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: 17409.5.1, 17409.5.2, 17409.5.3, 17409.5.4, 17409.5.5, 17409.5.6, 17409.5.7, 17409.5.8, 17409.5.9, 17409.5.10, 17409.5.10.5, 17409.5.11, 17409.5.12, 17414.2, 17896.44.1, 18981.1, 18981.2, 18982, 18983.1, 18983.2, 18984, 18984.1, 18984.2, 18984.3, 18984.4, 18984.5, 18984.6, 18984.7, 18984.8, 18984.9, 18984.10, 18984.11, 18984.12, 18984.13, 18984.14, 18985.1, 18985.2, 18985.3, 18986.1, 18986.2, 18986.3, 18987.1, 18988.1, 18988.2, 18988.3, 18988.4, 18989.1, 18989.2, 18990.1, 18990.2, 18991.1, 18991.2, 18991.3, 18991.4, 18991.5, 18992.1, 18992.2, 18992.3, 18993.1, 18993.2, 18993.3, 18993.4, 18994.1, 18994.2,

DECISION OF DISAPPROVAL OF REGULATORY ACTION

Government Code Section 11349.3

OAL Matter Number: 2020-0121-03

OAL Matter Type: Regular (S)
On January 21, 2020, the Department of Resources Recycling and Recovery (Department) submitted to the Office of Administrative Law (OAL) its proposed action to establish policies and require the implementation of programs for the diversion of organic waste from landfill disposal to recovery activities to reduce the methane gas generation that would otherwise occur.

**SUMMARY OF REGULATORY ACTION**

On March 4, 2020, OAL notified the Department that it could not approve this action because of failure to meet the clarity and necessity standards and certain procedural requirements of the California Administrative Procedure Act (APA).
DISCUSSION

The adoption, amendment, or repeal of regulations by a state agency must satisfy the substantive and procedural requirements of Chapter 3.5 of the APA governing rulemaking proceedings. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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 the APA. (Gov. Code, sec. 1.1346.)

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: consistent with statute, substantially necessary, 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. (Gov. Code, sections 11340.1, subd. (a) and 11349.1, subdivisions (a) and (c).) 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. CLARITY STANDARD

In adopting the APA, the Legislature found the language of many regulations to be unclear and confusing to persons who must comply with them. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349(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 California Code of Regulations (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;
(2) the language of the regulation conflicts with the agency’s description of the effect of the regulation;
(3) the regulation uses terms which do not have meaning generally familiar to those “directly affected” by the regulation, and those
terms are defined neither in the regulation nor in the governing statute;...
(b) Persons shall be presumed to be “directly affected” if they:
(1) are legally required to comply with the regulations; 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 following provisions failed to meet the clarity standard.

1.1. Section 18982(a)(30.5).

This subdivision states:

“Hazardous wood waste” means wood that is subject to the regulations under Division 20, Chapter 6.5 of the Health and Safety Code and associated regulations...

Division 20, Chapter 6.5 contains hundreds of state statutes. It is unclear what the universe of regulations is under Chapter 6.5 that “hazardous wood waste” may be subject to or how one would identify all applicable regulations. In addition, it is unclear what additional regulations, other than those under Chapter 6.5, are included by the phrase: “and associated regulations.”

1.2. Section 18984.4(a)(3)(B).

This subdivision states:

Include copies of, [sic] quarterly and annual average mixed waste organic content recovery rates, for each of those facilities, as defined in Section 18984.3.

It is unclear if section 18984.3 is referred to for a definition of certain facilities or for a definition of mixed waste organic content recovery rates. In any case, section 18984.3 does not define either facilities or mixed waste organic content recovery rates.

1.3. Section 18984.5(d).

This subdivision states:

A jurisdiction that notifies the department that it intends to implement a performance-based source separated collection service pursuant to Section 18998.1 shall notify the department within 30 days of conducting two consecutive gray container samples that each demonstrate prohibited
container contaminants in the gray container exceed 25 percent of the measured sample by weight.

The term "intends" causes this subdivision to be unclear because it indicates that implementation of a performance-based system has not yet occurred. It is unclear whether a jurisdiction must conduct the two-consecutive-gray-container sampling before implementation of a performance-based system, or whether a jurisdiction may give notice of intent to implement such a system, implement the system, conduct the sampling, and then only notify the Department within 30 days of discovering an excess of 25 percent contaminants. In the latter situation, it is unclear how much time a jurisdiction would have, after implementation of a performance-based system, to conduct the sampling, and it is unclear if the discovery of an excess of 25 percent contaminants would require the jurisdiction to cease implementation of its performance-based system.

