State of California
Office of Administrative Law

In re:

Department of Water Resources

Regulatory Action: Title 23 California Code of Regulations

Adopt sections: 490.1, 492.1, 492.2, 492.3, 492.4, 492.5, 492.6, 492.7, 492.8, 492.9, 492.10, 492.11, 492.12, 492.13, 492.14, 492.15, 492.16, 492.17, 493.1, 493.2, 495.1, 495.2, 495.3

Amend sections: 490, 491, 492, 493, 494, 495

DECISION OF DISAPPROVAL OF REGULATORY ACTION

Government Code Section 11349.3

OAL File No. 2009-0209-03 S

SUMMARY OF REGULATORY ACTION

The Department of Water Resources proposed to amend title 23 of the California Code of Regulations in order to update its Model Water Efficient Landscape Ordinance in accordance with the mandate of Government Code section 65595. On February 9, 2009, the Department of Water Resources ("Department") submitted the proposed regulations to the Office of Administrative Law ("OAL") for review in accordance with the Administrative Procedure Act ("APA") and on March 25, 2009, OAL disapproved the regulations. This Decision of Disapproval explains the reasons for OAL's action.

DECISION

OAL disapproved the proposed regulations for failing to comply with the "clarity" standard of Government Code section 11349.1; the incorporation of materials into the regulation by reference does not comply with the requirements of California Code of Regulations ("CCR"), title 1, section 20; the rulemaking record does not meet the necessity standard with respect to some of the proposed regulations; the Department's responses to some comments do not explain the reasons for rejection of the comments as required by Government Code section 11346.9, subdivision (a)(3); and for miscellaneous errors in the accompanying text.

DISCUSSION

1) CLARITY

OAL reviews proposed regulations for compliance with the clarity standard pursuant to Government Code section 11349.1. Clarity is defined in section 11349, subdivision (c), as follows: "[c]larity means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." The following provisions included in the proposed regulations are not clear and must be improved.

A) Existing Landscapes

The application of the proposed regulations is not clear. Since they will serve as model regulations as required by Government Code section 65595, and be adopted in counties and cities throughout the state, it is especially important that there be no ambiguity as to their applicability. All of the regulations except section 493.1 apply primarily to new construction and rehabilitated landscapes. Proposed section 490.1, subdivision (a)(4), specifies that "existing landscapes [are] limited to Section 493.1." In proposed section 493.1, the Department has attempted to prescribe the applicability of requirements for irrigation audits, irrigation surveys, and irrigation water use analyses concerning properties of one acre or more in size with landscapes installed before January 1, 2010 [the anticipated commencement date of the updated Water Efficient Landscape Ordinance]. In this way the application of the ordinance to properties landscaped before the ordinance takes effect and those landscaped afterwards will be indicated.

Proposed section 493.1 is confusing. For discussion, it is necessary to quote section 493.1 below in its entirety. It provides:

> **§493.1. Irrigation Audit, Irrigation Survey and Irrigation Water Use Analysis.**
>
> (a) For all existing landscapes installed before January 1, 2010 with a dedicated or mixed-use water meter that are one acre or more, including golf courses, green belts, common areas, multifamily housing, schools, businesses, parks, cemeteries and publicly owned landscapes, the local agency shall administer programs that may include, but not be limited to irrigation water use analyses, irrigation surveys and irrigation audits to meet the existing landscape Maximum Applied Water Allowance.
>
> (1) For all existing landscapes installed before January 1, 2010 without a meter that are one acre or more, the local agency shall administer programs that may include, but not be limited to irrigation surveys and irrigation audits to meet the existing landscape Maximum Applied Water Allowance.
>
> (b) Maximum Applied Water Allowance for existing landscapes shall be calculated as: MAWA = (0.8)(ETo)(LA)(0.62).
>
> (c) The audit shall comply with the *Irrigation Association Certified Landscape Irrigation Auditor Training Manual* (2004) or the most current edition.

> (d) All landscape irrigation audits shall be conducted by a certified landscape irrigation auditor.

