State of California
Office of Administrative Law

In re: **Office of Spill Prevention and Response**	**DECISION OF DISAPPROVAL OF REGULATORY ACTION**
Regulatory Action:	**Government Code Section 11349.3**
Title 14, California Code of Regulations	**OAL Matter Number: 2017-0126-01**
Adopt sections: 870.17 **Amend sections: 870.15** **Repeal sections: 870.17, 870.19, 870.21**	**OAL Matter Type: Certificate of Compliance Resub (CR)**

SUMMARY OF REGULATORY ACTION

The Office of Spill Prevention and Response (Office) submitted to the Office of Administrative Law (OAL) this timely Certificate of Compliance action. This action would have permanently amended section 870.15; repealed sections 870.17, 870.19, and 870.21; and adopted new section 870.17 in title 14 of the California Code of Regulations (CCR) to implement changes to the Statewide Oil Spill Prevention and Response Program fees pursuant to Senate Bill 861 (Stats. 2014, ch. 35). These regulatory changes were originally implemented via an emergency file and print action (OAL File No. 2014-1013-04EFP).[1]

On April 13, 2016, the Office submitted a Certificate of Compliance (OAL File No. 2016-0413-03C) to OAL for review. On May 23, 2016, the Office requested to withdraw the action. On January 26, 2017, the Office resubmitted the above-referenced rulemaking action to OAL for review. On March 10, 2017, OAL notified the Office that OAL disapproved the proposed regulations. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

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

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

[1] The file and print matter was a deemed emergency and exempt from OAL review pursuant to Government Code section 8670.7.5. Therefore, at that time, the emergency regulations were not reviewed by OAL for the six substantive standards in Government Code section 11349.1 and the procedural requirements of the Administrative Procedure Act. The Certificate of Compliance is not exempt from OAL review and is subject to the Administrative Procedure Act.

2. The Office did not meet the required Administrative Procedure Act (APA) procedural requirements due to its failure to accurately indicate changes to the regulation text pursuant to Government Code sections 11343 and 11346.8, and sections 8 and 46 of title 1 of the CCR.

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

DISCUSSION

The Office'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, 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 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. Necessity Standard

OAL must review regulations for compliance with the necessity standard of Government Code section 11349.1, subdivision (a)(1). Government Code section 11349, subdivision (a), defines "necessity" as follows:

> "Necessity" means 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 purposes 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 title 1 of the CCR provides:

> (b) 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 regulation 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 (ISOR). The ISOR is the primary document in the rulemaking record that demonstrates that the adoption, amendment, or repeal satisfies the necessity standard. Specifically, Government Code section 11346.2, subdivision (b)(1), states:

> (b) An initial statement of reasons … shall include … :
> (1) A statement of the specific purpose of each adoption, amendment, or repeal, the problem the agency intends to address, and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed. The statement shall enumerate the benefits anticipated from the regulatory action, including the benefits or goals provided in the authorizing statute.

The ISOR 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 of the information upon which the proposal is based. (Gov. Code, sec. 11346.2, subd. (b); Gov. Code, sec. 11346.5, subds. (a)(16) and (b).) In this way, the public is informed of why the regulation is needed and why the particular provisions contained in the regulation were chosen to fill that need. This information is essential in order for the public to comment knowledgeably. The ISOR and all data and other factual information, studies, or reports upon which the agency relies in the regulatory action must also be included in the rulemaking file. (Gov. Code, sec. 11347.3, subds. (b)(2) and (7).)

Proposed section 870.17, subdivision (b)(2), states: "The barrel fee is currently hereby set at six and one-half cents ($0.065) per barrel, rounded to no more than four decimal places." The six and one-half cent per barrel fee is not supported by the rulemaking record. Government Code section 8670.40, subdivision (a), states:

> The State Board of Equalization shall collect a fee in an amount determined by the [Office] administrator to be *sufficient to pay the reasonable regulatory costs to carry out the purposes set forth in subdivision (e), and a reasonable reserve for contingencies. The annual assessment shall not exceed six and one-half cents ($0.065) per barrel of crude oil or petroleum products.* The oil spill prevention and administration fee shall be based on each barrel of crude oil or petroleum products, as described in subdivision (b). [Emphasis added.]

