State of California
Office of Administrative Law

In re:
Department of Resources Recycling and Recovery

Regulatory Action: Title 14 California Code of Regulations

Adopt sections:	**17944.1, 17945.1, 17945.4, 17946, 17946.5, 17948.1, 17948.2**
Amend sections:	**17943, 17944, 17946(a)-(h) renumbered as 17945.2, 17946(i) renumbered as 17945.3, 17946.5 renumbered as 17945.5, 17947, 17948, 17948.5, 17949**
Repeal sections:	**17942, 17944.2, 17944.5, 17945**

DECISION OF DISAPPROVAL OF REGULATORY ACTION

Government Code Section 11349.3

OAL File No. 2012-0210-07 S

SUMMARY OF REGULATORY ACTION

This rulemaking action would have revised, clarified, simplified, and updated regulations in Title 14 of the California Code of Regulations governing the compliance certification process, compliance formulas and calculations, alternative compliance method, and penalty calculations for the manufacturers of products sold or offered for sale in California and contained in rigid plastic packaging containers.

DECISION SUMMARY

On February 10, 2012, the Department of Resources, Recovery, and Recycling (DRRR) submitted to the Office of Administrative Law (OAL) the proposed adoption, amendment, and repeal of the sections of Title 14 of the California Code of Regulations (CCR) noted in the caption above. On March 8, 2012, OAL notified the DRRR that OAL disapproved the proposed regulations for failure to comply with specified standards and procedures of the California Administrative Procedure Act (APA). The reasons for the disapproval are summarized below:

A. The agency failed to follow the required procedure, pursuant to Government Code section 11347.1, regarding notice to the public of the availability for inspection of technical, theoretical, or empirical studies, reports, and similar documents which were added to the rulemaking file and relied upon by the agency in proposing the action;

B. The agency failed to follow the required procedure, pursuant to Government Code section 11346.8(c), regarding notice to the public of the availability for comment of substantive changes to the regulation text which were adopted by the agency; and

C. The disapproved regulations also fail to comply with the Reference standard of Government Code section 11349.1.

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

BACKGROUND

The subject regulations implement the Rigid Plastic Packaging Container Act of 1991. Under these statutes, products sold or offered for sale in California in non-exempt plastic containers must meet one of four compliance criteria designed to encourage the reuse and recycling of these containers, the use of more post-consumer plastic in their manufacture, and a reduction in the amount of plastic used to manufacture them. The statute also provides an alternative method of demonstrating compliance. Because the recycling goal of 25% was not met without enforcement, in 2001, the DRRR's predecessor agency, the California Integrated Waste Management Board (CIWMB), began to enforce the regulations. After several years of carrying out random compliance certification verification processes and individual enforcement actions, the CIWMB determined that the regulations were unclear, redundant, inconsistent, and overly complex. This rulemaking action was initiated to address these problems with the regulations and to update them to conform to changes in statute.

DISCUSSION

Any regulation amended or adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute 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 review. (Gov. Code, secs. 11340.5 and 11346.) OAL reviews regulatory actions 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 its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that required procedures are followed in order to provide meaningful public opportunity to comment on rules and regulations before they become effective.

A. PROCEDURAL REQUIREMENTS OF THE APA.

(1) Failure of the agency to follow the required procedure, pursuant to Government Code section 11347.1, regarding notice to the public of the availability for inspection of technical, theoretical, or empirical studies, reports, and similar documents which were added to the rulemaking file and relied upon by the agency in proposing the action.

Pursuant to Government Code section 11346.2(b)(3), a rulemaking agency must identify each technical, theoretical, and empirical study, report, or similar document upon which the agency relied in proposing the regulatory action. In its Initial Statement of Reasons, the agency listed six documents relied upon in proposing the regulatory action. The documents consist of various laws as well as comments received by the agency from stakeholders and regulated entities on the subject of the proposed rulemaking action.

