

Memorandum 98-11

Administrative Rulemaking: Consent Regulations

This memorandum discusses the benefits of some form of streamlined procedure for the adoption of regulations that are unopposed (“consent regulations”). The staff solicited comments on this subject from a large sample of state agency regulatory specialists. Their responses and a letter we received from the State Bar Committee on the Administration of Justice are included in the Exhibit. Also included, for reference, is a copy of Section 100 of Title 1 of the California Code of Regulations.

	<i>pp.</i>
1. Jonathan T. Smith, San Francisco Bay Conservation and Development Commission (Nov. 7)	1
2. Mike Sotelo, Department of Boating and Waterways (Nov. 17)	2
3. Gary Brittner, Board of Forestry (Nov. 17)	4
4. Julian O. Standen, Department of Justice, representing the California Apprenticeship Committee (Nov. 18)	5
5. Lawrence C. Counts, Franchise Tax Board (Nov. 21)	7
6. Janice L. Masterson, State Board of Equalization (Nov. 24)	9
7. Jan Lynn Owen, Department of Financial Institutions (Nov. 24)	11
8. John D. MacLeod, Occupational Safety and Health Standards Board (Nov. 25)	12
9. Cheryl D. McNulty, Department of Transportation (Nov. 25)	15
10. Pete Bontadelli, Office of Oil Spill Prevention and Response (Nov. 25)	16
11. Stephen P. O’Brien, Department of Parks and Recreation (Dec. 1)	18
12. Jesse R. Huff, Department of Toxic Substances Control (Dec. 1)	22
13. Roger Wolfertz, Department of Education (Dec. 2)	25
14. Dick Ratliff, California Energy Commission (Dec. 2)	28
15. Ron Russo, Department of Justice (Dec. 3)	30
16.. Frank R. Vitulli, Department of Social Services (Dec. 4)	32
17. Luisa Park, Office of Public School Construction (Dec. 5)	35
18. Kim Zeldin, State Bar Committee on Administration of Justice (Dec. 10)	37
19. Dixon Arnett, Department of Aging (Dec. 17)	40
20. Linda Irokawa-Otani, Department of Pesticide Regulation (Dec. 23)	42
21. 1 CCR § 100 (Publication of “Changes Without Regulatory Effect”)	45

BACKGROUND

As part of its general study of administrative rulemaking law, the Commission instructed the staff to investigate whether a procedure similar to “direct final rulemaking” would be useful in the context of California’s rulemaking scheme. Direct final rulemaking is a streamlined process, developed by federal agencies, for the adoption of regulations that are noncontroversial. Under this process, an agency publishes the “final” text of a regulation that it believes to be noncontroversial. It then solicits public comment. If no adverse comment is received in the public comment period, the rule becomes effective. However, if even a single adverse comment is received, the proposed rule is withdrawn and does not become effective. Typically the agency then pursues adoption of the rule through the full rulemaking procedure.

Memorandum 97-69 discussed the issues that would arise in implementing a similar procedure in California and presented a preliminary discussion draft of proposed legislation. A copy of this draft is attached as the “First Discussion Draft.” The approach taken in that draft was very conservative. It was based on the following policy assumptions:

- Public notice should not be substantially simplified. Members of the public require complete information on the purpose and likely effect of a proposed regulatory action in order to determine whether they oppose it.
- Automatic OAL review should be preserved. The fact that a proposed regulatory action is unopposed does not necessarily mean that it satisfies the substantive criteria reviewed by OAL.

Given these constraints, the only real effect of the First Discussion Draft would be to eliminate the need to submit a Final Statement of Reasons and an Updated Informative Digest where no adverse comment is received in response to a proposed regulatory action.

At the October 1997 Commission meeting, Professor Michael Asimow, a Commission consultant on administrative law, criticized the approach taken in the First Discussion Draft as being much too limited. This criticism was reinforced by comments from representatives of the Office of Administrative Law (OAL). According to OAL, the effort that is required to prepare the Final Statement of Reasons and the Updated Informative Digest is proportional to the complexity and controversial nature of the regulatory action in question. If no adverse comment is received in response to a regulatory proposal, then the Final

Statement of Reasons and the Updated Informative Digest can easily be prepared by making only minor changes to the Initial Statement of Reasons and Informative Digest that were prepared earlier in the process. Thus, the savings achieved by eliminating the Final Statement of Reasons and Updated Informative Digest would be slight.

In light of these points, the Commission instructed the staff to solicit input from state agencies as to the usefulness of some form of streamlined procedure for the adoption of noncontroversial regulations. The results of this inquiry are discussed below. The Commission also instructed the staff to prepare draft language more along the lines suggested by Professor Asimow. This draft is attached as the "Second Discussion Draft" and is discussed below.

AGENCY INQUIRY

In November of 1997, the staff mailed questionnaires to the regulation coordinators of over a hundred state agencies. These questionnaires asked the coordinators to estimate the burden to their agency of each of the major steps of the rulemaking process when adopting a minor and noncontroversial regulation. Coordinators were also asked to suggest which procedures might be streamlined or eliminated when adopting a minor and noncontroversial regulation, and to estimate the savings if such streamlining were implemented. Twenty agencies responded. These responses are summarized below.

