

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

AGENCY: STATE ENERGY)	DECISION OF DISAPPROVAL OF
RESOURCES CONSERVATION AND)	REGULATORY ACTION
DEVELOPMENT COMMISSION)	
)	(Government Code section 11349.3)
ACTION: Adopt sections 1363.1, 1363.2)	
1365.1, 1365.2, 1368.1, and Appendix C;)	OAL file No. 05-0620-01 S
Amend sections 1361, 1362, 1364, 1366,)	
1367, 1369, 1370, 1371, Appendix A, and)	
Appendix B; Repeal sections 1363, 1365,)	
1368 and 1368.5 of title 20 of the)	
California Code of Regulations)	
_____)	

BACKGROUND

The State Energy Resources Conservation and Development Commission (“Commission”) proposed updating the regulations that define terms and specify the information that entities subject to the continuing monthly and new weekly, monthly and annual reporting requirements of the Petroleum Industry Information Reporting Act must report to the state. On June 20, 2005, these changes were submitted by the Commission to OAL for review and on August 1, 2005, OAL disapproved the proposed changes. This Decision of Disapproval explains the reasons for OAL’s action.

DECISION

OAL disapproved the Commission’s proposed action for its failure to meet the clarity and reference standards set forth in Government Code section 11349.1; failure to meet the requirements applicable to the incorporation of outside materials into a regulation by reference; defects related to the notice of rulemaking; the omission of some necessary documents; and several defects in the included documents.

DISCUSSION

1) CLARITY

Three of the proposed regulations do not meet the clarity standard set forth in Government Code section 11349. The standard is designed to assure that regulations can be easily understood by the directly affected public.

A) Emergency Reporting

Proposed section 1365.2 provides as follows:

“The CEC may need to obtain PIIRA information necessary for the performance of its responsibilities on an emergency or ad hoc basis [and] that is not reported through weekly, monthly or annual reporting requirements. In such an event, the CEC may solicit for this information through facsimile, electronic mail, telephone, letter, conversation or other forms of communication on an as needed basis. Information obtained in this manner will be afforded the same protection as other data provided under PIIRA pursuant to California Public Resources Code section 25364(b).”

The regulation addresses the possibility that the CEC may ask for additional information, and how such information would be safeguarded. The words of the regulation are easy to understand, but the duty, if any, of regulated entities to respond to such requests is uncertain. Other CEC regulations clearly set forth the regular periodic reporting requirements, and they are plainly mandatory, however the obligation of a reporting entity to respond to a solicitation it may receive based upon a CEC determination of emergency, or ad hoc determination of need is not addressed. If the CEC intends that such reporting will be required by law, then this should be set forth in the regulation.

B) Electronic Maps

Proposed Appendix C, Section III, paragraph F provides, in part:

“A submittal of electronic information for each pipeline system in a geographic information system (GIS) format to specifications that are suitable for the CEC’s mapping unit to develop an information data overlay for purposes of creating electronic maps for internal use only. Electronic information previously submitted to other state or federal agencies for similar purposes may be used if the format is acceptable to CEC.”

The proposed regulation requires the use of a GIS format, but leaves the additional specification of suitability up to the mapping unit of CEC. The actual standard for acceptance should be set forth in the adopted regulation, rather than left to future determination after the close of the APA rulemaking process. Without this important information, the full rule on format can not be easily determined from the regulation.

C) “Should”

New Appendix A lists the information required in Weekly Reports. Subdivision II of Appendix A specifically provides that “these reports shall contain the information detailed below in subsections A through E . . .” Subsection C then lists exports of certain petroleum products from California and the information required, but goes on to state that “[p]roduct regrades *should* also be noted, if applicable.” (Emphasis added.) This rule should be clarified to indicate if such reporting is mandatory, or is simply requested, but not required. Use of the word “should” here suggests that this is only a recommendation, but the context indicates that a legal requirement may be intended. Thus, the term “should” is ambiguous.

2) OMISSION OF REFERENCE CITATIONS

Government Code section 11346.2, subdivision (a), provides, in part:

“Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action as described in section 11346.5, and make available to the public upon request, all of the following:

(a) A copy of the express terms of the proposed regulation.

(1) . . .

“(2) The agency shall include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations.”

The notation that lists the statutes or other provisions of law being implemented, interpreted, or made specific is known as a reference citation. [See Government Code section 11349, subdivision (c).] Government Code section 11349.1 obliges OAL to review proposed regulations for compliance with the standard of reference. Thirteen of the proposed regulations do not include a reference citation following the text.

3) INCORPORATION BY REFERENCE

The proposed regulations contain numerous citations that identify materials that are not included within the text of the regulations, that may nevertheless determine the actual definitions, standards, and reporting requirements that will apply after these regulations have been approved. In 1986 OAL adopted section 20 of title 1 of the California Code of Regulations to set forth a uniform approach for the use of this practice. Some of regulatory language utilized by the CEC, together with included citations suggests that the CEC intends to incorporate materials that will not be published in the CCR as regulatory standards for the state of California, however the rulemaking record does not fully support the use of this alternative to publication of the standards in the CCR.

