State of California
Office of Administrative Law

In re:
California Governor's Office of Emergency Services

Regulatory Action:
Title 19, California Code of Regulations

APPROVED:
Adopt sections:
Amend sections: **2735.1, 2735.3, 2735.4, 2735.5, 2740.1, 2745.1, 2745.2, 2745.3, 2745.6, 2745.7, 2745.10, 2745.10.5, 2750.2, 2750.3, 2750.4, 2750.7, 2755.2, 2755.3, 2755.4, 2755.5, 2755.6, 2755.7, 2760.1, 2760.2, 2760.5, 2760.6, 2760.7, 2760.8, 2760.9, 2760.12, 2765.1, 2765.2, 2770.2, 2770.5, 2775.2, 2775.5, 2775.6, 2780.1, 2780.2, 2780.3, 2780.4, 2780.6, 2780.7, and Appendix A**
Repeal sections:

DISAPPROVED:
Adopt sections: **2770.3**
Amend sections:
Repeal sections:

DECISION OF PARTIAL DISAPPROVAL OF REGULATORY ACTION

Government Code Section 11349.3

OAL File No. 2014-0826-02 S

SUMMARY OF REGULATORY ACTION

This rulemaking action by the California Governor's Office of Emergency Services (OES) updates and amends the regulations that implement the California Accidental Release Prevention Program (CalARP), located in title 19 of the California Code of Regulations (CCR).

DECISION

On October 8, 2014, the Office of Administrative Law (OAL) notified OES of the disapproval, in part, of this regulatory action. Specifically, OAL disapproved the proposed adoption of section 2770.3 of title 19 of the CCR. The reasons for the disapproval were the following: (1) failure to comply with the "Clarity" standard of Government Code section 11349.1, and (2) failure to comply with the "Necessity" standard of Government Code section 11349.1.

DISCUSSION

Regulations adopted by OES must 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.

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

A. CLARITY

OAL must review regulations for compliance with the "Clarity" standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines "Clarity" as meaning "...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 of title 1 of the CCR, OAL's regulation on "Clarity," which provides the following:

> 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; or

(4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
(5) the regulation presents information in a format that is not readily understandable by persons "directly affected;" or
(6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

(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 rulemaking action, section 2770.3 of the proposed regulations fails to comply with the "Clarity" standard. Section 2770.3, entitled "Petition Process," was proposed by OES to establish a method for a person to modify one or more tables of regulated chemical substances found in section 2770.5. Section 2770.3 generally includes reasons why a listed substance may be modified, by addition, deletion, or amendment of its threshold value, specific required contents of a petition, timelines for responding to a petition, and other requirements.

Proposed section 2770.3, subdivision (a)(9), provides:

> "Any petition submitted pursuant to this section shall be accompanied by a submission fee, to be established by Cal OES. The purpose of this fee is to defray the reasonable costs incurred by Cal OES and the Office of Environmental Health Hazard Assessment in carrying out the evaluation of the petition, as required by this section."

The proposed provision establishes a submission fee that must accompany each petition, but does not provide the specific fee amount. This amount is not specified elsewhere in title 19 of the CCR, nor in statute. To the petitioner – a person directly affected by this provision – the regulation is unclear as to the amount of the submission fee. OES may remedy this problem by stating a valid, specific fee amount, after it is determined in accordance with statutory requirements and promulgated pursuant to the APA. (See discussion of relevant statutory provisions below.)

B. NECESSITY

OAL must review regulations for compliance with the "Necessity" standard of Government Code section 11349.1. Government Code section 11349, subdivision (a), defines "Necessity" as meaning "...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 CCR 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 regulation 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 need for a regulation, the APA requires that a rulemaking agency describe the need for the regulation and identify documents relied upon in proposing the regulation in the Initial Statement of Reasons (ISOR), pursuant to Government Code section 11346.2, subdivision (b).

The ISOR provided by OES in this regulatory action does not adequately explain the need for section 2770.3. Regarding this section, the ISOR merely declares:

> "This section establishes requirements for a person to modify the tables of regulated substances in section 2770.5, by addition or deletion of a substance, or by changing the threshold value. This new section provides a petition process as mandated by [Health and Safety Code] section 25543.1."

This brief statement fails to provide the public with the rationale for the determinations by OES as to why the specific regulatory provisions within section 2770.3 are needed to carry out the purpose for which they are proposed. This vital information should have been made available to the public during the rulemaking process so that the public is informed of the basis of the proposed action and can comment knowledgably during the public comment period.

Consider section 2770.3, subdivision (a)(9), *supra*. As discussed earlier, OES drafted this provision to establish a submission fee. According to the ISOR, this fee is a necessary element of a larger, statutorily mandated petition process. Health and Safety Code section 25543.1 provides, in relevant part:

> (a) Any person may submit a petition to the office for the addition of a material to, or for the deletion of a material from, the regulated substances list adopted pursuant to subparagraph (B) of paragraph (2) of subdivision (g) of Section 25532 or to revise the existing state threshold quantities that are used as the standards for registration and RMP compliance.

(b) A petition submitted pursuant to subdivision (a) shall be accompanied by a submission fee, to be established by the office, in consultation with the Office of Environmental Health Hazard Assessment. The fee shall be in an amount that is sufficient to pay for the reasonable costs incurred by the office and the Office of Environmental Health Hazard Assessment necessary to carry out this section. Upon the receipt of the petition and fee, the office shall transmit to the Office of Environmental Health Hazard Assessment funds sufficient to pay for the reasonable costs incurred by the Office of Environmental Health Hazard Assessment to carry out this section.

OES is correct that a petition process, including a submission fee, is mandated by statute, yet this fact alone does not comprise adequate rationale for the adoption of section 2770.3, subdivision (a)(9). The Legislature could have established the exact amount of this submission fee in statute, but clearly intended for OES to collaborate with the Office of Environmental Health Hazard Assessment to carry out the analytical task of determining an appropriate submission fee. It is this analysis that would constitute substantial evidence of necessity, and without such information OAL cannot approve this proposed regulation. In order to satisfy the APA, this type of evidence must be provided for each regulatory provision within section 2770.3.

CONCLUSION

For the reasons set forth above, OAL has disapproved part of this regulatory action. If you have any questions, please contact me at (916) 322-3761.

Date: October 15, 2014

Eric Partington
Attorney

FOR: DEBRA M. CORNEZ
Director

Original: Henry Renteria
Copy: Jack Harrah