

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

AGENCY: CALIFORNIA INTEGRATED) WASTE MANAGEMENT BOARD))	DECISION OF DISAPPROVAL OF REGULATORY ACTION
ACTION: Adopt sections 17939.1, 17939.2) 17939.3, 17939.4 and 17939.5 and Amend) sections 17930, 17931, 17932, 17933,) 17934, 17934.1, 17934.3, 17934.5, 17935) 17935.1, 17935.2, 17935.3, 17935.4,) 17935.5, 17935.55, 17935.6 and 17936 of) Title 14 of the California Code of) Regulations) _____)	(Government Code Section 11349.3) OAL FILE NO. 05-0316-01 S

BACKGROUND

The California Integrated Waste Management Board proposed updating the Recycling Market Development Loan program with a new specification of application requirements, a new procedure for determination of loan interest rates, miscellaneous updates, and a new article with rules that identify programs and activities the Board may participate in for the purpose of leveraging funds from the Recycling Market Development Revolving Loan Program Subaccount. On March 16, 2005, these changes were submitted to OAL for review, and on April 27, OAL disapproved the proposed changes. This Decision of Disapproval explains the reasons for OAL's action.

DECISION

OAL disapproved the Board's proposed action for its failure to meet the clarity, consistency and necessity standards set forth in Government Code section 11349.1; a deficiency in the mailing of notice; omission of necessary documents and defects in the documents submitted, and because of the Board's response to public comments.

DISCUSSION

(1) CONSISTENCY

In its administration of this loan program the Board is authorized to require applicants and borrowers to pay fees sufficient to cover its costs. Public Resources Code section 42023.1, subdivision (g), provides:

“The board shall establish and collect fees for applications for loans authorized by this section. The application fee shall be set at a level that is sufficient to fund the board's cost of processing applications for loans. In addition, the board shall

establish a schedule of fees, or points, for loans which are entered into by the board, to fund the board's administration of the revolving loan program.”

The current fee regulation is section 17934.3, which sets the application fee at 300 dollars and the loan fee at 3 percent. With the goal of gaining greater flexibility, the Board proposed to make the amount of these fees blank in the published regulation, and set them from time to time at noticed public meetings based upon current cost data. Use of this alternate procedure is not consistent with the purposes of the APA. The specification of the amount of these fees is itself a regulatory act that implements Public Resources Code section 42023.1, and it therefore can only be lawfully done in accordance with the APA. This is the manner in which numerous state agencies set and adjust the fees they collect to cover their costs of administration. The alternate procedure proposed by the Board might save some time or effort, but it would not assure full documentation of the public proceeding, the preparation of an administrative record that supports the fee setting, and independent legal review by OAL. Moreover, it would not comply with the applicable law.

(2) INCOMPLETE RECORD

Public Comment

Government Code section 11347.3 specifies the required contents of a rulemaking record. In subdivision (b), paragraph (6), it provides that the rulemaking file shall include “[a]ll 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.” The file submitted by the Board does not include the actual comment letter submitted during the public comment period. The index to the file does include an entry for Tab H, identified as “Written Comments Submitted During the 45-Day Public Comment Period and Response to Comments.” Under Tab H is the Board’s summary of comments, but not the actual comment letter submitted to the Board. OAL is obliged to determine that the Board’s summary of comments is complete, a task that is impossible without the inclusion of the actual comment document.

Form 604

Section 17935.1 presently incorporates the Board’s 15 page loan application form 604 by reference, and indicates that the form is also printed in Appendix A. The Board proposes to amend section 17935.1 by eliminating the form 604 and replacing it with a one page listing of application requirements in the regulation. Conceptually there is nothing wrong with this approach to specifying the information required of applicants, however the presentation of this change in the file reveals several problems and raises some concerns for OAL.

(a) The form 604 is not included in the record. The current form includes the existing application requirements, and should be used as the starting point in showing the changes being made.

(b) The Initial Statement of Reasons includes an explanation of the Board's several reasons for making a change in the presentation of application requirements, but no description of the substantive changes that are being made and no evidence of the necessity for any of them.

