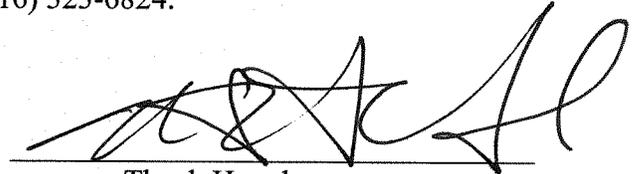
Any additional substantive modifications to the text, i.e., change in deadlines, will require a minimum 15-day notice and public comment period and approval by the Commission. Any

comments received during the comment period must be considered by the Commission before the Commission approves the modifications.

**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) 323-6824.

Date: March 30, 2016

A handwritten signature in black ink, appearing to read 'Thanh Huynh', written over a horizontal line.

Thanh Huynh  
Senior Attorney

FOR: Debra M. Cornez  
Director

Original: Robert P. Oglesby  
Copy: Jared Babula