

**State of California  
Office of Administrative Law**

**In re:**  
**Department of Water Resources**

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

**Adopt sections: 597, 597.1, 597.2, 597.3,  
597.4**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL File No. 2011-1219-04C**

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**SUMMARY OF REGULATORY ACTION**

The Department of Water Resources (Department) submitted a timely Certificate of Compliance action, which would have permanently adopted five sections and created a new article for agricultural water measurement in title 23 of the California Code of Regulations (CCR). These regulations were adopted as an emergency in OAL File No. 2011-0624-01E. The purpose of the regulations was to provide a range of options that agricultural water suppliers could use or implement to comply with the water measurement requirement in Water Code section 10608.48(b)(1).

**DECISION**

On February 2, 2012, the Office of Administrative Law (OAL) disapproved the above-referenced regulatory action because the proposed regulations failed to comply with the clarity, consistency, and necessity standards contained in Government Code section 11349.1, the agency failed to adequately summarize and respond to each comment made regarding the proposed action, and the rulemaking file failed to contain all required documents or required documents included in the file were defective.

**DISCUSSION**

Due to the numerous issues in this decision, upon resubmission of this matter, OAL reserves the right to conduct a complete review pursuant to the Administrative Procedure Act (APA) 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. All APA issues must be resolved prior to OAL's approval.

Regulations adopted, amended or repealed by the Department must be adopted pursuant to the APA. Any regulatory act a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the APA unless statutorily exempt or excluded. (Gov. Code, sec. 11346.) As no exemption applies in this instance, OAL must review this

regulatory action for compliance with both the procedural and substantive requirements of the APA. (Gov. Code, sec. 11349.1.)

A. SECTION 597.3(b)(1)(B) FAILS THE CLARITY STANDARD BECAUSE IT IS NOT CONSISTENT WITH THE STATED EFFECT OF THE REGULATION.

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to the persons who must comply with them. (Gov. Code, sec. 11340(b).) Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the “clarity” standard. Government Code 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 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:

...

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

In this rulemaking action, OAL determined that proposed section 597.3(b)(1)(B) did not satisfy the clarity standard because the language of the regulation conflicts with the Department’s description of the effect of the regulation. Section 597.3(b)(1)(B) provides:

(1) An agricultural water supplier may measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers using one of the measurement options described in §597.3(a) if the downstream individual customer’s delivery points meet either of the following conditions:

...

(B) The measurement options in §597.3(a) cannot be met, as approved by an engineer, by installing a commercially available measurement device, that is comparable in cost to other measurement devices commonly in use, at each individual customer’s delivery points because small differentials in water level or large fluctuations in flow rate or velocity occur during the delivery season at those delivery points. When a water measurement device becomes commercially available, that is comparable in cost to other measurement devices commonly in use, and that can meet the measurement options in §597.3(a)(2) at the individual customer’s delivery points, an agricultural water supplier shall include in its Agricultural Water Management Plan a schedule, budget and finance plan to measure water at the individual customer delivery points in compliance with §597.3(a) of this Article. [Emphasis added.]

The exemption from having to install a measurement device if a device is not “commercially available” and “comparable in cost to other measurement devices commonly in use,” created by section 597.3(b)(1)(B), appears to be based on the cost effectiveness of the measurement device. Yet, the Department states in its response to comments that cost effectiveness is not allowed to be a condition of the water measurement requirement of Water Code section 10608.48(b)(1). In response to one comment, the Department states, “The ‘cost-effectiveness’ condition was however left out from the water measurement requirement in section 10608.48(b). ...” In another response, the Department states, “As such, the local cost effectiveness does not apply to the critical [efficient water management practice of] water measurement.” The exemption created by section 597.3(b)(1)(B) appears to be based on no other reason than placing a condition of cost effectiveness on water devices. Since the language of the regulation conflicts with the Department’s stated effect of it, section 597.3(b)(1)(B) fails to meet the clarity standard. To resolve this issue, the Department needs to either modify the text of section 597.3(b)(1)(B) in a 15-day notice of modified text so that section 597.3(b)(1)(B) is consistent with the stated effect of the regulations, i.e., no exemption to water measurement devices may be based on cost effectiveness, or provide a different legal analysis in the rulemaking file that supports the notion that cost effectiveness is allowed as a condition to the water measurement requirement of Water Code section 10608.48(b)(1).

