

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)
)
) **DECISION OF DISAPPROVAL**
DEPARTMENT OF FOOD AND) **OF REGULATORY ACTION**
AGRICULTURE)
)
REGULATORY ACTION:)
) **(Gov. Code, sec. 11349.3)**
Title 3, California Code of)
Regulations)
) **OAL File No. 06-0202-03 S**
Adopt Sections: 1190, 1190.1, 1190.2,))
1190.3 and 1190.4)
_____)

SUMMARY OF REGULATORY ACTION

This regulatory action deals with transporters of inedible kitchen grease (“transporters”). On March 17, 2006, the Office of Administrative Law (“OAL”) notified the Department of Food and Agriculture (“Department”) that OAL disapproved the proposed regulations because they failed to comply with the Consistency, Clarity and Necessity standards contained in Government Code section 11349.1.

DISCUSSION

Regulations adopted by the Department must be adopted pursuant to the Administrative Procedure Act (“APA”). Any regulatory action 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 under review. Before this 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).)

Please note that there were numerous provisions of the proposed regulations that failed to meet the Consistency, Clarity and Necessity standards. Examples of some of the issues are contained in this disapproval. These examples and all of the Consistency, Clarity and Necessity problems with the regulations must be resolved before the regulations can be approved by OAL. All of the issues have been discussed with Department staff. Because the regulations require significant redrafting OAL reserves the right to conduct a complete APA review when the regulations are resubmitted.

A. CONSISTENCY

OAL must review regulations for compliance with the “Consistency” standard of the APA, in accordance with Government Code section 11349.1. Government Code section 11349, subdivision (d), defines “Consistency” as meaning “. . . being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”

EXAMPLE #1

Food and Agricultural Code section 19312, subdivision (a) mandates that transporters must register with the Department and include “. . . (2) A description of the operations to be performed by the applicant.”

Proposed section 1190, subdivision (b) mandates that applicants for registration complete Form 79-012A (Rev. 12/04), “Inedible Kitchen Grease Transporter Registration Application.” Form 79-012A fails to meet the Consistency standard because it does not include the required information mandated by subdivision (a)(2) of section 19312 of the Food and Agricultural Code for registering with the Department.

EXAMPLE #2

Food and Agricultural Code section 19313.1 was amended effective January 1, 2006, to change the record retention period of one year to two years for transporters. Although the regulation text was amended to be consistent, Form 79-012A (Rev. 12/04) “Inedible Kitchen Grease Transporter Regulation Application” contains the following language which is inconsistent with Food and Agricultural Code section 19313.1. “. . . I agree to . . . keep and make available records for one year.”

EXAMPLE #3

Proposed section 19310, subdivision (c)(3) of the Food and Agricultural Code mandates that transporters demonstrate the ability to respond to damages

“. . . by providing proof of a policy of insurance or surety bond for that purpose in an amount not less than two million dollars (\$2,000,000), except that the required amount shall be not less than one million dollars (\$1,000,000) if the applicant operates only one vehicle and the vehicle has a gross vehicle weight rating of not more than 10,000 pounds.”

Proposed section 1190, subdivision (c) requires that transporters submit to the Department “. . . proof of a policy of insurance or surety bond pursuant to section 19310 of the Food and Agricultural Code.”

Government Code section 11110 declares that:

“The form of all bonds of licensees, permittees, and all persons other than public officers and employees, furnishing bonds to a State department, office, board,

commission or bureau in pursuance of State law shall be on a form which form has been approved as to conformity with applicable law by the Attorney General.”

The rulemaking file and regulatory text do not address the issue of the surety bond having been approved by the Attorney General. Section 25 of title 11 of the California Code of Regulations (“CCR”) does not list any surety bond form for transporters as an approved form. Proposed section 1190, subdivision (a) is inconsistent with Government Code section 11110.

B. 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, subd. (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.”

The “Clarity” standard is further defined in section 16 of title 1 of the CCR which provides the following:

“In examining a regulation for compliance with the ‘clarity’ requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

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

- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
- (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
- (3) the regulation uses terms which do not have meanings generally familiar to those ‘directly affected’ by the regulation, and those terms are defined neither in the regulation nor in the governing statute; . . .”

(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.”

EXAMPLE #1

Proposed section 1190, subdivision (c) requires that transporters submit to the Department “. . . proof of a policy of issuance or surety bond pursuant to section 19310 of the Food and

Agricultural Code.” It is not clear what would be acceptable proof: a copy of the document, a statement of compliance, a statement with specific language made under penalty of perjury, a notarized statement or some other type of documentation.

EXAMPLE #2

Proposed section 1190.2(a) allows transporters “. . . to create and maintain a manifest on . . . Form 79-120 . . . or in another physical or electronic format approved by the Department.”

