State of California
Office of Administrative Law

In re:
Fish and Game Commission

Regulatory Action: Title 14
California Code of Regulations

Adopt sections: 550.5, 550, 551, 630
Amend sections: 552, 703
Repeal sections: 550, 551, 553, 630

DECISION OF DISAPPROVAL OF REGULATORY ACTION

Government Code Section 11349.3

OAL File No. 2012-0816-02 S

SUMMARY OF REGULATORY ACTION

The Fish and Game Commission (Commission) proposed this action to consolidate and clarify existing regulations that govern the public use of lands that are under the jurisdiction of the Department of Fish and Game. The proposed action was intended to improve the consistency and enforceability of these regulations, provide a statewide procedure and fee for the issuance of special use permits, and designate six recently acquired Department of Fish and Game (Department) properties as ecological reserves and one recently acquired Department property as a wildlife area.

DECISION

On September 28, 2012, the Office of Administrative Law (OAL) notified the Commission of the disapproval of this regulatory action. The reasons for the disapproval were the failure to comply with the "necessity" and "clarity" standards of Government Code section 11349.1 and the failure to comply with required Administrative Procedure Act procedures due to omitted or defective rulemaking record documents.

DISCUSSION

Regulations adopted by the Commission must generally be adopted pursuant to the rulemaking provisions of the California Administrative Procedure Act (APA), Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code (Gov. Code, secs. 11340 through 11361). Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA (Gov. Code, sec. 11346). No exemption or exclusion applies to the regulatory action here under review. Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed

by OAL for compliance with the substantive standards and procedural requirements of the APA, in accordance with Government Code section 11349.1.

Due to the numerous issues in this decision, upon resubmission of this matter, OAL reserves the right to conduct a complete review for compliance with the procedural and substantive requirements of the APA. All APA issues must be resolved prior to OAL's approval.

A. NECESSITY

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 the necessity standard:

> (a) "Necessity" means 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 purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

To explain the meaning of substantial evidence in the context of the necessity standard, Title 1, California Code of Regulations, section 10(b) 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 is the primary document in the rulemaking record that demonstrates that the adoption, amendment, or repeal of a regulation satisfies the "necessity" standard. 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 "why" the particular provisions contained in this regulation were chosen to fill that need. (Gov. Code, sec. 11346.2(b)(1).)

Agencies must submit the ISOR to OAL with the Notice of the Proposed Action and make the ISOR 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 why the regulation is needed and why the particular provisions contained in the regulation were chosen to fill that need. This information is essential in order to provide the public with a meaningful opportunity to comment knowledgeably.

In this regulatory action, the Commission issued two ISORs, the initial ISOR prepared at the time of the 45-day notice, and an "Amended Initial Statement of Reasons," which was prepared during May 2012. For purposes of this discussion, both ISORs will be referred to collectively as the ISOR. The ISOR provided with this regulatory action provided sufficient necessity for the addition of the special use permit and corresponding application and fees, and for the designation of recently acquired Department lands as either an ecological reserve or a wildlife area. However, the Commission overlooked providing necessity for substantive changes made in the process of consolidating the regulations.

The ISOR is lacking necessity in the following general areas:

1. The Commission established a set of definitions for terms used throughout the regulations. Some of these definitions include criteria.
2. Regulatory provisions that only applied to ecological reserves or to wildlife areas were made to now apply to both types of lands. Necessity would be required where, for example, a regulatory provision that currently only applies to an ecological reserve now also applies to a wildlife area.
3. Consolidation of some regulatory provisions resulted in new regulations with additional regulatory provisions.
4. Resolution of inconsistencies in the current regulations resulting in the inconsistency being resolved one way or another.
5. Revision of a regulatory provision for clarification that resulted in a substantive change to the provision.

The Commission will need to add a "Supplemental Statement of Reasons" to the rulemaking record that contains sufficient necessity for the areas described above in a 15-day notice pursuant to Government Code section 11347.1.

