

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

AGENCY: DEPARTMENT OF)
PARKS AND RECREATION,)
DIVISION OF)
OFF-HIGHWAY MOTOR)
VEHICLE RECREATION)

DECISION OF DISAPPROVAL
OF EMERGENCY REGULATORY
ACTION

(Gov. Code, sec. 11349.3)

ACTION: Adopt sections 4970.02, 4970.03,))
4970.04, 4970.05, 4970.06, 4970.07,))
4970.08, 4970.09, 4970.10, 4970.11,))
4970.12, 4970.13, 4970.14, 4970.15,))
4970.16, 4970.17, 4970.18, 4970.19,))
4970.20, and 4970.21; amend sections))
4970.00 and 4970.01; and repeal sections))
4970.02, 4970.03, 4970.04, 4970.05,))
4970.06, 4970.07, 4970.08, 4970.09,))
4970.10, 4970.11, 4970.12, 4970.13,))
4970.14, 4970.15, 4970.16, 4970.17,))
4970.18, 4970.19, 4970.20, 4970.21,))
4970.22, 4970.23, 4970.24, 4970.25,))
4970.26, 4970.27, 4970.28, 4970.29,))
4970.30, 4970.31, and 4970.32))

OAL File No. 05-0217-03ER

DECISION SUMMARY

This proposed emergency regulatory action deals with the Off-Highway Motor Vehicle Recreation local assistant grant and cooperative agreement program by the Off-Highway Motor Vehicle Recreation Division of the Department of Parks and Recreation. These regulations include definitions, project priorities, application requirements, application timelines (including public notice and review process), types of projects and specific application and content requirements for the individual projects, applications for equipments, environmental impact reporting requirements, wildlife habitat protection program (WHPP)/habitat management program(HMP) and soil conservation requirements, match fund requirements, application evaluation criteria and point scoring system, approval of applications, and accounting, audits and annual performance reviews. The Department of Parks and Recreation (Department) initially submitted this emergency regulatory action to the Office of Administrative Law (OAL) on February 11, 2005 (OAL file no. 05-0211-05E); it was later withdrawn by the Department on February 15, 2005. The Department resubmitted the emergency regulations on February 17, 2005 (OAL file no. 05-0217-03ER). On February 28, 2005, OAL notified the Department that

OAL disapproved the emergency regulatory action because the filing failed to demonstrate that all of the proposed changes were necessary for the immediate preservation of the public peace, health and safety, or general welfare. Additionally, OAL found that the regulations failed to comply with the Clarity and Consistency standards contained in Government Code section 11349.1. The reasons for disapproval are explained below.

DISCUSSION

Regulations adopted by the Department dealing with the Off-Highway Motor Vehicle Recreation (OHMVR) local assistant grant and cooperative agreement program must be adopted pursuant to the Administrative Procedure Act (APA). Any regulatory action, including emergency regulations, a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA unless a statute expressly exempts or excludes the act from compliance with the APA. (Gov. Code, sec. 11346.) 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 OAL for compliance with procedural requirements and substantive standards of the APA. (Gov. Code, sec. 11349.1(a).)

EMERGENCY STANDARD

The adoption of an emergency regulation by the Department must satisfy requirements established by Government Code section 11346.1, which provides in part:

“(b) [I]f a state agency makes a finding that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal. Any finding of an emergency shall include a written statement which contains . . . a description of the specific facts showing the need for immediate action. . . . [Emphasis added.]”

Government Code section 11349.6 governs OAL’s review of emergency regulations. It provides in part:

“(b) Emergency regulations adopted pursuant to subdivision (b) of Section 11346.1 shall be reviewed by the office within 10 calendar days after their submittal to the office. The office shall not file the emergency regulations with the Secretary of State if it determines that the regulation is not necessary for the immediate preservation of the public peace, health and safety, or general welfare, or if it determines that the regulation fails to meet the standards set forth in Section 11349.1”

In the emergency filing submitted to OAL, the Department did not provide a description of the specific facts that demonstrated that the proposed changes were immediately necessary to protect the public peace, health and safety, or general welfare. The Department’s Finding of Emergency

contained general statements or references to events that may occur without specific facts. The emergency filing did not contain any data, documentation or other credible evidence to support the general statements made by the Department. Thus, OAL determined that the Department failed to meet the emergency standard because it did not adequately demonstrate the need for immediate regulatory action in order to protect the public peace, health and safety, or general welfare.

CLARITY

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to the persons who must comply with the regulations. (Gov. Code, sec. 11340(b).) For this reason, subdivision (a)(3) of Government Code section 11349.1 requires that OAL review all regulations for compliance with the Clarity standard. Government Code section 11349, subdivision (c), defines “Clarity” as meaning “. . . written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” Section 16, subdivision (a)(2), of title 1 of the California Code of Regulations further provides:

“(a) A regulation shall be presumed not to comply with the ‘clarity’ standard if any of the following conditions exists:

....

