

**State of California
Office of Administrative Law**

**In re:
Department of Toxic Substances Control**

**DECISION OF PARTIAL
DISAPPROVAL OF REGULATORY
ACTION**

**Regulatory Action: Title 22
California Code of Regulations**

Government Code Section 11349.3

**Adopt sections: 69501.3(b), 69509.1(a),
69509.1(c)**

OAL File No. 2013-0718-03 S

SUMMARY OF REGULATORY ACTION

This regulatory action by the Department of Toxic Substances Control (Department) proposed to adopt new sections 69501, 69501.1, 69501.2, 69501.3, 69501.4, 69501.5, 69502, 69502.1, 69502.2, 69502.3, 69503, 69503.1, 69503.2, 69503.3, 69503.4, 69503.5, 69503.6, 69503.7, 69504, 69504.1, 69505, 69505.1, 69505.2, 69505.3, 69505.4, 69505.5, 69505.6, 69505.7, 69505.8, 69505.9, 69506, 69506.1, 69506.2, 69506.3, 69506.4, 69506.5, 69506.6, 69506.7, 69506.8, 69506.9, 69506.10, 69507, 69507.1, 69507.2, 69507.3, 69507.4, 69507.5, 69507.6, 69508, 69509, 69509.1 and 69510 in title 22 of the California Code of Regulations. The regulatory action establishes a list of Candidate Chemicals and provides for a process to identify additional chemicals. It also describes the process for evaluating and prioritizing consumer products that contain these chemicals and creating a Priority Products list. Responsible entities (manufacturers, assemblers, retailers and importers) are required to notify the Department if their product is listed and then, unless they meet specified exemptions, perform an alternatives analysis to determine ways to limit exposure and adverse impacts on public health and the environment. After the alternatives analysis, the Department may implement one or more regulatory responses to protect public health and/or the environment. This action also provides for audits related to these processes, dispute resolution arising from these processes and provides for assessment of trade secret claims made to the Department.

DECISION

On July 18, 2013, the Department submitted to the Office of Administrative Law (OAL) the proposed adoption of these sections in article 22. On August 28, 2013, OAL notified the Department that OAL approved the adoption of sections 69501, 69501.1, 69501.2, 69501.3(a) and (c) through (e), 69501.4, 69501.5, 69502, 69502.1, 69502.2, 69502.3, 69503, 69503.1, 69503.2, 69503.3, 69503.4, 69503.5, 69503.6, 69503.7, 69504, 69504.1, 69505, 69505.1, 69505.2, 69505.3, 69505.4, 69505.5, 69505.6, 69505.7, 69505.8, 69505.9, 69506, 69506.1, 69506.2, 69506.3, 69506.4, 69506.5, 69506.6, 69506.7, 69506.8, 69506.9, 69506.10, 69507, 69507.1, 69507.2, 69507.3, 69507.4, 69507.5, 69507.6, 69508, 69509, 69509.1(b) and (d), and 69510. On that same date, OAL notified the Department that it disapproved the adoption of subdivisions 69501.3(b), 69509.1(a) and 69509.1(c), for failure to comply with the Clarity standard of Government Code section 11349.1(a)(3) of the California Administrative Procedure Act (APA).

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

BACKGROUND

Subdivision 69501.3(b) provides for the format for submission of documents to the Department. Subdivision 69509.1(a) provides for the Department's review of trade secret claims and supporting information submitted to the Department. Subdivision 69509.1(c) describes the process when the Department determines that the information provided does not support a trade secret claim.

DISCUSSION

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.

FAILURE TO COMPLY WITH THE CLARITY STANDARD OF GOVERNMENT CODE SECTION 11349.1(a)(3).

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.”

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

(3) the regulation uses terms which do not have meanings generally familiar to those ‘directly affected’ by the regulation, and those terms are defined neither in the regulation nor in the governing statute;

(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.

(1) Proposed Adoption of Subdivision 69501.3(b).

The Department proposed to adopt subdivision 69501.3(b), which provides:

All documents submitted to the Department must be in English, and must be generated and submitted in a manner and in an electronic format *specified by the Department*. [Emphasis added.]

The proposed adoption of subdivision 69501.3(b) lacks clarity since it cannot be easily understood by those persons who are directly affected as to what manner and format is required by the regulation. It is unclear what factors would be examined in order for the Department to determine which manner and format to specify for submission of documents. The revised Initial Statement of Reasons states:

This provision is necessary to ensure information submitted to DTSC is easily accessed and understood by DTSC employees.

This described intention is not reflected in this subdivision because it does not provide any indication as to the basis upon which the Department would specify the manner and format. In order to meet the clarity standard, the Department will either need to indicate that the manner

and format must be one that the Department can access or must provide sufficient clarity as to the factors it will consider when specifying which manner and format(s) must be used for submitting information and documents.

(2) Proposed Adoption of Subdivision 69509.1(a).

The Department proposed to adopt subdivision 69509.1(a), which provides:

Upon receipt of information submitted under this chapter that contains information identified as being subject to trade secret protection, or at any time thereafter, the Department *may review* the trade secret claim and supporting information for compliance with the requirements of this article. [Emphasis added.]

Subdivision 69509.1(a) does not meet the clarity standard of Government Code section 11349.1 since it cannot be easily understood by those persons who are directly affected as to when the Department will review a trade secret claim. It is unclear what factors would be considered as the basis upon which the Department would determine to review the trade secret claim and when it might not review such a claim. The Initial Statement of Reasons states:

This provision ... puts DTSC in a position of settling some potential disputes about what is and is not trade secret information before such information is even subject to a Public Records Act request. This then will aid prompt responses to Public Records Act requests.

This seems to indicate that DTSC intends to review all trade secret claims to make a determination prior to any Public Records Act requests. This intention is not reflected in this subdivision so this subdivision also lacks clarity because the language of the regulation conflicts with the agency's description of the effect of the regulation. As written, the subdivision would allow the Department discretion to selectively review such claims with no discernible criteria as to when it might review and when it might not review these claims. The Department must either clarify the factors that would be used to determine when a review is necessary or clarify that it will review all such claims.

(3) Proposed Adoption of Subdivision 69509.1(c).

The Department proposed to adopt subdivision 69509.1(c), which provides:

If the Department determines that information provided in support of a request for trade secret protection does not meet the *substantive criteria for trade secret designation*, the Department shall provide notice to the submitter by certified mail [Emphasis added.]

This sentence in subdivision (c) does not meet the clarity standard of Government Code section 11349.1 since it cannot be easily understood by those persons who are directly affected as to what substantive criteria for trade secret designation is being referred to by the Department. In

section 69509, just prior to section 69509.1, the Department describes the information that a person claiming a trade secret must provide, but there is no indication as to which of this information would be considered “substantive criteria.” The Department must either clearly indicate the criteria to be considered or point to its definition for “trade secret” in subdivision 69501.1(a)(66), which includes some specified criteria.

CONCLUSION

For the reasons set forth above, OAL has disapproved subdivisions 69501.3(b), 69509.1(a) and 69509.1(c) of this regulatory action.

Date: September 3, 2013



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