1.4. Section 18984.11(a)(2)(A).

This subdivision states:

A jurisdiction may waive a commercial business’ or property owner’s obligation to comply with some or all of the organic waste collection service requirements of this article if the commercial business or property owner provides documentation, or the jurisdiction has evidence from its staff, a hauler, licensed architect, engineer, or similarly qualified source demonstrating that the premises lack adequate space for any of the organic waste container configurations allowed...

As compared to the architect, it is unclear if the engineer must be licensed.

In addition, it is unclear what standards the Department will apply to determine whether a source of evidence (demonstrating that a premises lacks adequate space to comply with some or all of the requirements of this article) is "similarly qualified," as jurisdiction staff, a hauler, an architect, or an engineer would be, to make that determination.

1.5. Sections 18984.13(b)(2); 18996.1(e), 18996.2(a), (a)(1), (a)(2) [twice], (a)(2)(A), and (a)(2)(A)3.; 18996.3 (first paragraph) and (a); 18996.5(d) and (e)(1); 18996.6(a), (a)(1) and (a)(2); 18996.7(a) [three instances]; 18996.9(a), (b)(1)(A), (b)(1)(B), (b)(1)(C), (b)(2)(A), (b)(2)(B), and (c).

These provisions contain a total of 25 instances in which the Department uses the permissive term “may” to describe when it may: waive certain requirements, commence enforcement, extend time, consider implementation schedules, issue certain orders, issue a corrective action plan, list a state agency in noncompliance, issue a Notice of Violation, commence an action to impose a penalty, grant certain relief, take a certain action, etc.
However, these provisions lack standards governing when the Department will or will not take the specified action so that persons directly affected know how to comply and avoid any adverse consequences of, or benefit from, the Department’s potential action. As written, these provisions do not articulate how the Department will exercise this discretion and are, therefore, unclear.

1.6. Section 18987.1(a)(1).

This subdivision states:

(a) A POTW generating biosolids is not subject to the following:
   (1) The generator requirements set forth in Article 3 of this chapter.

The reference to the generator requirements set forth in Article 3 of this chapter is unclear because Article 3 is a large article containing primarily jurisdiction requirements. A directly affected person would not be able to easily identify the generator requirements in that article without a more specific reference to them.

1.7. Sections 18988.2(c)(1) and 18998.1(e)(1).

These subdivisions contain the same unclear text. Section 18988.2(c)(1), for example, states:

(c) Notwithstanding (a), this section is not applicable to:
   (1) A hauler that is consistent with Article 1, Chapter 9, Part 2, Division 30, commencing with Section 41950 of the Public Resources Code, transporting source separated organic waste to a community composting site;

It is unclear whether the Department means a hauler as defined in the Public Resources Code beginning at section 41950, or a hauler that complies with requirements for haulers in the Public Resources Code beginning at section 41950, is not subject to this section [or, in the case of section 18988.1(e)(1), the requirements of subdivision (d) of that section].

1.8. Section 18990.1(c)(5).

This subdivision states:

(c) This section does not do any of the following:
   (5) Exempt a jurisdiction, generator, or hauler from compliance with regulations in Division 4.5 of Title 22 of the [CCR] relative to the proper handling of hazardous or universal waste pursuant, [sic] or regulations in Title 3. Food and Agriculture, Division 2. Animal Industry, Chapter 4. Meat Inspection, Subchapter 2. Rendering and Pet Food, Article 48. General Provisions, [section] 1180.48 Disposal
of Parts and Products of Animals Not Intended for Use as Human Food.

The use of the term "regulations" in relation to Title 3 makes it unclear if a jurisdiction is prohibited from exempting itself and others from all regulations in Article 48 of Subchapter 2 of Division 2 of Title 3 or only from section 1180.48 of that Article. The provision also uses language incorrectly pursuant to Title 1 CCR section 16(a)(4).

1.9. Section 18995.2(d).

This subdivision states:

All records and information shall be included in the Implementation Record within 60 days.

It is unclear in this subdivision, and including the surrounding context, when the 60-day period begins to run.