B. THE DEPARTMENT FAILED TO PROVIDE A SUFFICIENT RESPONSE TO COMMENTS REGARDING THE REINSTATEMENT OF SUBDIVISION (i) OF SECTION 597.1, WHICH ITSELF APPEARS TO FAIL THE CONSISTENCY STANDARD.

Section 597.1(i) provides an exemption to the water measurement regulations to certain water suppliers who are subject to submitting water conservation plans to the U.S. Bureau of Reclamations. This exemption was very controversial in this action, and the Department’s initial response to comments about it was to remove subdivision (i) of section 597.1 from the regulation in a first 15-day modification to the regulation text. The reason given for removing the exemption was based on the Department’s own assessment that the exemption exceeded the Department’s statutory authority. However, the Department reinstated the subdivision (i) exemption in a second 15-day modification to the regulation text. Section 597.1(i) provides:

(i) An agricultural water supplier subject to Central Valley Project Improvement Act (CVPIA) (Public Law 102-575) or the Reclamation Reform Act (RRA) of 1982 shall be deemed in compliance with this article if all irrigation water delivered by that water supplier to each customer is delivered through measurement devices that meet the United States Bureau of Reclamation accuracy standards defined in Reclamation’s Conservation and Efficiency Criteria Standards of 2008.

In response to comments objecting to the reinstatement of subdivision (i), the Department stated:

The California Water Commission (CWC) considered all arguments and voted to reinsert the CVP provision indicating that section 597.1(i) of regulation is a minimum requirement for federal water suppliers. ...

This response is a conclusory statement that fails to provide the reasons for the subdivision (i) exemption, and also fails to respond to the legal arguments raised by the commenter that indicate the subdivision (i) exemption is inconsistent with the Water Code. The commenter asserts that the subdivision (i) exemption is inconsistent with the Water Code with the following statement:

[T]he Department and Commission lack statutory authority to approve section 597.1(i) as part of the regulation. Although the statute exempts certain contractors of the Bureau of Reclamation from having to submit agricultural water management plans to report compliance, see Water Code §§ 10608.48(f), 10828, there is no similar exemption from the requirements for all agricultural water suppliers to measure the volume of customers and implement volumetric pricing, see Water Code § 10608.48(b). The statute requires all agricultural water suppliers to implement these two critical water management practices, and the statute provides no exemptions from these requirements, whether based on cost-effectiveness, or for Bureau of Reclamation contractors. Water Code §10608.48(b).

However, Section 597.1(i) effectively exempts certain contractors of the U.S. Bureau of Reclamation requirements of the regulation, including the requirement to verify the accuracy of measurement devices. ...

The Department's response is inadequate. Also, it appears from the language in subdivision (f) of section 10608.48 of the Water Code that water suppliers who contract with the Bureau of Reclamation are exempt from complying with subdivisions (d) and (e) of section 10608.48 of the Water Code, but are not exempt from subdivisions (b) and (c) of section 10608.48 of the Water Code.<sup>1</sup>

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<sup>1</sup> Water Code section 10608.48 provides in pertinent part:

- (a) On or before July 31, 2012, an agricultural water supplier shall implement efficient water management practices pursuant to subdivisions (b) and (c).
- (b) Agricultural water suppliers shall implement all of the following critical efficient management practices:
  - (1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to implement paragraph (2).
  - (2) Adopt a pricing structure for water customers based at least in part on quantity delivered.
- (c) Agricultural water suppliers shall implement additional efficient management practices, including, but not limited to, practices to accomplish all of the following, if the measures are locally cost effective and technically feasible:
  - ...
  - (d) Agricultural water suppliers shall include in the agricultural water management plans required pursuant to Part 2.8 (commencing with Section 10800) a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report, and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future. If an agricultural water supplier determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination.
  - (e) The data shall be reported using a standardized form developed pursuant to Section 10608.52.
- (f) An agricultural water supplier may meet the requirements of subdivisions (d) and (e) by submitting to the department a water conservation plan submitted to the United States Bureau of Reclamation that meets the requirements described in Section 10828.
- ...