Procedural Burden

Most of the agencies that responded estimated the costs associated with adoption of a minor and noncontroversial regulation to be minor. Several specifically noted that procedural complexity is proportional to the complexity and controversial nature of the proposed action. This is consistent with OAL's observation that a minor or trivial rulemaking involves only minor or trivial procedural costs and delay.

Suggested Streamlining

There was no consensus among responding agencies as to whether a streamlined procedure for adoption of minor and noncontroversial regulations would be useful. Agencies that feel that no streamlining is necessary offered two reasons for this opinion:

(1) The cost and delay associated with the procedure is minor when adopting a minor rule.

(2) There is already a streamlined procedure for adoption of truly trivial regulations. Section 100 of the OAL regulations allows an agency to adopt a regulation that makes technical changes without regulatory effect, without following the rulemaking procedure. See 1 CCR § 100, attached at Exhibit p. 45. Use of this procedure is contingent on OAL approval. Note, however, that many noncontroversial regulations will have some regulatory effect and therefore cannot be adopted under Section 100.

Other agencies felt that streamlining would result in significant savings. Of these agencies, virtually all suggested that the Final Statement of Reasons and Updated Informative Digest requirements be eliminated when adopting a minor and noncontroversial rule. This is consistent with the approach taken in the First Discussion Draft. There were also some suggestions that the Initial Statement of Reasons, Notice of Proposed Rulemaking, Assessment of Economic Impact, and OAL review be truncated or eliminated. This is consistent with the approach taken in the Second Discussion Draft.

Other Concerns

Difficulty of predicting controversy. A number of respondents are concerned that it would be difficult for an agency to predict whether a regulatory proposal is noncontroversial until after public comment has been received. This undermines the usefulness of a consent regulation procedure that requires an agency to commit to a separate procedural path before proceeding. For example, under the procedure set out in the Second Discussion Draft, an agency must commit to the consent regulation path from the beginning of the process. If an adverse comment is received in the public comment period, the process ends and the agency must start over with the general rulemaking procedure. This means that if an agency predicts that a regulation will be noncontroversial and guesses wrong, use of the consent regulation procedure will be more burdensome than if the agency had proceeded under the general rulemaking procedure from the beginning. This problem does not arise under the approach taken in the First Discussion Draft, because the streamlining in that proposal is a modification of the existing scheme rather than the creation of a separate procedural track.

The prospect of extra costs resulting from unexpected opposition would probably lead to conservative use of the procedure. If an agency had any doubt about a proposal being noncontroversial, it would probably not use the consent

regulation procedure. This slightly undermines the utility of the consent regulation procedure, but should reassure those who distrust agencies, by providing a disincentive against overuse of the procedure.

Perceived unfairness. Other commentators are concerned that simplification of rulemaking procedures might undermine the perceived legitimacy of rulemaking by compromising public participation. However, both of the discussion drafts substantially preserve public notice and comment procedures. Therefore, it doesn't appear that the perceived unfairness of the procedure would be a problem.

COMMENTS OF COMMITTEE ON ADMINISTRATION OF JUSTICE

The State Bar Committee on Administration of Justice (the Committee) wrote regarding the First Discussion Draft. See Exhibit pp. 37-39. The Committee endorses the approach taken in that draft, subject to one minor change in the definition of adverse comment. This change would make clear that a comment noting a defect in the procedures used to adopt a regulation is an "adverse comment." The staff has no problem with this change and has incorporated it into the First Discussion Draft.

The Committee believes that existing public notice and OAL review provisions should be preserved in the consent regulation procedure:

The notice and comment procedures are necessary to ensure that members of the public have the opportunity to receive notice and have an opportunity to raise an objection. OAL's review continues to be a necessary procedural safeguard because it addresses non-substantive defects.

See Exhibit p. 39. Note, however, that the Committee's comments were submitted before the Second Discussion Draft was prepared. It may be that the notice and comment and OAL review procedures in the Second Discussion Draft are adequate to address the Committee's concerns.

SECOND DISCUSSION DRAFT

The Second Discussion Draft implements the approach recommended by Professor Asimow. The most noteworthy features of this draft are the substantially simplified notice requirement and the elimination of mandatory OAL review.

Simplified Notice

Under existing law, the initial statement of reasons and the public notice of a proposed regulatory action must include each of the following items:

- A description of the public problem the action is intended to address.
- A statement of the specific purpose for the action.
- A statement justifying specific technological mandates or prescriptive standards.
- A catalog of all authority relied on by the agency in proposing the action.
- A description of alternatives to the proposed action and an explanation as to why they were rejected.
- A description of alternatives that would be less burdensome to small business.
- Evidence supporting a conclusion that the action will not have a significant adverse economic effect on business.
- Notice of public participation opportunities.
- Reference to the authority under which the action is taken and reference to the provisions of law to be implemented, interpreted, or made specific.
- An informative digest summarizing existing laws and regulations related to the proposed action and the effect of the proposed action.
- An analysis of significant differences between the proposed action and comparable federal law.
- A plain English policy overview (if small businesses will be affected).
- A statement as to whether the proposed action imposes a mandate on local agencies or school districts, and if so, whether reimbursement is required.
- An estimate of costs or savings to state agencies.
- Various statements relating to the proposed action's potential for adverse economic impacts on business and private persons.
- Analysis of the proposed action's effect on housing costs.
- A statement that no alternative would be more effective, or as effective but less costly, than the proposed action.
- Further information regarding procedures for public comment.