1.10. Section 18995.4(a)(3).

This subdivision states:

Except as otherwise provided in Section 18984.5, the jurisdiction shall commence an action to impose penalties pursuant to Article 16 of this chapter within the following time frames:

It is unclear what the phrase: "Except as otherwise provided in Section 18984.5" means. It is unclear if section 18984.5, or some part of it, is an exception to the enforcement process and timelines outlined in section 18995.4 and may be used in lieu of section 18995.4. It is unclear if the notice described in section 18984.5(b)(1) is synonymous with, or an alternative to, the Notice of Violation described in section 18995.4(a)(1). It is unclear if the time limits specified in section 18995.4(a)(3) for a jurisdiction to commence an action to impose penalties, if they apply to section 18984.5, begin to run with the issuance of a notice under section 18984.5(b)(1).

1.11. Sections 18995.4(a) and 18997.2(a)(1).

These sections state in pertinent part:

18995.4

(a) For violations of this chapter occurring on or after January 1, 2024, the jurisdiction shall take enforcement action as set forth in this section.

(1) The jurisdiction shall issue a Notice of Violation within 60 days of a determination that a violation has occurred.
(2) The jurisdiction shall conduct follow-up inspections to determine if compliance is achieved at least every 90 days following the issue date of an initial Notice of Violation and continue to issue Notices of Violation until compliance is achieved or a penalty has been issued.

(3) Except as otherwise provided in Section 18984.5, the jurisdiction shall commence an action to impose penalties pursuant to Article 16 of this chapter within the following time frames:

(A) For a first offense, no later than 150 days after issuance of the initial Notice of Violation.

(B) For a second, third and all subsequent offenses, no later than 90 days after the issuance of the initial Notice of Violation.

1. The commencement of each action to impose a penalty pursuant to Article 16...shall constitute an offense for purposes of the penalty calculations in Section 18997.2.

18997.2(a)

(1) For a first violation, the amount of the base penalty shall be $50-$100 per offense.

(2) For a second violation, the amount of the base penalty shall be $100-$200 per offense.

(3) For a third or subsequent violation, the amount of the base penalty shall be $250-$500 per offense.

Section 18995.4 provides that penalties for violations of this chapter are imposed through the commencement of an action to impose penalties pursuant to Article 16. Paragraph 1. of subdivision (a)(3)(B) provides that the commencement of an action to impose a penalty pursuant to Article 16 shall constitute an offense for purposes of the penalty calculations in Section 18997.2. In other words, if the jurisdiction wishes to impose a penalty for a second violation, it must commence an action to impose a penalty, but the commencement of an action by the jurisdiction to impose a penalty is, itself, another offense by the violator. This provision renders superfluous section 18997.2(a)(2) for purposes of imposing a $100 to $200 penalty for a second offense, because a penalty can never be imposed except by the commencement of an action to impose it, and the commencement of such an action is, itself, an offense, i.e., a third offense, by the violator for purposes of calculating the amount of the penalty under section 18997.2.

Section 18995.4(a)(3)(B)1. is inconsistent with section 18997.2(a)(2) and, therefore, unclear, because section 18997.2(a)(2) provides a penalty range for second offenses, but actual imposition of the second penalty range will never occur for second offenses because of the operation of section 18995.4(a)(3)(B)1.

Section 18995.4(a)(3)(A) is unclear because it conflicts with subdivisions (a)(1) and (2). Pursuant to subdivision (a)(1), a jurisdiction issues a, presumably, initial Notice of Violation. Pursuant to subdivision (a)(2), a jurisdiction must conduct at least two follow-
up inspections, a minimum of 90 days apart, to determine if compliance is achieved. However, pursuant to subdivision (a)(3)(A), if a jurisdiction must resort to imposition of a penalty to obtain compliance, an action to impose a penalty must be commenced within 150 days of the initial Notice of Violation. A jurisdiction cannot conduct follow-up inspections requiring at least 180 days after the initial Notice of Violation and, if necessary, commence an action to impose a penalty no later than 150 days after the initial Notice of Violation.