Subdivision (f) of section 10608.48 of the Water Code provides:

(f) An agricultural water supplier may meet the requirements of subdivisions (d) and (e) by submitting to the department a water conservation plan submitted to the United States Bureau of Reclamation that meets the requirements described in Section 10828.

This limited exemption in subdivision (f) would make the exemption in section 597.1(i) inconsistent with the Water Code as it purports to also exempt Bureau of Reclamation contracted water suppliers from subdivision (b) of section 10608.48 of the Water Code. This would violate the “consistency” standard of the APA. (Gov. Code, sec. 11349.1(a)(4).) “Consistency” as defined by Government Code section 11349(d) means a regulation must be “...in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” In resubmitting this action, the Department should either remove section 597(i) and provide an explanation for its removal in the Final Statement of Reasons, or provide legal analysis in the rulemaking file and in response to the above-quoted comment that explains how section 597(i) is in harmony with the Water Code.

#### C. THE DEPARTMENT FAILED TO ESTABLISH SUFFICIENT NECESSITY IN THE 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, title 1, CCR, section 10(b) 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 the regulation were chosen to fill that need. (Gov. Code, sec. 11346.2(b)(1).)

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).) This information is essential in order to allow the public 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. For the most part, it describes "what" the regulations do, not "why" they are needed. The Initial Statement of Reasons fails to provide the public with the rationale for the determinations by the Department as to why the specific regulatory changes are needed to carry out the purpose for which they are proposed. This vital information should have been 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.

The following examples are statements from the Department's Initial Statement of Reasons that demonstrate the types of necessity issues to be addressed by the Department prior to its resubmission of this regulatory action. However, all of the regulatory provisions in this action need to be supported by adequate necessity and will have to be resolved prior to approval by OAL.

Example 1. The Department's Initial Statement of Reasons states:

Section 597.1 Applicability

This section provides the broad criteria for applicability of the proposed water measurement regulation. This section is necessary because it defines the broad criteria for applicability of this regulation and identifies those entities that are required to comply and those that are excluded. ...

...

b) Clarifies applicability to wholesale agricultural water suppliers, canal authorities, and entities delivering water through federal facilities.

c) Clarifies applicability to suppliers providing water to wildlife refuges.

...

f) Clarifies applicability to canal authorities and entities delivering water through federal facilities.

...

j) Gives an alternate compliance option for agricultural water suppliers subject to CVPIA [the federal Central Valley Project Improvement Act] and RRA [the federal Reclamation Reform Act] if all their water deliveries are measured in accordance to the US Bureau of Reclamation Conservation and Efficiency Criteria Standards.

(Initial Statement of Reasons, p. 2.)

Example 2. The Department's Initial Statement of Reasons states:

#### Section 597.3 Range of Options for Agricultural Water Measurement

This section is necessary because it provides a range of options for agricultural water measurement as required by Water Code §10608.48(i)(1); description of these measurement options is needed for the purpose of enabling agricultural water suppliers to comply with the measurement requirement in order to report their water deliveries and adopt a volumetric water pricing structure. Options take into account various field and water flow conditions and existing infrastructure. Water measurement device accuracy standards are set for the identified range of options.

The section also includes conditions under which certain option can be used and the associated type of documentation required from the agricultural water suppliers should they choose to use those options.

(Initial Statement of Reasons, p. 3.)

The above examples comprise about one-half of the Department's necessity statements in the Initial Statement of Reasons. The statements essentially explain "what" the regulations do, not "why" the specific regulatory provisions are necessary to effectuate the purpose of the statute that the regulation implements. Note that in j) under Example 1., the Department failed to provide necessity for the section 597.1(i) exemption, discussed above, the exemption that the Department removed and then reinstated. Note also in Example 2. that the Department failed to explain why cost effectiveness for section 597.3(b)(1)(B), discussed above, was factored into the regulation, when the Department states in the response to comments that cost effectiveness is not allowed to be a condition for the water measurement requirement of Water Code section 10608.48(b)(1).

