STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

In re:	)	
	)	DECISION OF DISAPPROVAL
DEPARTMENT OF JUSTICE	)	OF REGULATORY ACTION
	)	
	)	(Gov. Code, sec. 11349.3)
REGULATORY ACTION: Title 11, California Code of Regulations	)	OAL File No. 07-0104-01S
ADOPT SECTIONS 100, 101, 102, 200, 300, 301, 400, 401, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 700, 701, 702, 703, 704, 705, 706, 707, 800, 801, 802, 803, 804, 805, 806, 807, 808, 900, 901, 902, 903, 904, 905, AND 906	)	

SUMMARY OF REGULATORY ACTION

The Electronic Recording Delivery Act of 2004 requires the Attorney General to develop, certify, regulate, and oversee an electronic recording system. The purpose of the system is to allow County Recorders to establish a limited and specified type of electronic recording alternative for recording deeds and other instruments affecting title, right, or interest in real property in California. This regulatory action implements this statutory directive.

DECISION

On February 20, 2007, the Office of Administrative Law (OAL) disapproved the above referenced regulatory action for the following reasons: failure to make changes to the regulations available to the public; failure to comply with the requirements for incorporation by reference; failure to comply with the clarity, consistency, necessity and authority standards of Government Code section 11349.1; failure to include an adequate response to all public comments; and the statement of mailing for the 15 day comment period was inadequate.

DISCUSSION

The adoption of regulations by the Department of Justice ("Department") must satisfy requirements established by the part of the California Administrative Procedure Act ("APA") that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.)

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by the Office of Administrative Law ("OAL") for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code Section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

1. **THE REGULATIONS CONTAIN CHANGES THAT WERE NOT MADE AVAILABLE TO THE PUBLIC**.

Subsection (c) of Government Code section 11346.8 requires that substantial changes to the original text be made available to the public for comment before the changes are adopted.

> "No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to section 11346.5, unless the change is (1) nonsubstantial or sole grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. *If a sufficiently related change is made, the full text of resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends or repeals the resulting regulation.* Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9." (Emphasis added.)

Section 44 of Title 1 of the California Code of Regulations (CCR) specifies how such sufficiently related changes are to be made available.

> "(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

(1) all persons who testified at the public hearing; and

(2) all persons who submitted written comments at the public hearing; and

(3) all persons whose comments were received by the agency during the public comment period; and

(4) all persons who requested notification from the agency of the availability of such changes.

(b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period."

The text of the regulations submitted to OAL for filing with the Secretary of State contains changes from the text that was made available to the public during the initial 45 day and subsequent 15 day comment periods. These changes are contained in subsection (c) of section 510; subsections (b), (c)(1)(D), and (c) (2)(D) of section 601; subsection (c)(2)(e) of section 700; subsection (c)(1) of section 800; subsection (a)(1) of section 801; subsection (f) of section 903; and ERDS form 0013. Although one might argue that some of these changes may be "nonsubstantial or solely grammatical in nature", it is not clear that all of them are. For example, the ERDS form 0013 made available to the public requires as documentation:

"Revised lead county resolution to participate in a multi county ERDS"

The corresponding provision in the ERDS form 0013 submitted to OAL for filing with the Secretary of State provides:

"Revised lead county resolution to participate in a ERDS software vendor contract (if any). If internal resources are being utilized to develop an ERDS, in lieu of a vendor, an approval to use internal resources or a government entity shall be noted in the county resolution multi county ERDS."

Also, the ERDS form 0013 submitted to OAL for filing has new entries as to the type of filing and a new Section B which provides:

"Briefly describe the change to ERDS functionality."

For this reason, the changes to ERDS form 0013 must be made available for comment pursuant to Government Code section 11346.8 (c) and section 44 of Title 1 of the California Code of Regulations. In that the changes made to the other regulation sections described above may also have substance, OAL recommends that all of the changes be made available for public comment at the same time.

2. INCORPORATION BY REFERENCE

OAL adopted section 20 of Title 1 of the California Code of Regulations to assure that material incorporated by reference in regulations conforms to the requirements of the APA. Subsection (c) of this section provides the requirements for a state agency that wishes to incorporate another document as part of a regulation by reference to that document. Subsection (c) of section 20 provides:

> "An agency may 'incorporate by reference' only if the following conditions are met:
> …
>
> (4) The regulation text states that the document is incorporated by reference and identifies the document by *title and date of publication or issuance*. Where an authorizing California statute or other applicable law requires the adoption or enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, no specific date is required…." (Emphasis added.)

a. Subsection (g)(1) of section 400 of the new regulations provides in pertinent part:

> "…proof of fingerprinting shall be provided to the ERDS Program by submission of a Change of ERDS Role form # ERDS 0008…."

