

**State of California  
Office of Administrative Law**

**In re:  
Department of Fish and Wildlife**

**Regulatory Action:  
Title 14, California Code of  
Regulations**

**Adopt sections:  
Amend sections:       132.8  
Repeal sections:**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL Matter Number: 2025-0404-03**

**OAL Matter Type: Regular (S)**

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**SUMMARY OF REGULATORY ACTION**

In this rulemaking action, the Department of Fish and Wildlife (Department) sought to amend its Risk Assessment Mitigation Program regulation for the commercial Dungeness crab fishery. The action sought to add definitions, revise management actions, modify mandatory data reporting requirements, and add identification requirements for Dungeness Crab Fishing Gear and Alternative Gear.

On April 4, 2025, the Department submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On May 16, 2025, OAL notified the Department that OAL disapproved the proposed regulatory action pursuant to the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

**DECISION**

OAL disapproved the action because the proposed regulatory changes failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3), and for incorrect procedure.

**DISCUSSION**

The Department'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adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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.) No exemption applies to this regulatory action.

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 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. 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 the regulations. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (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 of title 1 of the California Code of Regulations (CCR), 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; or

(2) [...]

(3) [...]

- (4) [...]
- (5) the regulation presents information in a format that is not readily understandable by persons "directly affected;" or
- (6) [...]
- (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.

Proposed section 132.8(a)(4) defines "Confirmed Entanglements" as follows:

- (a) The following definitions apply to this Section only:
  - (1) [...]
  - (4) "Confirmed Entanglements" means the following:
    - (A) "Confirmed Entanglement within California Commercial Dungeness Crab Gear" means a marine life entanglement of an Actionable Species in California Commercial Dungeness Crab Gear reported to the department from any location by NOAA. The reported information may include entangled species, gear marking, and a determination by NOAA regarding the severity of the entanglement and any subsequent disentanglement, if available.
    - (B) "Confirmed Entanglement within Unknown Fishing Gear" means a marine life entanglement of an Actionable Species in Unknown Fishing Gear reported to the department from Ocean Waters bounded by the California-Oregon border and the boundaries of the U.S. Exclusive Economic Zone adjacent to California by NOAA. The reported information may include entangled species, and a determination by NOAA regarding the severity of the entanglement and any subsequent disentanglement, if available.

Proposed section 132.8(c) states:

- (c) Triggers for Management Action: The Director shall restrict the take of commercial Dungeness crab as follows. If two or more triggers are attained for the same Fishing Zone, the more restrictive management action shall apply.
  - (1) Confirmed Entanglements as defined by subsection (a)(4) shall be evaluated ~~during a single Fishing Season, averaged over a three-year period beginning with the 2021 calendar year~~

~~(inclusive)~~, on an ongoing basis and applied for each individual the Actionable Species as specified below.

(A) [...]

1. A Confirmed Entanglement in California Commercial Dungeness Crab Gear shall be considered one (1) entanglement.

2. Until November 1, 2028, a Confirmed Entanglement in Unknown Fishing Gear shall be considered one-quarter (0.25) of a Confirmed Entanglement in California Commercial Dungeness Crab Gear.

3. Effective November 1, 2028, an entanglement in Unknown Fishing Gear shall not be considered as a Confirmed Entanglement in California Commercial Dungeness Crab Gear.

Use of the term "considered" in proposed section 132.8(c)(1)(A)1. through 3. makes it unclear whether these subsections are intended to modify the definitions of "Confirmed Entanglement in California Commercial Dungeness Crab Gear" and "Confirmed Entanglement in Unknown Fishing Gear" in section 132.8(a)(4), or whether the Department intends for "considered" to mean the same as "applied" as used in section 132.8(c)(1). Thus, the regulation is unclear because it can be reasonably and logically interpreted to have more than one meaning and it presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subs. (a)(1) and (a)(5).)

## **2. INCORRECT PROCEDURE**

The APA and OAL's regulations in title 1 of the CCR require agencies to follow specific procedures when conducting a regulatory action. In this action, the Department did not comply with the following procedures.

### **2.1. FAILURE TO NOTICE SUBSTANTIVE MODIFICATIONS TO THE REGULATION TEXT**

Subdivision (c) of Government Code section 11346.8 states, in part:

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was

adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation.