The statute establishes a *maximum* per barrel fee of six and one-half cents. Based on the language of the statute, the Office has the discretion to set the barrel fee – by regulation – at any amount not to exceed six and one-half cents per barrel. In this case, the Office proposes to set the barrel fee at the maximum allowable fee of six and one-half cents, but offered no analyses or calculations to support the specific amount of the fee. The fee is required to be "sufficient to pay the reasonable regulatory costs to carry out the purposes set forth in subdivision (e), and a reasonable reserve for contingencies." (Gov. Code, sec. 8670.40, subd. (a).) On page 3 of the revised initial statement of reasons (revised ISOR) and page 2 of the notice of modifications to text of proposed regulations and addition of documents relied upon, the Office provided a general explanation of the fee amount, explaining that "[t]he fee has been set at $0.065 cents for many years." However, it does not appear that this specific fee amount was ever codified in regulation. The Office previously established barrel fees in the amount of four cents and five cents, which were codified in regulation in 1993 and 2002 respectively.

Page 8 of the revised ISOR further explains that "[s]etting the fee at a lower rate would not allow for the funding necessary to support [the Office's] oil spill preparedness and response efforts critical to carrying out and meeting the statutory obligations set forth in Senate Bill 861...." Although this statement provides generalized necessity for the adoption of the maximum allowable fee, it is not clear from the contents of the rulemaking record how the Office made this determination. The rulemaking file must establish by "substantial evidence" the need for the six and one-half cent barrel fee. (Gov. Code, sec. 11349, subd. (a).) It does not.

The Office received one public comment during the 45-day public comment period. Notably, the commenter questioned what methodology the Office used to set the barrel fee at six and one-half cents per barrel. The Office responded to the commenter as follows:

> *This fee has been required by statute since 1991.* Since January 2012, by regulation, it has been collected at the amount of $0.065 cents...All calculation methodologies and program budget justifications were done as part of the legislative and Budget Change Proposal process that is attendant to the legislative approval process.... [Emphasis added.]

We note, the *exact* fee amount of six and one-half cents per barrel is not specifically established in statute or regulation. As such, the methodology relied upon to determine the fee has never

been subject to public scrutiny in accordance with the APA. An agency must demonstrate in the rulemaking record why the agency is charging a specific amount based upon the necessity for it.

As further justification for the proposed fee, the Office refers to the "calculation methodologies and program budget justifications" conducted as part of the Budget Change Proposal process. However, the Office did not make these Budget Change Proposal documents available to the public pursuant to the APA and did not include these documents in the rulemaking file. Neither did the Office reconstruct the calculations relied upon to determine the six and one-half cent fee in any of the Office's rulemaking documents. This lack of evidence violates the necessity standard of the APA. As such, the Office must provide an explanation of why it is necessary to set the barrel fee at six and one-half cents. The Office must must make the documentation available to the public for 15 days pursuant to Government Code section 11347.1 before resubmitting the rulemaking file to OAL.

2. Failure to Follow Required APA Procedures

The APA requires agencies to follow specific procedures. In this rulemaking action, the Office failed to follow the required procedures by failing to accurately indicate modifications to the regulation text. Government Code section 11343, subdivision (a)(1), requires state agencies to transmit to OAL for filing with the Secretary of State "a certified copy of every regulation adopted or amended by it." Subdivision (b) of section 8 of title 1 of the CCR provides that "[t]he final text of the regulation shall use underline or italic to accurately indicate additions to, and strike-through to accurately indicate deletions from, the [CCR]." The term "final text" is defined as "the certified copy of the regulation…transmitted to OAL for filing with the Secretary of State." (Cal. Code Regs., tit. 1, sec. 8, subd. (a)(2).) The final text of the proposed regulations contains a number of additions to and deletions from the CCR that are not accurately indicated. For example, sections 870.19 and 870.21 do not align with the regulatory language currently printed in the CCR. As such, the illustrations do not clearly show which text is to be inserted and which text is to be deleted.

Additionally, Government Code section 11346.8, subdivision (c), requires changes to text originally made available to the public to be "clearly indicated" so the public will know what modifications were made by the agency and to be able to comment knowledgably. (See also Cal. Code Regs., tit. 1, sec. 46.) The proposed text for the 15-day public comment period failed to accurately indicate modifications to the proposed regulations. Changes to the regulation text for the 15-day public comment period are indicated in double strike-through for deletions and double underline for additions. However, there are a few places where newly proposed text noticed to the public during the 15-day public comment period was illustrated in single underline rather than double underline, as is the case in section 870.17, subdivisions (a) and (b)(3)(B). There are also several places where changes to existing regulatory text were illustrated in double strike-through, but the language was reinserted in the final version of the regulation text without

proper notice to the public. For example, in section 870.15, subdivision (a), the word "fee" was illustrated in double strike-through, but was reinserted into the final regulation text. Another example, in section 870.17, subdivision (b)(1), the word "products" was illustrated in double strike-through, but was reinserted into the final regulation text. Additionally, section 870.17, subdivision (b)(5), was included in the final regulation text, but was not included in the version of text that was noticed to the public during the 15-day public comment period. As illustrated, it is not readily ascertainable what text is being added or deleted during the 15-day public comment period.

