



Notice of Proposed Emergency Rulemaking Action

NOVEMBER 7, 2022

WRITTEN HEARING PROCESS

Notice of Proposed Emergency Readoption

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of a proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency regulation to OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

The Office of Energy Infrastructure Safety (Energy Safety) intends to submit this proposed emergency rulemaking action for review on November 16, 2022. Upon submission, OAL will review the emergency rulemaking action within 10 calendar days. Following that review, OAL will file the regulations with the Secretary of State, and the regulations will become effective on December 12, 2022, and the regulations will continue to be effective for 90 days.

The submitted emergency action, including the specific language of the proposed emergency regulations, will appear on the list of “Emergency Regulations Under Review” on OAL’s website at: https://oal.ca.gov/emergency_regulations/emergency_regulations_under_review/.

Text of the Regulation

See the attached proposed text of the emergency regulation.

Authority

Government Code sections 15473(c)(2)(E), 15475.4(b) and (d), and 15475.

Reference

Government Code section 15475.4.

Written Comment Period

Interested parties have a five-calendar-day comment period that begins when OAL posts the notice of the pending emergency action on the OAL web site. Comments must be submitted in writing.

Comments to Energy Safety

Comments may be submitted in the 2022 Emergency Rulemaking Docket at:
<https://efiling.energysafety.ca.gov/EFiling/DocketInformation.aspx?docketnumber=2022-RM>

For e-filing questions, contact Energy Safety at: efiling@energysafety.ca.gov

In the alternative, comments can be mailed or emailed to:

Office of Energy Infrastructure Safety
715 P Street, 20th Floor
Sacramento, California 95814

Email: info@energysafety.ca.gov

Comments to the Office of Administrative Law

Comments may be submitted to the Office of Administrative Law at:

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
Fax: (916) 323-6826

Email: staff@oal.ca.gov

Substantial Progress Toward Adoption of Permanent Regulations

Energy Safety has proceeded with diligence and made substantial progress toward compliance with Government Code section 11346.1(e). Emergency Safety is adopting a permanent version of this regulation. Energy Safety has submitted notice of that action for publication in the California Regulatory Notice Register on August 26, and the 45-day public review and comment period ended on October 10, 2022. After the 45-day period, Energy Safety made minor changes to the proposed regulation, which is currently available for a 15-day public review and comment period with will end on November 8, 2022.

This readoption of the emergency regulation will provide Energy Safety with the time needed to adopt the same or similar regulations through the regular rulemaking process.

The emergency regulation which Energy Safety proposes to readopt will expire on December 13 2022.

Finding of Emergency

Pursuant to California Code of Regulations, title 1, section 52(b)(2), Energy Safety confirms that there have been no changes in emergency circumstances since the original adoption of the emergency regulation.

In July of 2021, Energy Safety came into existence as a department within the Natural Resources Agency. (See, Gov. Code § 15475.) The California Energy Infrastructure Safety Act Gov. Code §§ 15470 – 15476), in conjunction with Public Utilities Code sections 326 through 326.2 and 8385 through 8389, require Energy Safety to administer a range of statutory requirements intended to reduce the risks that wildfires will be caused by electrical utility infrastructure.

The Act provides, in two statutes, that adoption of these regulations constitutes an emergency for purposes of Government Code section 11342.545, and is considered to be necessary for the immediate preservation of the public peace, health and safety, or general welfare. Both Government Code sections 15473(c)(2)(E) and 15475(a) authorize Energy Safety to adopt regulations to carry out its duties pursuant to section 15475 and provide that adoption of the regulations is deemed an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare.

That Act authorizes Energy Safety to issue a notice of defect or violation regarding noncompliance with the approved wildfire mitigation plan or failure to comply with any laws, regulations, or guidelines within the authority of the office. (Gov. Code §§ 15475.2 and 15475.4(a).) The Act directs that Energy Safety provide an opportunity for a hearing on the notice and establish the hearing process through regulation. (Gov. Code § 15475.4(b), (d).) Further, the Act makes explicit findings regarding the emergency nature of these regulations. (Gov. Code §§ 15473(c)(2)(E) and 15475(a).)

Incorporation of the Original Record

Pursuant to California Code of Regulations, title 1, section 52(c), Energy Safety hereby incorporates by reference the rulemaking record of OAL File No. 2022-0307-02. Included with this notice is the specific regulatory language now in place following OAL's March 17, 2022 approval of Energy Safety's emergency action and the Notification of Proposed Emergency Regulatory Action that was submitted to OAL on or about March 17, 2022.