Throughout the rest of the regulations there are similar references to sixteen different forms by title and number, but no revision date. (See sections 400, 600, 601, 603, 605-9, 613-14, 700, 702, 705-6, 800, 803-4, 807, 900, and 902-4.)

In addition to violating subsection (c)(4) of section 20 of title 1 of the California Code of Regulations, failure to specify the date of publication or issuance of the particular version incorporated by reference makes the provision difficult to understand. One cannot understand from the text of the regulatory provision which particular revision has been incorporated by reference.

It should be noted that the forms themselves were included in the record and contain various revision dates. These revision dates need to be added to the regulation text or the forms themselves need to be printed in the California Code of Regulations as an appendix to the regulations.

b. Sections in Article 5 of the new regulations incorporate by reference many different publications by title and date. For example, subsection (a)(2) of section 509 refers to an "Advanced Encryption Algorithm using as minimum key – length of 128 bits as defined in FIPS 197, Advanced Encryption Standard (publication date November 26, 2001)."

However section 501, an introductory section in Article 5, provides in pertinent part:

> "Newly developed ERDS shall conform to the most current version of the references cited…"

This provision would require compliance with the most recently revised version of the many publications incorporated by reference in regulation sections 501, 509, 511, 513, 515, and 516 contained in the new Article 5.

Such an incorporation by reference of an external document (or part of an external document) into a regulatory provision effectively makes the incorporated text a part of the regulatory provision, as though the incorporated text were printed in its entirety as part of the regulatory provision. The failure to specify the date of publication or issuance of the particular version incorporated by reference makes the regulatory provision difficult to understand. One cannot understand from the text of the regulatory provision which particular text has been incorporated by reference.

Further, a prospective incorporation by reference (one that automatically incorporates future changes to an incorporated document) is of questionable validity. While prospective incorporation by reference could cut down on periodic rulemaking to incorporate future changes made by the body who originally issued the incorporated document, it also eliminates the opportunity for public participation in the decision to give regulatory effect to those changes. This problem has been described as follows:

> "…Prospective incorporation entirely removes from the usual rule-making process individual consideration, by the public and the agency, of each future change to the matter incorporated by reference, thereby effectively denying the many benefits of that process to those who may object to the legality or merits of the new amendments or editions. This is not an inconsiderable loss. It is equivalent to a declaration by the agency that it will not hold rule-making proceedings of any kind on the specific contents even though such changes will become effective law of the agency, and even if many of them turn out to be very controversial and of doubtful legality. Furthermore, it should be obvious that no one could effectively object to such later changes at the time the initial rule was adopted prospectively incorporating them by reference; at the time of the original rule-making proceeding in which the wholesale incorporation by reference of future changes was adopted, the specific content of those future changes would be unknown and unknowable."

> "In addition, allowing agencies to incorporate by reference, as rules, future amendments to or editions of the matter already incorporated in their rules involves an inappropriate delegation of power by the state legislature and the agencies involved to the body subsequently altering the incorporated matter. That is, in addition to being deprived of the benefits of the rule-making process for such future amendments or editions, the state legislature and the agencies issuing the rules containing the incorporated matter lose control over the content of the law involved. It is true, of course, that they can disapprove after the fact any specific amendment to or edition of the matter prospectively incorporated by

> reference. But it should be stressed that such action may be taken only after that new matter has become law. This is also why, in many states, prospective adoption of future amendments to or editions of the materials incorporated in rules by reference would be an unconstitutional delegation of authority to the body initially making those new amendments or editions, or would at least present serious questions of that nature." (Footnote omitted. Bonfield, State Administrative Rulemaking (1986) pp. 325-326.)

The validity of prospective incorporation by reference has been questioned by the Court of Appeal in a case involving a Department of Health Care Services regulation incorporating by reference standards issued by the Department of Finance.

> "There is no procedural barrier prohibiting the enacting agency from adopting by reference a set of standards issued by another agency if supporting evidence is made available at a public hearing, opportunity for refutation is given, the pro and con evidence considered and the evidentiary material assembled in an identifiable record. On the other hand, an attempt to embody by reference future modifications of the incorporated material without additional hearings would have dubious validity. (See Olive Proration etc. Com. V. Agric. Tec. Com., … , 17 Cal.2d at P. 209, 109 P.2d 918.)" [California Ass'n of Nursing Homes, Etc. v. Williams (1970) 4 Cal.App.3d 800, 814, 84 Cal.Rptr. 590.]

