

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
BOARD OF FORESTRY & FIRE PROTECTION)	DECISION OF DISAPPROVAL OF REGULATORY ACTION
)	
REGULATORY ACTION:)	Government Code section 11349.3
)	
Title 14, California Code of Regulations)	OAL File No. 01-1016-02 S
)	
Adopt sections: 916.13, 936.13, 956.13, 916.13.1, 936.13.1, 956.13.1, 916.13.2, 936.13.2, 956.13.2, 916.13.3, 936.13.3, 956.13.3, 916.13.4, 936.13.4, 956.13.4, 916.13.5, 936.13.5, 956.13.5, 916.13.6, 936.13.6, 956.13.6, 916.13.7, 936.13.7, 956.13.7, 916.13.8, 936.13.8, and 956.13.8)	
Amend sections : 895, 895.1)	
_____)	

SUMMARY OF REGULATORY ACTION

This regulatory action provides for the preparation of an Interim Watershed Mitigation Addendum (“IWMA”) to the Timber Harvest Plan containing mitigation measures for site specific watershed conditions which may be accepted by the Director as options to the more general restrictions imposed by regulations for the protection and restoration of watersheds with threatened or impaired values. On November 30, 2001, the Office of Administrative Law (“OAL”) disapproved this regulatory action for failure to make changes available to the public, failure to comply with the clarity and necessity standards of Government Code section 11349.1, failure to summarize and respond to comments, and failure to comply with the requirements for incorporation by reference.

DISCUSSION

Regulations adopted by the Board of Forestry and Fire Protection (“Board”) concerning watershed mitigation must be adopted pursuant to the Administrative Procedure Act (“APA”). Any regulatory act adopted by a state agency through the exercise of quasi-legislative power delegated to the agency by statute is subject to the APA unless the act is expressly exempted or excluded by statute from APA coverage. (Gov. Code, sec. 11346(a).) No exemption or exclusion applies to the regulatory action here under review. Thus, before the instant regulatory action may become effective, it is subject to a review by the OAL for compliance with procedural requirements of the APA and for compliance with certain substantive standards. (Gov. Code section 11349.1(a).)

1. SUBSTANTIAL CHANGES TO THE TEXT OF THE REGULATIONS ORIGINALLY MADE AVAILABLE TO THE PUBLIC WERE NOT MADE AVAILABLE.

Subsection (c) of Government Code section 11346.8 requires that substantial changes to the original text be made available to the public for comment before the changes are adopted.

“No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, 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. *If a sufficiently related change is made, the full text of resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation.* Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9.” (Emphasis added.)

Section 44 of Title 1 of the California Code of Regulations specifies how such sufficiently related changes are to be made available.

“(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
- (2) all persons who submitted written comments at the public hearing; and
- (3) all persons whose comments were received by the agency during the public comment period; and
- (4) all persons who requested notification from the agency of the availability of such changes.

(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 dated for this public availability period.”

Section 916.13.2 [936.13.2, 956.13.2] of the regulations adopted by the Board on October 10, 2001 establishes the parameters for the size of the evaluation area allowed in an Interim Watershed Mitigation Addendum to a Timber Harvest Plan. Subsection (a) of section 916.13.2 [936.13.2, 956.13.2] sets the minimum size for the evaluation area. Subsection (a) as made available to the public during the 45 day comment period required by section 11346.4 of the Government Code provided:

“No smaller than a second order watershed with a Class I watercourse, except third order or smaller basins flowing directly into the ocean shall also be considered an appropriate evaluation area. *Stream order shall be determined from the most recent USGS 7.5-minute quadrangle map.*” (Emphasis added.)

According to the minutes of the public hearing held on October 10, 2001, a Board member pointed out that, although the USGS maps are the standard, “. . . they only show blue line streams that often do not include second order streams.” Apparently for this reason, the Board deleted the italicized sentence prior to adopting the regulation.

The order of a watershed although not defined anywhere in regulation (see discussion under “clarity”) is related to the order of the watercourse which runs through it. By deleting the requirement that stream order be determined from the applicable USGS 7.5-minute quadrangle map, the Board has apparently addressed a concern with the adequacy of the scale of the USGS map. The effect, however, of eliminating the USGS map as the standard in determining stream order may result in second order watersheds being identified further upstream and cause a change in the minimum size of the IWMA evaluation area required by subsection (a) of section 916.13.2 [936.13.2, 956.13.2]. This is a substantial change. The APA requires that substantial changes be made available to the public for comment for at least 15 days prior to the adoption of the regulation (Gov. Code, sec. 11346.8(c), *supra*; Cal. Code Regs. tit. 1, sec. 44, *supra*.)