A notice prepared pursuant to the Second Discussion Draft would include only the following items:

- A clear overview explaining the purpose and effect of the proposed regulatory action.
- A boilerplate notice making clear that the consent regulation procedure is being used.
- Reference to the authority under which the regulatory action is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.
- Instructions on how to obtain a copy of the preliminary text of the proposed regulatory action and how to submit a written comment relating to the proposed regulatory action.
- A statement of the agency's findings that the proposed action will have no adverse effect on business and will not impose any financial burden on state or local agencies.

This streamlining would clearly save significant agency resources. The question is whether the streamlined notice would provide sufficient information for members of the public to determine whether or not the proposal was objectionable. The staff believes that the streamlined notice would probably be sufficient, for two reasons:

(1) The consent regulation procedure can only be used if the agency finds that the proposed regulatory action will have no significant adverse financial impact on businesses, individuals, or housing costs, and will not impose costs on state or local agencies. This should dispense with many potential concerns that the public might have.

(2) Anyone who feels that the information provided is inadequate can make an adverse comment in the public comment period and stymie the process.

Post-Comment Reporting

The Second Discussion Draft, like the First Discussion Draft, does not require preparation of the Final Statement of Reasons or the Updated Informative Digest. These documents are not useful where there has been no adverse comment and no substantive change following the public comment period.

Public Hearing

The Second Discussion Draft does not provide an opportunity for a public hearing. Public comment is limited to written comments received during the 45-day public comment period. Again, this should not be a problem, as anyone who has serious concerns about the proposed action can bar it with a very brief adverse written comment.

OAL Review

The Second Discussion Draft does not require automatic OAL review before a proposed regulatory action becomes effective. Instead, the draft provides for OAL review, on the request of any interested person, of regulations adopted under the consent regulation. If OAL finds that the procedures were not followed, or that the regulatory action does not satisfy the substantive standards that apply to all regulations, it can disapprove the regulation. Unless OAL's disapproval is overruled by the Governor's Office, it becomes final and the regulatory action is reversed.

In the vast majority of cases, a consent regulation, being relatively minor and unobjectionable, will not require or receive any review by OAL. In the few cases where a consent regulation is problematic, the elective review procedure can be used to reverse the problematic action. This should lead to significant savings in time and resources.

CONCLUSION

There is no consensus among state agencies that a streamlined consent regulation procedure is necessary. Section 100 of the OAL regulations already provides a streamlined procedure for the adoption of truly trivial regulations. Furthermore, as OAL and a number of state agencies pointed out, the burden of the existing rulemaking procedure is proportional to the complexity of the proposed action. Where a proposed action is minor and noncontroversial, the post-comment procedural requirements are relatively slight.

On the other hand, a reform along the lines of the First Discussion Draft would eliminate the need to prepare pointless boilerplate. While the time to do so might be trivial in the case of any particular rulemaking, the cumulative savings to the state of eliminating these requirements from all noncontroversial rulemaking proceedings could be significant. The potential efficiency gains derived from a reform along the lines of the Second Discussion Draft are even more substantial.

Despite the ambivalence of some agencies toward reform in this area, the staff recommends that at least the minimal reforms embodied in the First Discussion Draft be proposed. Furthermore, if the Commission concludes that the public notice provided in the Second Discussion Draft is adequate to inform the public of the probable purpose and effect of a consent regulation, then the staff recommends that the consent regulation procedure in that draft be developed as a separate tentative recommendation. The proposals contained in the two drafts are not incompatible.

Respectfully submitted,

Brian Hebert
Staff Counsel

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

THIRTY VAN NESS AVENUE, SUITE 2011
SAN FRANCISCO, CALIFORNIA 94102-6080
PHONE: (415) 557-3686

Law Revision Commission
RECEIVED

NOV 12 1997

November 7, 1997

File: _____

Mr. Brian Hebert
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

**SUBJECT: Streamlined Procedure For Adoption
of Noncontroversial Regulations**

Dear Mr. Hebert:

I am responding to your letter dated November 5, 1997. I have the following responses to your inquiries, which represent only my own personal assessment, not that of the remainder of the staff or the Commission:

1. I would approximate the cost and delay for noncontroversial regulations as moderate.
2. I believe that the APA could eliminate the public hearing, subject to the agency holding a hearing if any controversy arises in the submittal of written materials, the preparation of a final statement of reasons, and could hopefully truncate the OAL review process based on a limited review of the rulemaking process for assuring that the proposed change was in fact noncontroversial and that the agency follows the streamlined process only.

I believe that this review and possible change in rulemaking procedures could significantly improve the Commission's ability to carry out its mission and responsibilities and allow the Commission, the public, and OAL to focus on those matters that truly should be subject to close and careful scrutiny.

Thank you for the opportunity to respond, and please feel free to call or to write if you have any questions.

