

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:

CALIFORNIA HIGHWAY PATROL

DECISION OF DISAPPROVAL
OF REGULATORY ACTION
(Gov. Code, sec. 11349.3)

REGULATORY ACTION:
Title 13, California Code of
Regulations
ADOPT SECTION 1231.2
AMEND SECTIONS 1200, 1217,
1221, 1222 AND 1232

OAL File No. 2011-0105-01S

SUMMARY OF REGULATORY ACTION

The California Highway Patrol (CHP) proposed to adopt section 1231.2, amend sections 1200, 1217, 1221, 1222 and 1232 of title 13 of the California Code of Regulations pertaining to Pupil Activity Buses (PAB). On January 5, 2011, the CHP submitted the proposed regulatory action to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On February 17, 2011, OAL disapproved the proposed regulatory action. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above referenced regulatory action for the following reasons: failure to comply with the clarity and necessity standards of Government Code section 11349; a defective initial statement of reasons; failure to comply with the requirements for incorporation by reference.

DISCUSSION

The adoption of regulations by the CHP must satisfy requirements established by the part of the 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 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. NECESSITY/DEFECTIVE INITIAL STATEMENT OF REASONS

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 submitted with this proposed regulatory action contained only a very general explanation of the need for the changes proposed by this rulemaking. The initial statement of reasons is required to include an explanation of the need for each new provision or change to the existing provisions proposed in the initial text made available to the public with the 45 day notice. The CHP proposed an inspection fee of PABs in the amount of \$90. The stated necessity for this inspection fee in the initial statement of reasons is, "Subsection (c) is proposed to require an inspection fee of ninety dollars (\$90) for each PAB to be inspected." Pursuant to the initial statement of reasons the California Vehicle Code section 12517.45(a)(2)(B) allows the CHP to charge a fee. The statute states that the CHP may charge a "...reasonable fee sufficient to cover the costs incurred...." The necessity in the initial statement of reasons establishes that the CHP shall charge a fee, but it fails to explain why the specific amount of \$90 is required by the CHP and how that amount covers the costs incurred by the agency. A revised statement of reasons providing the necessity missing from the initial statement of reasons should be made available to the public for at least 15 days prior to resubmission to OAL pursuant to Government Code section 11347.1.

2. CLARITY

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."

Subsection (c) of section 1231.2 fails to comply with the clarity standard. The CHP initially proposed a \$90 dollar inspection fee for PABs. Following a 15-day change the CHP attempted to change the fee to \$75 dollars. However, the change to the text created a clarity problem. It states, "The fee for inspection of a PAB is ninety dollars (~~90~~75)." It is unclear from this sentence whether the fee is \$90 or \$75 dollars.

Any change made to the regulations to address the clarity concern above must be made available to the public pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.

3. INCORRECT PROCEDURE

(1) STD. 399: Government Code section 11347.3, subdivision (b)(5), requires that the rulemaking file contain the estimate, together with the supporting data and calculations, required by Government Code section 11346.5, subdivision (a)(6). Section 11346.5, subdivision (a)(6) requires, in part, the estimate of the cost to any state or local agency. This paragraph further defines "cost" as "additional [cost] ..., both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations." Government Code section 11357 requires the Department of Finance (Finance) to adopt instructions for

inclusion in the State Administrative Manual (SAM) prescribing the methods that each agency shall use in making the estimate required by section 11346.5, subdivision (a)(6).

For purposes of reporting this estimate and other information, Finance has developed, and requires regulatory agencies to use, the STD. 399 "Economic and Fiscal Impact Statement." (SAM Chapter 6600, commencing with section 6601.)

SAM section 6615 establishes when financial estimates contained in STD. 399 require the concurrence of Finance. Section 6615 provides in part:

6615 ESTIMATES WHICH REQUIRE DEPARTMENT OF FINANCE ACTION
(Revised and renumbered from 6660 on 03/09)

Subdivision (c) of Government Code Section 11357 specifically authorizes the DOF to "...review any estimate...for content including, but not limited to, the data and assumptions used in its preparation."

A state agency is not required in all instances to obtain the concurrence of the DOF in its estimate of the fiscal impact of its proposed regulation on governmental agencies. Such concurrence is required when the adoption, amendment, or repeal of a regulation results in local agency costs or savings, in state agency costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399 as follows:

- | | |
|----------------------------------|-------------------|
| A.1-Reimbursable Local Costs | B.1-State Costs |
| A.2-Non-Reimbursable Local Costs | B.2-State Savings |
| A.3-Local Savings | B.4-Other |
| A.6-Other | |

In addition, [Finance's] approval is required for the inclusion in any such estimate of any statement to the effect that reimbursement of local costs will be requested in a subsequent Governor's Budget, Section A.1 (b) on the STD. 399....

In the rulemaking record, the Fiscal Impact Statement part of the STD. 399 indicates in section A., regarding the Department's proposed regulatory action's "Fiscal Effect on Local Government":

1. Additional expenditures of approximately \$ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Section 17500 et seq. of the Government Code because this regulation:
 - e. Will be fully financed from the \$90 inspection fee authorized by Section 12517.45 of the California Vehicle Code.

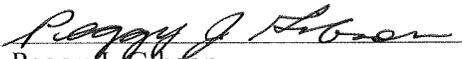
Pursuant to SAM section 6615, when a state agency indicates its proposed regulatory action will have a cost impact on any local government, then the STD. 399 is required to be submitted to Finance for review and a signature obtained from Finance indicating concurrence by Finance before submitting the STD. 399 as part of the rulemaking record for OAL's review. This did not occur. There is no signature from Finance on the CHP's STD. 399. Additionally, the rulemaking record did not contain supporting data and calculations as required by Government Code section 11346.5, subdivision (a)(6). Thus, the CHP failed to follow required APA procedures. Supporting data and calculations for the cost estimate must be added to the rulemaking record and a review and signature from Finance must be obtained and indicated on the STD. 399 before resubmitting these regulations to OAL.

- (2) In order to incorporate a document by reference, the agency must meet the specific conditions listed in title 1, section 20(c)(1), of the California Code of Regulations. The conditions described in (c)(1) require the Final Statement of Reasons ("FSR") to include specific information regarding the document being incorporated by reference. However, the FSR in the rulemaking record contains no statement or description to indicate that it would be cumbersome, unduly expensive, or otherwise impractical to publish the "Youth Bus, Pupil Activity Bus or General Public Paratransit Vehicle (GPPV) Inspection Application, CHP 294D" or the "Society of Automotive Engineers (SAE) Standard J687c" in the California Code of Regulations, as required by title 1, section 20(c)(1), of the California Code of Regulations.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. Please also note that there are some discrepancies in the proposed regulation text from the existing California Code of Regulations. If you have any questions, please contact me at (916) 323-6805.

Date: February 24, 2011


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