The Board made other changes to the text of the regulations at the public hearing held on October 10, 2001 without providing the required opportunity for public comment. Section 916.13.8 [936.13.8, 956.13.8] as made available to the public during the 45 day comment period authorizes in subsection (b) the submission of other long-term plans.

“An approved *long-term plan such as a SYP, (or) PTEIR (, or NTMP)* that assesses the limiting factors for anadromous salmonids and the watershed conditions within the IWMA evaluation area consistent with 14 CCR 916.13 [936.13, 956.13] may be submitted as an IWMA.” (Emphasis added.)

At the public hearing, the Board revised subsection (b) of section 916.13.8 [936.13.8, 956.13.8] by deleting the italicized words and the use of an approved NTMP as an IWMA. This change also appears to be substantial and should be made available for public comment for at least 15 days prior to adoption pursuant to the APA. (Gov. Code, sec. 11346.8(c), *supra*; Cal. Code Regs., tit. 1, sec. 44, *supra*.) Other changes which do not appear to be substantial were made to subsection (b)(3) of section 916.13.3 [936.13.3, 956.13.3] and subsection (c) of section 916.13.4 [936.13.4, 956.13.4].

2. SOME PROVISIONS OF THE REGULATIONS ARE UNCLEAR.

The Legislature in establishing OAL, found that regulations, once adopted, were frequently unclear and confusing to the persons who must comply with them. (Gov. Code, sec. 11340(b).) For this reason, 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 or regulations will be easily understood by those persons directly affected by them.”

a. Subsection (a) of section 916.13.2 [936.13.2, 956.13.2] of the regulations as adopted by the Board on October 10, 2001 provides that the IWMA evaluation area shall be

“No smaller than a *second order* watershed with a Class I watercourse, except *third order* or smaller basins flowing directly into the ocean shall also be considered an appropriate evaluation area.” (Emphasis added.)

The terms “second order” and “third order” watersheds are not defined nor do the regulations otherwise describe how the order of watershed is to be determined. For this reason, a person directly affected by the regulations would not easily understand what the prescribed minimum size of the IWMA evaluation area is.

b. Subsection (b) of section 916.13.2 [936.13.2, 956.13.2] of the regulations adopted by the Board on October 10, 2001 provides that the IWMA evaluation area shall be “[n]o larger than a Calwater planning watershed. . . .” The term “Calwater planning watershed” is not defined in the regulations. A person directly affected by the regulation would not easily understand what prescribed maximum size of the IWMA evaluation area is.

c. Some apparently minor “clarity” problems should also be clarified prior to resubmission. Section 916.13.1 [936.13.1, 956.13.1] of the regulation adopted by the Board on October 10, 2001 provides that the “. . . timberland owner or his/her agent shall *seek participation* of the Natural Marine Fisheries Service (NMFS).” (Emphasis added.) In response to a public comment that the requirement to “seek participation” of the NMFS is ambiguous and lacks clarity, the Board responded that it “. . . relies on the dictionary definition that in part includes ‘request’.” If that is the Board’s intent, the word “request” should be used in the text of the regulation itself. Subsection (b)(3) of section 916.13.3 [936.13.3, 956.13.3] of the regulations adopted by the Board on October 10, 2001 requires that the IWMA include a problem statement identifying “. . . the fieldwork conducted to make the determinations.” The term “determination” is not used elsewhere in the regulations and a person directly affected by the regulation may not easily understand what is being referred to. Does it refer to all “determinations” that must be made to develop an IWMA?

3. THE REQUIREMENTS FOR INCORPORATION BY REFERENCE WERE NOT MET.

OAL has adopted section 20 of Title 1 of the California Code of Regulations to assure that material incorporated by reference in regulations conforms to the requirements of the APA. Subsection (c) of this section provides the requirements for a state agency that wishes to incorporate another document as part of a regulation by reference to that document. Subsection (c) of section 20 provides:

“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, or was reasonably available to the affected public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained.
- (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. If, in accordance with Government Code section 11346.8(c), the agency changes the originally proposed regulatory action or informative digest to include the incorporation of a document by reference, the document shall be clearly identified by title and date of publication or issuance in the notice required by section 44 of these regulations.
- (4) The regulation text states that the document is incorporated by reference and identifies the document by title and date of publication or issuance. Where an authorizing California statute or other applicable law requires the adoption or enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, no specific date is required.
- (5) The regulation text specifies which portions of the document are being incorporated by reference.”

