

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

In re:

AGENCY: STATE LANDS COMMISSION)	)	DECISION OF DISAPPROVAL OF RULEMAKING ACTION
RULEMAKING ACTION: ADOPT	)	(Gov. Code, sec. 11349.3)
Sections 2980.0, 2980.1, 2980.2,	)	
2980.3, 2980.4, 2980.5, 2980.6,	)	
2980.7, 2980.8, 2980.9, 2990.0 of	)	
Title 2, California Code of	)	OAL File No. 00-1208-05S
Regulations.	)	
	)	

**SUMMARY OF RULEMAKING ACTION**

This regulatory action implements Government Code Section 4526 in providing criteria for the Commission's selection of contractors for architectural, landscape architectural, engineering, environmental, land surveying, or construction project management services. It also adopts definitions; notice, negotiation, contracting and contract amendment requirements; and prohibitions for conflict of interest.

**SUMMARY OF DECISION**

On January 24, 2001, the Office of Administrative Law (OAL) notified the State Lands Commission (Commission) of the disapproval of the above action. The reasons for the disapproval are summarized here and explained in detail in "Discussion," below.

- A. Procedure.** The Commission failed to mail Notice of Proposed Action at least 45 days prior to the close of the public comment period, pursuant to Government Code section 11346.4(a)(1)-(4) and Title 1, section 86 of the California Code of Regulations (CCR).
- B. Necessity/Nonduplication.** Several sections and subsections of the proposed regulations duplicate the statutes being implemented, with no explanation or justification for the duplication given in the statements of reasons.
- C. Missing and/or defective documents.** The rulemaking record is incomplete. It does not contain a petition and/or documents relied upon in this action.

**DISCUSSION**

- A. Procedure.**

Government Code section 11346.4, as in effect at the time of the public availability period (year 2000), provides in subdivision (a):

“At least 45 days prior to the hearing and close of the public comment period on the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be: (1) Mailed to every person who has filed a request for notice of regulatory actions with the state agency. . . . (3) Mailed to a representative number of small business enterprises or their representatives which have been identified as being affected by the proposed action. (4) When appropriate in the judgment of the state agency, mailed to any person or group of persons whom the agency believes to be interested in the proposed action and published in the form and manner as the state agency shall prescribe. (5) Published in the California Regulatory Notice Register as prepared by the office for each state agency’s notice of regulatory action.”

Title 1, CCR section 86 provides, in pertinent part:

“The rulemaking record shall contain a statement confirming that the agency complied with the provisions of Government Code Section 11346.4(a)(1) through (4) regarding the mailing of notice of proposed action at least 45 days prior to public hearing or close of the public comment period, and stating the date upon which the notice was mailed. . . .”

The rulemaking record for this action contained a “Statement of Mailing Notice (Section 86 of Title 1 of the California Code of Regulations),” stating “The California State Lands Commission has complied with the provisions of Government Code Section 11346.4, Subdivisions (a)(1) through (4).” Upon OAL’s request for the date of notice mailing, pursuant to section 86, it was ascertained that no actual mailing of notice was made due to the assertion that there was no specific mailing list for this program.

Since the statutory scheme requires that a mailing be made, however, it is incumbent upon the agency to prepare such a list and mail the notice. In an instance such as this one, which has an effect on small businesses, it is particularly important to comply with the mailing requirement in order that there may be meaningful public participation, including the opportunity to comment during the 45 days provided for that purpose.

Therefore, since the omission was in the original mailing of notice, the usual 120 days for resubmission of disapproved regulations does not apply. The Commission will have to re-notice the regulations for 45 days, both by publication in the California Notice Register and by mailing to interested and affected persons and small business enterprises, consistent with statute and regulation as cited above.

## **B. Necessity/Nonduplication.**

Government Code section 11349.1, subdivision (a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349, subdivision (a) defines “necessity” to mean that:

“. . . 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.”

Please note, the standard in title 1, CCR section 10 that became effective January 1, 2001 must be met. It provides that in order to meet the “necessity standard” the rulemaking record must 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.”

Government Code section 11349.1, subdivision (a)(6) requires that OAL review all regulations for compliance with the nonduplication standard. Government Code section 11349, subdivision (f), provides, in part, as follows:

“‘Nonduplication’ means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard in paragraph (3) of subdivision (a) of Section 11349.1. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation.”

Several definitions in proposed section 2980.1, plus sections 2980.4 and 2980.8(b) and (c) duplicate the statutes they are purporting to implement, interpret or make specific. No evidence or explanation is given in the statements of reasons to explain the duplications.

Additionally, no evidence is presented in the rulemaking record to show that any of the regulations are necessary, other than that the mandating statute requires that regulations be adopted. However, the statute, while requiring that “regulations” be adopted, does not specify these particular regulations but leaves it up to the Commission’s discretion, for example, as to which selection criteria should be adopted as regulations. The record must show that these particular regulations would fulfill the purpose for which they are adopted.

### **C. Missing and/or defective documents.**

Government Code section 11347.3, subdivision (b) provides that the rulemaking file shall include:

“(1) Copies of any petitions received from interested persons proposing the adoption, amendment, or repeal of the regulation, and a copy of any decision provided for by subdivision (d) of Section 11340.7, which grants a petition in whole or in part. . . . (6) All data and other factual information, any studies or reports, and written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation. (7) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation, . . .”

It appears that a petition from an interested association might have been forwarded to the Commission, along with other documents, before the start of this rulemaking. If these documents were relied upon in this rulemaking action, they must be included in the record and available for public information during the comment period. If a petition was in fact received, then that document plus any decision granting the petition must be included in the rulemaking record as well.

### **OTHER OBSERVATIONS.**

Although not listed here as grounds for disapproval, the following issues should be noted and/or corrected before resubmitting these regulations.

1. The certification of file closure is dated earlier than other documents in the rulemaking file. The file must be closed after all other documents are included, and the file is complete.
2. The Notice published in the California Regulatory Notice Register contained an incorrect statement concerning availability of changed or modified text:

“The text of any modified regulations will be available to the public at least fifteen (15) days prior to the date on which the Commission considers the proposed regulation for adoption, 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. Government Code section 11346.8(c).”

This statement is inconsistent with statute, in that substantively changed text that is sufficiently related to the original text must be made available to the public for at least fifteen days prior to adoption by the Commission. That statement in the Notice should be corrected before re-publication.

3. The Form 400 had box B.6. checked for Department of Finance approval. However, the Form 399 indicated "No fiscal impact," and was not signed by Department of Finance. Therefore, there was no need to check the box on the Form 400.
4. There are several minor punctuation errors, and a typographical error in section 2980.8(a) ("shall" twice), which we have previously discussed.

### **CONCLUSION**

For the reasons set forth above, OAL has disapproved the adoption of the above regulations. If there are any questions, or if you need assistance in re-noticing this regulatory action, please contact me at (916) 445-9511, or call the Reference Attorney voice mail at (916) 323-6815.

Date: January 26, 2001

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