Sincerely,



JONATHAN T. SMITH
Senior Staff Counsel

DEPARTMENT OF BOATING AND WATERWAYS

1629 S STREET
SACRAMENTO, CA 95814-7291
(916) 445-6281



November 17, 1997

Law Revision Commission
RECEIVED

NOV 26 1997

File: _____

Brian Hebert
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Dear Mr. Herbert:

This is in response to your November 5, 1997 letter, pertaining to the formulation of a recommendation to the State Legislature, for the purpose of streamlining procedures for the adoption of non-controversial regulations, in a manner similar to the direct final rulemaking procedures under federal law.

Question: *(1) When adopting a regulation that has only very minor effects, and to which there is no public opposition, how great are the cost and delay associated with the following procedures:*

- *Preparing the initial statement of reasons.*

Comment: Insignificant or negligible.

- *Preparing the notice of proposed regulatory action.*

Comment: Insignificant or negligible.

- *Assessing the potential for significant adverse economic impacts.*

Comment: This process may delay the preparation of the notice and initial statement of reasons depending on the extent of the impact.

- *Holding a public hearing (if any).*

Comment: Insignificant or negligible.

- *Preparing a final statement of reasons.*

Comment: Insignificant or negligible.

- *Preparing a final statement of reasons.*

Comment: Insignificant or negligible.

Mr. Brian Hebert
November 19, 1997
Page Two

- *Preparing an updated informative digest.*

Comment: Insignificant or negligible.

- *OAL review.*

Comment: To date the Department has not experienced any unusual delays due to the OAL review process, nor has it incurred any additional expense as a result, thereof.

Question: (2) *Which of the procedures enumerated above could be skipped or abbreviated when adopting a regulation that has only minor effects, and to which there is no public opposition, without substantially affecting the quality of your agency's deliberations and without compromising the essentials of public notice and comment?*

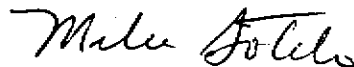
Comment: Any position the Department takes in regard to proposed legislation must be approved by the Governor's Office. We, therefore are unable to answer this question.

Question: (3) *How great a savings would result to your agency if an exception were created along the lines suggested by your answer to question (2)?*

Comment: This issue would be difficult to assess with a blanket monetary assessment of the savings gained. The estimated range of savings would be staff time which could range from one day to one week per each rulemaking file, depending on the degree of complexity of these processes.

If you have any questions regarding the responses noted above, please contact me at: (916) 322-1823.

Sincerely,



Mike Sotelo
Program Manager
Regulations Unit

BOARD OF FORESTRY

1416 NINTH STREET
P. O. BOX 944246
SACRAMENTO, CALIFORNIA 94244-2460
(916) 653-8007
FAX (916) 653-0989



Law Revision Commission
RECEIVED

NOV 19 1997

November 17, 1997

File: _____

Mr. Brian Hebert, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Dear Mr. Hebert:

I am writing in response to your November 5, 1997, letter regarding streamlined procedures for administrative law. It would be difficult for the Board of Forestry to participate in the streamlined approach you are considering. The bulk of the Board's rules relate to amendments to the Forest Practice Rules under authority of the Forest Practice Act Public Resources Code (PRC). PRC 4554 requires the Board to conduct public hearings when it modifies the Forest Practice Rules.

In other rulemaking arenas such as regulations affecting Professional Foresters Registration, the Board may be able to take advantage of streamlining.

- (1) The cost and delay for minor rules may be in the neighborhood of \$1000.00 and 14 weeks.
- (2) For real streamlining one could skip all items except the initial statement of reasons and OAL review (approval).
- (3) The annual savings for streamlining would be minuscule. The Board rarely adopts rules that are not within the domain of the Forest Practice Rules.

Please call me at (916) 653-9418 if you have any questions. Good luck in your streamlining attempts!

Sincerely,

A handwritten signature in cursive script that reads "Gary Brittner".

Gary Brittner
Deputy Chief, Regulations

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE



50 FREMONT STREET, SUITE 300
SAN FRANCISCO, CA 94105
(415) 356-6000

FACSIMILE: (415) 356-6370
(415) 356-7395

November 18, 1997

Law Revision Commission
RECEIVED

NOV 19 1997

File: _____

Brian Hebert
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

RE: California Apprenticeship Council

Dear Mr. Hebert:

This Office represents the California Apprenticeship Committee in matters relating to the adoption of new regulations. This letter responds to your request for information about the cost of promulgating regulations that have "only very minor effects".

I estimate the following costs arise from even the most minor regulation:

1. At the bare minimum, at least twenty hours of attorney time to draft the regulation and to prepare summaries of comments, informative digests, responses to comments and so forth;
2. At least one public hearing involving rental of public hall, travel costs of Council members and staff, time of Council members and staff relating to hearing, recording services, etc.;
3. At least two mailings to a large mailing list.

If you try to make an exception to the rules for "minor" regulations, you will have the problem of deciding which proposed regulations are and are not "minor". Will this determination add another level to the review process?

Brian Hebert
November 18, 1997
Page 2

In my opinion, the review process by AOL accomplishes little of value and is very cumbersome.