The first clarity problem is caused by the organization of the regulation. The properties described in paragraph (a)(1), are not a subset of the properties in subdivision (a). These two groups of properties together comprise all of the properties subject to section 493.1. Common characteristics of both groups are that (1) the landscaping was installed prior to January 1, 2010 and (2) the size is one acre or more. They differ in that the properties described in (a) have a water meter while the properties described in (a)(1) do not have a meter. What cannot be easily determined is whether the properties in (a)(1), are in all other respects the same as the properties described in (a), as suggested by the placement of this paragraph under subdivision (a); or whether the properties described in (a)(1) are a broader group, as suggested by the fact that the nine examples of properties subject to (a) have not been included in (a)(1). The examples seem to serve a limiting role, explaining the proper application of subdivision (a). Without the examples, and with the introductory words "all existing properties," paragraph (a)(1) probably applies to a much broader class of properties than (a). On the other hand, it may be that the properties all have the same characteristics, with the only difference being the presence or absence of a water meter. The regulation must be reorganized with a proper hierarchy, perhaps by making paragraph (a)(1) into a new subdivision (b), or by creating two separate sections. Common language can be used to describe two groups to the extent they have the same characteristics, but where most of the words are the same and some are different, the usual implication is that the difference is intended to convey a different meaning or application. The absolute language of subdivision (c) should also be clarified because it was written when the requirement for an irrigation audit would have applied to all properties, and it was not made conditional when the other program options were added to subdivision (a). When the rule has been clarified, the Department must also update the final statement of reasons to explain the purpose and provide the rationale as described in CCR, title 1, section 10, subdivision (b).

B) Who Can Sign Plans?
The landscape design plan, the irrigation design plan, and the grading design plan [sections 492.6(b)(13), 492.7(b)(7), and 492.8] all call for

> . . . the signature of a licensed landscape architect, certified irrigation designer, licensed landscape contractor or any other applicable landscape professional, person, licensed or unlicensed, as listed in the Business and Professions Code, California Code of Regulations, or Food and Agriculture [sic][1] Code.

The initial statement of reasons ("ISR") does not discuss the signing requirements. As originally proposed, the rule would have required the signature or stamp of one of the first three licensed persons listed above. The final statement of reasons ("FSR") does discuss the reason for the expansion – "to accommodate the wide variety of professionals who can prepare a landscape design plan." Apparently some restriction is contemplated here, but it is wide open if the language "any other . . . person . . ." is given literal interpretation. A general reference to the codes doesn't specify any common set of capabilities. We don't know how wide a variety the

[1] Food and Agricultural Code

Department is contemplating here, but the proposed language is going to require further clarification to identify the classes of licensees that that have the requisite knowledge and skills to endorse these plans.

C) Draft Version of Manual
The *Irrigation Association Certified Landscape Irrigation Auditor Training Manual* (2004) mentioned above in proposed section 493.1, subdivision (c), will present clarity issues when local agencies attempt to apply the guidelines as a regulatory standard. On page 161, the manual indicates that the recommended audit guidelines:

> are in **DRAFT** form and are meant to act as a set of Guidelines only – NOT as a set of Regulations or Standards. They are currently under review by the Auditor Sub-Committee of the Certification Board and are to be considered as minimum GUIDELINES only. (Emphasis in original.)

We do not know if the Irrigation Association has since finalized its guidelines in an updated version, or if the 2004 version is the most current. While it is clear that the Department intends that the manual to have regulatory effect, the net effect of these provisions is ambiguous, given the language of the manual itself.

D) Invasive Species
Section 492.6, subdivision (a)(1)(F) says "[i]nvasive species of plants shall be avoided especially near parks, buffers, greenbelts, water bodies, and open spaces because of their potential to cause harm to environmentally sensitive areas." A rule that says something "shall be avoided" appears to be a mandatory prohibition, but the language indicating that this is "especially" so in certain circumstances suggests it's not a true prohibition. The result is that the provision is ambiguous.

E) Standard Industry Practices
Section 492.6, subdivision (b), says "[t]he landscape design plan shall follow *standard industry practices* . . ." The same language is also used in the irrigation design plan requirements set forth in section 492.7, subdivision (b). The general concept here is not difficult to understand, but these provisions lack specificity that may prove essential when these provisions will serve as legal standards and a decision must be made concerning whether to allow the use of a practice that may be less than common. This would seem to be a particular problem in landscape design, a field that includes artistic expression and innovation. The statement of reasons does not discuss the standard practices and the record does not present evidence to describe or list them. It would be difficult for a commenter to offer suggestions concerning standards not specifically enumerated. Moreover, a requirement of use of standard practices may be a prescriptive regulation for which the record ought to include support as described in Government Code section 11340.1, subdivision (a).