Copies of those documents are available on Energy Safety's website at this address:

<https://efiling.energysafety.ca.gov/EFiling/DocketInformation.aspx?docketnumber=2022-RM>

Informative Digest

In enacting the Energy Infrastructure Safety Act (Government Code sections 15470-15476), the Legislature acknowledged the critical nature of energy and communication infrastructure as the “driving the engine of the state’s prosperity, in the hardships placed on the state’s residents in the absence of the services the infrastructure provides, and in the devastation that can occur when the operators of the infrastructure lose operational control of the infrastructure.” (Gov. Code § 15470.) To ensure that the operations of energy and communication infrastructure within the state are managed adequately, the Legislature created Energy Safety.

Energy Safety is the successor to, and is vested with, all of the duties, powers, and responsibilities of the Wildfire Safety Division established pursuant to Public Utilities Code section 326, including, but not limited to, the power to compel information and conduct investigations. Energy Safety’s mission is to advance long-term utility wildfire safety by developing data-driven, comprehensive utility wildfire mitigation evaluation and compliance criteria, collaborating with local, state and federal agencies, and supporting efforts to improve utility wildfire safety culture and innovation.

Energy Safety will ensure electrical utilities are taking effective actions to reduce utility-related wildfire risk by deploying measures to ensure an integrated, utility-related wildfire mitigation approach and to seek innovative problem solving to address utility wildfire risks. Those measures include, but are not limited to, notices of defect or violation in the event of any defect or noncompliance with the approved wildfire mitigation plan or failure to comply with any laws, regulations, or guidelines within the authority of the office.

Purpose of the Hearing

The proposed emergency adoption of section 29104 furthers Energy Safety’s mission of reducing wildfire risk by establishing a process by which the regulated entities can present additional information to the office regarding their notice of defect or violation as well as facilitating public engagement in the review of the notice.

The purpose of the hearing is to allow the public and the regulated entity to present additional information regarding the circumstance that led to the notice of violation (or defect) based on an electrical corporation’s failure to comply with its wildfire mitigation plan. The hearing is fact-finding in nature and does not relate to an enforcement decision. Ultimately, Energy Safety’s decision is whether to refer the notice to the Public Utilities Commission for further investigation and any enforcement action.

The Hearing is Exempt from Administrative Procedure Act Requirements

The procedural requirements of the Administrative Procedure Act do not apply to this hearing because (1) the statute which requires the hearing does not require an adjudicative hearing (Gov. Code section 11415.50(a)), and an adjudicative proceeding is not required for an informal fact-finding or investigatory hearing, or for a decision whether or not to initiate an investigation or other proceeding. (Gov. Code § 11415.50 (b).) Energy Safety has no statutory authority to

issue citations or determine penalty amounts. That authority is vested in the California Public Utilities Commission. Energy Safety's role is to gather information relating to the act (or condition) charged as a violation and then decide whether or not to provide the information to the California Public Utilities Commission to investigate and, potentially, enforce.

Further, due process does not require that the hearing conform to Administrative Procedure Act requirements because in issuing the notice of violation (or defect), Energy Safety is not infringing upon any protected interest. If a penalty is imposed, the decision regarding that action will be made through the California Public Utility Commission's formal process.

The procedural requirements of the APA do not apply to this hearing because (1) the statute which requires the hearing does not require an adjudicative hearing (Gov. Code § 11415.50(a)), and (2) an adjudicative proceeding is not required for an informal fact-finding or investigatory hearing, or for a decision whether or not to initiate an investigation or other proceeding. (Gov. Code § 11415.50 (b).) Energy Safety has no statutory authority to issue citations or to determine penalty amounts. As noted above, that authority is reserved to the PUC. Energy Safety's role is to gather information relating to the act (or condition) identified as a violation and then decide whether or not to provide the information to the PUC to investigate and, potentially, enforce.

Further, due process does not require that the hearing conform to APA requirements because in issuing the notice of violation (or defect), Energy Safety is not infringing upon any protected interest. If a penalty is imposed, the decision regarding penalty taking will be made through the PUC's formal process.

Existing laws and regulations directly related to the proposed action include the following:

Government Code sections 15470 et seq. set forth the legislative findings regarding the importance of energy infrastructure and the need for Energy Safety to support the State's efforts to ensure the operations of energy infrastructure will be managed adequately, as well as the authorities of Energy Safety to carry out those objectives. Proposed section 29104 is consistent with and in furtherance of those goals and is consistent with existing state regulations.

Other Matters Prescribed by Statute

Besides Government Code sections 15470-15476, other bodies of law that govern Energy Safety include the Public Utilities Code sections 326, 8385-8386.5, and 8389.

Local Mandate Determination

Energy Safety has determined that the proposed changes do not impose a mandate on local agencies or school districts.

