

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:

DEPARTMENT OF RESOURCES
RECYCLING AND RECOVERY

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

REGULATORY ACTION:
Title 14, California Code of
Regulations
ADOPT SECTIONS 18950, 18951,
18952, 18953, 18954, 18955,
18955.1, 18955.2, 18955.3, 18956,
18957, 18958

OAL File No. 2012-0224-03S

SUMMARY OF REGULATORY ACTION

The Department of Resources Recycling and Recovery (Department) proposed to adopt sections 18950, 18951, 18952, 18953, 18954, 18955, 18955.1, 18955.2, 18955.3, 18956, 18957, and 18958 in title 14 of the California Code of Regulations to implement, interpret, and make specific Assembly Bill 1343, Chapter 420, Statutes of 2010, establishing the Architectural Paint Recovery Program. On February 24, 2012, the Department submitted the proposed regulatory action to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On April 6, 2012, 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 failure to follow the required procedure, required documents included in the file were defective, the agency failed to summarize and/or respond to each comment made regarding the proposed action, and for failure to comply with the clarity and reference standards of Government Code section 11349.1.

DISCUSSION

The adoption of regulations by the Department 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. THE DEPARTMENT FAILED TO IDENTIFY IN THE INITIAL STATEMENT OF REASONS, OR OTHERWISE MAKE AVAILABLE TO THE PUBLIC, DOCUMENTS REPORTED AS RELIED UPON IN THE FINAL STATEMENT OF REASONS

Government Code section 11346.2(b) requires that each agency prepare and make available to the public at the time the Notice of Proposed Action is published an Initial Statement of Reasons (ISOR). In order to give the affected public an opportunity to meaningfully comment on the proposed regulatory action, subdivision (b)(2) of Government Code section 11346.2 requires that the ISOR include:

An identification of each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation.

In this regulatory action, no such documents were identified in the ISOR. The Final Statement of Reasons (FSOR) for this regulatory action, which is prepared by the adopting agency after the conclusion of the public comment periods, provided the following under a heading of “Technical, Theoretical and/or Empirical Study, Reports, or Documents”:

Department relied upon the following in proposing the adoption of these revised regulations:

1. Assembly Bill 1343
2. Assembly Member Jared Huffman Letter
3. Oregon Paint Stewardship Plan
4. Oregon 2010 Annual Report
5. Paint Product Stewardship Initiative (PPSI), 2nd Memorandum of Understanding
6. California Integrated Waste Management Board Signing Statement Attached to PPSI 2nd Memorandum of Understanding Signature Page

Subdivision (a) of Government Code section 11346.9 describes the required content of the FSOR. Subdivision (a)(1) of Government Code section 11346.9 requires:

An update of the information contained in the initial statement of reasons. **If the update identifies any data or any technical, theoretical or empirical study, report, or similar document on which the agency is relying in proposing the adoption, amendment, or repeal of a regulation that was not identified in the initial statement of reasons, or which was otherwise not identified or made available for public review prior to the close of the public comment period, the agency shall comply with Section 11347.1.**
[Emphasis added.]

Government Code section 11347.1 provides:

- (a) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action shall make the document available as required by this section.
- (b) At least 15 calendar days before the proposed action is adopted by the agency, the agency shall mail to all of the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:
 - (1) Persons who testified at the public hearing.
 - (2) Persons who submitted written comments at the public hearing.
 - (3) Persons whose comments were received by the agency during the public comment period.
 - (4) Persons who requested notification from the agency of the availability of changes to the text of the proposed regulation.
- (c) The document shall be available for public inspection at the location described in the notice for at least 15 calendar days before the proposed action is adopted by the agency.
- (d) Written comments on the document or information received by the agency during the availability period shall be summarized and responded to in the final statement of reasons as provided in Section 11346.9.
- (e) The rulemaking file shall contain a statement confirming that the agency complied with the requirements of this section and stating the date on which the notice was mailed.
- (f) If there are no persons in categories listed in subdivision (b), then the rulemaking file shall contain a confirming statement to that effect.

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The documents identified as relied upon in the FSOR for this regulatory action were not identified in the ISOR or otherwise identified and made available for public review prior to the close of the public comment period. Pursuant to Government Code section 11346.9(a)(1), these documents must now be made available 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.”

- a. Subdivision (b) of new section 18952 as proposed by the Department would provide:

The stewardship plan **should** be submitted electronically according to instructions provided by the department. A hard copy, signed by a corporate officer of a manufacturer or stewardship organization, must also be submitted to the department. [Emphasis added.]

A person directly affected by this regulation would not easily understand from the use of word “should” whether the stewardship plan must be submitted electronically or not.

