

State of California
Office of Administrative Law

In re:

Department of Water Resources

**Regulatory Action: Title 23
California Code of Regulations**

**Adopt sections: 570, 571, 572, 573, 574,
575, 576, 577, 578**

**DECISION OF DISAPPROVAL OF
EMERGENCY REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2008-0731-02 E

DECISION SUMMARY

On July 31, 2008, the Department of Water Resources ("Department") submitted to the Office of Administrative Law ("OAL") a proposed emergency action to adopt Chapter 3.5 of Division 2 of Title 23 (commencing with section 570) regarding Financial Assistance for Flood Management Projects and Small Flood Management Projects.

On August 11, 2008, OAL notified the Department that OAL disapproved this emergency regulatory action for failure to comply with specified standards and procedures of the California Administrative Procedure Act ("APA"). The reasons for the disapproval are summarized below:

- A. the proposed regulations fail to comply with the *emergency standard* of Government Code section 11346.1¹;
- B. the proposed regulations fail to comply with the *clarity* standard of section 11349.1; and,
- C. the proposed regulations fail to comply with the *consistency* standard of section 11349.1.

This disapproval decision contains examples of some of the identified issues, but is not exhaustive. OAL reserves the right to conduct a complete APA review for compliance with the procedural and substantive requirements of Chapter 3.5 (commencing with section 11340), Part 1, Division 3, Title 2, of the Government Code, upon the

¹ Unless stated otherwise, all California Code references are to the Government Code.

submission of a proposed regular rulemaking or resubmission of a proposed emergency rulemaking. All APA issues must be resolved prior to OAL approval of any submission.

BACKGROUND

In 2000 the Legislature passed (and the Governor signed) AB 1147 which added a new section 12585.7 to the Water Code and provided for revised local and state cost sharing for certain flood management projects. The Department was to establish criteria and a process for determining the percentage of state financial assistance in flood management projects based upon stated statutory objectives. The Disaster Preparedness and Flood Prevention Bond Act of 2006, a bond act approved by the voters, authorized the issuance of over four billion dollars worth of bonds for financing disaster preparedness and flood prevention projects (three million of which, upon appropriation, will be available to the Department for flood control and reduction of levee failure). In August 2007, the Legislature mandated the Department to adopt emergency regulations to implement Water Code section 12585.7 on or before January 1, 2008 (Public Resources Code section 5096.954). On July 31, 2008, the Department submitted to OAL the proposed emergency regulations² to implement section 12585.7 of the Water Code.

DISCUSSION

Any regulation adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute 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 review (sections 11340.5 and 11346). OAL reviews emergency regulations for compliance with the emergency standard in section 11346.1, with applicable APA procedural requirements and for compliance with the standards for administrative regulations in 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 its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret and make specific statutory law, and to ensure that required procedures are followed in order to provide the meaningful opportunity to comment on rules and regulations before they become effective.

As indicated above, this disapproval decision contains examples of identified issues in the proposed rulemaking submitted by the Department, but is not exhaustive. The

² The Department is currently conducting a regular rulemaking in accordance with Chapter 3.5 (commencing with section 11340), Part 1, Division 3, Title 2 of the Government Code. A notice of proposed rulemaking was filed June 13, 2008 (Register 2008, No. 24-Z). The period for public comment closed on July 28, 2008.

issues have been identified to and discussed with Department staff. All APA issues must be resolved before the regulations can be approved by OAL. Because the regulations require significant redrafting, OAL reserves the right to conduct a complete review for compliance with both the procedural and substantive requirements of the APA.

A. FAILURE TO MEET THE EMERGENCY STANDARD

The first comprehensive changes in the adoption of emergency regulations since the 1980s became effective January 1, 2007 as part of AB 1302. Section 11342.545 now defines an “emergency” as “a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.” The adoption of an emergency regulation by the Department must satisfy requirements established by section 11346.1, which provides in part:

(b)(1) [I]f a state agency makes a finding that the adoption of a regulation or order of repeal is necessary to address an emergency, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal.

(2) Any finding of an emergency shall include a written statement that contains ... a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency.

Section 11349.6 governs OAL’s review of emergency regulations, providing:

(b) ...The office shall disapprove the emergency regulations if it determines that the situation addressed by the regulations is not an emergency, or if it determines that the regulation fails to meet the standards set forth in Section 11349.1, or if it determines the agency failed to comply with Section 11346.1.

