

**State of California
Office of Administrative Law**

In re:
Fish and Game Commission

Regulatory Action:

Title 14, California Code of Regulations

Adopt sections: 42

Amend sections: 43, 651, 703

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2018-0801-02

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

SUMMARY OF REGULATORY ACTION

On January 24, 2018, the Fish and Game Commission (Commission) submitted to the Office of Administrative Law (OAL) its initial proposed regulatory action (OAL File No. 2018-0124-01S) to adopt and amend sections in Title 14 of the California Code of Regulations. The regulations establish a permit program for the commercial use of native rattlesnakes to develop antivenom, vaccines, and other therapeutic agents. This program includes an application form and fees, species authorized for use, minimum qualifications for applicants and employees, inspection requirements, humane care and treatment standards, emergency plan requirements, and record keeping and reporting obligations. On March 7, 2018, the Commission withdrew this initially submitted file.

The Commission subsequently modified its regulatory text and added an Amended Initial Statement of Reasons (ISOR) to the file. The Commission then made these documents available to the public for comment on June 11, 2018, for a period of 15 days. On August 1, 2018, the Commission resubmitted the proposed regulatory action to OAL for review. On September 13, 2018, OAL notified the Commission that OAL disapproved the proposed regulations because the Commission 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 substantial changes made to the final version of the regulation text, and by not considering a public comment received during the 15-day comment period of June 11, 2018, through June 26, 2018, as required by Government Code section 11346.8, subdivision (a).

DISCUSSION

The Commission's regulatory action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. (See Gov. Code, sec. 11340 et seq.) Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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.) No exemption applies to the present regulatory action under review.

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with both the procedural requirements of the APA and the standards for administrative regulations in Government Code section 11349.1. (See Gov. Code, sec. 11340.1, subd. (a).) 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. (*Ibid.*) 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 a recording of the October 11, 2017, Commission meeting demonstrating that the members of the Commission voted upon and approved the originally proposed regulation text, which was made available for public comment on August 4, 2017. Subsequent to the Commission's approval, substantial changes were made by Commission staff to the regulation text and the Amended ISOR was added to the rulemaking file. The modified regulation text and the Amended ISOR were made available June 11, 2018, through June 26, 2018, for a 15-day comment period, during which a public comment was received by Commission staff. Government Code section 11346.8, subdivision (a) states:

(a) ... The state agency shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation.

Since the Commission is the governing body and the entity granted the rulemaking authority in this matter (Fish and Game Code, §§ 200, 5061), the rulemaking file must include documentation that after consideration of all relevant matter, including any public comment, the Commission approved the final version of the regulation text, including all substantial changes. (Gov. Code, § 11347.3, subd. (b)(8).) The Commission staff made substantial changes to the regulations which were noticed in a 15-day comment period and a comment was received; therefore, the Commission was required to subsequently adopt the regulation text as amended after consideration of that comment, but did not do so. Thus, the Commission failed to follow the required APA procedures because the Commission did not consider all relevant matter and vote upon and approve the final version of the regulation text.

CONCLUSION

For these reasons, OAL disapproved the above-referenced 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. A copy of this Decision was emailed to the Commission on the date indicated below. If you have any questions, please do not hesitate to contact me at (916) 323-7465.

Date: September 20, 2018



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