State of California
Office of Administrative Law

In re: **Natural Resources Agency** **Regulatory Action:** **Title 14, California Code of Regulations** **Adopt sections:** **Amend sections: 4351.1, 4360** **Repeal sections: 4351**	**DECISION OF DISAPPROVAL OF REGULATORY ACTION** **Government Code Section 11349.3** **OAL File No. 2014-0630-04S**

SUMMARY OF REGULATORY ACTION

On June 28, 2013, the Department of Parks and Recreation issued a Notice of Proposed Action, informing the public of its intent to amend sections 4351.1 and 4360 and repeal section 4351 in title 14, division 3, chapter 2 of the California Code of Regulations (CCR). The proposed amendments would delineate trail uses and users on trails in the State Park System, what tools may be used, and under what circumstances the tools may be used in cultural and natural preserves. The Agency also clarifies that permanent structures and installations are allowed in wilderness and preserves where necessary for natural or cultural heritage protection.

On June 30, 2014, the Natural Resources Agency (Agency), rather than the Department of Parks and Recreation, submitted the regulatory action to the Office of Administrative Law (OAL) for review. On August 12, 2014, OAL notified the Agency that OAL disapproved the proposed regulations because the regulations failed to comply with the authority and clarity standards of Government Code section 11349.1. The Agency also failed to follow procedures required by the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

For purposes of this disapproval decision, because the Natural Resources Agency submitted this rulemaking action to OAL for review, this decision refers to the Agency. However, the Natural Resources Agency and the Department of Parks and Recreation should both take note of this disapproval decision because the Legislature granted rulemaking authority to the Department of Parks and Recreation and the rulemaking action was conducted by the Department of Parks and Recreation.

DECISION

OAL disapproved the above-referenced regulatory action for the following reasons:

1. The proposed regulations failed to comply with the authority standard of Government Code section 11349.1, subdivision (a)(2);

2. The proposed regulations failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3); and
3. The Agency failed to follow the required APA procedures by omitting to:
   a. summarize and respond to all of the public comments submitted regarding the proposed action pursuant to Government Code section 11346.9, subdivision (a)(3); and
   b. include in the rulemaking file all data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the Agency relied, pursuant to Government Code section 11347.3, subdivision (b)(7).

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

DISCUSSION

The above regulatory adoption and amendments by the Agency must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed 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 regulation subject to the APA may become effective, the 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 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 regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. Authority Standard

OAL must review regulations for compliance with the authority standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (b), defines "Authority" as meaning: "the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation."

Each proposed regulation section must include "Authority" and "Reference" citations at the end of the section. (Gov. Code, sec. 11344(d); Gov. Code, sec. 11346.2(a)(2).) OAL reviews the "Authority" and "Reference" citations at the end of each proposed regulation section to verify that the agency has been granted the regulatory power to adopt the regulation and to verify that the proper sources of "Authority" and "Reference" for the regulation are cited.

OAL's regulation in CCR, title 1, section 14, subdivision (a) states that the authority "shall be presumed to exist only if an agency cites in its 'authority' note proposed for printing in the California Code of Regulations: (1) a California constitutional or statutory provision which expressly permits or obligates the agency to adopt, amend, or repeal the regulation; or (2) a California constitutional or statutory provision that grants a power to the agency which impliedly permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted."

With regards to reviewing these authority and reference citations, California Code of Regulations, section 14, subdivision (c) adds:

> OAL shall use the same analytical approach employed by the California Supreme Court and the California Court of Appeal, as evidenced in published opinions of those courts.
> (1) For purposes of this analysis, an agency's interpretation of its regulatory power, as indicated by the proposed citations to "authority" or "reference" or any supporting documents contained in the rulemaking record, shall be conclusive unless:
> (A) the agency's interpretations alters, amends, or enlarges the scope of the power conferred upon it; or
> (B) a public comment challenges the agency's "authority";...