B. 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." "Clarity" is further defined in California Code of Regulations, title 1, section 16(a):

> 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; ....

In proposed section 550(b)(2), the Commission established a definition for "compatible activities or uses," which provided

> (2) "Compatible activities or uses" are defined as hunting, fishing, wildlife viewing, wildlife photography, environmental education, and/or environmental research. Each activity or use is subject to review pursuant to state and federal regulatory requirements prior to being authorized. Activities that do not meet the following criteria or are not otherwise authorized in Sections 550, 551, and 630 shall require written authorization from the department; typically in the form of a Special Use Permit (see subsection 550.5(d)).
> (A) they are included in the approved acquisition documents and/or management plan for a subject property, on file with the department.
> (B) they will not result in impacts to conflict with the wildlife, plant or habitat conservation purposes for which the property was acquired, or department activities necessary to achieve those purposes.[1]

At first glance, it appears that any activity or use that is not one of the defined "compatible activities or uses" would require written authorization from the Department, typically in the form of a special use permit, in order to perform that activity or use on Department lands. However, the definition further specifies that activities that do not meet the specified criteria in subdivision (b)(2)(A) and (B), or are not otherwise authorized in sections 550, 551, and 630, will require the special use permit. It is unclear whether these "activities" refer to the compatible activities or uses defined in the first sentence, or if they refer to other activities. Perhaps they apply to activities that must undergo "review pursuant to state and federal regulatory requirements prior to being authorized." Either interpretation appears valid, leaving the definition ambiguous. Further, the language starting with the word "Activities" in the third sentence appears to suggest a separate idea from the definition of compatible activities or uses, making the definition somewhat confusing. Finally, the "and" in the phrase referring to "Sections 550, 551, and 630" (emphasis added) likely should be an "or."

The Commission should consider re-writing the definition for "compatible activities or uses" so that it is clearer and expressly conveys what the Commission means by the definition. Since there was no necessity provided for this definition in the ISOR, it is difficult to determine what the Commission intended this definition to mean.

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[1] This version of the definition of "compatible activities or uses" was modified from the version made available with the 45-day text. It represents modifications made available in May 2012 in connection with a "continuing notice" issued by the Commission on May 7, 2012. The version of the definition had been further modified before being submitted to OAL; however, this version is used to illustrate the clarity issue involved. All versions of the definition carry the same clarity issues.

In another example, the Commission added a regulatory provision in section 550(x)(1) for the possession and use of alcohol. This regulation provides,

> (1) No visitor shall possess, use, or be under the influence of alcohol while in the field hunting. For the purpose of this section, "in the field" is defined as all areas except designated parking and camping areas. Persons under the influence of alcohol to a level determined to be unsafe may be cited and ejected per subsection 550(c)(3).

It is unclear in this regulation how the Commission intends to enforce mere possession of alcohol. Is the regulation intended to exclude possession of alcohol only "in the field," or is the enforcement of possession of alcohol intended to include areas outside the field where a person under the influence of alcohol is determined to be unsafe? Another consideration about this provision is whether the standard of "a person under the influence of alcohol is determined to be unsafe" is intended to apply only to persons "in the field," or if the enforcement of this standard is intended to include areas outside the field. The Commission should re-write this regulation so that the answers to these questions are clear.

OAL discussed with the Commission staff a number of other minor instances in the regulation text where clarity might be an issue. The Commission will be making additional revisions to the regulation text in accordance with those discussions.