Subdivision (a)(3)(B) is unclear because it could be interpreted to have more than one meaning. It is unclear if the reference to “the initial Notice of Violation” is a reference to the, presumably, initial Notice of Violation issued pursuant to subdivision (a)(1), or if it is referring to an initial Notice of Violation issued for a second or subsequent violation. If the former, then it clearly conflicts with the operation of subdivision (a)(3)(B), because the initial Notice of Violation issued under subdivision (a)(1), which must be followed by at least two follow-up inspections at least 90 days apart, will preclude a jurisdiction from ever commencing an action to impose a penalty for a second or subsequent violation within 90 days of that initial Notice of Violation. If the latter, subdivision (a)(3)(B) is still unclear, because it is unclear if the requirement of follow-up inspections 90 days apart in subdivision (a)(2) also applies to second and subsequent violations. Because if it does, a jurisdiction is still precluded, by the 90-day time limit in subdivision (a)(3)(B), from commencing an action to impose a penalty for a second or subsequent violation, even if the reference to “initial Notice of Violation” is not to the original Notice of Violation issued pursuant to subdivision (a)(1) but rather to a later-issued “initial Notice of Violation” for a second or subsequent violation.

1.12. **Section 18995.4(b).**

This subdivision states:

The jurisdiction may extend the compliance deadlines set forth in Subdivision (a) if it finds that extenuating circumstances beyond the control of the respondent make compliance within the deadlines impractical.

The subdivision is unclear, because there are no compliance deadlines set forth in subdivision (a).

1.13. **Section 18997.3(b)(2) and (3).**

These subdivisions state in pertinent part:

(2) A “Moderate” violation means a violation involving moderate deviation from the standards in this chapter where the entity failed to comply with critical aspects of the requirement... [penalty range of $4,000 to $7,000 per violation per day]
(3) A “Major” violation means a violation that is a substantial deviation from the standards in this chapter... [penalty range of $7,500 to $10,000 per violation per day]

The distinction, if any, between “failure to comply with critical aspects of a requirement,” for purposes of a $4,000 to $7,500 penalty assessed under subdivision (b)(2), and “substantial deviation from the standards in this chapter,” for purposes of a $7,500 to $10,000 penalty assessed under subdivision (b)(3), is not clear.


This subdivision states:

(3) ...For purposes of this subsection, a major violation shall always be deemed to include the following types of violations:

... 

(F) A jurisdiction fails to report any information to the Department as required in Sections 18994.1 and 18994.2.

Sections 18994.1 and 18994.2 call for the reporting of approximately 31 pieces of information. As written, this subdivision characterizes the failure of a jurisdiction to report any of the 31 pieces of information as a major violation which can result in a $10,000 penalty per violation per day. However, the provision might also be interpreted to mean that a person’s reporting of none of the information required in sections 18994.1 and 18994.2 is what constitutes a major violation.

1.15. Section 18997.3(d)(4).

This subdivision states:

The penalty amount shall be calculated by determining an [sic] penalty range based on the factors in Subdivision (c) above, and multiplying that number by the number of days determined according to Subdivision (d)(3)...

The subdivision is unclear because the penalty range is determined on the basis of the seriousness of the violation pursuant to subdivision (b), not the factors in subdivision (c). The actual penalty amount is determined within the range selected from subdivision (b) based on the factors specified in subdivision (c). This subdivision is also unclear because a penalty range is not a number that can be multiplied by a number of days.

1.16. Section 18998.2(a)(2).

This subdivision states:

The container labeling requirements in Section 18984.4, and waivers and exemptions in Section 18984.11.
The subdivision is unclear because section 18984.11 does not appear to contain exemptions.

1.17. **Section 18998.2(a)(5).**

The subdivision states:

The recordkeeping requirements in Section 18985.3 except the provisions related to edible food recovery in that section.

The subdivision is unclear because section 18985.3 does not appear to contain provisions related to edible food recovery.

1.18. **Sections 17409.5.9(a), (b) and (c), 17867(a)(16)(E), and 17896.44.1(d).**

These subdivisions state, respectively:

(a) The EA may approve, with concurrence by the Department, alternative measurement protocols to the requirements of Sections 17409.5.2... as long as they will still ensure that the measurements will be as accurate.

(b) …If scales are not accessible, the EA may approve, with concurrence by the Department, the operator to report the tonnages using a method described in Section 18815.9(g).

(c) The EA may approve, with written concurrence by the Department, a substitute to certain requirements to sample and measure specific types of organic waste...

(E) An alternative measurement protocol for determining the amount of organic waste sent to landfill disposal may be approved by the EA, with concurrence by the Department.

(d) An alternative measurement protocol...may be approved by the EA, with the concurrence of the Department.