1.1. Proposed Section 4351

The Agency proposes to amend section 4351 of the California Code of Regulations. Two subdivisions within that section propose phrases that do not comply with the authority standard of the APA.

First, proposed subdivision 4351(a) states: "Except where it is necessary in an emergency... or the safe and legal landing and takeoff from proximate airports, there shall be... no flying of aircraft lower than 2,000 feet above the ground in wilderness or lower than 500 feet above the ground in cultural preserves or natural preserves."

Second, proposed subdivision 4351(a)(1) has similar language: "...flying of aircraft lower than 2,000 feet above the ground in wilderness or lower than 500 feet above the ground in cultural preserves or natural preserves... must meet a minimum management requirement."

In section 4351 of the CCR, the Agency provides Public Resources Code sections 5003 and 5093.36 as authority citations. Section 5003 of the Public Resources Code provides:

> The department shall administer, protect, develop, and interpret the property under its jurisdiction for the use and enjoyment of the public. Except as provided in Section 18930 of the Health and Safety Code, the department may establish rules and regulations not inconsistent with law for the government and administration of property under its jurisdiction. [Emphasis Added.]

Section 5093.36 of the Public Resources Code states, in part:

> (a) Except as otherwise provided in this chapter, each state agency with jurisdiction over any area designated as a wilderness area shall be responsible for preserving the wilderness character of the wilderness area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character....

As discussed above regarding OAL's review of proposed actions, the authority citations are conclusive unless a public comment challenges the agency's regulatory authority. (Cal. Code Regs., tit. 1, sec. 14(c).)

1.2. Public Comments Challenging Agency's Authority to Regulate Airspace

During the comment periods, the Agency received numerous comments challenging its authority to regulate airspace. More specifically, the comments referred to United States Code, title 49, section 40103, which states that the "United States Government has exclusive sovereignty of airspace of the United States."

For this reason, pursuant to CCR, title 1, section 14, subdivision (c)(1), the proposed authority citations are not conclusive.

1.3. Agency's Lack of Authority to Regulate Airspace

In the Final Statement of Reasons, the Agency provided its arguments in response to the comments challenging its regulatory authority.

The Agency argued that the 500-feet-above-ground altitude limit is a "disturbance threshold for protected species and cultural resources – not a [Federal Aviation Administration (FAA)] airspace restriction." However, regardless of the Agency's rationale for establishing the altitude limit, the language in section 40103, United States Code, title 49, provides that the U.S. Government has exclusive sovereignty of airspace of the United States. Hence, the Agency does not have jurisdiction to establish a 500-feet-above-ground altitude limit in cultural or natural preserves in the United States.

The Agency further suggested that it has implied authority to set a 500-feet-above-ground altitude limit. In the Final Statement of Reasons, the Agency stated that Public Resources Code section 5019.71 imposes a statutory duty on State Parks to "manage preserves for 'endangered plant and animal species and their supporting ecosystems without interference.'" (Emphasis added.) Section 5019.71 of the Public Resources Code actually provides:

> The purpose of natural preserves shall be to preserve such features as rare or endangered plant and animal species and their supporting ecosystems.... Areas set

> aside as natural preserves shall be of sufficient size to allow, where possible, the natural dynamics of ecological interaction to continue without interference.

It is the natural dynamics of ecological interaction that the statute intends to continue without interference, not the management of preserves. Therefore, the statute does not provide implied authority to the Agency to set the 500-feet-above-ground altitude limit because such a duty to manage preserves without interference is an interpretation that alters, amends, or enlarges the scope of power conferred upon it. (Cal. Code Regs., tit. 1, sec. 14(c)(1)(A).)

The Agency further contended that the disturbance threshold is consistent with the FAA limitations found in the Code of Federal Regulations, title 14, part 91.119. This federal provision states, in part:

> 91.119(b) [...] Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
> (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

While title 14, CFR, part 91.119 may provide the Agency with the rationale as to how it established the limit of an altitude of 500-feet above the surface, this does not overcome the fact that title 49, UCS, section 40103 provides that the U.S. Government has exclusive sovereignty of airspace of the United States.

