State of California
Office of Administrative Law

In re:

California Department of Transportation

Regulatory Action: Title 21 California Code of Regulations

Adopt Sections: 1412.1, 1412.2, 1412.3, 1412.4, 1412.5, 1412.6, 1412.7, 1412.8, 1412.9

DECISION OF DISAPPROVAL OF REGULATORY ACTION

Government Code Section 11349.3

OAL File No. 2009-0323-01 S

DECISION SUMMARY

On March 23, 2009, the California Department of Transportation ("Department") submitted to the Office of Administrative Law ("OAL") the proposed adoption of sections 1412.1, 1412.2, 1412.3, 1412.4, 1412.5, 1412.6, 1412.7, 1412.8, and 1412.9 for inclusion into Chapter 8 of Division 2 of Title 21 of the California Code of Regulations ("CCR") regarding broadband facility installation state right-of-way encroachment permits.

On May 1, 2009, OAL notified the Department that OAL disapproved the proposed amended regulation for failure to comply with specified standards and procedures of the California Administrative Procedures Act ("APA"). The reasons for the disapproval are summarized below:

A. the proposed regulation fails to comply with the necessity standard of Government Code section 11349.1(a)(1)[1] and 1 CCR section 10(b);

B. the proposed regulation fails to comply with the clarity standard of section 11349.1(a)(3) and 1 CCR section 16(a);

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

C. the proposed regulation fails to comply with the consistency standard of section 11349.1(a)(4); and

D. the agency failed to comply with the APA procedural requirements regarding:

(1) the contents of the rulemaking file pursuant to section 11347.3(b)(7);

(2) the contents of the Final Statement of Reasons pursuant to section 11346.9(a)(4); and

(3) the identification of Authority and Reference Citations pursuant to section 11346.2(a)(2) and 1 CCR section 14(d).

All APA issues must be resolved prior to OAL approval of any resubmission.

BACKGROUND

In 2006, the Governor issued Executive Order ("EO") S-23-06, *Twenty-First Century Government: Expanding Broadband Access and Usage in California (Revised)*. The EO found, among other things, that California is at the forefront of the Internet revolution in terms of e-commerce, networking, telecommunications, entertainment, broadcasting, and computer software and hardware businesses, but that to continue to be a world-class leader, California must adopt next generation policies and practices that spur on further broadband innovation. The EO further found that State action is needed to continue investment in, stimulate adoption of, and remove further barriers to the development of world-class broadband networks, and that it is an executive priority to promote widespread access to, adoption of, and new applications for broadband networks and advanced communications services.

The EO resolved, among other things, to promote and encourage broadband access by limiting charges to broadband providers for state right-of-way ("ROW") usage to the actual costs incurred by the state. The EO resolved that the Business Transportation and Housing Agency ("Agency") shall lead a statewide effort to streamline ROW permitting, and that state agencies granting ROW access shall adopt policies to standardize and expedite the processing of broadband providers' ROW access applications. The EO also resolved that the Agency shall direct development and use of an interagency best practices guide for resolution of ROW disputes between state agencies and broadband providers, and that the dispute resolution process shall be designed in a manner that promotes broadband access, adoption, and applications.

California Streets and Highways Code, Division 1, Chapter 3, Articles 1 and 2, commencing with section 660, contains provisions governing state ROW encroachments, including provisions related to encroachment permit applications, fees, approval and denial timelines, appeals, and facility relocation costs, among many other

provisions. The proposed rulemaking action implements EO S-23-06 and provisions of Chapter 3, Division 1, of the California Streets and Highways Code.

DISCUSSION

Any regulation amended or 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 regulatory actions for compliance with the standards for administrative regulations in section 11349.1. Generally, to satisfy the standards, a 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 meaningful public opportunity to comment on rules and regulations before they become effective.

A. NECESSITY

OAL must review regulations for compliance with the necessity standard of the APA, in accordance with section 11349.1(a)(1). Section 11349(a) provides that "necessity" means that the record of the rulemaking proceeding demonstrates by substantial evidence the need for the 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. Necessity is explained primarily in the agency's Initial Statement of Reasons ("ISR"). Section 11346.2(b)(1) requires that the ISR include a statement of the specific purpose of each adoption and the rationale for the determination by the agency that each adoption is reasonably necessary to carry out the purpose for which it is proposed. Title 1 CCR section 10(b) requires that the rulemaking record include a statement of the specific purpose of each adoption, amendment, or repeal and information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.

In the ISR for this rulemaking action, the rationale for seven of the nine proposed regulations is explained by the agency using the same paragraph.[2] This paragraph was used to explain the rationale for these seven proposed regulations whether the regulation was a collection of definitions, or described the application process, or listed the mandatory and discretionary reasons for permit denials, or discussed permit denial

[2] The paragraph states: "The proposed regulation will establish guidelines for the permitting of broadband facility installation in the State highway ROW, as well as a dispute resolution process for permit denials. The regulation is necessary to address Executive Order S-23-06, which intends to enhance access and adoption of broadband in California by streamlining and expediting ROW permitting and developing a dispute resolution process for permit denials."

processes, informal dispute resolution, reconsideration, or formal appeals. In an eighth regulation, the agency uses the same paragraph with the addition of one sentence specific to that regulation.