It is statutorily mandated that the Department articulate its reasons for adopting the specific regulatory provisions for each section so that the public has an opportunity to comment on the process and the reasoning of the Department. The Department will need to introduce a statement of reasons into the rulemaking file that resolves the necessity issues by making the document available during a 15-day notice of availability pursuant to Government Code section 11347.1.

D. THE FINAL STATEMENT OF REASONS DOES NOT SUFFICIENTLY SUMMARIZE AND RESPOND TO SEVERAL COMMENTS SUBMITTED DURING THE PUBLIC COMMENT PERIODS.

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA currently requires that rulemaking agencies provide notice and at least a 45-day comment period prior to adoption of a proposed regulatory action. (Gov. Code, secs. 11346.4 and 11346.5). By requiring the state agency to summarize and respond in the record to comments received during the comment period, the Legislature has clearly indicated its intent that an agency account for all relevant comments received, and provide written evidence of its meaningful consideration of all timely, relevant input. Section 11346.9(a)(3) of the Government Code requires that the adopting agency prepare and submit to OAL a Final Statement of Reasons, which shall include:

A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reason for making no change. ...

Furthermore, where an agency makes substantial, but sufficiently-related changes to its original regulatory proposal and provides notice of the changes pursuant to Government Code section 11346.8(c), that statutory provision specifically includes the requirement:

(c) ... Any written comments received regarding the change must be responded to in the final statement of reasons required by [Government Code] Section 11346.9.

The Department failed to adequately include in its Final Statement of Reasons summaries and/or responses to the following public comments and to explain how the proposed regulation was changed to accommodate each objection or recommendation, or its reasons for making no change, pursuant to Government Code sections 11346.8(c) and 11346.9(a)(3).

1. Oral comment provided by Brad Mattson, Richvale Irrigation District, at the Department's August 24, 2011 public hearing. The Final Statement of Reasons has no summary or response to this comment.
2. Written comment provided by the National Resources Defense Council (NRDC), Pacific Institute, and Sierra Club California on September 6, 2011 (referenced as comment G14 in the Final Statement of Reasons). The summary to this comment fails to capture all of the issues raised by the NRDC and, therefore, the response fails to respond to all of the issues. Moreover, the response to this comment does not adequately address the cost effectiveness issue raised by the NRDC related to section 597.3(b)(1)(B).
3. Written comment provided by the NRDC on November 3, 2011 (referenced as comments G46, G47, and G48 in the Final Statement of Reasons). The summary to comment G46 is adequate, but the response fails to address the issues raised by NRDC. The summary and



responses to comments G47 and G48 should be expounded upon, as they are too succinct to tell whether the Department adequately considered these comments.

E. THE RULEMAKING FILE DOES NOT INCLUDE A COPY OF ALL OF THE REQUIRED DOCUMENTS OR DOCUMENTS THAT WERE INCLUDED WERE DEFECTIVE.

Government Code section 11347.3 requires certain documents be included in the rulemaking file. The Department failed to include the following documents, or the documents that were included were defective:

1. "... [W]ritten comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation." (Gov. Code, sec. 11347.3(b)(6).) The rulemaking file submitted by the Department did not include any of the written comments that were summarized and responded to in the Final Statement of Reasons. In order for OAL to complete the review of this action, the Department provided copies of these comments. The Department must include these comments in the rulemaking file upon resubmission of this action.
2. "All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation, ..." (Gov. Code, sec. 11347.3(b)(7).) The Department listed ten documents in the Initial Statement of Reasons as materials that they were relying upon in the adoption of these regulations, pursuant to Government Code section 11346.2(b)(2). The rulemaking file included a compact disk that contained ten electronic files representing the ten documents relied upon. However, one of the electronic files is corrupt and will not open for viewing. (This document is titled "2007 Census Data.") If the Department chooses to use an electronic method for including such documents in the rulemaking file, all of the electronic files contained on the compact disk need to be viewable.
3. "A transcript, recording, or minutes of any public hearing connected with the adoption, amendment, or repeal of the regulation." (Gov. Code, sec. 11347.3(b)(8). See also title 1, CCR, sec. 90.) In order for OAL to complete the review of this action, the Department provided draft minutes, erroneously captioned as "transcripts," for the hearings held in connection with this action on August 24, 2011 and September 8, 2011. These documents identified one oral comment provided at the Department's August 24, 2011 public hearing. The Department must include either a transcript, recording, or minutes for both public hearings in the rulemaking file upon resubmission of this action. These documents need to comply with title 1, CCR, section 90.
4. "The date on which the agency made the full text of the proposed regulation available to the public for 15 days prior to the adoption, amendment, or repeal of the regulation, if required to do so by subdivision (c) of Section 11346.8." (Gov. Code, sec. 11347.3(b)(9).) Title 1, CCR, section 44 implements Government Code sections 11346.8(c) and 11347.3(b)(9) and provides:

