

**State of California
Office of Administrative Law**

In re:
Department of Parks and Recreation

Regulatory Action:

Title 14, California Code of Regulations

Adopt sections: 4325

Amend sections:

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2017-0317-02

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This action by the Department of Parks and Recreation (Department) proposed to adopt section 4325 in title 14 of the California Code of Regulations to restrict public off-trail use in units classified as Natural Preserves, Cultural Preserves, State Cultural Reserves, and State Natural Preserves. On March 17, 2017, the Department submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On May 1, 2017, OAL notified the Department of the disapproval of this regulatory action.

DECISION

The reason for the disapproval was failure to comply with the “clarity” standard of Government Code section 11349.1. This Decision of Disapproval of Regulatory Action explains the reasons for OAL’s action.

DISCUSSION

Regulations adopted by the Department must generally be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act (APA), chapter 3.5 of part 1 of division 3 of title 2 of the Government Code (secs. 11340-11361). Pursuant to section 11346 of the Government Code, any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA. No exemption or exclusion applies to the present regulatory action under review. Consequently, before this regulation may become effective, the regulation and rulemaking record must be reviewed by

OAL for compliance with the substantive standards and procedural requirements of the APA, in accordance with Government Code section 11349.1.

CLARITY

OAL must review regulations for compliance with the “clarity” standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines “clarity” as meaning “...written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The “clarity” standard is further defined in section 16 of title 1 of the California Code of Regulations (CCR), OAL’s regulation on “clarity,” which provides the following:

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
 - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; 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
 - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
 - (5) the regulation presents information in a format that is not readily understandable by persons “directly affected;” or
 - (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.
- (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.

As discussed below, the proposed regulation violates the clarity standard. All clarity concerns must be addressed by the Department prior to resubmission of this rulemaking to OAL.

Proposed section 4325, of title 14 of the CCR provides:

Section 4325 Off Trail Restrictions - Preserves and Reserves

(a) No person shall leave trails or board walks in Natural Preserves, Cultural Preserves, State Cultural Reserves, or State Natural Reserves within the California State Park System, unless approved by the Department.

(b) Notwithstanding (a), the entirety or portions of Natural Preserves, Cultural Preserves, State Cultural Reserves, or State Natural Reserves may be open to off-trail access:

(1) on routes of travel that have been shown in a general plan or management plan or adopted in a similar process;

(2) in an area that has been designated open for off-trail use by the park unit's general plan or a specific management plan;

(3) or, on a route of travel or in an area that the District Superintendent designates open for off-trail use by posted order after determining that off-trail use is important for public access and where it has been determined that impacts to the resources for which the park unit was established will not be significant.

(c) Section (a) shall not restrict Department employees or their agents for the purpose of management, including but not limited to research, enforcement, rescue, or educational programs.

Note: Authority cited: Sections 5003 and 5008, Public Resources Code.
Reference: Sections 5003, 5008, 5019.50, 5019.65, 5019.71, and 5019.74.
Public Resources Code

Issue 1. As set forth above, proposed section 4325, subdivision (a), prohibits a person from leaving trails or board walks in State Reserves and Preserves “unless approved by the Department.” Although this provision allows for approval of off-trail uses by the Department, it is not clear from the regulation text how someone would request approval or how such approval is granted. What criteria will the Department evaluate when making a decision whether to approve off-trail use? Are there procedural or substantive requirements for obtaining approval? This provision is not easily understood by those persons directly affected by it and can reasonably and logically be interpreted to have more than one meaning. Therefore, this provision is in violation of Government Code section 11349.1 and section 16(a)(1) of title 1 of the CCR, and must be revised by the Department prior to resubmitting this action to OAL for review.

Issue 2. Subdivision (b) of section 4325 provides that “[n]otwithstanding (a), the entirety or portions of Natural Preserves, Cultural Preserves, State Cultural Reserves, or State Natural Reserves *may be* open to off-trail access” under three listed circumstances (italics added). Use of the permissive phrase “may be” in this provision creates a clarity issue because the phrase can reasonably and logically be interpreted to have more than one meaning. For example, if an area is designated open for off-trail use in a park’s general plan or a specific management plan, such as in subdivision (b)(2), does that mean the area must be open for off-trail use or can the Department or park unit still choose to prohibit off-trail uses? If so, under what conditions? Is approval from the Department required before these areas may be open to off-trail use?

In adding subdivision (b), the Department explains in the record that the proposed regulation “is intended to be implemented by local managers in a manner that best protects the resources in a specific park while providing maximum access to recreational opportunities.” (Final Statement of Reasons (FSR) at p. 12.) If it is the Department’s intention that each park unit or district shall make the final decision as to whether areas specified in subdivision (b)(1) through (b)(3) will be open to off-trail use, then this must be specified in the regulation text. This ambiguity creates a clarity issue in violation of subdivision (a)(1) of section 16 of title 1 of the CCR.

Issue 3. Proposed subdivision (b)(1) of section 4325 provides that off-trail uses may be allowed “on routes of travel that have been shown in a general plan or management plan *or adopted in a similar process*” (italics added). Based on the regulation text, it is not easily understood what process would qualify as similar to that of a general plan or management plan. For example, general plans must be prepared pursuant to Public Resources Code section 5002.2 and the California Environmental Quality Act, Public Resources Code sections 21000 through 26000. Which of the many procedures required by these statutory provisions for general plans, if any, must be followed in order to allow off-trail use on these routes of travel if the routes of travel are not on a general or management plan? This ambiguity creates a clarity issue in violation of Government Code section 11349.1.

Miscellaneous:

Although a hearing for this rulemaking was not originally scheduled in the Notice of Proposed Action, a hearing was requested and noticed pursuant to Government Code sections 11346.5, subdivision (a)(17) and 11346.8. In the Notice of Hearing, the Department states:

At the hearing, any person may present statements or arguments orally or in writing relevant to the proposed actions described in the Informative Digest. *DPR requires that persons making oral comments at the hearing also submit a written copy of their testimony at the hearing.* [Notice of Public Hearing at p. 1, (italics added).]

Government Code section 11346.8, subdivision (a), provides that “both oral and written statements, arguments, or contentions, shall be permitted” if a public hearing is held. OAL notes that the statement in the Notice of Hearing that the Department requires submission of a written comment if a commenter wishes to make an oral comment at the hearing is inconsistent with the language of Government Code section 11346.8, subdivision (a).

CONCLUSION

For the reasons set forth above, OAL disapproved this regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Department 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 Department contact person on the date this decision is signed below.

Any changes made to the regulation text to address the clarity issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11346.8 and section 44 of title 1 of the CCR prior to adoption by the Department. Additionally, any supplement to the ISR or other document the Department may create or otherwise propose to add to the record must be made available for at least 15 days for public comment pursuant to Government Code section 11347.1 prior to adoption by the Department.

If you have any questions, please contact me at (916) 323-8916.

Date: May 8, 2017



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