These provisions are unclear because they include no standards under which the Department will exercise its discretion to concur or not to concur so that the public and regulated entities know how the concurrence of the Department can be obtained.
1.19. **Section 18815.5(e).**

This subdivision states:

The Department shall determine if a facility meets or exceeds the recovery efficiency percentages specified in Sections 18984.3 and 17409.5.1 of this division...

The subdivision is unclear because section 18984.3 does not appear to specify recovery efficiency percentages.

1.20. **Title 27 CCR sections 21570(g)(2) and 21650(g)(5).**

These subdivisions state:

(2) Provide a summary of the comments received at the public meeting, and, where applicable, responses to public comments...

(5) Any written public comments received on a pending application and a summary of comments received at the informational meeting and, where applicable, responses to public comments...

The subdivisions are unclear because they lack standards for when it would be applicable to provide responses to public comments and when it would not.

1.21. **Title 27 CCR section 21695(b).**

This subdivision states:

The SIR shall be prepared by a California registered civil engineer or certified engineering geologist.

The subdivision is unclear, because the California Department of Consumer Affairs Board of Professional Engineers, Land Surveyors, and Geologists provides for the licensing, as opposed to registration or certification, of these professionals.

Prior to resubmission of this matter to OAL for review, the Department must revise the text of the regulations discussed above to make them clear and make the revised text available for public comments for a minimum of 15 days pursuant to Government Code section 11346.8(c) and Title 1 CCR section 44.

2. **NECESSITY STANDARD**

Government Code section 11349.1, subdivision (a)(1), requires OAL to review all regulations for compliance with the necessity standard. Government Code section 11349, subdivision (a), defines “necessity” to mean:
(a) ...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, Title 1 of the CCR, section 10, subsection (b) 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 regulations 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 on 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). (Gov. Code, sec. 11346.2, subd. (b).) The ISOR must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed, or, simply restated, “why” a regulation is needed and “how” this regulation meets that need. (Gov. Code, sec. 11346.2, subd. (b)(1).)

In this action, proposed sections 18981.1(b), 18984(a) and (b), and 18998 are summary overviews, or an index, of the regulations which follow in the chapter or article that these sections introduce. The scope or content or applicability of the regulations which follow these sections becomes apparent from the operative regulations themselves and renders these provisions unnecessary.

Absent providing a more compelling rationale for the necessity of these introductory provisions in an addendum to the ISOR and making that document available pursuant
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to Government Code section 11347.1, prior to resubmission of this matter to OAL, the Department must remove these provisions.

3. FAILURE TO FOLLOW REQUIRED APA PROCEDURES

The APA requires agencies to follow specific procedures in conducting a rulemaking action. In this action, the Department failed to comply with the following procedures.

3.1. Failure to identify and make available all relied-upon technical, theoretical, or empirical studies, reports, or similar documents, added to the rulemaking record after publication of its Notice of Proposed Action, pursuant to Government Code section 11347.1.

Pursuant to Government Code section 11346.2(b)(3), a rulemaking agency’s ISOR must include identification of each technical, theoretical, and empirical study, report, or similar document upon which it relies in proposing the regulatory action (hereafter “relied-upon documents”). Subsequent to issuance of the ISOR, which is made available at the time an agency publishes its notice of proposed action, additional relied-upon documents may be added to the rulemaking record only pursuant to Government Code section 11347.1. Government Code section 11347.1(a) requires that an agency that adds any relied-upon document to the rulemaking record after publication of its notice of proposed action must make the document available by mailing to certain categories of persons a notice which identifies the document and specifies where and when the document is available for inspection. Thereafter, the agency must accept public comments on the relied-upon material for a period of 15 days. (Gov. Code, sec. 11347.1, subdivisions (b)-(d).)

In this action, the Department’s ISOR identified 15 technical, theoretical, and empirical studies, reports, or documents. Although the Department does not expressly identify these documents as “relied upon,” it is reasonable to assume that the Department intended to comply with Government Code section 11346.2(b)(3) by identifying these 15 documents in its ISOR. The Department also made available its Updated ISOR and Appendix A to the Standardized Regulatory Impact Assessment (SRIA) for 15-day periods during the rulemaking proceeding. However, the Department’s Table of Contents for this action identifies four other groupings of technical, theoretical, and empirical studies, reports, or documents at: Binder 1 Tab 8; Binder 1 Internal Sleeve Disc 1; Binder 1 Internal Sleeve Disc 2; and Bundle 1. By characterizing these documents as technical, theoretical, and empirical studies, reports, or documents, it is reasonable to assume that the Department considers these documents to also have been relied upon in proposing this action. These collections of documents include numerous documents not identified in the ISOR pursuant to Government Code section 11346.2(b)(3) and not added to the rulemaking record, subsequent to publication of the notice, pursuant to Government Code section 11347.1.

