

A. INCORRECT APA PROCEDURE / INADEQUATE NOTICE OF MODIFICATION OF THE PROPOSED REGULATORY ACTION

OAL must review rulemaking records submitted to it in order to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code section 11349.1(a).)

1. Government Code section 11346.8(c) requires substantial but sufficiently related changes to the originally noticed text to 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“No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to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 the 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 to the public.

“(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.”

An identical process must be followed in order to add any study, report, or similar document which the agency relies on to support the regulatory action to the rulemaking file after publication of notice of the proposed action. See Government Code section 11347.1.

The Board noticed three 15-day comment periods; October 31, 2001 – November 15, 2001, November 15, 2001 – November 30, 2001, November 19, 2001 – December 4, 2001. The first and third 15-day notices made numerous substantive revisions to the original regulatory text and the first and second 15-day notices added additional supporting documents and electronic files to the rulemaking file. The most significant document added to the rulemaking file was the Board's staff response to a General Motors Corporation study entitled "Impacts of Alternative ZEV Sales Mandates on California Motor Vehicle Emissions: A Comprehensive Study." The Board's staff response added to the file by 15-day notice was entitled "ARB Staff Review of Report Entitled 'Impacts of Alternative ZEV Sales Mandates on California Motor Vehicle Emissions: A Comprehensive Study', October 2001."

The Board failed to provide any of the three 15-day notices to over 100 commenters (see Attachment A) who had submitted written comments to the Board prior to the public hearing on January 21, 2001. The Board notified OAL of this notice/procedural error in a memorandum dated January 16, 2002. The memorandum states in pertinent part:

"We have accordingly determined that while three "15-day" notices listed as Tabs 13, 15 and 17 were each mailed to approximately 700 persons and e-mailed to approximately 723 persons, they were *not* transmitted to the persons and entities on Attachment A unless the person was on our mailing or e-mailing list by virtue of some other reason. In this respect the certifications in Tabs 13, 15 and 17 were in error, although the person who signed them had a good-faith belief the certifications were correct. We recognize that failure to transmit the '15-day' notices to persons listed on Attachment A affects the approvability of the amendments." (Emphasis in original.)

As acknowledged by the Board in its January 16, 2002 memorandum, failure to mail the three 15-day notices to the commenters listed on Attachment A clearly violates Government Code sections 11346.8(c) and 11347.1 and Title 1 CCR section 44. The Board must provide a procedurally adequate 15-day notice and comment period on all of the changes made and documents added by the three 15-day notices to all the commenters listed on Attachment A who did not receive the three original 15-day notices prior to resubmittal of this rulemaking action.

2. The three Title 1 CCR section 44 certifications of mailing of 15-day notice included in the file under Tabs 13, 15 and 17 are inaccurate. The Board must correct the 15-day mailing certifications after providing the additional notice discussed in 1. and prior to resubmittal of this rulemaking action.

3. Because of the failure to provide 15-day notices to over 100 potential commenters, the record in this rulemaking is still open. Consequently, OAL reserves its decision on all APA issues which can be properly raised by a commenter during the remedial 15-day notice and comment period, including, but not limited to, the legal sufficiency of any of the 15-day notices, until the rulemaking record is closed.

CONCLUSION

For the reasons set forth above, OAL has disapproved the proposed revisions to sections 1900, 1960.1(k), 1961 and 1962 of Title 13 of the CCR. If you have any questions, please contact me at (916) 323-8916.

Date: 01/30/02

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For:

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