(5) the regulation presents information in a format that is not readily understandable by persons ‘directly affected;’

(b) Persons shall be presumed to be ‘directly affected’ if they:

- (1) are legally required to comply with the regulation;
- (2) are legally required to enforce the regulation; or
- (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
- (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.”

A. The proposed regulations contain language the meaning of which would not be easily understood by those persons directly affected by it. For example, the phrase “application instructions” is used in several places in the regulations. “Application instructions” is defined in section 4970.00, subdivision (e), as meaning “directions for completing an application for an OHV grant or cooperative agreement in a format provided by the Division.” First, the definition is unclear because an applicant would not know by reading the regulation what standards and/or

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criteria were required for the application format. Furthermore, the regulations show that the application instructions serve more than the purpose of providing mere instructions for completing an application. For example, section 4970.04, subdivision (j), requires grantees to “include a report that describes project accomplishments in accordance with application instructions provided by the Division, if applicable.” Moreover, section 4970.19, subdivision (c), concerning completed applications, provides “... The panel shall review and score each single or multiple project application using the application evaluation criteria and scoring process contained in application instructions provided by the Division” The regulation is unclear because the application evaluation criteria and scoring process is not set forth in the regulation or statute, and applicants directly affected by this regulation would not easily understand what application evaluation criteria and scoring process applied just by reading the regulation.

B. Section 4970.04, subdivision (e), which deals with the public review and comment process of an application, sets forth the time period for submitting comments and the applicant’s responses to comments along with the final application. Subdivision (e)(3) requires “All comments received by the final application filing date along with the final responses, if any, shall be included with the application package. Include applicant’s statement of how the public input was incorporated into the development of the application.” Subdivision (e)(4) states “The applicant shall forward to the Division any public comments received after submittal of the application. A response by the applicant to a forwarded comment may not be required.” (Emphasis added.) Section 4970.04, subdivision (b), states that all applications “that do not meet the deadline set by the Division for the grant cycle shall be returned to the applicant without consideration.” It is unclear how an applicant can receive a comment on the last day at the last minute, yet be required to respond and incorporate the comment into the development of the application before the deadline. Furthermore, it is not clear when a response to a forwarded comment will be required or not.

C. Additionally, there are many provisions in these regulations that contain the language “in a format provided by the Division.” These provisions fail to meet the Clarity standard because a directly affected person would not know what is required in order to comply with the regulation.

These are just a few examples of the many provisions in the proposed regulations that do not meet the Clarity standard.

CONSISTENCY

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OAL is required to review every regulation adopted by a state agency pursuant to the APA to determine whether the regulation complies with the “consistency” standard. “‘Consistency’ means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Gov. Code, sec. 11349(d).)

A. Public Resources Code section 5090.32, subdivision (l), requires the Division to “[c]onduct, or cause to be conducted, an annual audit of grants and cooperative agreements, and the performance of any recipient in expending a grant or cooperative agreement made pursuant to Article 5 (commencing with Section 5090.50).” Proposed regulation section 4970.22, subdivisions (d) and (e) provide as follows:

“(d) The grantee shall retain all financial accounts, documents, and records until any project has been audited by the [Department], or notified in writing of an audit waiver.
(e) The [Department] may postpone, defer, or waive an audit and the grantee shall be notified in writing of such a decision.”

Public Resources Code section 5090.32 requires the Division to conduct an annual audit. It does not permit the Division to waive this annual audit. Therefore, regulation section 4970.22, subdivisions (d) and (e) are inconsistent with Public Resources Code section 5090.32, subdivision (l).

B. Government Code section 11340.5, subdivision (a), specifically prohibits a state agency from issuing, utilizing, or enforcing any guideline, criteria, or standard of general application, which is a regulation as defined in Government Code section 11342.600, unless the guideline, criteria, or standard of general application is adopted pursuant to the APA.

Government Code section 11342.600 defines “regulation” as meaning

“... every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. [Emphasis added.]”

The application instructions not only fail to meet the Clarity standard, but they also fail to meet the Consistency standard of the APA. Upon reviewing the new proposed regulations, the regulations proposed for repeal and the rulemaking record, it appears to OAL that the application instructions contain regulatory provisions as well as procedures that are subject to the APA.

Repealing sections dealing with the application process and criteria, but clearly demonstrating

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that an application process and criteria exist, and not adopting new regulations establishing the application process, standards and criteria pursuant to the APA, is in conflict with or contradictory to Government Code section 11340.5, and thus, violates the Consistency standard. Upon resubmitting the regulatory action, the Department must ensure that the proposed regulations meet the Consistency standard, as well as the other substantive standards and procedural requirements of the APA.

CONCLUSION

For the reasons discussed above, OAL disapproved the emergency regulatory action because the filing failed to demonstrate that all of the proposed changes were necessary for the immediate preservation of the public peace, health and safety, or general welfare. Additionally, OAL found that the regulations failed to comply with the Clarity and Consistency standards contained in Government Code section 11349.1. If you have any questions, please do not hesitate to contact me at (916) 323-6831.

DATE: March 7, 2005

DEBRA M. CORNEZ
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Director

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