

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)
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STATE WATER RESOURCES)
CONTROL BOARD)
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)
REGULATORY ACTION:)
Titles 23, 27, California Code of)
Regulations)
)
Adopt Sections: 3890, 3891, 3892,)
3893, 3894, 3895)
Amend Sections: 15110, 15185,)
15290, 15400, 15400.3)
_____)

DECISION OF DISAPPROVAL
OF REGULATORY ACTION

(Gov. Code, section 11349.3)

OAL File No. 04-0426-03 S

SUMMARY OF REGULATORY ACTION

This regulatory action implements sections 13195 through 13198 of the Water Code by expanding the electronic submission requirements to all the SWRCB’s groundwater cleanup programs. On June 8, 2004, the Office of Administrative Law disapproved this regulatory action because changes had not been made available to the public, there were some missing or defective documents, and because some provisions of the regulations did not comply with the “clarity” standard of Government Code section 11349.1.

DISCUSSION

The adoption of regulations by the State Water Resources Control Board (“Board”) must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency (“APA”). 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 the Office of Administrative Law (“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 regulations. 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.

1. THE REGULATIONS CONTAIN CHANGES THAT WERE NOT MADE AVAILABLE TO THE PUBLIC.

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 3891 of the regulations as made available to the public during the supplemental 15 day comment period conducted between March 3, 2004 and March 18, 2004 added the following definition:

“‘Monitoring well’ means any artificial excavation by any method made for the purpose of monitoring fluctuations in groundwater levels, the quality of underground waters, or the concentration of contaminants in underground waters.”

The text of section 3891 of the regulation submitted to OAL for filing with the Secretary of State has been changed as follows:

“‘**Permanent** monitoring well’ means any artificial excavation by any method made for the purpose of monitoring fluctuations in groundwater levels, the quality of **groundwater**, or the concentration of contaminants in **groundwater, and which is used for at least thirty days**”. (Emphasis added.)

This change in the definition affects the reporting requirements contained elsewhere in the regulations and must be made available to the public pursuant to Government Code section 11346.8(c) and Cal. Code Regs., tit. 1, section 44 prior to adoption by the Board and submission to OAL.

Section 3893 of the regulations as made available to the public during the initial 45 day comment period provided in pertinent part:

“(b) Data generated by chemical analysis of soil, vapor, or water samples (including influent/effluent water samples from remediation systems), shall be submitted in EDF format . . .”

The terms “surface water” and “groundwater” were added to the text submitted to OAL without being made available to the public:

“(b) Data generated by chemical analysis of soil, vapor, or water samples (including **surface water, groundwater and** influent/effluent water samples from remediation systems) shall be submitted in EDF format. . . .” (Emphasis added.)

While this writer is uncertain as to whether this change has any real regulatory effect, OAL recommends that this change and any other change made to the text of the regulations that have not yet been made available to the public for comment be included in the text when the change to the definition of “monitoring well” in section 3891 is made available pursuant to Government Code section 11346.8(c) and Cal. Code Regs., tit. 1, section 44.

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 regulation will be easily understood by those persons directly affected by them.”

a. Section 3892 of the regulations submitted to OAL for review provides in part:

“The following reports are subject to the requirements of this Chapter, when those reports are required for the purpose of subsurface investigation or remediation of: (1) an unauthorized release of a hazardous substance or (2) a discharge of waste to land subject to Division 2 of Title 27 or Division 3, Chapter 15 of Title 23 of the California Code of Regulations.

- (a) Reports submitted pursuant to Chapter 6.7 (commencing with Section 25294) of Division 20 of the Health and Safety Code **or implementing regulations.**
- (b) Reports submitted to the State Board or a regional board pursuant section 25356 of the Health and Safety Code **or implementing regulations.**
- (c) Reports submitted pursuant to section 13172 or **13140 et seq.** of the Water Code **or implementing regulations** or pursuant to **State Board adopted policy for water quality control . . .**” (Emphasis added.)

A person directly affected by the regulations would not easily understand which reports are subject to the requirements of the new chapter unless the “implementing regulations” are more specifically identified. The same can be said of “13140 et seq.” of the Water Code and the “State Board adopted policy.” As to the latter, is it contained in regulation or is it exempt from the APA?

b. Section 3893 of the regulations submitted to OAL for review provides in subsection (a):

“Persons responsible for submitting reports pursuant to this Chapter shall submit the following information described in subdivision (b) electronically over the Internet to the State Board’s Geotracker system in conformance with data dictionaries found in Title 27, Division 3, Subdivision 2 (Monitoring and Release Information) and specifications contained in the State Water Resources Control Board EDF Guidelines and Restrictions (version 1.2i) and **Survey XYZ Guidelines and Restrictions (Version 5)**. These data dictionaries and documents are available through links provided at <http://www.swrcb.ca.gov/ust>.” (Emphasis added.)

