

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
AGENCY: CALIFORNIA)	DECISION REGARDING
INTEGRATED WASTE)	PARTIAL DISAPPROVAL OF
MANAGEMENT BOARD)	A RULEMAKING ACTION
)	(Gov. Code Sec. 11349.3)
)	
RULEMAKING ACTION: Adopt)	
sections 17225.25, 17380-17386, 18223,)	
18223.5 of title 14; Amend 18831 of title)	OAL File No. 03-0530-03s
14 and 21565 of title 27; Repeal 17225.54)	
of title 14 of the California Code of)	
Regulations)	

SUMMARY OF RULEMAKING ACTION

This rulemaking action places facilities and operations that receive, store, handle, transfer, or process construction, demolition, and inert (“CDI”) debris into the following regulatory tiers: (1) Enforcement Agency Notification for the following: less than 25 tons per day of any combination of CDI debris, less than 200 tons per day of construction and demolition (“C & D”) wood debris chipping and grinding operations, emergency CDI processing operations, and less than 1500 tons per day of inert debris Type A only processing operations; (2) Registration for the following: 25 to 175 tons per day of CDI debris and for 200 to 500 tons per day C & D wood debris chipping and grinding operations; and, (3) Full Solid Waste Facility Permit for the following: more than 175 tons per day of CDI debris, more than 1500 tons per day of any combination of Type A and Type B inert debris or any amount of Type B inert debris, and more than 500 tons per day C & D wood debris chipping and grinding operations. The action also establishes minimum operating standards for each regulated activity and defines activities that are excluded from regulation.

SUMMARY OF DECISION

On July 10, 2003, the Office of Administrative Law (“OAL”) approved the above-referenced rulemaking action with the exception of subsection (d) of section 17383,¹ which OAL severed and disapproved for failing to satisfy the Authority and Clarity standards of Government Code section 11349.1. The disapproved provision would require local enforcement agency staff to be trained on worker health and safety standards under the jurisdiction of the California Division of Occupational Health and Safety and to submit complaints on potentially unsafe worker health

¹ This provision would have been added to title 14 of the California Code of Regulations by this rulemaking action.

and safety conditions to the division. The provision appears to go beyond the authority granted to the Board by the Legislature and thus fails to satisfy the Authority standard of Government Code section 11349.1. In addition, it is not easy to understand from the provision how much training is required. The reasons for the disapproval are explained in detail below.

DISCUSSION

The adoption of regulations by the California Integrated Waste Management Board ("Board") must satisfy requirements established by the part of the California Administrative Procedure Act ("APA") that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency 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 coverage.

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code Section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This 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 the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

A.

Subsection (d) of section 17383 appears to go beyond the authority granted to the Board by the Legislature and thus fails to satisfy the Authority standard of Government Code section 11349.1.

Subsection (d) of section 17383 would require local enforcement agency staff who enforce Construction and Demolition and Inert Debris Transfer/Processing Regulatory Requirements to be trained on worker health and safety standards under the jurisdiction of the California Division of Occupational Health and Safety and to submit complaints on potentially unsafe worker health and safety conditions to the division. It provides:

“[Enforcement Agency] staff shall attend training on worker health and safety matters under the jurisdiction of the California Division of Occupational Safety and Health (DOSH) as deemed necessary by the board to enable the [Enforcement Agencies] to identify potentially unsafe worker health and safety conditions in operations and facilities

permitted under this section and, as appropriate, to submit complaints on such unsafe conditions to DOSH.”

Each regulation submitted to OAL for review must satisfy the Authority standard.² “‘Authority’ means the provision of law which permits or obligates an agency to adopt, amend or repeal a regulation.”³ A regulation that is beyond the scope of an agency’s express or implied rulemaking authority is void. “Each regulation adopted, to be effective, shall be within the scope of authority conferred.”⁴ In reviewing for compliance with the Authority standard OAL applies the “same analytical approach employed by the California Supreme Court and the California Court of Appeal, as evidenced in published opinions of those courts.”⁵

The law is clear”[a]n administrative agency may not, under the guise of rulemaking, abridge or enlarge its authority or exceed the power given to it by the statute—the source of its power. (Benton v. Board of Supervisors (1991) 226 Cal.App 3d 1467, 1480, 277 Cal.Rptr. 481; Cal. Drive-in Restaurant Assn. v. Clark (1943) 22 Cal.2d 287, 302-303, 140 P.2d 657.) In other words: “[a]dministrative bodies and officers have only such powers as have expressly or impliedly been conferred upon them by the Constitution or by statute. [Citation]. In the absence of valid statutory or constitutional authority, an administrative agency may not, under the guise of regulations, substitute its judgment for that of the Legislature. Administrative [actions] in conflict with applicable statutes are null and void. [Citations.]” (Cal. State Restaurant Assn. v. Whitlow (1976) 58 Cal.App.3d 340, 346-347, 129 Cal.Rptr. 824; citing Ferdig v. State Personnel Bd. (1969) 71 Cal.2d 96, 103, 77 Cal.Rptr, 224, 453 P.2d 728.)

“Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations.’ ([Morris v. Williams (1967) 67 Cal.2d 733.] 748.63 Cal.Rptr. 689, 433 P.2d 697; see Dyna-Med, inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379. 1388-1389, 241 Cal.Rptr. 67, 743 P.2d 1323; Hittle v. Santa Barbara County Employees Retirement Assn. (1985) 39 Cal.3d 374, 387, 216, Cal.Rptr. 733, 703, P.2d 73.)” Ass’n of Psychology Providers v. Rank (1990) 51 Cal.3d 1, 11,270 Cal.Rptr. 796.

We consider whether subsection (d) of section 17383 satisfies this standard. The Board cites Public Resources Code sections 40502, 43020, 43021, 43200, 43209, and 40053 in its Authority and Reference citations for regulation section 17383. A rulemaking agency’s interpretation of its rulemaking power is indicated by its proposed Authority and Reference citations.^{6, 7} OAL has

² Government Code, sec. 11349.1(a).

³ Government Code, sec. 11349(b).

⁴ Government Code, sec. 11342.1.

⁵ California Code of Regulations, tit. 1, sec. 14(c).

⁶ *Ibid.*

⁷ OAL’s review of administrative regulations for compliance with the Authority and Reference standards uses the standards and presumptions established by Section 14 of the Title 1 of the California Code of Regulation. OAL presumes that the Authority and Reference standards are satisfied if the rulemaking agency cites sources of Authority and Reference in its note submitted along with the regulation for publication in the California Code of Regulations. This presumption is conclusive unless: “(A) the agency’s interpretation alters, amend or enlarges the

not identified any documents in the rulemaking file explaining the Board's analysis of the statutory authority for subsection (d) of 17383. OAL considers such documents in reviewing a regulation for compliance with the Authority standard.⁸ Consequently, we must proceed with our analysis without the benefit of the Board's written analysis.

Public Resources Code, section 40502 authorizes the Board to adopt rules and regulations, "as necessary, to carry out this division [Division 30 of the Public Resources Code, commencing with section 40000]"

Public Resources Code, section 43020 provides that the Board shall adopt and revise regulations that set forth "minimum standards for solid waste handling, transfer, composting, transformation, and disposal, in accordance with this division, and Section 117590 of, and Chapter 6.5 (commencing with Section 25100) of Division 20 of, the Health and Safety Code."⁹

Public Resources Code, section 43021 requires that the Board's regulations shall include standards for the design, operation, maintenance, and ultimate reuse of solid waste facilities,"

Public Resources Code, section 43200 provides that the Board shall prepare and adopt certification regulations for local enforcement agencies and shall specify four separate types of certifications for which an enforcement agency may be designated, as follows:

"(1) Permitting, inspection, and enforcement of regulations at solid waste landfills.

"(2) Permitting, inspection, and enforcement of solid waste incinerators.

"(3) Permitting, inspection, and enforcement of transfer and processing stations.

scope of the power conferred upon it; or [(B)] a public comment challenges the agency's 'authority'; or [(C)] a judicial interpretation of a provision of law cited as 'authority' or 'reference' contradicts the agency's interpretation." The presumption does not operate here because commenters challenged the Board's authority for the adoption of subsection (d) of 17383. See, rulemaking record, comments on 3ed set of 15 day modifications from County of Ventura Resource Management Agency and from Solid Waste Local Enforcement Agency of Lassen, Modoc, Plumas, and Sierra counties.

The Board did not respond to the challenges to its authority to adopt this provision on the record. In response to these comments from local agencies the Board explained: "The Board at their March 28, 2003 meeting directed staff to make this change based upon their concerns with worker health and safety impacts created by these operations and facilities. LEA's [sic] are many times the only regulatory official that makes routine inspections at these sites. Board members wanted LEA's [sic] to be trained to identify potentially unsafe worker health and safety conditions to submit complaints on such unsafe conditions to DOSH." Rulemaking record, Final Statement of Reasons Response to Comments and Staff Changes, pp. 78-79.

⁸ *Id.* at sec. 14(c)(1).

⁹ Health and Safety Code, sec.117590 concerns minimum standards for solid waste handling and disposal for the protection of the public health. Chapter 6.5 (commencing with sec. 25100) of Division 20 of, the Health and Safety Code has to do with management and disposal of hazardous waste.

“(4) Inspection and enforcement of litter, odor, and nuisance regulations at solid waste landfills.”