An example from the language used in Appendix A, subdivision III can be used to illustrate our concerns. [Similar language is employed throughout the three appendices, and in each instance, presents the same issues.] The regulation provides:

“California Major Petroleum Product Storer and Terminal Weekly Reports shall contain all of the information specified on the most recent version of CEC form W08, using instructions and definitions published by the CEC. Specifically, these reports shall contain the information detailed below in subsections A through C for crude oil, finished gasoline blended with ethanol, other motor gasolines, gasoline blendstocks, oxygenates, distillates, aviation fuels, liquefied petroleum gases, crude oil, and other petroleum products.”

The second sentence in the example clearly lists information that must be reported. If this list is complete, then Commission's use of form W08 and its instructions to collect the information from reporting entities presents no issue under the APA. Our concern is with the language from the first sentence that indicates that the duty to report includes whatever may be requested in forms we have not seen. Even with all the information in the record, we do not know what information the form W08 calls for, what its instructions say, and what definitions the CEC has published. Moreover, it is impossible for anyone to know what they may say in the future as new versions are published by CEC.

The forms exception set forth in Government Code section 11340.9, subdivision (c), allows the CEC to issue and require the use of forms and instructions for the collection of the information required by law, even without the adoption of a regulation. Nevertheless, when regulations are proposed that require the use of forms and instructions, the rulemaking agency must include these materials in the rulemaking record so OAL can see them and determine whether the obligation to report the information thus required is supported by law. The CEC did not include any of its forms and instructions in the rulemaking record, despite the requests of some commenters who asked that the forms be developed with public participation in the rulemaking proceeding [tab 4, hearing transcript of 4/13/05, pages 23 to 50].

The legal analysis for definitions is a little different since they are not covered by the forms exception. A definition that makes a term utilized in an applicable statute, regulation, form or instruction more specific is very likely a regulation itself. Definitions that are regulations which have not been properly adopted through the rulemaking process cannot be lawfully issued simply by publication. Whereas no one considering this rule can determine with any precision just what information will be required, and what definitions will be published, it cannot be approved in its present form.

Considering the forgoing discussion, and information exchanged in a meeting with Commission staff, it seems likely that the Commission will include all definitions and list all the required information in the regulation, and it will not need to incorporate its forms by reference. In some other instances, however, the Commission may choose incorporation by reference. In order to do this properly, the regulation text, public notice, and rulemaking record must comply with CCR, title 1, section 20.

4) NOTICE and DOCUMENTATION OF MAILING

The notice of proposed rulemaking (45 day notice) was not included in the file. The Commission did supply a copy of the notice at the end of the review period, and the notice itself is satisfactory. There are however, some defects in the documentation related to the Commission's posting and distribution of the notice. The statement of mailing found in the file at tab 3, does not conform with the requirements applicable mailing that are set forth in CCR, title 1, section 86. Afterwards, the Commission proposed substantial changes to the proposed regulations and provided public notice (15 day notice) on March 15, 2005. The statement included in the file at tab 7 concerning

this mailing does not fully address the requirements of CCR, title 1, section 44, because it does not mention the category of persons included in subdivision (a), paragraph (4).

The Commission adopted these regulations at its hearing on April 13, 2005. At this proceeding there was some concern over the question of whether all major petroleum products marketers, as defined in section 1363.2, would be obliged to file monthly reports containing all of the information specified in Appendix B, section VI. A decision was made to limit the requirement to major marketers who are providing the same information to the federal government [tab 4, hearing transcript of 4/13/05, at page 67]. The text originally proposed and the text with 15 day changes both would have required all major petroleum products marketers to report this information in section 1366, subdivision (j). The final text includes a substantial amendment in subdivision (k), that limits application of the state reporting requirement to major petroleum marketers who are required to file Form EIA 782B published by the United States Department of Energy. Information in the record indicates that not all major petroleum marketers are obliged to submit that report. This change does have a legal effect and adopting it will require notice and opportunity to comment for at least 15 days in accordance with Government Code section 11348.6, subdivision (c).

The record includes a report from the federal Energy Information Administration publication *Petroleum Supply Monthly*, September 2002. The report is entitled "Accuracy of Petroleum Supply Data" and its summary indicates that the accuracy of petroleum supply data increases with a move from weekly to monthly reports. The accuracy of data was the subject of some discussion by commenters during this rulemaking. This report was not listed in the original notice as information upon which the proposal was based in accordance Government Code section 11346.5, and the index indicates it was added after the hearing on April 13, 2005. The Commission must make material it adds to the record as support for the rulemaking action available for public comment in accordance with Government Code sections 11347.1 and 11346.8, subdivision (d), and comply with the applicable provisions of section 11346.9, subdivision (a), paragraphs (1) and (3) as well.

For the foregoing reasons, OAL disapproved the proposed rulemaking action.

Date: August 8, 2005

David Potter
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For William L. Gausewitz
Director

Original: Scott W. Matthews, Acting Executive Director
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Decision of Disapproval
August 8, 2005