OAL notes that existing language found in section 4351 of title 14 of the CCR states that "there shall be... no flying of aircraft lower than 2,000 feet above the ground." This language restates the California statutory language found in subdivision 5093.36(b) of the Public Resources Code:

> (b) Except as specifically provided in this chapter... there shall be no temporary road, no use of motor vehicles, motorized equipment, or motorboats, no landing or hovering of aircraft, no flying of aircraft lower than 2,000 feet above the ground, no other form of mechanical transport, and no structure or installation within any wilderness area, except under either of the following circumstances:
> (1) It is necessary in an emergency involving the health and safety of persons within the wilderness area.
> (2) It is the minimum tool necessary to meet the minimum management requirements. [Emphasis Added.]

There is no same or similar state statutory provision or authority prohibiting the flying of aircraft lower than 500 feet above the ground within cultural preserves or natural preserves. In other words, while the Public Resources Code section 5093.36(b) prohibits aircraft from flying lower than 2,000-feet above the ground in wilderness areas, no law provides the Agency with the authority, express or implied, to set a 500-feet-above-ground altitude limit in cultural and natural preserves.

Thus, proposed section 4351 fails to comply with the authority standard of the APA.

2. Clarity Standard

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. (Gov. Code, sec. 11340(b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines "clarity" to mean "written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them."

The "clarity" standard is further defined in section 16, title 1, of the CCR, OAL's regulation on "clarity," which provides:

> 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 exists:
> (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or...
> (3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or...
> (5) the regulation presents information in a format that is not readily understandable by persons "directly affected;"....
> (b) Persons shall be presumed to be "directly affected" if they:
> (1) are legally required to comply with the regulation; or
> (2) are legally required to enforce the regulation; or
> (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
> (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this regulatory action, the proposed regulations failed to comply with the clarity standard of the APA.

2.1. Proposed Section 4351(a)(1) of the CCR

This proposed provision states: "Except where it is necessary in an emergency or the safe and legal landing and takeoff from proximate airports, there shall be... no flying of aircraft lower than 2,000 feet above the ground in wilderness or lower than 500 feet above the ground in cultural preserves or natural preserves." (Emphasis Added.)

On its face, the term "proximate airports" can be reasonably and logically interpreted to have more than one meaning. (Cal. Code Regs., tit. 1, sec. 16(a)(1).) With this language, the distance may be 100 feet or 1,000 yards or many other choices. Consequently, the regulation is unclear.

2.2. Proposed Section 4360.1 of the CCR

This proposed provision states:

> Trails in Reserves and Preserves as defined in [Public Resources Code] Sections 5019.65, 5019.71, and 5019.74 may be designated for bicycle or equestrian use when the District Superintendent has determined after appropriate review and analysis that such use is important for public access to the area or to make important connections to other trails and there it has been determined that impacts to the special resources for which the area was established will be less than significant. [Emphasis Added.]

The regulation contains three unclear phrases. First, an "appropriate review and analysis" can be interpreted to have more than one meaning. With this language, the District Superintendent can perform any review and any analysis so long as he or she deems it "appropriate." Because the standard for what constitutes "appropriateness" is undefined and subject to more than one meaning, the regulation is unclear.

Second, "special resources" can also be interpreted to have more than one meaning. The phrase "resources for which the area was established" may address the protected resources. But adding the word "special" implies that there is another type of resources upon which the impact must be less than significant. Special type of resource is not defined and, therefore, the regulation is unclear.

And third, the term "less than significant" does not have a meaning that is generally familiar to those directly affected by the regulation and could be interpreted to have more than one meaning. The term is defined in neither the regulation nor the governing statute. (Cal. Code Regs., tit. 1, sec. 16(a)(1) and (3).) Even more, the term can be interpreted to have more than one meaning. The threshold of what is deemed "significant" is undefined; therefore, what constitutes "less than significant" is vague. This makes unclear the standard by which the District Superintendent is required to abide. Thus, the regulation is unclear.