Page 2 of the Final Statement of Reasons states that “. . . a provision was made to allow the use of forms other than the Department’s form in a different paper or electronic format as long as the required information is included, as approved by the Department.” Section 1190.2, subdivision (a) does not contain any criteria to be met in order to obtain Department approval including the criteria contained in the Final Statement of Reasons that the required information on Form 79-120 must be included if an optional format is used. Because the language of the regulation conflicts with the agency’s description of the effect of the language it fails to comply with the Clarity standard.

EXAMPLE #3

Proposed Section 1190.2, subdivision (a)(3)(F)(3) requires that transporters retain all manifests, and a copy of all receipts “. . . at a publicly accessible location within the state for two years. . .” The Registration Application form 79-012A (Rev. 12/04) for transporters states that “I agree to abide by sections 19303(b) through 19306 [Food and Agricultural Code] pertaining to requirements to keep and make available records for one year.” The regulation and Form 79-012A are internally inconsistent.

EXAMPLE #4

Proposed section 1190.3 permits a transporter to use the “3/05” version of Form 79-120 “Instruction Waste Transporter Manifest and Receipt”. But the “3/05” version was amended by a 15-day public availability and the amended Form’s correct date is “10/05.” Proposed section 1190.2 also uses the incorrect date of “3/05” when referring to Form 79-120.

EXAMPLE #5

Proposed section 1190.3 subdivision (c)(1), through (c)(10) lists information about receipts which must be included on Form 79-120. Eight of the required items of information are missing from the Form, including a statement signed and dated by the transporter “. . . attesting to the accuracy of the information under penalty of perjury.”

EXAMPLE #6

Proposed section 1190.3, subdivision (c)(1) requires receipts to contain “. . . (9) the transporter’s name and current inedible kitchen grease serial number found on the official decal issued by the Department for the transportation vehicle.” This is the only reference to an “official decal” in the regulations. It is not clear what criteria must be met, including any fees if applicable, in order to obtain the official decal. There is also no Necessity given for this requirement.

EXAMPLE #7

The Registration Application for transporters, Form 79-012A (Rev. 12/04), states that “I apply to register as a Transporter of Inedible Kitchen Grease in accordance with Sections 19215 through 19316 of the California Food and Agricultural Code” This language is overly broad and therefore unclear because it includes many statutory requirements that are inapplicable to transporters. For example, Food and Agricultural Code sections 19240 – 19242 deal with licensing to slaughter animals for pet food or slaughtering horses for human food purposes, sections 19260 through 19262 deal with pet food processing and sections 19280 through 19282 deal with horsemeat and pet food importers.

EXAMPLE #8

The Registration Application Form 79-012A (Rev. 12/04) states that “Obtaining all information is mandatory and required before a license can be issued according to requirements in Division 9 of the California Food and Agricultural Code.” The cross reference to Division 9 is overly broad. Division 9 entitled “Animals Generally” covers Food and Agricultural Code sections 16301 through 19503. The majority of these Food and Agricultural Code sections have nothing to do with transporters.

C. NECESSITY

Government Code section 11349.1, subdivision (a)(1) requires that OAL review all regulations for compliance with the “Necessity” standard. Government Code section 11349, subdivision (a) defines “Necessity” to mean that

“. . . the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, 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.”

Section 10, subdivision (b) of Title 1 of the CCR provides that in order to meet the “Necessity standard” the rulemaking record must include:

“(1) A statement of the specific purpose of each adoption, amendment, or repeal;
and

(2) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An ‘expert’ within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.”

EXAMPLE #1

Registration Application Form 79-012A (Rev. 12/04) states in relevant part “. . . In accordance with the Governor’s Executive Order B-22-76, each individual has the right to review files maintained on them by the Meat and Poultry Inspection Branch, unless exempted under Section 4 of this Executive Order.” The rulemaking record is silent as to why a 1976 Executive Order is the basis for allowing or denying applicants access to their files.

EXAMPLE #2

The rulemaking record does not contain any Necessity for proposed section 1190.2, subdivision (a)(2)’s requirement to sign and date the manifest under penalty of perjury.

EXAMPLE #3

Proposed section 1190.4 states that a violation of this proposed Article (Article 49, “Transporters of Inedible Kitchen Grease”) constitutes a basis for the Department to pursue existing remedies which are defined in proposed subdivision (b) as including but not limited to: “(1) Denial, suspension, revocation of a license, registration, certificate, permit, exception, or other indicia of authority issued by the Department”

No Necessity is provided for this provision. Please note that there is an interrelated Clarity issue because Article 49 only mentions registration certificates. No mention is made in Article 49 of licenses, permits, exceptions or other indicia of authority issued to transporters by the Department.

CONCLUSION

For the reasons described above, OAL disapproved this regulatory action because it did not comply with the Consistency, Clarity and Necessity standards contained in Government Code section 11349.1.

March 23, 2006

BARBARA ECKARD
Senior Staff Counsel

For:

WILLIAM L. GAUSEWITZ
Director

Original: A. G. Kawamura, Secretary
Cc: Nancy Grillo