The ISR also uses the same paragraph regarding conditions for denials of permits to describe the purposes of six different regulations (sections 1412.3, 1412.5, 1412.6, 1412.7, 1412.8, and 1412.9).[3]

Neither the ISR, nor the rulemaking file generally, specifies the purposes of each regulation or gives the rationale for the agency's determination that the adopted language is necessary to carry out the stated purposes. For example, no purpose or rationale is stated for defining the terms listed in section 1412.1 the way they are proposed to be defined. No purpose or rationale is stated for the mandatory reasons for permit denial or for the discretionary reasons listed in section 1412.3. The governing statute requires only one dispute resolution proceeding [Department Director formal appeal, Streets and Highways Code Section 671.5(c)], however, no purpose or rationale is given for establishing three additional processes in sections 1412.6 – 1412.8. No purpose or rationale is stated for the various 15, 10, and 5 day appeal and/or response timelines proposed in connection with the various dispute resolution alternatives. No purpose or rationale is stated for selecting the composition of the Broadband Permit Dispute Resolution Committee which will make decision recommendations to the Department's Director under section 1412.8.

The Final Statement of Reasons (FSR) does not supplement or update any of the information in the ISR as permitted by section 11346.9(a)(1), but provides only that: "There are no changes to the Initial Statement of Reasons."

B. CLARITY

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to 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." Title 1 CCR section 16 states in pertinent 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:

[3] The paragraph states: "Streets and Highways Code Section 671.5 authorizes the Department to approve or deny an encroachment permit application within 60 calendar days of receiving a completed application form, as determined by the Department. The proposed regulation will institute conditions for denial of broadband facility installation and use request application."

> (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
> >
> > (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; ...

As discussed below, OAL determined that several of the proposed regulatory provisions did not satisfy the "clarity" standard.

(1) Proposed Section 1412.2. A regulation that relates only to the internal management of a state agency is not subject to the APA pursuant to section 11340.9(d). Proposed section 1412.2 provides that: "All encroachment permits for broadband facility installation shall be issued by the DOT through its District Offices pursuant to the internal management procedures set forth in the Encroachment Permits Manual."

It is unclear what is meant by the phrase "issued [by the Department] pursuant to the internal management procedures set forth in the Encroachment Permits Manual," because the "internal management" exception to the APA is extremely narrow and must, at most, directly affect only the employees of the issuing agency. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244; *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1. However, Chapters One and Two of the manual contain the following provisions relating to the issuance of permits that apply to the affected public generally. Section 101 of the Manual specifies that an encroachment permit creates a contractual relationship and that permits are not not assignable or transferrable to another party. Encroachment permits shall not be issued for projects costing more than one million dollars and funded by local or private entities without the district office receiving a copy of the fully executed cooperative or highway improvement agreement. (Sections 108.1 and 202.3.) Section 202.1B is somewhat more specific than proposed regulation section 1412.4 regarding how actual costs are computed for purposes of determining the encroachment permit processing fee. (See also section 207.4.) For certain underground encroachment permits to be issued, the applicant must supply a permit from the Reclamation Board. (Section 202.1.) Section 202.1G requires that some permits may not be issued without environmental clearances and refers to Chapter 4. Some permits require a Permit Engineering Evaluation Report (Section 202.2A) which involves specified procedures. (Table 2.4.) The Manual states that permits are issued with a set of Standard General Provisions (such as the requirement for liability insurance) and some with a set of Standard Special Provisions. (Sections 203.1 - 203.3 and Appendix K.) Section 206.2 specifies a number of responsibilities the applicant has immediately after permit issuance.

Thus, it is unclear what the Department intends the phrase "internal management procedures" to mean, because those procedures that affect only employees of the

Department are not identified or explained in the ISR. Furthermore, as written, it is unclear, without additional clarifying language, how permits can be issued to the public pursuant to internal management procedures

(2) Proposed Sections 1412.1(d), 1412.7, and 1412.8. In proposed section 1412.1(d), the term "dispute letter" is defined as a letter sent by the broadband applicant via certified mail to the District Director. This subsection is unclear when read together with subsequent regulations which state that the dispute letter (section 1412.7) or dispute letter presumably attached to the dispute resolution package (section 1412.8) may be sent via electronic and/or certified mail to the District or Department Director, respectively. Although the Department addresses this internal inconsistency in the FSR summary and response to comments [number 27] by saying that the applicant must send the dispute letter by certified mail but may also send it by email, the actual text has not been changed to reconcile the conflict. An applicant, for example, who relied on section 1412.7, might use only email during the 15-day period he/she is allowed to request District Director reconsideration and be precluded from reconsideration by failing to have also sent a dispute letter via certified mail.