3. Failure to Follow Required APA Procedures

The Administrative Procedure Act (APA) requires agencies to follow specific procedures. In this rulemaking action, the Agency failed to follow the required procedures by neglecting to include in the rulemaking file all the documents that the Agency relied on in amending and repealing the proposed regulations and by omitting to summarize and respond to all of the public comments.

3.1. Documents Relied Upon to be Included in the Rulemaking File

Government Code section 11347.3, subdivision (b)(7), requires that the rulemaking file include:

> (7) 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....

The Initial Statement of Reasons indicates that the Agency relied on "the rule making record for Wilderness Regulations for units of the State Park System completed in May 2009." The Agency is required to add this document to the rulemaking file upon resubmitting the regulatory action to OAL.

3.2. Missing Summary and Response to Public Comments

Government Code section 11346.9, subdivision (a), provides that an agency proposing regulations shall prepare and submit to OAL a final statement of reasons. One of the required contents of the final statement of reasons is a summary and response to public comments. Specifically, Government Code section 11346.9, subdivision (a)(3), requires that the final statement of reasons include:

> (a)(3) 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 reasons for making no change. 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.... [Emphasis added.]

In this rulemaking action, the Agency provided a 45-day public comment period for its originally proposed text, conducted two public hearings, and issued a notice to the public providing an additional 15-day public comment period for substantive changes to the text of the regulations. Numerous comments were received during these comment periods, but the Agency did not summarize and respond to all of the comments. The following are some examples:

A) **IMBA, verbal comment made at the Glendale public hearing.** An individual representing the International Mountain Bicycling Association (IMBA) expressed the need to keep regulations applicable to wilderness areas separate from those applicable to reserves and preserves.

B) **Paul Liebenberg, written comment dated August 11, 2013.** The commenter submitted the following:

> Another matter is that in the "INITIAL STATEMENT OF REASONS" it's stated that "The adoption of these regulations will not include retroactive authority and will not change the allowable uses on trails in the California State Park System. All trail uses will continue as currently designated unless and until a change is made in allowable use by order of the District Superintendent." There is no mention of existing trail uses being "grandfathered in" in the text(s) of the proposed rules. This omission is very troubling to me.

These comments were not summarized or responded to in the final statement of reasons. However, the above list of comments is not an exhaustive list. The Agency is required to summarize and

respond to all comments made during the 45-day and 15-day comment periods and at both public hearings before resubmitting the rulemaking action to OAL for review.

4. Miscellaneous

The following issues must be addressed prior to resubmitting its rulemaking action to OAL:

A) **Corrections on the Form 400.** Section B.2. of the Form 400 must be corrected by striking out "4360.1" as an adopted regulation, striking out "4351" as an amended regulation and including "4351.1" as amended regulation instead, and striking out "4351.1" as a repealed regulation and include "4351" as a repealed regulation instead. Also, section B.4. of the Form 400 is currently blank but it must be corrected to include the 15-day comment period: 2/17/2014 to 4/4/2014.

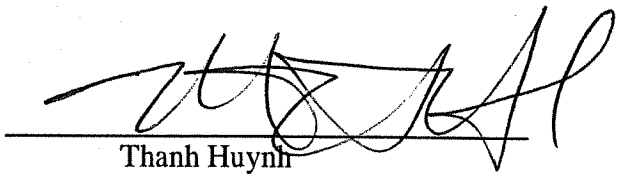
B) **Fifteen-day notice mailing statement.** This mailing statement states an incorrect date for the end of the comment period. The statement says that the comment period ended May 4, 2014 when in fact it ended April 4, 2014. This error must be corrected.

C) **Form STD 399.** The checked box next to section A.5. of the Fiscal Impact Statement is hole-punched through. The Agency must provide a form copy that is not hole-punched through.

CONCLUSION

For the reasons stated above, OAL disapproved this regulatory action proposed by the Agency. If you have any questions, please contact me at (916) 323-6824.

Date: August 19, 2014



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