

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
CALIFORNIA ENERGY COMMISSION))	DECISION OF DISAPPROVAL OF REGULATORY ACTION
REGULATORY ACTION:)	
Title 20)	
California Code of Regulations)	
Adopt Sections 2800, 2801, 2810, 2811)	(Government Code § 11349.3)
2820, 2821, 2822, 2823, 2830, 2831, 2832)	
2833, 2834, 2835, 2836, 2840, 2841, 2842)	OAL File No. 05-0329-02S

DECISION SUMMARY

This regulatory action by the California Energy Commission (“CEC”) proposes to establish standards for applicants to be approved by the state as qualified to certify the emissions results of participants in the California Climate Action Registry (“CCAR”), or to be designated as a state-approved technical assistance provider advising CCAR participants. On May 9, 2005, the Office of Administrative Law (“OAL”) disapproved the proposed regulations for the reasons summarized here and explained in detail below: The Commission did not conduct or reschedule a scheduled public hearing; Necessity has not been demonstrated for the level of experience required, the amount of liability insurance required, the passing score required, and the weighting of evaluation criteria; the Commission has not adequately responded to comments; the final text is not correctly formatted.

DISCUSSION

A. INCORRECT PROCEDURE

OAL must review rulemaking records to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code, § 11349.1.) The APA requires a rulemaking agency to either conduct a public hearing or provide an opportunity to request one. (Gov. Code, § 11346.8(a).) If a rulemaking agency elects to schedule a public hearing or a public hearing is required pursuant to a timely written request, the agency’s subsequent actions must comply with the hearing requirements of Government Code section 11346.8, which provides in pertinent part:

“In any hearing under this section... [a]n agency may continue or postpone a hearing from time to time to the time and at the place as it determines. If a hearing is continued or postponed, the state agency shall provide notice to the public as to when it will be resumed or rescheduled.”

On April 9, 2004, the CEC published notice in the California Regulatory Notice Register of its intent to hold a public hearing on the proposed regulations on June 2, 2004. The notice stated, “Interested persons may present oral and written statements, arguments, or contentions regarding the proposed regulations at the hearing....”

Prior to the June 2, 2004 hearing, a decision was made to remove the item concerning the proposed regulations from the Commission’s agenda. There is no indication in the rulemaking record that the hearing was ever rescheduled. Although the CEC notified interested persons that the item was being removed from its June 2 agenda, and subsequently involved interested persons in informal discussions concerning revisions to the text of the proposed regulations, the CEC’s failure to reschedule the hearing is nevertheless a serious error preventing OAL from approving these regulations until this procedural requirement is fulfilled.

B. NECESSITY

In the record of a rulemaking proceeding, an agency must state the specific purpose of each regulatory provision, and explain why the provision is reasonably necessary to accomplish that purpose. The Necessity standard set forth in Government Code section 11349 provides:

“‘Necessity’ means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation ...taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

The record does not adequately demonstrate necessity for the provisions enumerated below:

- A. Sections 2811, 2821 and 2822 of the proposed regulations would require applicants to have “at least two years’ experience” in specific topics. Although the rulemaking record includes the reasonable assertion that relevant knowledge and experience will ensure an applicant has the proper knowledge and level of skill, the Necessity standard requires support in the rulemaking record for the determination that 2 years is the most appropriate amount of experience.
- B. Section 2820 of the proposed regulations would require applicants to provide proof of “a minimum of one million U.S. dollars of professional liability insurance.” Although the rulemaking record includes the reasonable assertion that adequate insurance is desirable given that certifiers may be held liable for certification activities, the Necessity standard requires support in the rulemaking record for the determination that a minimum of \$1,000,000 is the most appropriate amount of insurance.
- C. Section 2831 of the proposed regulations would require each applicant to achieve a “cumulative score of at least 80 percent” to qualify for approval. The Necessity standard requires support in the rulemaking record for the determination that 80 percent is the most appropriate score to qualify an applicant.
- D. Appendix B of the proposed regulations sets forth a table containing evaluation criteria for applicants, and designates the number of points assigned to each category. The

Necessity standard requires support in the rulemaking record for the number of points selected for the enumerated categories.

C. INADEQUATE RESPONSE TO COMMENTS

Government Code section 11346.8(a) requires a state agency to “consider all relevant matter presented to it before adopting, amending, or repealing any regulation.” To satisfy this requirement, an agency must demonstrate on the record that it considered the relevant input it received during the noticed opportunities to comment.

The record of this rulemaking proceeding reveals that a number of written comments were submitted during the 45 day comment period, including a document from the California Climate Action Registry which raised several specific objections and suggestions. The abbreviated description of CCAR’s comments in the rulemaking record and brief mention of changes in response to the comments do not constitute an adequate summary and response to the comments submitted by the California Climate Action Registry.

D. ADDITIONAL CONCERNS

OAL notes that the proposed text does not follow the correct format required by California Code of Regulations, title 1, section 8(b), which provides,

“The final text of the regulation shall use underline or italic to accurately indicate additions to ... the California Code of Regulations. Underline or italic is not required for the adoption of a new regulation or set of regulations if the final text otherwise clearly indicates that all of the final text submitted to OAL for filing is added to the California Code of Regulations.”

The proposed text submitted to OAL is not italicized, underlined, or designated as proposed to be adopted.

E. CONCLUSION

For these reasons OAL disapproved the Commission’s proposed action.

Date: May 11, 2005

LINDA C. BROWN
Deputy Director

for: WILLIAM L. GAUSEWITZ
DIRECTOR

Original: Mr. Joe Desmond
cc: Ms. Lisa DeCarlo