(3) Proposed Sections 1412.5 and 1412.6. Under section 1412.5, the Department may send its denial letter to an applicant via email or certified mail. The Department has indicated in the FSR summary and response to comments [numbers 22 and 23] that it will send denial letters by both email and certified mail. Under section 1412.6, an applicant has 15 days from receipt of the denial letter to ask for a formal appeal at the District Office Director level, assuming the applicant waives an informal meeting. The applicant initiates this process by filing a dispute resolution package with the District Director. Because the denial letter may and will be sent by both certified and electronic mail, it is unclear whether an applicant's 15 days to file a dispute resolution package begins to run from receipt of the email or the certified denial letter.

(4) Proposed Section 1412.8. This section provides that the applicant shall reimburse the state for up to 50 percent of the administrative cost of conducting the dispute resolution. The next sentence in the regulation, however, provides that the applicant will be billed and shall reimburse the state 50 percent of the administrative cost of conducting the dispute resolution. The governing statute gives the agency discretion to require the applicant to pay not more than 50 percent of the cost of the appeal. (Streets and Highways Code Section 671.5.) The regulation is unclear as to whether the reimbursement is some percentage between zero and 50 percent of the cost of conducting the appeal or the maximum allowed 50 percent of that cost, and, if the former, what criteria will be used by the Department to determine the actual amount imposed.

C. CONSISTENCY

Section 11349.1(a)(4) requires that OAL review all regulations for compliance with the consistency standard. Section 11349(d) defines "consistency" to mean "being in harmony with, and not in conflict with or contradictory to, existing statutes, court

decisions, or other provisions of law." In this rulemaking, proposed section 1412.1(a) conflicts with Government Code Section 11340.5(a).

In section 1412.1(a), the agency proposes to define the term "broadband" as follows:

> "Broadband" is a data transmission with speeds exceeding 200 kilobits per second (Kbps), or 200,000 bits per second, in at least one direction (downstream or upstream). Any revisions to this definition by the Federal Communications Commission shall change the definition used herein accordingly.

Government Code Section 11340.5(a) provides:

> No state agency shall issue, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Defining the term "broadband" prospectively to include any subsequent Federal Communications Commission (FCC) versions of this term, is inconsistent with section 11340.5(a) because the proposed regulation would allow for the creation of a new definition without adopting it pursuant to the APA and filing it with the Secretary of State.

D. PROCEDURAL REQUIREMENTS OF THE APA.

(1) Incomplete Rulemaking File. Government Code Section 11347.3(b)(7).

The ISR identifies the Encroachment Permits Manual as a technical, theoretical and/or empirical study, report, or document that the Department used in promulgating this regulation. Government Code Section 11347.3(b)(7) requires that the rulemaking file shall include all data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption of a regulation. The rulemaking file in this action does not contain the Encroachment Permits Manual or those chapters or portions of it which the agency relied upon in the development of the proposed regulations.

(2) Incomplete Final Statement of Reasons. Government Code Section 11346.9(a)(4).

Section 11346.9(a)(4) requires that the agency's FSR contain a determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation. The only statement in the FSR relevant to this determination is the following sentence: "There are no changes to the Initial Statement of Reasons." The only statement in the

ISR relevant to this determination is the following sentence: "The Department has not identified any reasonable alternatives."

Subsequent to the publication of the Notice, the agency solicited public comments on the proposed regulations. Several commenters questioned whether an encroachment permit that involved a lane closure was an appropriate reason to support a discretionary denial of the permit application. See proposed section 1412.3, item 7. These commenters posed alternative language such as: "the service access requires a lane closure and the effects of the lane closure cannot be mitigated or properly managed" or "the service access requires a lane closure between the hours of 5 AM and 10 PM." Even assuming that the agency's statements in the ISR and FSR together mean, in essence, that the Department has [still] not identified any reasonable alternatives, the two statements contain no supporting information which explains why no alternative considered by the agency would be more effective or as effective and less burdensome to affected private persons than the adopted regulation as required by section 11346.9(a)(4).

(3) Insufficient Authority and Reference Citations. Government Code Section 11346.2(a)(2).

Section 11346.2(a)(2) and Title 1 CCR section 14(d) require that the text of the regulations include a notation or citation following each section of the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or laws being implemented, interpreted, or made specific by that section of the CCR.

Proposed section 1412.9 includes no Authority or Reference Citations following the section.

All citations following all other proposed regulations reference Section 660 et seq., Streets and Highways Code. The phrase "Sections 660 et seq." fails to list the specific statutes being implemented, interpreted, or made specific by each regulation.

CONCLUSION

For the foregoing reasons, OAL disapproves the above-referenced rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-4237.

Date: May 11, 2009

Dale Mentink
Senior Staff Counsel

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Director

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