Public Resources Code, section 43209 establishes the duties of an enforcement agency.¹⁰ While it specifically requires an enforcement agency to request enforcement of appropriate federal, state, and local agencies of their respective laws governing solid waste storage, handling, and disposal, and requires an enforcement agency to consult with the appropriate local health agency concerning all actions which involve health standards, and requires an enforcement agency to establish and maintain an inspection program designed to determine, in part, whether any solid waste facility may pose a significant threat to public health and safety or to the environment, the section neither expressly nor implicitly addresses inspection to enforce occupational safety and health standards as adopted by the Occupational Safety and Health Standards Board.

Public Resources Code, section 40053 provides that cities, counties, or districts may impose and enforce reasonable land use conditions or restrictions on solid waste management facilities to

¹⁰ Public Resources Code, sec. 43209 provides: “The enforcement agency, within its jurisdiction and consistent with its certification by the board, shall do all of the following:

“(a) Enforce applicable provisions of this part, regulations adopted under this part, and terms and conditions of permits issued pursuant to Chapter 3 (commencing with Section 44001).

“(b) Request enforcement by appropriate federal, state, and local agencies of their respective laws governing solid waste storage, handling, and disposal.

“(c) File with the board, upon its request, information the board determines to be necessary .

“(d) Develop, implement, and maintain inspection, enforcement, permitting, and training programs.

“(e) Establish and maintain an enforcement program consistent with regulations adopted by the board to implement this chapter, the standards adopted pursuant to this chapter, and the terms and conditions of permits issued pursuant to Chapter 3 (commencing with Section 44001). The enforcement agency may establish specific local standards for solid waste handling and disposal subject to approval by a majority vote of its local governing body, by resolution or ordinance. Any such standard shall be consistent with this division and all regulations adopted by the board.

“(f) Keep and maintain records of its inspection, enforcement, permitting, training, and regulatory programs, and of any other official action in accordance with regulations adopted by the board.

“(g) Consult, as appropriate, with the appropriate local health agency concerning all actions which involve health standards. The consultation shall include affording the health agency adequate notice and opportunity to conduct and report the evaluation as it reasonably determines is appropriate.

“(h) Establish and maintain an inspection program. The inspection program shall be designed to determine whether any solid waste facility is operating without a permit, or in violation of state minimum standards, or in violation of the terms and conditions of its solid waste facilities permit, or may pose a significant threat to public health and safety or to the environment, based on any relevant information. The inspection program shall also ensure frequent inspections of solid waste facilities that have an established pattern of noncompliance with this division, regulations adopted pursuant to this division, or the terms and conditions of a solid waste facilities permit.”

prevent or mitigate potential nuisances, if the conditions do not conflict with or impose lesser requirements than Division 30 and rules or regulations adopted by the Board pursuant to Division 30.

None of the provisions cited by the Board in either the authority or reference citations for section 17383 appear to expressly or impliedly permit or obligate the board to adopt a regulation to ensure the enforcement of occupational health and safety protections adopted by the Occupational Safety and Health Standards Board at an operation or facility that receives, stores, handles, transfers, or processes construction and demolition debris and inert debris. Consequently, we conclude that subsection (d) of section 17383 fails to satisfy the Authority standard of Government Code, section 11349.1.

This is not to say that worker safety is unprotected at facilities and operations regulated by the Board. Labor Code, section 142.3 authorizes the Occupational Safety and Health Standards Board to adopt occupational safety and health standards and orders, and provides that the Occupational Safety and Health Standards Board shall be the only agency in the state authorized to adopt occupational safety and health standards. Labor Code, section 142 specifically requires the Division of Occupational Safety and Health to enforce all occupational safety and health standards.

B.

It is not easy to understand from Subsection (d) of section 17383 how much training the provision requires.

Each regulation must satisfy the Clarity standard. (Gov. Code, sec. 11349.1.) "'Clarity' means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (Gov. Code, sec. 11349.)

Subsection (d) of section 17383 provides:

“[Enforcement Agency] staff shall attend training on worker health and safety matters under the jurisdiction of the California Division of Occupational Safety and Health (DOSH) as deemed necessary by the board to enable the [Enforcement Agencies] to identify potentially unsafe worker health and safety conditions in operations and facilities permitted under this section and, as appropriate, to submit complaints on such unsafe conditions to DOSH.”

The provision specifies that the amount of training shall be “as deemed necessary by the board” to accomplish the two specified purposes. It is not possible to easily understand from this language how much training is required. Consequently the regulation fails to satisfy the Clarity standard of Government Code, section 11349.1.

FOR THESE REASONS OAL disapproved the adoption of subsection (d) of section 17383.

Date July 15, 2003

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