In this regard, subsection (c)(4) of section 20 of Title 1 of the California Code of Regulations requires regulation text to identify a document that it incorporates by reference by "title and date of publication or issuance," unless "an authorizing California statute or other applicable law requires the adoption or enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto,…" The Department has cited no such California statute or other applicable law which would allow the prospective incorporation present in new regulation section 501.

We also note that this rulemaking record failed to contain any copies of the incorporated documents (California Code of Regulations Title 1, Section 20(d)). The incorporated documents must be included in the record for review by OAL and must have been made available to the public for comment.

3. CLARITY

The Legislature in establishing OAL, found that regulations, once adopted, were frequently unclear and confusing to the persons who must comply with them. (Gov. Code, sec. 11340(b).) For this reason, OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the "clarity" standard. (Gov. Code, sec. 11349.1(a)(3).) "Clarity" as defined by Government Code section 11349(c) means "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."

a. Initially it must be noted that this regulatory action adopts a new Chapter 17 with sections numbered 100 through 906 in Title 11. Unfortunately, the Department already has in Title 11 an existing Chapter 17 containing section 999.40. Perhaps even more troublesome for the new chapter, the Department's Chapters 1 through 16 that precede Chapter 17 in Title 11 contain regulations with section numbers ranging from 1 to 999.23. The regulations of the Commission on Peace Officer Standards and Training in Title 11 start at section number 1000. To avoid confusion to the public, this regulatory action needs to renumber the new chapter of regulations being adopted to follow existing Chapter 17 and renumber the individual section numbers to greater than 999.40 and less than 1000 or place this new chapter and these new regulations somewhere else.

b. New regulation section 600 provides in subsection (g):

> "A County Recorder shall be required, prior to entering into a contract with a Vendor of ERDS Software, if any, that the Vendor has a valid Vendor of ERDS Software Certificate issued by the ERDS Program."

A County Recorder would not easily understand what is required by this provision as, at a minimum, a verb appears to be missing.

c. New regulation section 601 provides for the initial county certification of an ERDS in subsection (c)(1). Subsection (c)(1)(D) provides in part:

> "…If internal county resources and/or another governmental entity are being used to develop an ERDS in lieu of a vendor, it shall be stated in the County Resolution…."

The reviewer is uncertain what this provision means in the context of a Single-County ERDS.

d. New regulation section 610 provides in subsection (a):

> "The County Recorder, either in his or her official capacity or by delegation of responsibility, shall notify the ERDS Program within 30 days by submitting a written notification of the change."

The type of change intended to be covered by this provision is only described in the title of section 610 and includes changes of "physical and/or mailing address and/or contact information." This language needs to be included in the regulation text itself.

e. New regulation section 800 provides in subsection (c)(1):

> "…the individual shall attest to the fact that the ERDS software, at the time of development, will meets [sic] all of the audit and testing requirements as contained within these regulations, and acknowledges that ERDS Program's issuance of the Vendor of ERDS software Certificate shall include a 'disclaimer'

stating that the software is not being approved as to its ability to serve/function in an ERDS operational environment nor that it will meet all County Recorder's requirements, only that the vendor has stated that it meets all of the audit and testing requirements as contained."

Some words appear to be missing from the end of this provision following "contained". A person directly affected by this regulation would not easily understand what audit and testing requirements the vendor must state that it meets in the disclaimer.

f. New regulation section 601, in subsections (c)(1), (c)(2) and (c)(3), describes the documents required to be submitted when applying for initial certification as a Single-County ERDS, Multi-County ERDS (Lead County), and Multi-County ERDS, (Sub-County). However, the incorporated forms, ERDS forms 0001A and 0001B, in Section B require an additional document not listed in section 601:

> "A list of all users for secure access and/or authorized access."

g. New regulation section 400 provides in subsection (b):

> "If the state or federal criminal records contain a conviction of a felony, or a misdemeanor related to theft, fraud, or a crime of moral turpitude, or a pending criminal charge for all of these crimes shall be justification for denial to an individual to serve in an ERDS role that requires fingerprinting…."

There appears to be a word or two missing from this provision and this reviewer believes that a pending charge for "any" rather than for "all" of the described crimes was intended to be justification for denial.

4. CONSISTENCY

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. New regulation section 101 provides:

> "Documentation submitted to the ERDS Program shall be exempt from disclosure pursuant to the Information Practices Act of 1977, Civil Code Section 1798 et seq."

Regulation section 101 cites Government Code section 27394 (c) and (d) as both the authority and reference citations. Subsection (c) of the statute provides for the audit and security testing of the system and subsequent reports by the computer security auditor and subsection (d) provides that these reports shall be exempt from disclosure under the

Public Records Act. Neither these statutory provisions nor the Initial Statement of Reasons explain why all documentation submitted to the ERDS program is exempt from disclosure pursuant to the Information Practices Act.

b. New regulation section 300 provides in subsection (a):

> " The ERDS Program non-refundable fees for certification of a Vendor of ERDS Software are as follows:
>
> (1) Initial certification by the ERDS Program is $500.
> (2) Renewal certification by the ERDS Program is $300…."