(c) With the change from 15 pages down to one, it is readily apparent that some of the particular requirements now in use will no longer be specified in the CCR. If the Board actually wants to simplify the application requirements OAL has no objection, however in this context we must emphasize an important point. The new provision being added to section 17935.1, subdivision (a), that says "[t]he Board may make application forms available to assist applicants in applying for a loan" cannot be used as the means for issuing new regulatory standards for loan applications that are adopted outside the APA process.

(d) Strangely, the Form 604 (5/97) is currently incorporated by reference in section 17935.1, while the 2/98 version of the Form 604 is printed in Appendix A. Clearly this is the result of a mistake and the resulting ambiguity should be resolved by the Board.

(e) If mention of Form 604 will be eliminated from section 17935.1, the form itself should be presented in strike-out form so that it will also be removed from Appendix A.

(f) With the elimination of the Form 604, certain legally required notices about the state's use of the information submitted by applicants and required certifications will have to be provided by other means.

Final Statement of Reasons

The Board prepared a final statement of reasons for this rulemaking action as required by Government Code section 11346.9, but it lacks the updated determinations concerning local mandate and alternatives considered by the Board that are required by paragraphs (2) and (4) of subdivision (a), of this section.

(3) UNACCEPTABLE RESPONSE TO COMMENTS

Although the comment letter that the Board received was not included in the record, the Board's summary describes a comment recommending that the Board adopt a regulation specifying a procedure for modifying its Eligibility Guidelines. The comment was offered in connection with the amendment to section 17933, which, in subdivision (c), states that priority consideration shall be given to projects that satisfy additional priorities that are determined by the Board. The Board's response to this comment rejects it on the ground that the Board's practice of adopting and amending Eligibility Guidelines at a noticed meeting is more flexible and faster than adopting them pursuant to the APA. While none of the Eligibility Guidelines are included in the record, the Agenda for the

meeting of December 14-15, 2004, Item 3, at page 7, includes a discussion of the Board's rationale and it is plainly based upon the desire to avoid the requirements of the APA. In the same vein, the minutes of the Board's Sustainability and Market Development Committee from December 9, 2004, on page 24, include this discussion:

"The CRMDZ [commenter] specifically wants that mentioned in the regs. And in mentioning that in the regs, you're going to end up probably having to provide OAL with a copy of that eligibility criteria and you may open the issue of maybe these underground regs. So what we've been trying to encourage Steve Lautze is that there's a process right now that's well controlled, and it's outside that regulations process. And the big advantage is that you're not going to have to spend 9 months to get your criteria changed."

Although the Board may find this procedure for revision of its guidelines convenient, it is violative of the APA. Government Code section 11340.5, subdivision (a), plainly states:

"No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter."

The Legislature has not granted the Board's Eligibility Guidelines an exemption from the APA and it is plain that the Board cannot craft its own exemption by regulation. The language of subdivision (c), referring to additional priorities determined by the Board thus, can only refer to factors relied upon for the decision in a specific case, or those lawfully adopted for general application. It does not enable the adoption of guidelines for general application through a procedure other than the APA. A preference for the use of an alternate procedure is not a sufficient basis for rejecting a comment asking the Board to codify its procedure in a regulation.

(4) NECESSITY

Use of Funds by Local Governments and Agencies

The Board initially proposed changing several of its regulations to exclude local governments and agencies from participation in the Recycling Market Development Loan program. The change was offered to make more of the fund available to job creating entities, and was supported by the explanation that loan funds for governments and agencies are available through another and better source. With regard to one of the affected sections, the Initial Statement of Reasons explained that section 17934.1, subdivision (b), pertaining to use of loan funds by local governments and agencies would be deleted. After receiving comments objecting to the exclusion of local governments and agencies, the Board dropped most of the proposed changes relating to local governments and agencies. It proceeded however, with the deletion of section 17934.1,

subdivision (b). This action is not addressed in the Final Statement of Reasons. With the overall decision not to proceed with the exclusion of local governments and agencies, the only explanation offered for the deletion of section 17934.1, subdivision (b) was eliminated. If the Board still wants to delete this subdivision, a reason must be provided.