The “Geotracker Survey XYZ Guidelines and Restrictions” located at the Board’s website referred to in section 3893(a) is not identified as “Version 5” but rather “Electronic Deliverable Format and Data Dictionary, Revision 4, October 15, 2003.” If this is the version of the “Survey XYZ Guidelines and Restrictions” intended to be referred to in section 3893(a) and that was made available to the public during the March 3 through March 18, 2004 public comment period, the description in section 3893(a) should be clarified to match.

c. The definition of Unified Program Consolidated Form (UPCF) in section 15110 as submitted to OAL states that the “. . . UPCF consists of the sections described in Section 15410. . . .” Title

27 of the California Code of Regulations does not contain a section 15410. You may have intended to refer to section 15400.

d. New title 27, division 3, subdivision 1, chapter 1, “Facility Information”, page 76, imposes a reporting requirement at ID number 4 if:

“. . . – radioactive materials are handled in quantities for which an emergency plan is required to be adopted pursuant to Part 30, Part 40, or Part 70 **of Chapter 10 of the CFR or pursuant to any regulations adopted by the state in accordance with those regulations.** . . .” (Emphasis added.)

A person directly affected by the regulation would not easily understand which state regulations were adopted “in accordance with” the federal regulations, and the pertinent parts 30, 40, and 70 of title 10 of the Code of Federal Regulations appear to be located in Chapter 1, not Chapter 10.

e. New title 27, division 3, subdivision 1, chapter 4, “Hazardous Waste,” p. 124, ID number 709, as submitted to OAL provides in part:

“Type of financial mechanism established to provide closure cost assurance.
Eligible types for FTUs and TTUs are contained in **CCR section 65450.13(a)(5)**.
a = closure trust fund, as provided in **CCR section 66265.143(a)** (Attach DTSC Form 1154)
b = surety bond guaranteeing payment into a closure trust fund, as described in **CCR section 66265.143(b)** (Attach DTSC Form 1155 or 1156 with DTSC Form 1154)
c = closure letter of credit, as described in **CCR Section 66265.143(c)** (Attach DTSC Form 1157)
d = closure insurance, as described in **CCR Section 66265.143(d)** (attach DTSC Form 1158)
e = financial test and corporate guarantee for closure, as described in **CCR Section 66265.143(e)** (Attach either DTSC Form 1159 or 1173)
f = alternative mechanism for closure costs, as described in **CCR Section 67450.13(c)** (No Form)
g = multiple financial mechanisms for closure costs, as described in **CCR Section 66265.143(g)** (No Form)
h = certificate of deposit, as described in Section **3-104(2)(c)** of the Uniform Commercial Code (No Form)
I = savings account, as described in Section 4-104(a) of the Uniform Commercial Code (No form). . . .” (Emphasis added.)

Since the sections referred to in the California Code of Regulations are not located in title 27 but in title 22, the title should be identified. See also ID number 717 at page 125 in this regard.

Also “certificate of deposit” is defined at section 3-104(j) not 3-104(2)(c) of the Uniform Commercial Code.

3. THE RULEMAKING FILE IS MISSING A COMMENT AND A STATEMENT IS MISSING FROM THE FINAL STATEMENT OF REASONS.

a. Subdivision (b) of Government Code section 11347.3 provides in part:

“The rulemaking file shall include: . . .

(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. . . .” (Emphasis added.)

In the “SWRCB Response to Comments (Comments submitted between April 25 and June 16, 2003)” located at part 15.A. of the rulemaking file, page 26 contains a summary and response to “Commenter 18.” This comment is identified as having been made on June 2, 2003, but does not appear to be contained in the rulemaking file.

b. Subdivision (a) of Government Code section 11346.9 requires that the rulemaking agency:

“. . . Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following: . . .

(2) A determination as to whether adoption, amendment, or repeal of the regulation imposes a mandate on local agencies or school districts. If the determination is that adoption, amendment, or repeal of the regulation would impose a local mandate, the agency shall state whether the mandate is reimbursable pursuant to Part 7 (commencing with Section 17500) of Division 4. If the agency finds that the mandate is not reimbursable, it shall state the reasons for that finding. . . .”

This determination is missing from the Final Statement of Reasons located at part 15 of the rulemaking file.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-6808.

Date: June 21, 2004

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