- b. Subdivision (c) of new section 18952 as proposed by the Department would provide:

The annual report shall be submitted by a corporate officer acting on behalf of a manufacturer or stewardship organization that is operating an architectural paint stewardship program under a department-approved stewardship plan. The annual report **should** be submitted electronically to the department according to directions provided by the department. A hard copy, signed by the corporate officer of a manufacturer or stewardship organization must also be submitted. [Emphasis added.]

A person directly affected by this regulation would not easily understand from the use of word “should” whether the annual report must be submitted electronically or not.

- c. Subdivision (a)(3)(D) of section 18954 as proposed by the Department would provide:

A statement that the manufacturer or stewardship organization coordinated with existing household hazardous waste collection programs and retailers as potential collection points per section 18953(a)(4)(E) and (F) during the reporting period. [Emphasis added.]

The coordination provisions being referred to are located in subdivision (a)(3)(E) and (F) of section 18953.

- d. Subdivision (a)(6) of new section 18954 as proposed by the Department would provide:

Education and Outreach: Describe educational and outreach activities in context of those identified in the stewardship plan. Provide a description of educational materials that were provided to retailers, consumers, and contractors during the reporting period and provide electronic examples of these materials....These education and outreach materials may include, but are not limited to, any of the following per PRC section 48703(b)(4)(e).... [Emphasis added.]

The education and outreach materials are described in subdivision (e) of Public Resources Code section 48703.

- e. Base Penalty Table 1 of subdivision (a)(1) of new section 18955.1 as proposed by the Department would provide a Level 1 severity penalty for failure to resubmit a stewardship plan or provide supplemental information within 60 days after receiving a notice of disapproval or conditional approval from the department. The violation cited for this entry in Base Penalty Table 1 is "14 CCR 18952(b)(2)." This violation is actually contained in subdivision (b)(3) of new section 18952.

3. THE FINAL STATEMENT OF REASONS FAILED TO INCLUDE A SUMMARY AND RESPONSE TO EVERY COMMENT SUBMITTED DURING THE PUBLIC COMMENT PERIOD ON THE PROPOSED REGULATORY ACTION

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 requires that rulemaking agencies provide notice and at least a forty-five 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."

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Tab 9 in the rulemaking file contains written comments submitted during the 45 day comment period. Within these comments, is a 6 page letter, dated September 2, 2011, from the Los Angeles County Solid Waste Management Committee/Integrated Waste Management Task Force, in conjunction with the County of Los Angeles, the County Sanitations Districts of Los Angeles County, and the City of Los Angeles. Beginning on page 1 and continuing on to page 2 of this letter are three comments listed as “General Comments” on the regulations which precede the more numerous comments listed as “Specific Comments” which begin at the bottom of page 2. This reviewer was unable to find summaries and responses to the three comments listed as “General Comments” on pages 1 and 2 of this comment letter.

4. THE STATEMENT OF MAILING OF THE NOTICE OF PROPOSED REGULATORY ACTION IS DEFECTIVE

Government Code section 11346.4(a) requires that the notice of proposed regulatory action be mailed out at least 45 days prior to the hearing and close of the public comment period. Section 86 of title 1 of the California Code of Regulations provides:

The rulemaking record shall contain a statement confirming that the agency complied with the provisions of Government Code Section 11346.4(a)(1) through (4) regarding the mailing of notice of proposed action at least 45 days prior to public hearing or close of the public comment period, and **stating the date upon which the notice was mailed.** This section is not intended to require an agency to provide a copy of its mailing list to support the statement. [Emphasis added.]

The statement of mailing submitted with this regulatory action states that:

...The notice was mailed on February 11, 2011, over 45 days prior to the close of the public comment period and the public hearing, which was held on April 8, 2011.

These dates appear to be in error in that the Notice of Proposed Rulemaking for this regulatory action was published in the California Regulatory Notice Register on July 22, 2011 and the public hearing was held on September 8, 2011.

5. REFERENCE

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “authority” and “reference” standards. (Gov. Code, sec. 11349.1(a)(2) and (a)(5).) “Authority” as defined by Government Code section 11349(b) means “...the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.” “Reference” as defined by Government Code section 11349(e) means “...the statute, court decision, of other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.”

Subdivision (a) of Government Code section 11346.2 requires that the adopting agency submit to OAL the express terms of the proposed regulation. Subdivision (a)(2) of Government Code section 11346.2 provides:

The agency shall include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the **specific statutes** or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations. [Emphasis added.]

The text of the proposed regulations adopted by the Department and submitted to OAL for review and filing with the Secretary of State in this regulatory action for all but one of the regulation sections cites "Section 48700-48706, Public Resources Code" as reference. The cited sections comprise all of Chapter 5 to Part 7 of Division 30 of the Public Resources Code. This citation appears over-inclusive as each reference citation should only cite the specific statute or statutes being implemented, interpreted, or made specific by that particular regulation.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action.

If you have any questions, please contact me at (916) 323-6808.

Date: April 10, 2012

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