The APA permits the adoption of emergency regulations only if the additional level of justification is met because the use of emergency regulations severely limits one of the key purposes of the APA – public participation in the rulemaking process. Since emergency regulations require the regulated public to obey rules that it had little opportunity to review and comment upon, the APA limits emergency regulations only to certain circumstances. In the absence of substantial evidence in the Finding of Emergency that the situation calls for immediate action to avoid serious harm, OAL shall disapprove the proposed emergency regulation.

A proposed emergency rulemaking may be exempt from meeting the emergency standard and from providing substantial evidence that the situation calls for immediate action. This occurs when the Legislature clearly indicates its intention to “deem” a

particular situation an emergency and exempt the regulations from meeting the emergency standard of 11346.1. Examples of “deemed emergency” language are as follows:

The department may adopt emergency regulations to implement this section. The adoption, amendment, repeal, or readoption of a regulation authorized by this section is deemed to be necessary for the immediate preservation of the public peace, health and safety, or general welfare, for purposes of Sections 11346.1 and 11349.6 of the Government Code, and the department is hereby exempted from the requirement that it describe specific facts showing the need for immediate action. A certificate of compliance for these implementing regulations shall be filed within 24 months following the adoption of the first emergency regulations filed pursuant to this subdivision. (Welfare & Institutions Code, section 4783 (m); underlining added.)

and,

- (a) The board and the department may each adopt regulations to implement and enforce this chapter as emergency regulations.
- (b) The emergency regulations adopted pursuant to this chapter shall be adopted in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and for the purposes of that chapter, including Section 11349.6 of the Government Code, the adoption of these regulations is an emergency and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health, safety, and general welfare. . . . (Public Resources Code, section 42475.2; underlining added.)

Examples from the Water Code include:

Notwithstanding the rulemaking provisions of the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, until emergency regulations are filed with the Secretary of State, the department may implement this section through all-county letters or similar instructions from the director. The department shall adopt emergency regulations implementing this chapter no later than September 30, 2005, unless notification of a delay is made to the Chair of the Joint Legislative Budget Committee prior to that date. . . . Under no circumstances shall the adoption of emergency regulations be delayed, or the use of all-county letters or similar instructions be extended, beyond June 30, 2006. (2) The adoption of regulations implementing this section

shall be deemed an emergency and necessary for the immediate preservation of the public peace, health, safety, or general welfare. The emergency regulations authorized by this section shall be exempt from review by the Office of Administrative Law. The emergency regulations authorized by this section shall be submitted to the Office of Administrative Law for filing with the Secretary of State and shall remain in effect for no more than 180 days by which time final regulations shall be promulgated. . . (Water Code, section 12301.21(d)(1), underlining added.)

and,

The emergency regulations adopted pursuant to this subdivision, any amendment thereto, or subsequent adjustments to the annual fees, shall be adopted by the state board in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The adoption of these regulations is an emergency and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health, safety, and general welfare. Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, any emergency regulations adopted by the state board, or adjustments to the annual fees made by the state board pursuant to this section, shall not be subject to review by the Office of Administrative Law and shall remain in effect until revised by the state board. (Water Code, section 13260(f)(2), underlining added.)

Section 11346 provides that “[chapter 3.5 (commencing with section 11340), Part 1, Division 3, Title 2, of the Government Code] shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.” As demonstrated by the above examples, when the Legislature intends to exempt proposed emergency regulations from meeting the emergency standard of 11346.1, it knows what language to use and does so expressly. Thus, absent the manifestation of legislative intent to exempt a rulemaking from APA standards and review, OAL cannot presume such a legislative intent without contravening its statutory obligation.

In the present rulemaking record, the Department does not provide any facts establishing an emergency. Rather, the Department bases its Finding of Emergency on the following statutory language of the Public Resources Code:

5096.954. On or before January 1, 2008, the department shall adopt emergency regulations to implement Section 12585.7 of the Water Code.

The language in section 5096.954 does not indicate the Legislature's intent to exempt the rulemaking from meeting the emergency standard required by section 11346.1. Rather, the language only instructs the Department to proceed to adopt emergency regulations by January 1, 2008. Although the Department states in its Finding of Emergency that the "[a]doption of the attached proposed emergency regulations is necessary to avoid serious harm to the public peace, health, safety, or general welfare," this statement is insufficient for meeting the emergency standard. Absent language indicating an exemption, the Department is still obligated to comply with the substantive requirements of section 11349.1 and the emergency standards of sections 11342.545, 11346.1, and 11349.6.

Although the Department does not provide any facts establishing an emergency, the subject matter would indicate the possibility of real and imminent harm if flood prevention is not timely addressed. However, it is not for OAL to presume the *facts* to support such a need for immediate action. Further, section 11346.1(b)(2) provides that "expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency."