(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government

Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
- (2) all persons who submitted written comments at the public hearing; and
- (3) all persons whose comments were received by the agency during the public comment period; and
- (4) all persons who requested notification from the agency of the availability of such changes.

(b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period.

(c) If there were no persons in the categories listed in subsections (a)(1) through (a)(4), then the rulemaking record shall contain a confirming statement to that effect.

(d) Whether or not a mailing is required by subsection (a), the agency shall make the notice and text available to the public for at least 15 days at the location where the rulemaking record is maintained, and the confirming statement shall contain the beginning and ending dates for this public availability period.

Title 1, CCR, section 44(b) and (c) requires a statement in the rulemaking file that certifies the mailing criteria of section 44 have been met for any 15-day notices of modified text. The Department made two modifications to the original 45-day text, each requiring a 15-day notice of modified text, but the rulemaking file does not include the required mail certification statements. Upon resubmission of this action, the rulemaking file should include these two certification statements.

5. “An index or table of contents that identifies each item contained in the rulemaking file. ...” (Gov. Code, sec. 11347.3(b)(12).) The index to the rulemaking file should be revised to identify the location of the two sets of 15-day modified text and the updated informative digest. The index also needs to identify the location of the omitted written comments, the omitted transcript, recording or minutes, and the two omitted mail confirmation statements required by title 1, CCR, section 44.

#### F. THE FORM 400 AND THE ATTACHED REGULATION TEXT WERE DEFECTIVE.

Title 1, CCR, section 6 requires rulemaking agencies to complete the Form 400 for the submission of regulations to OAL for publication and/or for transmittal to the Secretary of State for filing. Section 6(b) specifies the required contents of the completed Form 400, including a requirement in section 6(b)(4) that the form specify “the beginning and ending dates of all public availability periods pursuant to section 44 of this Article and section 11347.1 of the Government Code; ...” These dates pertain to any 15-day period for public comment, and are to be entered in Box B.4. of the Form 400. The Department omitted the dates of the two 15-day notices for modified text in Box B.4. of the Form 400. On resubmission of this action, the dates of the two


15-day comment periods already held, as well as additional dates for any 15-day comment periods that result from this disapproval decision, should be entered in Box B.4. of the Form 400.

Additionally, title 1, CCR, section 8 sets forth the requirements for the “final text” of regulations submitted to OAL for filing with the Secretary of State. Section 8(b) provides, “The final text of the regulation shall use underline or italic to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations...” The Department originally submitted the version of the text that was adopted in the emergency action and made available during the 45-day comment period. All of the text was erroneously shown with underlining, as if it were all new text. It should have shown all of the emergency adopted text with no underlining. This version of the text also did not show modifications that were made to the text in the two 15-day text modifications, which should have been shown in underlining and strikeout to show changes to the emergency adopted text to comply with section 8. In order for OAL to complete the review of this action, the Department provided a version of the text that removed the underlining from the entire text, and just showed changes incorporated from the two 15-day text modifications in single underlining and single strikeout. When resubmitting this action, the Department needs to submit this version of the text for compliance with section 8.

### CONCLUSION

For the reasons set forth above, OAL disapproved this regulatory action. Please contact me at (916) 323-6809 if you have any questions.

Date: February 8, 2012



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