Sincerely,

DANIEL E. LUNGREN
Attorney General

Julian O. Standen
JULIAN O. STANDEN
Deputy Attorney General

JOS:is

cc: Rita Tsuda



FRANCHISE TAX BOARD

P.O. Box 1720
Rancho Cordova, CA 95741-1720
(916) 845-3302 Fax (916) 845-3648

KATHLEEN CONNELL
Chair

Law Revision Commission
RECEIVED

ERNEST J. DRONENBURG, JR.
Member

NOV 26 1997

CRAIG L. BROWN
Member

MEMORANDUM

File: _____

To: Brian Herbert, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Date: November 21, 1997

From: Lawrence C. Counts

Subject: Administrative Rulemaking Questions

This is in response to the three questions asked in your November 5, 1997 letter to Ms. Beverly Moore regarding a streamlined procedure for non-controversial regulations.

Question 1: When adopting a regulation that has only very minor effects, and to which there is no public opposition, how great are the cost and delay associated with the following procedures:

- Preparing the initial statement of reasons.
- Preparing the notice of proposed regulatory action.
- Assessing the potential for significant adverse economic impacts.
- Holding a public hearing (if any).
- Preparing a final statement of reasons.
- Preparing an updated informative digest.
- OAL review.

Answer: Individually and collectively, the cost and delay associated with the enumerated procedures are minor.

Question 2: Which of the procedures enumerated above could be skipped or abbreviated when adopting a regulation that has only very minor effects, and to which there is no public opposition, without substantially affecting the quality of your agency's deliberations and without compromising the essentials of public notice and comment?

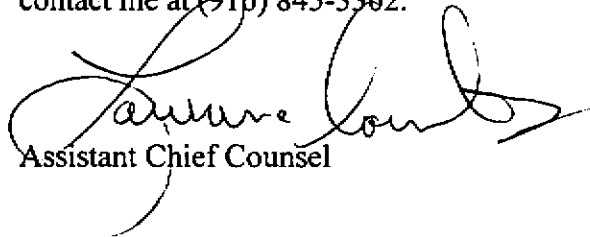
Answer: The first, third, fourth, fifth and sixth procedures could be skipped.

Brian Herbert
November 21, 1997
Page Two

Question 3: How great a savings would result to your agency if an exception were created along the lines suggested by your answer to question 2?

Answer: Minor savings.

I hope you find these answers helpful. If you require further information, you may contact me at (916) 845-3302.



Laurie Lund
Assistant Chief Counsel



STATE BOARD OF EQUALIZATION
Board Proceedings Division
450 N STREET - SACRAMENTO, CALIFORNIA
(PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0081)
TELEPHONE: (916) 445-6479
FAX: (916) 324-3984

JOHAN KLEHS
First District, Hayward

DEAN F. ANDAL
Second District, Stockton

ERNEST J. DRONENBURG, JR.
Third District, San Diego

KATHLEEN CONNELL
Controller, Sacramento

JOHN CHANG
Acting Member
Fourth District, Los Angeles

E. L. SORENSEN, JR.
Executive Director

November 24, 1997

Law Revision Commission
RECEIVED

NOV 26 1997

File: _____

Mr. Brian Hebert
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-1827

Dear Mr. Hebert:

This is in reply to your letter of November 5, 1997, addressed to Ms. Mary Ann Stumpf of the State Board of Equalization.

We understand that as a part of a general study of administrative rulemaking law, the California Law Revision Commission is considering whether to recommend a streamlined procedure for the adoption of noncontroversial regulations, similar to direct final rulemaking procedures under federal law.

You have identified a problem which previously existed, but has now been remedied by the Rule 100 (1 Cal. Code of Regs., Chap. 1, § 100) procedure adopted by the Office of Administrative Law. The Rule 100 procedure simplifies the administrative process with respect to minor and technical amendments to regulations. This new methodology has proven to be both expeditious and cost effective.

The State Board of Equalization has always been sensitive to the need for full public participation in the rulemaking process. The Rule 100 procedure has proven to be consistent with that concept. We would not be supportive of proposals or procedures which would limit public participation in the rulemaking process.

Sincerely,

Janice L. Masterton
Chief, Board Proceedings

JLM:sr

Mr. Brian Hebert

-2-

November 24, 1997

cc: Ms. Charlene Mathias
Assistant Chief Counsel
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, CA 95814-4602

Mr. E. L. Sorensen, Jr. - MIC:73

DEPARTMENT OF FINANCIAL INSTITUTIONS

801 K STREET, SUITE 2124
SACRAMENTO, CA 95814
(916) 322-5966



November 24, 1997

Law Revision Commission
RECEIVED

NOV 26 1997

File: _____

Mr. Brian Hebert
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Dear Mr. Hebert,

This letter is in response to yours of November 5, 1997 requesting comments and suggestions regarding streamlining procedures for the adoption of noncontroversial regulations.

When adopting regulations that have non-substantive changes, and that it can be reasonably anticipated to be non-controversial, the greatest costs and delays are associated with the following procedures:

- Preparing the initial statement of reasons.
- Holding a public hearing (if any).
- Office of Administrative Law ("OAL") review.

The adoption of regulations that have non-substantive changes, and that it can be reasonably anticipated to be non-controversial, can be streamlined without substantially affecting the quality of the Department's deliberations, and without compromising the essential of the public notice and comment through the following abbreviated procedures:

- Prepare an abbreviated statement of reasons.
- Prepare the notice of proposed regulatory action.
- An abbreviated OAL review.