During the 45-day comment period, the public was notified that the Department proposed to amend section 132.8 by modifying existing subsection (e)(4) and adding new subsection (h)(1). During the 15-day comment period, the Department noticed several modifications to the originally proposed regulation text but did not propose additional changes to subsections (e)(4) and (h)(1).

However, the final regulation text submitted to OAL for review includes additional substantive changes to subsections (e)(4) and (h)(1). The Department revised the language from what was originally proposed in the 45-day notice. Because these additional modifications were not illustrated in the modified regulation text or noticed to the public, the public was not given the opportunity to comment on those changes as required by Government Code section 11346.8(c).

The Department must make all changes available to the public for comment, with changes accurately illustrated, prior to resubmitting the rulemaking to OAL for review.

## **2.2. MAILING CONFIRMATION STATEMENTS**

Every rulemaking must include a mailing confirmation statement pursuant to CCR, title 1, section 86, which requires:

The rulemaking record shall contain a statement confirming that the agency complied with the provisions of Government Code Section 11346.4(a)(1) through (4) regarding the mailing of notice of proposed action at least 45 days prior to public hearing and close of the public comment period, and stating the date upon which the notice was mailed.

Further, when an agency substantively modifies the regulation text and notices the public with the changes for a 15-day comment period, CCR, title 1, section 44 requires:

(b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period.

In addition, when an agency adds a document relied upon to the rulemaking file, subdivision (e) of Government Code section 11347.1 requires:

The rulemaking file shall contain a statement confirming that the agency complied with the requirements of this section and stating the date on which the notice was mailed.

The mailing statements in the record do not comply with the requirements set forth in CCR, title 1, sections 44 and 86, and Government Code section 11347.1.

### **2.3. DOCUMENTS MISSING FROM THE RULEMAKING FILE**

Government Code section 11347.3, subdivision (b)(6), requires the rulemaking file to include all "written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation." The Department received written comments in connection with a 15-day notice conducted pursuant to Government Code sections 11346.8(c) and 11347.1, however, the submitted rulemaking file does not include the comments received during the 15-day public comment period.

Government Code section 11347.3, subdivision (b)(7), requires the rulemaking file to include "[a]ll data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation...." The Department identified several documents as being relied on but did not include them in the submitted rulemaking file.

### **2.4. INCORPORATION OF DOCUMENTS BY REFERENCE**

CCR, title 1, section 20, subdivision (c), establishes the conditions an agency must meet in order to incorporate a document by reference. It states:

(c) An agency may "incorporate by reference" only if the following conditions are met:

(1) The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the [CCR].

(2) The agency demonstrates in the final statement of reasons 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. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained....

Further, CCR, title 1, section 6, subdivision (a), requires, in relevant part:

For all regulatory actions submitted in hard copy to OAL for publication in the California Code of Regulations and/or transmittal to the Secretary of State for filing, the agency must include three copies of the certified regulation text.

In this action, the Department's proposed regulations incorporate by reference three sections of the Code of Federal Regulations. They also delete a prior version of a section in the Code of Federal Regulations incorporated by reference in the existing regulations. The Final Statement of Reasons (FSR) does not include the required statements, pursuant to subdivision (c) of section 20 of title 1 of the CCR. In addition, the final regulation text submitted to OAL does not include the documents incorporated by reference.

## **2.5. UPDATED INFORMATIVE DIGEST**

Subdivision (b) of Government Code section 11346.9 requires that the Updated Informative Digest (UID) contain "a clear and concise summary of the immediately preceding laws and regulations, if any, relating directly to the adopted, amended, or repealed regulation and the effect of the adopted, amended, or repealed regulation." The UID in the rulemaking record does not include the required summary.

## **CONCLUSION**

For the foregoing reasons, OAL disapproved the above-referenced regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Department may resubmit revised regulations within 120 days of its receipt of this

Decision of Disapproval of Regulatory Action. A copy of this Decision will be emailed to the Department on the date indicated below.

The Department must make any substantive regulatory text changes, which are sufficiently related to the originally noticed text, available for public comment for at least 15 days pursuant to subdivision (c) of Government Code section 11346.8 and section 44 of title 1 of the CCR. Any objections or recommendations raised by the public during the 15-day public comment period must be summarized and responded to in the FSR. The Department must resolve all issues raised in this Decision of Disapproval of Regulatory Action prior to the resubmittal of this regulatory action.

If you have any questions, please do not hesitate to contact me at (916) 323-6824.

Date: May 23, 2025



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