In that the Department did not articulate specific facts to demonstrate the existence of the emergency but relied upon the language of section 5096.954 of the Public Resources Code, OAL informed the Department that the rulemaking file, as submitted, did not satisfy the requirements of the APA.

We further note that SB 85 (adopting Public Resources Code section 5096.954), is urgency legislation. Section 11346.1(b)(2) provides that "[t]he enactment of an urgency statute shall not, in and of itself, constitute the need for immediate action."

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 (section 11340(b).) Section 11349.1(a)(3) requires that OAL review all regulations for compliance with the "clarity" standard. Section 11349(c) defines "clarity" to mean "...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them."

Section 16 of Title 1 of the California Code of Regulations ("CCR") declares in relevant part that:

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) A regulation shall be presumed not to comply with the 'clarity' standard if any of the following conditions exist:
 - (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or ...
 - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
 - (5) the regulation presents information in a format that is not readily understandable by persons 'directly affected;' ...
- (b) Persons shall be presumed to be 'directly affected' if they:
 - (1) are legally required to comply with the regulation; or
 - (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.

In this rulemaking, OAL determined that several of the proposed regulatory provisions did not satisfy the "clarity" standard, as discussed below.

1. **Two proposed section 570s.** The proposed regulations have two sections titled "Section 570: Scope." They are similar but not identical. It would create a clarity issue to adopt both sections 570. One must be removed.
2. **Applicability of proposed section 571(r).** Section 571(r) defines "[s]tate transportation facility" to mean "all facilities for the transportation of passengers and property to and over any toll bridge, tube or other highway crossing and the approaches to each end thereof, acquired or constructed, to be acquired or constructed, or in course of construction. State transportation facility includes terminals, stations, viaducts, rails, and the real property, easements, and rights of way upon which any of them are located or situated or which are necessary therefore, and equipment, signals, and interlockers, cars and rolling stock, and franchises, rights, and privileges appurtenant thereto."

It is unclear as to whether federal, state or county highways are included in this definition. The definition includes "highway crossing and the approaches to each end thereof" but it must be clarified as to which highway projects qualify.
3. **Heading of proposed section 572 is misleading.** The heading of section 572 is: "Process to Determine Project Eligibility." The title is a misnomer as the section merely describes one part of the process. The remainder of the process is contained in other sections.
4. **Proposed section 572(b)(1) uses unclear terms.** Section 572(b)(1) provides "The Department or Board shall use the following process to determine project eligibility for State cost-sharing as required by Water Code Section 12582.7(b):
 - (1) During the preparation of the federal feasibility report, the Department or

Board staff shall attend a site inspection tour of the project arranged by the Sponsor. If the project is past the feasibility phase, then the Sponsor shall arrange for this tour as soon as reasonably possible. The Sponsor shall invite interested local and state agencies, organizations and persons, including the general public, by providing written or other reasonable notifications and publication at least 10 calendar days before the tour. The Sponsor shall give a field and informational tour of the project. This site tour and Department or Board attendance is contingent upon the appropriation of sufficient funds.”

How will the Sponsor determine the “interested local and state agencies, organizations and persons” to invite? “Publication” is also unclear. Is it the intention that the “publication” be in a local newspaper or will any periodical suffice? Is the “site tour” only mandatory when the State appropriates funds for this purpose?

5. **References to “Sponsor’s Draft Nonfederal Cost-Sharing Report” (section 573), “Sponsor’s Nonfederal Cost Sharing Report” (section 576(b)) and “NonFederal Cost Sharing Report” (section 576(a)) are unclear.** The regulations define “Sponsor’s nonfederal Cost Sharing Report” at section 571(q). “Draft Nonfederal Cost-Sharing Report” and “NonFederal Cost Sharing Report” are not defined. The “NonFederal Cost Sharing Report” appears to be a different document than the “Sponsor’s nonfederal Cost Sharing Report.” Each of the reports must be defined and there must be consistent use of titles of the same report.
6. **“Certification” in proposed section 573(b)(4)(B)(2) is unclear.** Section 573(b)(4)(B)(2) provides that the Sponsor’s Nonfederal Cost-Sharing Report shall provide: “[t]he source documentation used to evaluate the potential contribution, including publication and compilation dates. The latest decennial U.S. Census Bureau data is the Department’s preferred choice of data source; however, a Sponsor may elect to use an alternative method that has been certified as equitable by the Department, such as the American Community Survey (starting in 2010). All data that is used for evaluation must be applicable to the same year, originate from reliable sources and have details given down to the census block group level or better.”