Subsection (a) of section 916.13.3 [936.13.3, 956.13.3] of the regulations adopted by the Board on October 10, 2001 requires that the IWMA include “. . . a map locating the evaluation area within the Hydrologic Area, as defined by Calwater.” This provision does not identify the Calwater document which defines the Hydrologic Area by “. . . title and date of publication or issuance” as required by subsection (c)(4) of section 20, nor were the other requirements of section 20 complied with. For this reason, a person directly affected by this regulation would not easily understand the area required by subsection (a) of section 916.13.3 [936.13.3, 956.13.3] and a violation of the “clarity” standard of the APA also results.

4. THE INITIAL STATEMENT OF REASONS DOES NOT CONTAIN INFORMATION EXPLAINING THE NEED FOR ALL OF THE REGULATORY PROVISIONS.

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 “necessity” to mean “. . . 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 California Code of Regulations (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, fact, 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. (Gov. Code sec. 11346.2(b).) The initial statement of reasons 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 (Gov. Code sec. 11346.2(b)(1)) or, simply restated, “why” a regulation is needed and “how” this proposed regulation fills that need. The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made 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 the basis of the regulatory action and may comment knowledgeably. The initial statement of reasons and all data and other factual information, studies or reports upon which the agency is relying in the regulatory action must also be included in the rulemaking file. (Gov. Code sec. 11347.3(b)(2) and (7).) Otherwise substantial evidence of necessity is not included into the record.

The discussion in the initial statement of reasons (“ISOR”) submitted with this rulemaking failed to provide information explaining why each of the particular provisions contained in sections 916.13 [936.13, 956.13] and 916.13.2 [936.13.2, 956.13.2] was necessary to carry out the purpose of the statute. In addition, the ISOR failed to provide information explaining why one year following completion of timber operations was chosen as the time period within the timberland owner is required to report pursuant to section 916.13.6 [936.13.6, 956.13.6]. Consequently, substantial evidence of necessity is missing from the record.

5. THE FINAL STATEMENT OF REASONS DOES NOT CONTAIN A SUMMARY AND RESPONSE TO ALL COMMENTS SUBMITTED DURING THE PUBLIC COMMENT PERIOD.

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA currently requires that rulemaking agencies provide notice and at least a 45-day comment period prior to adoption of proposed regulatory actions. (Gov. Code, sec. 11346.4 and 11346.5). By requiring the state agency to summarize and respond in the record to comments received during the

comment period, the Legislature has clearly indicated its intent that an agency account for all relevant comments received, and provide written evidence of its meaningful consideration of all timely, relevant input. Section 11346.9(a)(3) of the Government Code requires that the adopting agency prepare and submit to OAL a final statement of reasons which shall include a “. . . summary of each objection or recommendation made requiring 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.”

a. On page 95 of the rulemaking record, Commenter #14 made the following comment:

“Alternatives which are reasonable and need to be explored include development of an objective data base, developed by disinterested entities, which in turn can then form the foundation for subsequent assessments by individual landowners, or groups of landowners. This could and should involve the expertise of state trustee agencies, such as the California Department Fish and Game (DFG) and Regional Water Quality Control Boards (Water Quality), to name two such agencies. Federal agencies such as the National Marine Fisheries Service (NMFS) should also be involved. Any such assessment must require empirical and scientific standards and criteria of assessment, and must be subject to public and peer review. Any such assessments must be updated on a regular basis, and must be supplemented after the occurrence of specific events, such as 100 year storms, listing of species under federal or state endangered species laws, or listing of species under federal or state endangered species laws, or listing of a waterway as impaired under the Clean Water Act. Alternatives for assessments include special consideration for watersheds listed as impaired under the Clean Water Act as well as waterways that host species, including their habitat, listed under federal or state endangered species laws. Such considerations would include evaluation of the very conditions that may have caused those species to be listed, or the waterways to be impaired, as well as application of the ‘best management practices’ as defined by current science and reviewed and accepted by the Environmental Protection Agency. These are just a few methods by which adequate assessment of watersheds can commence. The problem with the IWMA rules is that they provide no creative, scientific, or measurable method by which watershed conditions can be assessed, recorded, and improved. This is what must be done to develop any reasonable rule intended to address the problem of watershed management within the context of forest practices. The rule package fails to explore alternatives, identify what limitations may exist, and how those limitations may be overcome so as to better fulfill the goals and purposes of the Forest Practice Act.”