While it is difficult to quantify the savings that would result to the Department if the above abbreviated procedures were adopted, a savings of 50 -75% can be anticipated.

Thank you for the opportunity to provide input on the current procedures for the adoption of regulations, and provide suggested procedures for the adoption of regulations that are non-substantive and non-controversial.

Very truly yours,

CONRAD W. HEWITT
Commissioner of Financial Institutions

by

JAN LYNN OWEN
Deputy Commissioner of Financial Institutions
Office of Policy, Planning and Legislative Affairs

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

1300 I STREET, SUITE 920
SACRAMENTO, CA 95814
(916) 322-3640

Law Revision Commission
RECEIVED



NOV 26 1997

November 25, 1997

File: _____

Brian Hebert, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Mr. Hebert:

The Occupational Safety and Health Standards Board (Board) is in receipt of the California Law Revision Commission's (CLRC) letter dated November 5, 1997 regarding streamlined procedures for the adoption of noncontroversial regulations. Per CLRC's request, the following are the Board's views on the matters outlined in your memorandum with respect to the adoption of regulations with minor effects and to which there is no public opposition.

(1) Costs and delays associated with the procedures listed in CLRC's memorandum.

The Board's main responsibility is the adoption, amendment or repeal of occupational safety and health regulations. Therefore, the majority of the Board's resources are devoted to rulemaking activities. The Board has a small staff of 15 budgeted positions and it is not known what percentage of their time is devoted strictly to rulemaking. However, it is estimated to be a very high percentage.

With respect to categorizing the Board's noncontroversial rulemaking proposals, it is unclear how CLRC is defining "minor effects." It is difficult for the Board to forecast which regulatory proposals have minor effects or no public opposition until after a 45-day comment period and public hearing are held. However, for purposes of responding to your request, the Board has reviewed a two year history of regulatory proposals and identified those proposals which received no public comments.

The Board schedules approximately 24 proposals per year for public hearing. Of the 48 total proposals heard over a two year period, 8 had no written or oral comments. Even though the Board in hind sight considers these proposals to have no public opposition, it is unsure if they can be characterized as having a "minor effect."

(2) Which of the procedures described in CLRC's memo could be skipped or abbreviated?

In 1993, Labor Code Section 142.3(a)(3) was enacted to provide the Board a mechanism to comply with an existing mandate to adopt state standards at least as effective as corresponding federal standards within 6 months. This Labor Code provision exempts the Board from complying with most of the Administrative Procedures Act (APA) requirements for the adoption of federal regulations that are substantially the same as federal standards. Based on the Board's experience with this abbreviated rulemaking process, the Board recommends that the preparation of some supporting documents and OAL's review process can be skipped for regulations with a minor effect.

The Board strongly believes that even with an exemption from most APA requirements, its regulations are less susceptible to challenge if basic due process considerations are followed. Notice to the public of the intent to adopt, amend or repeal regulations, coupled with an opportunity to provide comment, adds immensely to the credibility of the process and if the rulemaking proposal is litigated, aids in convincing a court that appropriate deliberations were taken. Furthermore, while there is no prescribed form for such a rulemaking record, it is prudent to establish one to demonstrate a degree of formality and structure.

As such, the Board developed and adheres to abbreviated procedures which includes: preparation of an informative digest with cost statements; 45-day notice to affected parties; a public hearing; a summary of comments and responses; a rulemaking record established; and, submission to OAL for printing only. It should be noted that the Board narrowly limits the scope of the comments to three specific areas: 1) any clear and compelling reasons for California to deviate from the federal standard; 2) any issues unique to California that should be incorporated into the proposal; and, 3) the effective date. Also, since Labor Code Section 142.1 mandates the Board to hold monthly public meetings, it has been a longstanding policy to hold a three part monthly meeting which includes a public hearing, for all proposed regulations.

Since 1993 when Labor Code Section 142.3(a)(3) became effective, the Board has developed 17 proposals in response to federal rulemaking activities. Eight of these proposals met the criteria for the APA exemption and were adopted using the Board's abbreviated procedures to meet the 6 month processing timeframe.

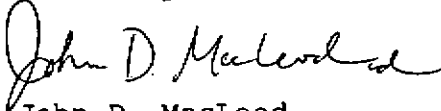
Therefore, even with an exemption from most of the APA for the adoption of noncontroversial regulatory proposals, the Board would most likely adhere to similar procedures as those developed for the adoption of federal standards for the reasons noted above.

(3) How great a savings would result with an exception to these procedures?

Using the Board's abbreviated rulemaking procedures described above, there is a minimal savings of costs but a substantial savings of time. The Board believes it is worthy to note that although the costs associated with OAL's print only review requirements are minimal, they typically take the full 30 working days which is a significant delay in time. If OAL's review time for exempt or print only files was accelerated, the Board and the regulated public would experience an even greater savings of time.

If you have any questions, please contact me at (916) 322-3640.