C. INCORRECT PROCEDURES, OMITTED OR DEFECTIVE DOCUMENTS

1. Numerous Substantive Changes Made to Text Without Notice Required by Government Code Section 11346.8(c)

The Commission made substantial modifications to the original regulation text in connection with a "continuing notice" issued by the Commission on May 7, 2012, which allowed for a minimum 15-day comment period. This version of the text was mailed out with the notice, as required by title 1, California Code of Regulations, section 44(a). Pursuant to the notice, the Commission held an adoption hearing on June 20, 2012; however, the record shows that a number of additional modifications were made to the regulation text prior to that time. Additionally, the final version of the regulation text that was submitted to OAL showed numerous additional modifications made to the May 2012 version of the text. Many of these modifications appeared to be substantive changes to the text. In Government Code section 11346.8(c), the APA requires such changes to "be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation." There was no documentation in the rulemaking record that the Commission had conducted a 15-day notice for any of the modifications made to the text since the May 2012 version of the text. Furthermore, the rulemaking record was unclear as to what version of the regulation text the Commission adopted at its June 20, 2012 adoption hearing.

2. Documents Added to the Rulemaking Record Without Notice Required by Government Code Sections 11346.8(d) and 11347.1

In May 2012, the Commission prepared two documents that were added to the rulemaking record, an Economic Impact Assessment and a second ISOR titled "Amended Initial Statement of Reasons." In discussing these documents with the Commission, the documents were prepared in connection with the May 7, 2012 "continuing notice." However, the documents were not identified in the May 7, 2012 notice, and the notice did not contain any information as to where the new documents would be made available. Government Code section 11347.1(b) requires any new documents that are added to the rulemaking record and that the adopting agency relies upon must be made available to the public

> 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 state the place and business hours that the document is available for public inspection ....

The Commission will need to comply with the 15-day notice and public availability requirements of Government Code section 11347.1 in order to add these two documents to the rulemaking record.

3. Failure to Include Mail Certification Statement for the 15-day Notice

The Commission provided a 15-day notice in May 2012 for its first modification of text and, ostensibly, to add two new documents to the rulemaking record. Whenever an agency issues a 15-day notice, the APA requires that a mail certification statement be placed in the rulemaking record that certifies compliance with the procedural requirements of the 15-day notice. For a 15-day notice of modified text, this requirement is in title 1, California Code of Regulations, section 44(b), which requires the following:

> (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.

A similar procedure is required when adding documents to a file. Government Code section 11347.1(e) provides:

> (e) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date on which the notice was mailed.

The rulemaking record for this action does not have a 15-day mail certification statement for the 15-day modified text. The Commission will need to add it to the rulemaking record in the resubmitted action for the May 2012 modified text. Inasmuch as the Commission will be conducting a new 15-day notice for the modifications made to the text since the May 2012 modified text, it will need to include another 15-day mail certification statement for the new 15-day notice.

The rulemaking record does not have a 15-day mail certification statement for the documents that were intended to be added to the rulemaking record in May 2012, but one would not be expected as the documents were not added to the record in compliance with Government Code section 11347.1. Inasmuch as the Commission will be adding these and other documents to the record in a new 15-day notice pursuant to Government Code section 11347.1, the Commission will need to include a 15-day mail certification statement for all newly added documents.

4. Failure to Illustrate Changes to the Special Use Application Form in the May 2012 15-day Comment Period

The Commission made substantial changes to the application form for the special use permit after the version of the form that was made available during the 45-day comment period. The modified form was mailed with the modified text in connection with the May 7, 2012 "continuing notice." However, none of the changes to the form were illustrated to show additions to and deletions from the form's text as required by Government Code section 11346.8(c) and title 1, California Code of Regulations, section 44(a), both of which require changes to the text be "clearly illustrated." Because the changes to the form were not clearly illustrated, the Commission will need to re-notice the changes to the form in a new 15-day notice, with the changes to the form clearly illustrated.

5. Failure to Adequately Summarize and Respond to Comments in Compliance with Government Code Section 11346.9(a)(3)

The Commission received numerous comments from the public addressing issues with the regulations, both in writing and by oral testimony provided by the public at four public hearings, both during the 45-day comment period and the May 2012 15-day comment period. Government Code section 11346.9(a)(3) requires that, with each of these comments, the agency provide the following:

> (3) 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 reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action. The agency may aggregate and summarize repetitive or irrelevant comments as a group, and may respond to repetitive comments or summarily dismiss irrelevant comments as a group. For the purposes of this paragraph, a comment is "irrelevant" if it is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.