Tire Fund

The Board has proposed new Article 1.2, entitled “Leveraging The Recycling Market Development Zone Revolving Loan Fund.” Within this article, section 17939.2 defines the term “Leverage,” and indicates that the definition applies to funds “from the Recycling Market Development Revolving Loan Program Subaccount (Public Resources Code Section 42023.1) or the California Tire Recycling Management Fund (Public Resources Code Section 42885)” There is no mention in the record of the reason for making this definition applicable to the tire fund. It appears that there is no separate group of regulations for the tire fund, and that the Board utilizes the Recycling Market Development Revolving Loan Program regulations of Article 1.1 for the tire fund as provided in Section 17932.1. This can be confusing since nothing else in Articles 1.1 or 1.2 mentions the tire fund. For example, even the aforementioned definition of “Leverage” goes on to specify the manner of using funds from the Recycling Market Development Revolving Loan Program Subaccount or the California Tire Recycling Management Fund that would qualify as leverage. It states that leveraging is “use in a manner that generates or facilitates the generation of financial capital that is made available as loans under the Board’s Recycling Market Development Revolving Loan Program as described in Article 1.1 of the Chapter.” If the money is from the tire fund, presumably its use would be limited to tire related projects, but this is not apparent from the definition, which includes tires when identifying the funds, but not when identifying the uses. Questions such as this are inevitable when attempting to use one set of regulations for another purpose. In any event, the reasons for including the tire fund in the Recycling Market Development Loan program regulations must be stated in the record, and the application of the rule must be clear.

(5) NOTICE

Mailing of Notice

The Board did not comply with all of the requirements applicable to the mailing of notice at the outset of this rulemaking action. Government Code section 11346.4, subdivision (a), provides that at least 45 days prior to the hearing and close of the public comment period notice of the proposed action shall be:

“(1) Mailed to every person who has filed a request for notice of regulatory actions with the state agency. Each state agency shall give a person filing a request for notice of regulatory actions the option of being notified of all proposed regulatory actions or being notified of regulatory actions concerning one or more particular programs of the state agency.

“(2)

“(3) Mailed to a representative number of small business enterprises or their representatives that are likely to be affected by the proposed action. "Representative" for the purposes of this paragraph includes, but is not limited to, a trade association, industry association, professional association, or any other business group or association of any kind that represents a business enterprise or employees of a business enterprise.”

The Board provided a statement of mailing that indicates it complied with the requirements of subdivision (a), paragraph (1), by e-mailing notice to the interested parties who had expressed willingness to receive notice by e-mail. It also says that the Board has no other list. Where a proposed rulemaking action affects small business, an agency has an obligation under the APA to have a list, or create one and make the mailing. It cannot fulfill the requirement of subdivision (a), paragraph (3), by stating that it has no list. There were also the following minor errors in the statements of mailing notice:

- (a) The statement of mailing the 45 day notice mistakenly refers to Government Code section 11364.4 while it should actually refer to section 11346.4;
- (b) The statement of mailing notice for the 15 day comment period mistakenly refers to Section 86 of Title 1 of the CCR while it should refer to Section 44, and it includes the same mistaken citation to the Government Code mentioned in (a) above; and
- (c) The description of the 15 day comment period varies in the Board's documents and is reported as 12/20/04 to 1/4/05 in the actual notice, 12/24/04 to 1/7/05 in Board Resolution 2005-27, and 12/17/04 to 1/4/05 on the OAL Form 400. Either of the first and third periods described is sufficient, so the defect is apparently minor, but the period should be consistently stated. The comment period described in Board Resolution 2005-27 is actually one day short of the 15 days required.

Notice Content

The original public notice for this rulemaking action only mentioned the Board's intention to change the RMDZ Loan Fund regulations and it identified Public Resources Code sections 42023.1 through 42024 as the relevant legislation. The notice did not mention changes to any regulations affecting the California Tire Recycling Management Fund, nor did it refer to Public Resources Code section 42885, yet the proposal includes a provision that is apparently intended to make some, or all of the new Article 1.2 on leveraging funds applicable to the use of the tire fund. It seems likely that persons interested in the Tire Recycling Management Fund may not have realized this from the Board's notice, and if this is the case, changes to tire fund related regulations should not be included in a filing based upon this notice.

Decision of Disapproval
May 4, 2005

7

For the foregoing reasons, OAL disapproved the Board's proposed rulemaking action.

Date: May 4, 2004

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