Sincerely,



John D. MacLeod
Executive Officer

cc: John Duncan, Acting Director, DIR

DEPARTMENT OF TRANSPORTATION

LEGAL - MS 57

1120 N STREET, SACRAMENTO, CA 95814

P.O. BOX 1438, SACRAMENTO, CA 95812-1438

PHONE (916) 654-2630

FAX (916) 654-6128



November 25, 1997

Law Revision Commission
RECEIVED

DEC - 3 1997

Brian Hebert, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

File: _____

Dear Mr. Hebert:

In re: Administrative Law Matters

Thank you for the opportunity to comment upon the administrative law matters to be addressed at the December 1997 Commission Meeting.

The Department of Transportation engages in perhaps eight to ten rulemaking activities each year. Due to the recent regulatory reform project, instituted by the Governor's Office, that number has increased slightly this past year. Many of the regulations impacted by that project were of the kind that would be considered of insignificant effect.

In all regulatory activity, the time to prepare documents and follow other procedures corresponds to the significance of the regulatory impact. Therefore, less time is spent in promulgating regulatory actions which are less controversial or significant. Typically, these regulatory activities involve little or no public comment. For that reason, the Final Statement of Reasons will be almost non-existent in these cases.

Accordingly, the Department of Transportation's position with respect to modifying the current process under the Administrative Procedure Act is that it is unnecessary. There are already provisions in the Act to alleviate some of the requirements for less significant changes. For example, for non-substantive changes, the Act allows the Department to adopt those changes using a summary procedure.

Furthermore, it is difficult to ascertain the significance of the regulation, many times, until there is public involvement in the process.

Lastly, it would appear that agencies would be given too great discretion that could easily lead to legal challenges down the road.

Sincerely,

Handwritten signature of Cheryl D. McNulty in cursive script.
CHERYL D. McNULTY

Attorney

DEPARTMENT OF FISH AND GAME

1416 NINTH STREET
P. O. BOX 944209
SACRAMENTO, CA 94244-2090
(916) 445-9338



November 25, 1997

Law Revision Commission
RECEIVED

DEC - 1 1997

File: _____

Mr. Brian Hebert
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Dear Mr. Hebert;

Thank you for your recent letter regarding a streamlined procedure for the adoption of noncontroversial regulations to the Legislature.

The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (the Act) created a new and comprehensive state oil spill program for the state's coastal and marine waters. The new law greatly expanded the authority, responsibilities and duties of the Department of Fish and Game under the direction of the Administrator for oil spill response. The Oil Spill Prevention and Response Office (OSPR) was established to assist the Administrator in performing the duties specified in the Act.

Within the OSPR, the Regulations Unit was established to promulgate the regulatory provisions of the Act. To date, the Unit has completed development of regulations implementing several major prevention and response programs.

There is already an "abbreviated" procedure under the Administrative Procedures Act (APA). The OSPR may "...add to, revise or delete text published in the California Code of Regulations (CCR) without complying with the rulemaking procedure specified in Article 5 of the APA only if the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any CCR provision..."

If a regulatory package has only minor changes, that in turn will require a simplified initial statement of reasons. In Section 11346.5 of the APA, the requirements to be included in the Notice are detailed. Since this information must be included in all Notices, the OSPR has developed "boilerplate" language and therefore the Notice requires only a few minor amendments. In addition, a hearing is not always required. It is the Department's choice to hold one if they see the need or to have one if someone requests it.

The OSPR cannot quantify the time and effort that would be saved if there were a "streamlined" rulemaking process. Minor, noncontroversial packages are streamlined as is. The Initial Statement of Reasons are brief, the comments received are minimal and the Final Statement of Reasons are equally as brief.

Mr. Brian Hebert
November 25, 1997
Page Two

The amendment to the Administrative Procedures Act to reflect your proposed changes will result in requiring an additional step, not "abbreviating" the process. To follow the "direct final rule" process, if only one adverse comment were received, the procedures currently established would have to be followed, resulting in additional cost and delay to the package.

This agency has already developed procedures to save duplication and mailing costs. We have placed our draft rulemaking packages, as well as our final regulations, on the World Wide Web. This has reduced requests for "hard" copies and has provided flexibility to the affected public.

Thank you for the opportunity to comment.

Please contact Ms. Tracey Edwards, AGPA, at telephone number (916) 327-9405 if you have any questions, or if we can be of any further help.

Sincerely,



Pete Bontadelli
Administrator
Office of Oil Spill Prevention
and Response

STATE OF CALIFORNIA — THE RESOURCES AGENCY

PETE WILSON, Governor

DEPARTMENT OF PARKS AND RECREATIONP.O. BOX 942895
SACRAMENTO 94296-0001

December 1, 1997

Law Revision Commission
RECEIVED

DEC - 1 1997

File: _____

Brian Hebert
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303- 4739

Dear Mr. Hebert:

The California Department of Parks and Recreation last completed a full revision of its State Park Rules and Regulations in 1990, wherein approximately 23 Sections were modified. Personnel and support cost for that effort amounted to nearly \$35,000. It would appear that the State is spending an inordinate amount of taxpayers dollars in following the present procedures, and that a good deal can be simplified.

Publication of the Register

Even with the Register schedule being published by OAL, there is still a great deal of confusion as to when things have to be turned in. The problem is compounded by the fact that dates required in the text change as they depend on the date of publication.

Suggestions:

Most revisions are planned months in advance and published in the yearly calendar. The need for Registers being published more than once a month has, therefore, not been justified. It is suggested that we simplify things with a single monthly due date for publication submissions and a single monthly publication date; i.e. the 15th of the month for submission of information, and the first of each month for publication.