Subsection (b) of Government Code section 27397 provides:

> "The Attorney General may charge a fee directly to a vendor seeking approval of software and other services as part of an electronic recording delivery system. The fee shall not exceed the reasonable costs of approving software or other services for vendors."

The Initial Statement of Reasons discussion for section 300 says only:

> " AB 578 authorizes the Attorney General to charge a fee directly to a vendor seeking approval of software and other services as part of an ERDS. This section establishes and identifies those fees to be charged for an initial certification and a renewal certification."

Based upon the lack of information in the Initial Statement of Reasons explaining why these vender fees were set at the amounts specified in subsections (a)(1) and (a)(2) of new regulation section 300, OAL cannot determine that these fees are consistent with subsection (b) of Government Code Section 27397. (See further discussion of the required content of the initial statement of reasons under "Necessity".)

5. NECESSITY

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the "necessity" standard. Government Code section 11349(a) defines "necessity" to mean ". . . 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 purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion."

To further explain the meaning of substantial evidence in the context of the "necessity" standard, subdivision (b) of section 10 of the Title 1 of the California Code of Regulations provides:

> "In order to meet the 'necessity' standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:
>
> "(1) a statement of the specific purpose of each adoption, amendment, or repeal; and
>
> "(2) information explaining why each provision of the adopted regulations 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."

In order to provide the public with an opportunity to review and comment upon an agency's perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons. (Gov. Code, sec. 11346.2(b).) The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, "why" a regulation is needed and "how" this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1).) The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably. The initial statement of reasons and all data and other factual information, studies or reports upon which the agency is relying in the regulatory action must also be included in the rulemaking file. (Gov. Code, sec. 11347.3(b)(2) and (7).)

The Initial Statement of Reasons provided with this regulatory action describes the effect of the proposed regulations but fails to provide information explaining the need for the provisions contained in submitted sections 300, 401, 502, 503, 504, 505, 514, 517, 518, 522, 600, 601, 608, 612, 613, and 803. This information should be added to the Final Statement of Reasons.

6. THE FINAL STATEMENT OF REASONS DOES NOT CONTAIN A RESPONSE TO ALL COMMENTS SUBMITTED DURING THE PUBLIC COMMENT PERIOD.

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA currently requires that rulemaking agencies provide notice and at least a 45-day comment period prior to adoption of a proposed regulatory action. (Gov. Code, secs. 11346.4 and 11346.5). By requiring the state agency to summarize and respond in the record to comments received during the comment period, the Legislature has clearly indicated its intent that an agency account for all relevant comments received, and provide written evidence of the its meaningful consideration of all timely, relevant input. Section 11346.9(a)(3) of the Government Code requires that the

adopting agency prepare and submit to OAL a final statement of reasons which shall include a ". . . summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reason for making no change."

The Final Statement of Reasons for this regulatory action in responding to comments #15 and #16 of the 45 day public comments and comment #1 of the 15 day public comments states that the Department agrees with the comments and has revised the regulations accordingly. However, the regulation text was not revised to accommodate these comments and for this reason these responses were inadequate.

7. INADEQUATE STATEMENT OF MAILING

Between November 17, 2006 and December 4, 2006, the Department conducted a 15 day availability period for sufficiently related changes made to the original text of the regulations made available to the public. Pursuant to section 44 of Title 1 of the California Code of Regulations, notice of the proposed changes and the text are required to be mailed out to specified categories of persons. Subsection (b) of section 44 provides:

> "The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period."

The statement of mailing provided with this rulemaking for the November 17, 2006 availability period did not conform to these requirements.

8. AUTHORITY CITATIONS

Subsection (a)(2) of Government Code section 11346.2 provides:

> " 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."

Subsection (b) of Government Code section 11349 provides:

> "'Authority' means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation."

Subsection (e) of Government Code section 11349 provides:

"'Reference' means the statute, court decision, or, other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation."

The listing of statutes in the authority citations for some of the new regulations are over inclusive. In some cases the authority citations include Government Code sections 27390, 27391, 27397.5, or particular subsections in Government Code sections 27394, 27395, or 27397, which do not provide authority to the Department to adopt regulations. Although these same statutory provisions might be implemented , interpreted, or made specific by the particular regulations, and hence belong in the reference citations, they should not be cited as authority. This minor defect can be easily remedied.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-6808.

Date: February 26, 2007

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CRAIG S. TARPENNING
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