Pursuant to Government Code section 11347.1, if an agency 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, it must mail notice which identifies that document to all persons listed in section 11347.1(b) and which includes the place and business hours of availability of the document for public inspection for a period of 15 days before the proposed action is adopted by the agency. Any written comments received by the agency on the document must be summarized and responded to in the Final Statement of Reasons, and the rulemaking file must contain a statement confirming that the agency complied with these notice and availability requirements and the date on which the notice was mailed. (Gov. Code sec. 11347.1(d) and (e).)

Page 46 of the agency's Final Statement of Reasons identifies the six documents relied upon which were previously identified in the Initial Statement of Reasons. The Final Statement of Reasons, however, goes on to add six new items relied upon in proposing the adoption of the revised regulations. Items seven through eleven consist of oral and written comments received by the agency from stakeholders and regulated entities regarding the rulemaking action. The twelfth item identifies "Other documents (Reports, Studies and other Publications) included in Binders 4, 5, & 6." Binders 4, 5 and 6 consist of 101 documents. None of the documents added to the rulemaking file as relied-upon documents under items seven through twelve on page 46 of the Final Statement of Reasons was previously identified as relied upon by the agency in proposing the regulatory action or made available for inspection for 15 days prior to adoption of the revised regulations.

Prior to resubmission of this action for review, the agency must comply with the requirements of section 11347.1 with respect to these documents.

(2) Failure of the agency to follow the required procedure, pursuant to Government Code section 11346.8(c), regarding notice to the public of the availability for comment of substantive changes to the regulation text which were adopted by the agency.

After adoption of the revised regulations on January 17, 2012, and before submitting the file to the OAL on February 10, 2012, for review, DRRR made changes to 25 provisions of the revised regulations. The great majority of these changes were non-substantive changes to the text, but three were determined by OAL to be sufficiently related to the original text but substantive in nature from that which had been originally made available to the public pursuant to Government Code section 11346.5. The three changes determined to be substantive, post-adoption changes are found at proposed sections 17943(af)(1)(C), 17945.2(e), and 17945.5(f)(3).

Prior to resubmission, and pursuant to Government Code section 11346.8(c), the agency must make the text of the regulations, with these substantive changes clearly indicated, available to the public for at least 15 days before the agency adopts the resulting regulations.

B. REFERENCE CITATION REQUIREMENTS OF THE APA.

Government Code section 11346.2(a)(2) requires that a rulemaking agency include a notation following each regulation listing the specific statutes being implemented, interpreted, or made specific by that regulation. These statutes are known as the Reference citations for a regulation. (See Gov. Code, sec. 11349(e).) The OAL must review all regulations submitted to it for publication and transmittal to the Secretary of State and determine whether the Reference standard has been met. See Gov. Code, sec. 11349.1.)

OAL could not determine how Public Resources Code section 40170 is implemented, interpreted or made more specific by proposed, amended regulation 17943, how Public Resources Code section 42310.2 is implemented, interpreted, or made more specific by proposed, adopted regulation 17945.1, or how Public Resources Code sections 42330 and 42340 are implemented, interpreted, or made more specific by renumbered section 17945.2.

Prior to resubmission of this action to OAL for review, the agency shall review the above-referenced Reference citations and eliminate any which are not implemented, interpreted, or made more specific by the identified regulations.

Miscellaneous.

OAL also notes that the Initial and Final Statements of Reasons in this rulemaking file identify as a document relied upon "Comments received during the RPPC certification cycles for the reporting periods 1996, 1997-99 (combined into one certificate), 2000, 2001 and 2005," but that the document was not included in the submitted copy of the

rulemaking file pursuant to Government Code section 11347.3(b)(7) nor was it identified as exempt from public inspection and disclosure pursuant to any exemption for proprietary business information or trade secrets. If this document is exempt from public inspection and disclosure, prior to resubmission of this rulemaking action to OAL for review, the agency must identify the document as such and give assurance of its inclusion in the rulemaking record for purposes of any judicial review.

CONCLUSION

For the foregoing reasons, OAL disapproves the above-referenced rulemaking action. Pursuant to Government Code section 11349.4(a), the DRRR may resubmit the action to OAL within 120 days of the DRRR's receipt of this Decision of Disapproval.

Date: March 14, 2012

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