

**State of California
Office of Administrative Law**

In re:
State Lands Commission

Regulatory Action:

Title 02, California Code of Regulations

Adopt sections: 3000, 3001, 3002, 3003,
3004, 3005, 3006, 3007,
3008, 3009, 3010, 3011,
3012, 3013, 3014, 3015,
3016

Amend sections:

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2016-0420-02

**OAL Matter Type: Regular Resubmittal
(SR)**

SUMMARY OF REGULATORY ACTION

On January 21, 2016, the State Lands Commission (Commission) submitted to the Office of Administrative Law (OAL) its initial proposed regulatory action (OAL File No. 2016-0121-03S) to adopt sections in Title 2 of the California Code of Regulations. The regulations establish the procedures that allow the Commission to enforce its authority to remove trespassers who maintain structures on land owned by the state and under the jurisdiction of the Commission. These procedures include issuing a Notice of Violation, setting an administrative hearing, imposing penalties, and ordering the removal of encroaching structures. On March 2, 2016, the Commission withdrew this initially submitted file.

The Commission subsequently modified its regulatory text and added a Supplement to the Initial Statement of Reasons (ISOR) to the file. The Commission then made these documents available to the public for comments on April 1, 2016, for a period of 15 days. On April 20, 2016, the Commission resubmitted the proposed regulatory action to OAL for review. On June 2, 2016, OAL notified the Commission that OAL disapproved the proposed regulations because the regulations 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.

DECISION

OAL disapproved the above-referenced regulatory action because the Commission failed to follow required APA procedures by not considering and approving a substantial change made to

the final version of the regulation text, and by not considering public comments received during the 15-day comment period of April 1, 2016 through April 16, 2016, as required by Government Code section 11346.8, subdivisions (a) and (c).

DISCUSSION

The Commission's regulatory action must satisfy requirements established by the part of the APA 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 Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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, § 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 APA 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. Failure to Obtain Commission Approval of Final Regulation Text After Substantial Changes and Consideration of Public Comments

The rulemaking file submitted to OAL for this action includes minutes of the December 18, 2015 Commission meeting, demonstrating that the members of the Commission voted upon and approved the first modified regulation text, which was made available for public comments on September 4, 2015. Subsequent to the Commission's approval, substantial changes were made by Commission staff to the regulation text and a Supplement to the ISOR was added to the rulemaking file. The second modified regulation text and the Supplement to the ISOR were made available on April 1, 2016 through April 16, 2016, for a 15-day comment period, during which public comments were received by Commission staff.

Government Code section 11346.8, subdivision (c), states:

11346.8(c). No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, *the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made*

available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation. Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9. [Emphasis added.]

The Commission staff made substantial changes to the regulations which were noticed in a second 15-day comment period; therefore, the Commission was required to subsequently adopt the regulation text as amended, but did not do so. Since the Commission is the governing body and the entity granted the rulemaking authority in this matter (Pub. Resources Code, §§ 6108, 6224.5), the rulemaking file must include documentation that the Commission approved the final version of the regulation including all substantial changes. However, no such documentation was included in the rulemaking file. Thus, the Commission failed to follow the required APA procedures because the Commission did not vote upon and approve the final version of the regulation text that included the second set of changes to the regulation text.

In addition, the Commission failed to consider the comments received during the second comment period, beginning April 1, 2016. Government Code section 11346.8, subdivision (a), provides "[t]he State agency shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation." The Commission must consider all public comments received during the 45-day and 15-day comment periods prior to approving the final text. The Commission failed to follow the required APA procedures because the Commission did not consider the public comments received during the second 15-day comment period and then approve the final text. The Commission must consider all comments timely received on this rulemaking prior to approving the final regulation text which includes substantial changes.

Also, Government Code section 11347.3, subdivision (b)(8), specifically requires that the rulemaking file include "[a] transcript, recording, or minutes of any public hearing connected with the adoption, amendment or repeal of the regulation." The rulemaking file for this action needs to include the transcript, recording, or minutes of the hearing where the Commission approves the *final* version of the regulation text.

2. Miscellaneous

OAL also notes the following issues that must be addressed prior to any resubmission of this rulemaking action:

- 2.1. Documents incorporated by reference.** As discussed above, substantial changes to the regulation text were made during the 15-day comment period which began on April 1, 2016. However, the documents incorporated by reference were not changed to match the modified language in the regulation. For example, the regulation text of section 3009, subdivision (c), as submitted to OAL during the initial proposed regulatory action, stated:

3009(c) The Respondent shall complete the Statement of Defense form and provide any other documents, evidence, or arguments the

Respondent wishes the Commission to consider within forty-five (45) Days of the Enforcement Staff submitting its statement of position....

This provision was modified to replace the word “submitting” with the term “Mailing.” However, both documents incorporated by reference were not changed to match the modification made to section 3009, subdivision (c).

First, on page 2 of the Statement of Defense (Rev. 03/2016), the document still states that “[t]his form, along with any evidence you wish the Commission to consider is due forty-five (45) days after the Enforcement Staff submits its statement of position.” The term “submits” must be changed to “mailed” in order to ensure the language in the document incorporated by reference matches the language in the regulation.

Second, on page 2 of the Notice of Violation (Rev. 03/2016), the document still states that “[o]nce you receive the statement of position from the Enforcement Staff, you have forty-five (45) days to respond. The statement of position will specify the exact date.” The modified regulation text states that the forty-five day period begins when the Enforcement Staff mails its statement of position, not upon the respondent’s receipt of the statement of position. The Notice of Violation must be revised to ensure its language matches the language in the regulation.

Another example can be found on page 2 of the Notice of Violation. The regulation text of section 3002, subdivision (c), as submitted to OAL during the initial proposed regulatory action, stated: “The Commission retains sole and absolute discretion to approve or deny applications submitted for the use of State Lands.” This language was removed from the text and the modified text was made available to the public for a 15-day comment period, beginning April 1, 2016. However, similar language still appears on page 2 of the Notice of Violation. The language states that the “Commission reserves sole and absolute discretion whether to authorize any proposed use of state land.” The Notice of Violation must be revised to ensure its language matches the language in the regulation.

- 2.2. **Regulation text.** In the April 1, 2016 modified text, subdivision (f) of proposed section 3012 defines a term that is not used in that provision. It states:

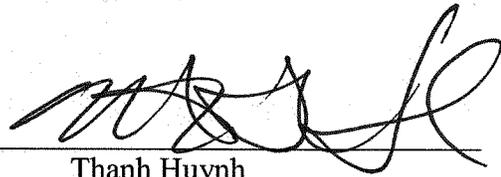
3012(f) The Commission may ~~postpone or~~ continue an enforcement hearing if ~~in the Commission’s sole and absolute discretion~~ circumstances or fairness so dictate. Good cause may include, but is not limited to, impossibility for the parties to attend, ongoing negotiations with a high probability of resolving the violation, or evidence is admitted under section 3009(e) above which requires further analysis or affects the recommended decision and order.

The term "good cause" is not used in subdivision (f) of proposed section 3012. If the intent was to define "circumstances or fairness," then subdivision (f) needs to be rewritten to reflect this intent.

CONCLUSION

For these reasons, OAL disapproved the above-reference rulemaking action. Pursuant to Government Code section 11349.4(a), the Commission may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval. If you have any questions, please do not hesitate to contact me at (916) 323-6824.

Date: June 9, 2016



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