2) INCORPORATION BY REFERENCE

An agency may incorporate provisions of another document into a regulation published in the CCR by including a reference to that document in the published regulation. CCR, title 1, section 20, specifies the necessary steps for clearly incorporating material by reference that will

satisfactorily address the public participation requirements of the APA. Proposed section 492.12, subdivision (a), and section 493.1, subdivision (c), both include provisions that require irrigation audits to comply with the "*Irrigation Association Certified Landscape Irrigation Auditor Training Manual* (2004 or most current edition)" which is incorporated by reference. The incorporation of this manual by reference presents several issues under the APA.

CCR, title 1, section 20, subdivision (b), specifies that material incorporated by reference shall be reviewed in accordance with the standards for regulations published in the CCR. As noted above in the discussion of clarity, the manual presented in the rulemaking record is designated as a draft version. If there is no better version and the Department intends that this version should be the rule for California, this matter should be addressed in the final statement of reasons. Also, section 20, subdivision (c), paragraph (5), requires the agency to specify which portions of the document are incorporated by reference. The designated manual contains 278 pages of material, and it appears that it may be possible to narrow down the breadth of the material incorporated by reference so that it includes only procedures and standards pertinent to performing an irrigation audit. It's likely that more specificity here would be helpful to auditors responsible for performing a compliant audit and those who must comply with the regulation.

Finally, the language incorporating the manual by reference indicates that the version shall be the 2004 or "most current" edition. This form of designation of the document, which would have the effect of bringing in changes to the manual without further public rulemaking is not acceptable under section 20, subdivision (c), paragraph (4).

3) NECESSITY

OAL reviews proposed regulations for compliance with the necessity standard pursuant to Government Code section 11349.1. The standard is defined in Government Code section 11349, subdivision (a):

> "Necessity" means 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.

Proposed section 492.17 says "[t]he adoption of the Model Water Efficient Landscape Ordinance by the state of California is not subject to review under the California Environmental Quality Act (CEQA)." Under the APA, a rulemaking agency has the obligation to prepare an ISR with an explanation of why a proposed regulation is needed. The Department's ISR says what the regulation says, but does not include any explanation of why this regulation is needed. The FSR says the rule addresses the non applicability of CEQA to the regulations for the reasons stated, however no reasons are stated there. Trying to discern the reason, we looked at the reference citations. One of them is Public Resources Code section 21080, which contains a list of exempt activities in subdivision (b), and provides for a negative declaration in subdivision (c). No specific provision from section 21080 has been identified for implementation. Perhaps this

regulation is the Department's negative declaration, but there is no indication of why it has been included in a regulation. Moreover, section 21080, subdivision (b)(15), suggests that local agencies would not have to follow CEQA when implementing a regulation imposed by a state agency, but the proposed regulation goes on to say that "[t]he local agency must comply with CEQA, as appropriate." None of this has been explained by the Department in the record.

4) RESPONSE TO COMMENTS

At its heart, the APA offers the public an opportunity to participate in state agency rulemaking by offering comments concerning proposed regulations and suggestions for changes to them. The Department conducted two public comment periods, received a great number of comments, and did a fine job of summarizing and organizing the comments it received. Government Code section 11346.9, subdivision (a)(3), calls for the preparation of a final statement of reasons that includes "an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change."

The Department's responses include both changes to the regulations and rejection of comments, and for the most part, they are sufficient to meet the requirements of the APA. In some instances, however, the Department rejected comments on the basis that they were not specifically directed at the proposed action. Presumably the Department is relying upon Government Code section 11346.9, subdivision (a)(3), which further explains the agency's obligation to respond to comments.

> This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action. . . . For the purposes of this paragraph, a comment is 'irrelevant' if it is not specifically directed at the agency's proposed action or the procedures followed by the agency in proposing or adopting the action.