In addition, Appendix A to the SRIA contains a section of “References.” These References appear to be 49 technical, theoretical, or empirical studies, reports, or other
documents presumably used in the preparation of Appendix A, but it is not clear whether the Department is also identifying these documents as relied-upon documents for purposes of adding them to the record pursuant to Government Code section 11347.1.

Prior to resubmission of this matter to OAL, the Department must identify each technical, theoretical, or empirical study, report, or other document upon which it relies in proposing this action (other than the body of Appendix A to the SRIA, the Updated ISOR, and the 15 documents identified in the ISOR) and make those documents available for public comment pursuant to Government Code section 11347.1. In addition, all technical, theoretical, and empirical studies or reports on which the Department relies in proposing this action must be included in the rulemaking record and must be identified as such on the Table of Contents pursuant to Government Code section 11347.3(b)(7) and (12).

3.2. Failure to comply with Title 1 CCR section 20 regarding the incorporation by reference of other documents and materials expressly or impliedly incorporated by reference in the regulatory text.

Pursuant to Title 1 CCR section 20(a), a regulation printed in the CCR may make provisions of another document part of that regulation by reference to that other document. Under section 20(c) and (d), the requirements for incorporating another document by reference into a regulation are these:

1. the agency must demonstrate in the FSOR that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the CCR;
2. the agency must demonstrate in the FSOR that the document was made available upon request directly from the agency or was reasonably available to the affected public from a commonly known or specified source;
3. the informative digest in the notice of proposed action must clearly identify the document to be incorporated by title and date of publication or issuance;
4. the regulation must state that the document is incorporated by reference and identify the document by title and date of publication or issuance;
5. the regulation text must specify which portions of the document are being incorporated by reference; and
6. unless the document is a formal publication reasonably available from a commonly known or identified source, the document must be attached to the regulatory text for filing with the Secretary of State.

In this action, the text of the regulations incorporates by reference, expressly or otherwise, the provisions of six other documents. The following is a list of those documents, their location in the text, and the requirements for incorporation by reference which have not been met or entirely met.

b. Section 18982(a)(27.6) "Table A-1 to Subpart A of Title 40 CFR Part 98 (12/11/2014)" – requirements 1., 2., 3., and 6.


e. Sections 18984.1(a)(1)(A) and 18984.2(a)(1)(C) "ASTM D6400" – requirements 1. – 6.

f. Section 18993.3(b) and (c)(2) "16 CFR Section 260.12 (2013)" – requirements 1. – 6.

Prior to resubmission of this matter to OAL, the Department must make revisions to the text and rulemaking record to comply with the requirements for incorporation by reference of these six documents under Title 1 CCR section 20. Compliance with requirement 3 above may be achieved in the Updated Informative Digest.

3.3. Failure to summarize and respond to all public comments pursuant to Government Code section 11346.9(a)(3).

OAL was unable to locate summaries and responses by the Department to a number of public comments submitted in this action, and a number of other public comments were not adequately summarized and responded to by the Department. OAL has identified those public comments for the Department.

Prior to resubmission of this matter to OAL, the Department must ensure that all public comments are adequately summarized and responded to in the FSOR.

3.4. Failure to include in the Final Statement of Reasons the three alternatives determinations, with supporting information, required pursuant to Government Code section 11346.9(a)(4).

Government Code section 11346.9(a)(4) requires that a rulemaking agency’s FSOR contain a determination with supporting information that no alternative considered by it would be: more effective in carrying out the purpose for which the regulation is proposed; as effective and less burdensome to affected private persons than the adopted regulation; or more cost effective to affected private persons and equally as effective in implementing the statutory policy. Although the Department’s FSOR contains a section which makes one of these alternatives determinations and includes supporting information, and it discusses a second alternative that would lessen the adverse economic impact of the regulation on small businesses while protecting human health and safety and the environment and provides the reasons for rejecting that alternative, the FSOR does not fully comply with Government Code section 11346.9(a)(4).