OAL also notes that the list of proposed changes to the text included in the notice of modifications to text of proposed regulations and addition of documents relied upon (notice of modifications) is incomplete. For example, the notice of modifications does not address the proposed changes to new subdivision (a) of section 870.15. As such, the public could not rely on the notice of modifications or the modified regulation text for an accurate picture of the text proposed to be added or deleted during the 15-day public comment period.

Prior to resubmittal of these regulations, the Office must ensure that the additions and deletions to the text are accurately indicated and the underlying text matches the text currently printed in the CCR. Additionally, because the public has not had the opportunity to review and comment on the proposed regulation text with changes clearly indicated, the Office shall make the properly illustrated text available to the public for at least 15 days pursuant to Government Code section 11346.8 and section 44 of title 1 of the CCR.

3. Miscellaneous

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

3.1 Regulation Text. The proposed regulatory text contains numerous grammatical errors and citation errors, as well as several discrepancies with the statutory language upon which the proposed regulatory text is based.

3.2 Table of Contents. The table of contents does not accurately list the contents of the rulemaking file.

3.3 Revised Initial Statement of Reasons (revised ISOR). The revised ISOR identifies three new documents relied upon. However, the revised ISOR also provides that two of the three new documents relied upon are "incorporated by reference." This statement is not accurate. The Office must correct this erroneous statement in the "Updated Information" section of the final statement of reasons.

3.4 **45-Day Mailing Statement.** The 45-day mailing statement contains an incorrect execution date.

3.5 **15-Day Mailing Statement.** The 15-day mailing statement contains an incorrect date. Additionally, the 15-day mailing statement identifies three new documents relied upon. However, the 15-day mailing statement also provides that two of the three new documents relied upon are "incorporated by reference." This statement is not accurate.

3.6 **Updated Informative Digest.** The updated informative digest does not contain a discussion of the changes to the effect of the proposed regulation. Additionally, the updated informative digest states that there were no substantive revisions to the regulation text, which is not accurate.

3.7 **Final Statement of Reasons.** The "Updated Information" section of the final statement of reasons contains an incorrect date. Additionally, the "Non-Substantive Changes" section of the final statement of reasons describes a nonsubstantive revision to the regulation text made after the close of the 15-day public comment period. However, the change is not illustrated in the final version of the regulation text.

3.8 **Corrections on the Form STD 400.**

3.8.1 Section B.1b of the Form 400 must be corrected to remove the reference to "2016-0115-02EFP." Upon resubmittal, the Office must also add a reference to "2017-0126-01CR."

3.8.2 Section B.3 of the Form 400 must be corrected to check the "Certificate of Compliance" box and the "Resubmittal of disapproved or withdrawn nonemergency filing" box.

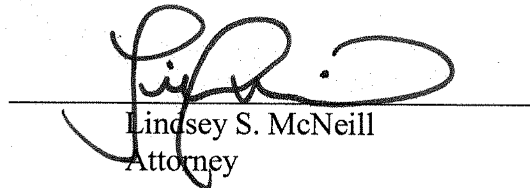
3.8.3 Upon resubmittal, the Office must add the dates of the second 15-day public comment period under section B.4.

3.8.4 Upon resubmittal, if the Office would like the changes to the initial emergency regulatory text to take effect on filing with the Secretary of State, the Office must check the "Effective on Filing" box under section B.5 and provide OAL with a written request explaining why the changes to the initial emergency regulatory text should take effect prior to the quarterly effective date prescribed in subdivision (a) of Government Code section 11343.4. If the Office would like the changes to the initial emergency regulatory text to take effect on the quarterly effective date, the Office must check the quarterly effective date box.

CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced rulemaking action. Pursuant to Government Code section 11349.4, subdivision (a), the Office may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval. A copy of this disapproval decision will be e-mailed to the Office contact person on the date specified as the date this decision was signed below. The documentation supporting the six and one-half cent barrel fee must be made available to the public for at least 15 days pursuant to Government Code section 11347.1. Additionally, the properly illustrated text must be made available to the public for at least 15 days pursuant to Government Code section 11346.8 and section 44 of title 1 of the CCR. If you have any questions, please contact me at (916) 323-6820.

Date: March 16, 2017



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