Estimate of Cost or Savings

Proposed section 29104 is a process-based regulation that does not impose any additional costs not contemplated by the hearing requirement imposed by the Energy Safety Act.

The proposed regulations will not result in any reimbursable costs to local government agencies, school districts, nondiscretionary costs or savings to local government agencies, or costs or savings in federal funding to the state.

Duplication

There are no existing regulations related directly to the proposed emergency rulemaking, and this proposed emergency readoption does not conflict with or duplicate any existing statutes or regulations. The proposed emergency regulations do not conflict with any federal requirements.

Necessity

Energy Safety is a new department. Before July of 2021, its responsibilities were handled by the Wildfire Safety Division of the California Public Utilities Commission. In July of 2021, Energy Safety became a department within the Natural Resources Agency. (See, Gov. Code § 15475.)

Electrical corporations are required to operate and maintain electrical equipment in ways that minimize the risk that the equipment will start wildfires. (Pub. Util. Code § 8386(a).) Energy Safety is required by statute to conduct investigations into electrical corporation compliance with wildfire mitigation plans and related matters. (Gov. Code §§ 15475.1, 15473(c)(2)(D).) In conducting those investigations, Energy Safety is authorized to compel the production of information and require answers to questions. (Gov. Code §§ 15473(d), § 15475(g).) Electrical corporations are required to cooperate with the investigations. (Gov. Code § 15475(f), (h).)

Further, statute authorizes Energy Safety to issue notices of defect and notices of violation based upon investigation findings, (Gov. Code § 15475.4(a)) and Energy Safety has begun serving notices of defect and notices of violation.

The readoption of this regulation is necessary because statute also requires Energy Safety to provide electrical corporations with hearings, if requested, on the notices, (Gov. Code § 15475.4(b).) The dual purpose of the hearing is to allow (1) the public to comment on the notice of defect notice of violation, and (2) the electrical corporation to provide more information regarding the notice. (Gov. Code § 15475.4(b).) After conducting the hearing, Energy Safety may decide whether to refer the notice to the California Public Utilities Commission for investigation.¹

¹ The California Public Utilities Commission responsible for imposing penalties for failures to comply with wildfire mitigation plans. (Pub. Util. Code § 8386.1.)

Section 29104

Energy Safety must establish a procedure for the hearings by regulation. (Gov. Code § 15475.4(b), (d).) Two statutes provide that the regulation may be adopted through the emergency process.

Government Code section 15473(c)(2)(E) authorizes Energy Safety to adopt regulations to carry out its duties pursuant to section 15475 and provides that the adoption of the regulations is deemed an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare.

Government Code section 15475(a) also requires Energy Safety to adopt emergency regulations to implement the California Energy Infrastructure Act, provides that the adoption is an emergency for purposes of Government Code section 11342.545, and is considered to be necessary for the immediate preservation of the public peace, health and safety, or general welfare.

If the hearing process is not established through this regulatory action, Energy Safety will be unable to offer the hearing required by the statutory framework.

Subdivision (d)

In subdivision (d), section 29104 provides that Energy Safety will receive information, from members of the public and from the appealing entity, for a period of 30 days. Energy Safety weighed the need to finalize its notices of violation with the need of the appealing entity to provide further information and for the public to provide comment on the notice. The prescribed duration will provide sufficient time for interested persons to review information and provide input, while also serving the need to expediently resolve appeals.

Subdivision (e)

Subdivision (e) of section 29104 provides that when a hearing is requested, Energy Safety will identify a neutral hearing examiner. The hearing examiner will be selected by the Office of Administrative Hearings and will consider information received by Energy Safety via subsection (d), described above, and will issue a proposed determination. The proposed determination will make a finding regarding whether the information submitted by Energy Safety, the public, and the regulated entity supports the deficiency, violation, or failure to act set forth in the notice of defect or violation. This subsection is needed so Energy Safety can ensure that a neutral arbiter reviews the information and comments regarding a notice of defect or violation. A neutral arbiter not only can provide an impartial view of the submitted material, but can also provide a new and potentially different perspective on the issues.

Subdivision (f)

In subdivision (f), section 29104 provides that Energy Safety will make the hearing officer's proposed determination available for public review and comment for 15 days. Energy Safety concludes that the 15-day duration is appropriate because, at this stage, interested members of

the public already had 30 days to review and comment on the notice of violation or defect and had the opportunity to review submissions from other interested parties. At this stage, those members of the public are already familiar with the information relating to the appeal.

Subdivision (g)

In subdivision (g), section 29104 provides that Energy Safety will issue a final decision on appeals within 15 days after the close of the final public comment period. Energy Safety concludes that this time period provides the final decisionmaker with sufficient time to reach the decision and will provide interested parties a final resolution on the matter.