Prior to resubmission of this matter to OAL, the Department must prepare an FSOR which complies with Government Code section 11346.9(a)(4).
3.5. Failure to include, after each regulation, a notation listing the specific statutes authorizing the adoption of the regulation and the specific statutes being implemented, interpreted, or made specific by each regulation, pursuant to Government Code section 11346.2(a)(2).

In the regulation text, the Department included new or amended notations of the statutes authorizing this action (Authority statutes) and of those being implemented, interpreted, and made specific by these regulations (Reference statutes). However, the notations sometimes failed to list, for example, as an Authority statute, Public Resources Code section 42652.5, which is the Department’s primary authority for these regulations. In many other instances, the notations contained many Reference statute citations that were not implemented, interpreted, or made specific by the regulations for which they were listed.

Prior to resubmission of this matter to OAL, the Department must review the Authority and Reference statute notations following each adopted and amended regulation to ensure that all applicable, and only applicable, statutes are included.

3.6. Failure to include in the administrative record statements confirming compliance with Government Code section 11347.1 for the addition to the record of the Updated ISOR and Appendix A to the SRIA pursuant to Government Code section 11347.1(e).

Government Code section 11347.1(e) requires that, when an agency adds any relied-upon document to the administrative record after publication of its notice and makes the document available pursuant to section 11347.1(b) and (c), the rulemaking file include a statement confirming that the agency complied with the requirements of section 11347.1 and stating the date of compliance. In this action, the record did not include such statements for the availability of the Updated ISOR and Appendix A to the SRIA.

Prior to resubmission of this matter to OAL, the Department must prepare, and include in the record, Government Code section 11347.1 compliance statements for the availability of relied-upon documents added to the record after publication of its notice of proposed action.

3.7. Failing to include in the administrative record, pursuant to Government Code section 11347.3(b)(2), and to identify on the Table of Contents, pursuant to Government Code section 11347.3(b)(12), all published notices.

The Department sent notice of the first 15-day revised text and the addition of the Updated ISOR to the rulemaking record on June 18, 2019. Subsequently, the Department issued notices on June 20 and July 1 extending the deadline for public comments on that revised text and additional document.
The June 20 and July 1 notices must be included in the administrative record and listed on the Table of Contents pursuant to Government Code section 11347.3(b)(2) and (12).

3.8. Failing to include in the Updated Informative Digest, pursuant to Government Code section 11346.9(b), a description of any changes in the effect of the regulation resulting from substantial revisions made to the text during the rulemaking proceeding.

For every rulemaking action, an agency must prepare an Informative Digest which must include a clear and concise summary of, among other things, the effect of the proposed regulation. (Gov. Code, sec. 11346.5, subd. (a)(3)(A).) Government Code section 11346.9(a)(5) requires that the Informative Digest be updated at the conclusion of the rulemaking proceeding. In this action, the Department twice revised the text of the regulations in substantial ways and made the text available for public comment pursuant to Government Code section 11346.8(c). The Updated Informative Digest submitted by the Department did not update the Informative Digest regarding any changes in the effect of the regulation resulting from the two revisions to the text.

Prior to resubmitting this matter to OAL, the Department must prepare an Updated Informative Digest which describes any substantial changes in the effect of the regulation as described in the Informative Digest for the originally proposed regulations.

CONCLUSION

For the reasons outlined above, OAL disapproved the above-referenced rulemaking action. Pursuant to Government Code section 11349.4(a), the Department may resubmit this action to OAL for review within 120 days of its receipt of this Decision of Disapproval.

Prior to resubmission, any substantial changes made to the regulation text to address the issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11346.8(c) and section 44 of Title 1 of the CCR.

Prior to resubmission, any relied-upon documents identified by the Department for inclusion in the rulemaking record, and which have not already been identified and made available pursuant to Government Code section 11346.2(b)(3) or 11347.1, must be made available pursuant to Government Code section 11347.1.

A copy of this Decision of Disapproval will be emailed to the Department on the date indicated below.
Date: March 11, 2020

For: Kenneth J. Pogue
Director, OAL

Original: Ken DaRosa, Acting Director, CalRecycle
Copies: Harllee Branch, CalRecycle
Department of Finance, Major Regulations Division