

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

In re:	)	
	)	
BOARD OF EQUALIZATION	)	DECISION OF DISAPPROVAL OF REGULATORY ACTION
	)	
	)	(Gov. Code, sec. 11349.3)
REGULATORY ACTION:	)	
Title 18, California Code of	)	
Regulations	)	OAL File No. 07-0427-04 SR
	)	
ADOPT SECTION 474	)	
	)	
_____	)	

**SUMMARY OF REGULATORY ACTION**

This proposed regulatory action seeks to adopt section 474 to title 18 of the California Code of Regulations. Proposed section 474 defines "petroleum refining property" and establishes a rebuttable presumption, for purposes of recognizing declines in value for such property, that land, improvement, and fixtures and other machinery and equipment classified as improvements constitute one appraisal unit, except when measuring declines in value caused by disaster, in which case the land constitutes a separate appraisal unit. This regulatory action was originally submitted by the Board of Equalization to the Office of Administrative Law on December 26, 2006. It was subsequently withdrawn by the Board of Equalization on February 8, 2007 before the Office of Administrative Law took any action on the filing. On April 27, 2007, the Board of Equalization resubmitted this regulatory action to the Office of Administrative Law. This resubmission incorporated the prior rulemaking file by reference. The only change in the resubmission from the prior rulemaking file was one minor deletion from the reference citations for section 474.

**DECISION**

On June 8, 2007, the Office of Administrative Law disapproved the above referenced regulatory action because the Initial Statement of Reasons failed to provide the public with the rationale for the determination by the agency that the provisions in section 474 are needed to carry out the purpose for which it is proposed.

**DISCUSSION**

The adoption of regulations by the Board of Equalization ("Board") 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. (Gov. Code, sec 11349.1.)

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 is the primary document in the rulemaking record that demonstrates that

the adoption, amendment, or repeal satisfies the “necessity” standard. 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 “why” the particular provisions contained in this regulation were chosen to fill that need. (Gov. Code, sec. 11346.2(b)(1).) The Initial Statement of Reasons must also identify any technical, theoretical, or empirical study, report, or similar document upon which the agency relies. (Gov. Code, sec. 11346.2(b)(2).)

The Initial Statement of Reasons must be submitted to OAL with the Notice of the Proposed Action and be 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 why the regulation is needed and why the particular provisions contained in the regulation were chosen to fill that need. This information is essential in order to 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 is inadequate. It contains just five short paragraphs: the first paragraph describes in one sentence the general purpose of section 474, the second and third paragraphs briefly describe pertinent provisions in Article XIII of the California Constitution and section 51 of the Revenue and Taxation Code, and the last two paragraphs briefly describe the effect of section 474. The Initial Statement of Reasons fails to provide the public with the rationale for the determination by the Board as to why the provisions in section 474 are needed to carry out the purpose for which it is proposed, i.e., why the particular provisions contained in the regulation were chosen. For example, for subsection (d)(2) of section 474, there is no information explaining why fixtures and other machinery and equipment classified as improvements on petroleum refining property should be rebuttably presumed to constitute a single appraisal unit with the land and improvements.


It is vital that this information be made available to the public during the rulemaking process so that the public is informed of the basis of the proposed action and can comment knowledgeably during the public comment period. In that the 45-day comment period had already been completed, Board staff were advised by OAL in early February, prior to the withdrawal of the original submission of this rulemaking, that the defect could be remedied by making the information required to be contained in the Initial Statement of Reasons available to the public for a 15-day written comment period pursuant to sections 11346.8(d) and 11347.1 of the Government Code. OAL did not advise Board staff that the public hearing on the proposed regulatory action had to be reopened. Government Code section 11347.1(b) requires that the rulemaking agency mail to persons who commented or requested notification of changes a notice making documents added to the record available for public inspection and written comment for at least 15 days. In the event any comments are received by the agency on the documents during the 15-day comment period, Government Code section 11346.8(a) would require that the comments be considered by the agency prior to adoption.

The Board in this resubmission has elected to resubmit the file to OAL without making this information available to the public for a 15-day written comment period. The only change in the resubmission from the prior rulemaking file was one minor deletion from the reference citations for section 474.

**CONCLUSION**

For the reasons set forth above, OAL has disapproved this regulatory action.

Date: June 8, 2007



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Director

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