On page 101 of the rulemaking record, Commenter # 14 made the following comment:

“This section begins in confusion and ambiguity because, whereas in the previous sections, the reference is to the ‘timberland owner’ now it is to the ‘area owned, controlled, or leased by the landowner.” Further, what does it mean to have ‘primary emphasis’ and how does that relate to identification of ‘site-specific watershed conditions’? If emphasis is placed on the area of the proposed activity, then watershed assessment is not being done.”

The FSOR does not contain a summary and response to these comments.

b. On page 101 of the rulemaking record, Commenter # 14 made the following comment:

“Subsection (b)(1) [of section 916.13.3, 936.13.3, 956.13.3] requires submission of a problem statement ‘identifying’ ‘[t]he limiting factors for anadromous salmonids that may be affected by conditions within the evaluation area.’ Not only is the ‘identifying’ still undefined and ambiguous, but similarly so are the terms ‘affected’ and ‘conditions.’ These terms can embrace any number of interpretations, and require specific criteria and delineation in order to have meaning within the context of an assessment.”

On page 684 of the rulemaking record, the Board provides:

“Subsection (3) states that a description of the fieldwork and the consultation with other responsible agencies must be included. That sets forth the assumptions, application of definitions, and basis for work products included in the IWMA.”

On page 102 of the rulemaking record, Commenter #14 made the following comment:

“Subsection (a) [of section 916.13.4, 936.13.4, 956.13.4] requires submission of ‘*documentation*’ of the information and evaluation approaches used to reach findings’ yet there are no standards as to what constitutes valid or adequate ‘*documentation*.’ Nor is there a requirement to make findings – rather, only a requirement to provide a ‘summary of findings.’” (Emphasis added.)

On page 685 of the rulemaking record, the Board provides:

“14 CCR 916.13.3(d) guides the dictionary definition of ‘findings and conclusions’ as . . .’ the association between existing site-specific watershed condition within the evaluation area that affect the limiting factors for anadromous salmonids identified in 14 CCR 916.13.3(b)(2), and the proposed management activities.”

On page 102 of the rulemaking record, commenter #14 made the following comment:

“The rule is deficient as well because it only requires submission of documentation on what supports the findings, and no contrary evidence that may have been developed or provided by agencies or others. The subsection (a) requires that the ‘information and evaluation methods must be adequate to support the findings and proposed mitigation measures’ yet no criteria or standards are given to evaluated ‘adequacy’. The subsection provides that ‘[s]cientifically or professionally accepted approaches shall be used ‘but no definition is given to what constitutes such approaches and how the agency will measure whether an approach is scientifically or professionally accepted.’”

On page 685 of the rulemaking record, the Board provides:

“Refer to L1421. A subsection of the Board rules cannot be read independently but must be viewed within the context of the entire of body of the Board’s regulations.”

These responses do not adequately address each of the concerns raised by the commenter. They do not explain the reason for rejecting the comments so as to demonstrate that the Board in fact considered the input.

c. On page 669 of the rulemaking record, the Board responded to comment L0607 on section 916.13.8 [936.13.8, 956.13.8] stating that it “. . . chose to retain the reference to an NTMP in subsection (b).” On page 681 of the rulemaking record, the Board responded to comment L1413 on section 916.13 [936.13, 956.13] stating that “[t]he editorial change of ‘effected’ to ‘affected’ was made in the final language.” These responses do not accurately portray the text of the regulations submitted to OAL as adopted by the Board.

We also note that the reference citations included as existing text for sections 895 and 895.1 have some discrepancies from that currently printed in the California Code of Regulations. In the reference citations to the Public Resources Code shown for section 895.1, an incomplete group of reference citations precedes the more accurate reference citations. In the latter reference citations, section 4561.5 of the Public Resources Code is not in the existing reference citation for section 895.1.

Please also note that the assessment in the notice of proposed action of the effect of the regulations on the creation or elimination of jobs and businesses and expansion of businesses in California required by Government Code section 11346.54 is not limited to small businesses. See section 4 of title 1 of the California Code of Regulations concerning small businesses.

DATE: December 7, 2001

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