It is unclear as to how the data is to be “certified as equitable” and who is doing the certification. Section 573 says the “Department” and section 574(d)(4) states the “Department of Finance” is to do the certifying. It is unclear if one is a prerequisite of the other or if there is some other intent. It is likewise unclear what the phrase “(starting in 2010)” means after “American Community Survey.”

7. **Proposed section 574(c) cannot be understood as currently written.** Section 574(c) provides: “Significant contributions to both the Impoverished Area and State Facilities objectives must be met when a project with provides a ten

percent or greater increase in flood protection to the Impoverished Area and State Facilities.”

This sentence is unintelligible in its current form. Whether there is an unnecessary word, a word missing or a misspelled word, the true meaning of the subsection cannot be understood absent clarification.

8. **Report to the Legislature in proposed section 576 is unclear.** Section 576(b) indicates that “[t]he Department or Board will review the Sponsor’s Nonfederal Cost Sharing Report for completeness and accuracy” and requires the Department or Board to “notify the Sponsor in writing upon determination that the Sponsor’s Nonfederal Cost Sharing Report meets the requirements set forth in 12582.7(a)” However, section 576(c) provides that: “[w]ithin 30 days of determining that the Sponsor’s Nonfederal Cost Sharing Report meets the requirements set forth in 12582.7(a), the Sponsor must circulate the Sponsor’s Nonfederal Cost Sharing Report to the Legislature and interested persons and organizations, and will allow written comments for 45 days.”

Which “interested persons and organizations” and members of the Legislature need to receive the report is unclear and how the report is to be circulated is unclear.

9. **Placement of proposed new chapter 3.5 in the CCR is confusing.** The Department proposes to locate the new chapter 3.5 in division 2, between chapters 3 and 4, of Title 23, which is an acceptable placement if they change the section numbers. Chapter 3 currently ends with section 509 and chapter 4 begins with section 510. It would cause great confusion to have section numbers 570 through 578 located in between 509 and 510. The Department must consider changing the section numbers or relocating the chapter to 4.5 (in that chapter 4 ends with section 517 and chapter 5 begins with section 595).

C. 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 11349.1, 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.” As currently written, proposed section 575 is inconsistent with Water Code section 12585.7.

Water Code section 12585.7(d) states:

(d) The state share of the nonfederal capital costs authorized in subdivision (a), (b), and (c) may be increased by up to an additional 20 percent, to a maximum of 70 percent, upon the recommendation of the department or the Reclamation

Board, if either entity determines that the project will result in a significant contribution to **any** of the following objectives:

- (1) Protects, creates, enhances, or provides opportunities for enhancement of endangered species, riparian, aquatic, terrestrial, or other important habitats.
- (2) Protects or enhances open space.
- (3) Develops or enhances recreational opportunities that include, but shall not be limited to, picnic areas, foot and bike paths, and provides public access to all or nearly all of the project works, except those areas where public access would constitute a threat to public safety or habitat or would constitute a trespass on private property.
- (4) Increases the level of flood protection within the benefitted area of the project, if that area has a median household income that is less than 120 percent of the poverty level, as defined by the Department of Finance, Population Research Unit, for the year in which the project would be authorized.
- (5) Increases the level of flood protection for state transportation facilities or state water supply facilities.
(Emphasis added.)

The following proposed section 575 is in conflict with Water Code section 12585.7:

Section 575 states:

The recommended State cost share is a baseline 50 percent plus the recommended percentage increases for the multipurpose objectives, up to a maximum total of 70 percent, notwithstanding any other provisions stated within the Water Code, Division 6, Part 6, Chapters 1, 2 and 3. The recommended percentage increases will be:

- (a) 0 percent, if the objectives are not met; . . .

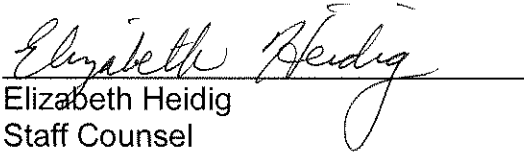
By using the plural "objectives," the regulation suggests that the Sponsor's project would have to meet more than one objective in order to be considered for a higher state contribution when the statutory threshold is "any" of the objectives.

In addition, proposed section 575's use of "[n]otwithstanding any other provisions stated within the Water Code" is language taken from section 12585.7. However, when applied in a regulatory sense, it has a different meaning; one which could indicate a possible inconsistency with a provision of the Water Code. Clearly, a *regulation* cannot supersede provisions in the Water Code.

CONCLUSION

For these reasons OAL disapproved the above-referenced rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-6800.

Date: August 18, 2008


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