While the Commission generally satisfied the requirements of Government Code section 11346.9(a)(3), there were a few comments that were overlooked and, as a result, did not receive a summary and response. OAL went over these instances with the Commission staff. The existing summary and response to comments will be supplemented to address these comments.

The Commission will also need to prepare a summary and response to address any new public comments that are provided during the new 15-day comment period and, if applicable, any comments that are received at any public hearing held by the Commission for this rulemaking action.

6. Failure to Meet Incorporation by Reference Requirements as Required by Title 1, California Code of Regulations, Section 20

The new application form that is to be used for applying for a special use permit is incorporated by reference in amended provisions of section 703. The form is titled "Permit Application for Special Use of Department Lands," has a form number, FG-WLB-730, and a version date. The date of the original form that was made available during the 45-day comment period was "New 08/2011." Title 1, California Code of Regulations, section 20 (Section 20) is the regulation that addresses incorporation of documents and forms for purposes of the APA. Section 20(c)(3) requires the following:

> (c) An agency may "incorporate by reference" only if the following conditions are met:
> ...
> (3) The informative digest in the notice of proposed action clearly identifies the document to be incorporated by title and date of publication or issuance....

In the informative digest of its 45-day notice, the Commission discussed in general terms the use of the special use application form but failed to identify the application form by title and date of publication or issuance. The Commission will need to resolve this discrepancy in its updated informative digest, which is prepared for the rulemaking record pursuant to Government Code section 11349.6(b).

Section 20(a)(4) requires the following:

> (c) An agency may "incorporate by reference" only if the following conditions are met:
> ...
> (4) The regulation text states that the document is incorporated by reference and identifies the document by title and date of publication or issuance....

In the addition of language to section 703(a)(2)(B), the Commission referred to the application form as the "Special Use Permit Application (FG-WLB-730 (New 08/2011)), incorporated by reference herein." The title of the application form is "Permit Application for Special Use of Department Lands." The regulation text will need to be modified to reflect the accurate title of the application form. Furthermore, since the application form has undergone modifications since it was introduced during the 45-day comment period, the date of publication or issuance may change. In this case, the regulation text will need to reflect the accurate date of publication or issuance.

Section 20(a)(1) and (2) require certain statements to be included in the final statement of reasons, as follows:

> (c) An agency may "incorporate by reference" only if the following conditions are met:
> (1) 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.
> (2) The agency demonstrates in the final statement of reasons that the document was made available upon request directly from the agency, ...

The Commission failed to provide the statements in the final statement of reasons as required by Section 20(a)(1) and (2). In its resubmitted action, the Commission will need to add these two statements to the final statement of reasons.

7. Summary and Response to Comments in Final Statement of Reasons as Required by Government Code section 11346.9(a)(3)

Government Code section 11346.9(a)(3) requires agencies to summarize and respond to comments in the final statement of reasons, as follows:

> Every agency subject to this chapter shall do the following:
> (a) Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following:
> ...
> (3) 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 reasons for making no change.
> ....

The Commission prepared its summary and response to comments in a separate document in the rulemaking record. The summary and response to comments was prepared in a matrix format. Rather than trying to adapt this format to the final statement of reasons, the Commission should incorporate by reference the summary and response to comments into the final statement of reasons, indicating where the summary and response to comments is located in the rulemaking record. If the Commission chooses to follow this same format in summarizing and responding to any comments received during the new 15-day comment period, this document should similarly be incorporated by reference into the final statement of reasons.

CONCLUSION

For the reasons set forth above, OAL has disapproved the Commission's rulemaking action because it failed to comply with the "necessity" and "clarity" standards in Government Code section 11349.1, and failed to comply with required Administrative Procedure Act procedures due to omitted or defective rulemaking record documents.

Date: October 5, 2012

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