In the course of rejecting comments we believe the Department has interpreted the scope of relevant comment too narrowly. The Legislature mandated an updating of the Model Water Efficient Ordinance [CCR, title 23, sections 490 through 495] in order to promote the efficient use of water in landscaping. The public notice announcing the initiation of the rulemaking proceeding included an invitation to the public to offer alternatives to the proposed regulations, and of course, at the end of the proceeding the APA requires an agency to make a determination that it has selected the least burdensome alternative sufficient to effectively achieve its purposes [Govt. Code section 11346.9 (a)(4).] Surely a commenter's suggestion to change one of the rules proposed in the model ordinance or use another method to better achieve the desired purpose is relevant. A number of the Department's responses have the general form as follows:

> Comments [description of a comment or group of comments] are general objections directed at the proposed regulation. The [subject of the comments] is part of the existing regulation. The applicability remains the same.

In some instances, responses that begin with this format also include reasons for rejection of suggestions, or mention of changes to the regulations made in response to the comments, and

these are sufficient. On the other hand, some do not, and fall short of the requirement of Government Code section 11346.9, subdivision (a)(3). Some examples will be helpful:

A) Response to comment 34 (FSR, pp. 47 – 48)
The commenter had suggested that an exemption for landscapes of less than 2,500 square feet should be eliminated so that the model ordinance would have broader application and achieve greater water savings. The response, in part, is as follows:

> Accept in part and reject in part. Comments in disagreement with the applicability of the Model Ordinance to homeowner installed or provided residential landscape projects and the 2,500 square foot thresholds are general objections directed at the proposed regulation. The 2,500 square foot threshold is part of the existing regulation (California Code of Regulations, Title 23 Section 490-495). The applicability to homeowner installed or provided landscapes remains the same in the modified text of the proposed regulation but renumbered as Section 490.1 (c). However, the threshold was increased from 2,500 square foot to 5,000 square foot for homeowner installed or provided landscape projects only. Urban landscapes account for significant amounts (30-50 percent) of outdoor water use in California and the Department supports provisions targeting this sector. Provisions for new construction landscape projects and rehabilitated landscape projects by public agencies and private developers etc. remain the same but were slightly modified and renumbered as section 490.1.

The Department's response indicates rejection of the comment and even describes a change that will have an opposite effect, but it does not provide a reason for the rejection, apart from the idea that the current threshold is 2,500 square feet and that the Department did not propose to reduce it. Indeed, the fact that the threshold for homeowner installed landscaping was increased from the originally proposed 2,500 square feet to 5,000 square feet undercuts the notion that the 2,500 square foot threshold could not have been changed in the opposite direction. The responses to comments that have been numbered 42, 48, 56, 44 (FSR, p. 48) and 45, 50, and 54 (FSR, pp. 49 - 50) present essentially the same answer and likewise fall short of providing an adequate response for rejection of these comments.

B) Response to comment 67 (FSR, p. 66)
A commenter proffered a definition of the term *controller.* The response is as follows:

> Reject. This definition [term] is part of the existing regulation (California Code of Regulations, Title 23 Section 490 (d)). There is no change to the definition which is renumbered as Section 491 (i).

The response indicates the Department decided not to change the definition as suggested by the commenter, but it does not indicate the reason. The responses to other rejected comments suggesting new and different definitions of terms found in the regulations that have been numbered 44, 67 (FSR, p. 64); 50, 67, 57, 44, 74, 114 (FSR, p. 65); 20, 67, 44 (FSR, p. 66); 44, 85, 44, 163 (FSR, p. 67); 150, 44, 25 (FSR, p. 68); 44, 67, 85 (FSR, p. 75); 44, 85 (FSR, p. 76); and 44, 59, 79 (FSR, p. 77) all follow the same pattern and are inadequate for the same reason. As in the case of comments addressing the minimum size of a lot subject to these regulations, the

fact that the Department did make changes to some of the definitions in response to comments belies the notion that the unchanged definitions were beyond the realm of relevant comment. The Department must provide reasons for rejecting the definitions in the FSR.

5) ERRORS IN THE TEXT

The proposed text of the regulations includes some errors. They include mistaken citations and incorrect display of changes with respect to the existing regulations. None of the errors presents a significant substantive issue with regard to the notice that was provided to the public or impairs the adequacy of the Department's rulemaking proceeding, but they must nevertheless be corrected prior to the time the regulations can be filed with the Secretary of State and published in the CCR.

CONCLUSION

For the foregoing reasons, OAL disapproved the Department's update of the model water efficient landscape ordinance.

Date: April 1, 2009

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