Preparation of Documentation for OAL

We need to stop wasting valuable time preparing boiler plate and somewhat useless secondary information for the OAL file. We should forget major portions of secondary documents such as the Informative Digest, the Initial Statement of Reasons, (Problem, Purpose of Adopted Amendment, Factual Basis for Necessity, Studies, Alternatives Identified etc.), Written Comments, and Public Hearing Transcripts. Modified Text, Updated Information Digest and Final Statement of Reasons.

What the public needs is a chance to review what the agency is actually changing, not read a lot of rhetoric and bureaucratic mumbo jumbo about what the agency thinks it wants to change and why. The public needs the name of the code, the section, the

Brian Hebert
December 1, 1997
Page Two

change itself, and the reason for doing so. That's it! They do not need a "problem" statement, a "purpose" statement and an "effect, if not included in the purpose" statement etc.

Example:

CCR T-14, Div. 3, Section 4301

XXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXX.

This change is necessary because:

It honestly takes less time and effort to publish the actual changes we want to make than to write the Notice of Proposed Rule Making and the Initial Statement of Reasons, neither of which tells the public what you actually want to do.

Response Cut Off Date

We again we should simplify and set an easily determined response cut off date i.e. post marked not later than the last day of the second month after publication.

Public Response

Every public response now has to be recorded, transcribed, documented in writing and responded to in the OAL record. The need to develop so much documented "evidence" is unnecessary. It would appear that the program was made incredibly difficult so that members of the public could find procedural errors and file suits against the rule making agency. These difficult and cumbersome procedures only slow the process down. Few cases have occurred where rules have been overturned due to procedural errors. As it turns out, the entire procedure is not as adversarial as originally envisioned.

Suggestions:

Allow and encourage informal direct phone, E-mail, and Internet communication between agency and responders. The process should encourage posting of questions and answers on a the Internet so that the questions and responses can be reviewed by all.

Agencies should only be required to hold public hearings if one is formally requested and then only if the respondent has contacted the agency with a problem and failed to resolve it.

Brian Hebert
December 1, 1997
Page Three

One Simple Process

The additional procedures for regulations that are significantly modified after receiving public input is unnecessarily complicated. Either an agency moves ahead with a proposed amendment or they don't. There are only three possibilities:

1. Unmodified proposals or ones with non significant changes - proceed with a final submission to OAL.
2. Proposal is dropped - respondents need to be advised, but there is no need to report a dropped proposal to OAL.
3. Agency decides to make a significant change - then lets be realistic and start the whole process over again, with a new publishing of the revised section and new reasons. There is plenty of time to recycle significant changes through the normal process. In the unlikely event that there was not enough time to recycle a modified proposal - an emergency regulation could be placed in effect.

All OAL really needs is to be sure:

- 1) The changes to the section were published. (Copy of the Register)
- 2) The reasons and necessity were published. (Copy of the Register)
- 3) The public had a reasonable time to respond. (Response period listed in the front of the Register for all changes within.)
- 4) The agency reviewed and evaluated the public input for all forwarded proposals, (copies or summaries of public input need to be forwarded in the file), and a summary of how the agency:
 - a) made non significant changes and improvements based upon the public input, or
 - b) rejected the public input and had justifications for doing so.

Brian Hebert
December 1, 1997
Page Four

Executive Order W-144-97

Much of Executive Order W-144-97 makes an already complicated process even more complicated, with little additional direct information being made available to the public. W-144-97 states that all agencies shall establish a schedule to complete a sunset review of all existing regulations by 1999. Unfortunately there is no explanation as to what constitutes a sunset review. Do we have to re-adopt every current regulation by reprocessing

it through the entire OAL procedures, or do we simply do an internal review and issue a statement of re-adoption? To date we have received no information from OAL on what will be required. Any information you have on this issue would be greatly appreciated.

If you have any questions concerning this information please call me at (916) 653-0398.



Stephen P. O'Brien
Regulations Coordinator



Cal/EPA

December 1, 1997

Department of
Toxic Substances
Control

400 P Street,
4th Floor
P.O. Box 806
Sacramento, CA
95812-0806

Mr. Brian Hebert
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Law Revision Commission
RECEIVED

DEC - 3 1997

File: _____

Pete Wilson
Governor

Peter M. Rooney
Secretary for
Environmental
Protection

Dear Mr. Hebert:

This is in response to your recent letter requesting input concerning how rulemaking might be streamlined for the adoption of noncontroversial regulations. We believe most of the components of the rulemaking package are necessary to support informed responses by the regulated community and interested members of the public. Many rulemakings are only "noncontroversial" when fully explained. However, two areas worth reviewing are rulemakings driven by changes in federal regulations and the economic impact component of the rulemaking package.

FEDERAL REGULATIONS

Section 25159.1 of the Health and Safety Code requires the Office of Administrative Law (OAL) to deem any conforming rulemaking initiated for the purpose of maintaining California's authorization to administer the federal Resource, Conservation and Recovery Act to be a nonsubstantive change (Section 100 of Title 1 of the California Code of Regulations (CCR)), *provided the regulation is not more stringent or broader in scope than the corresponding federal regulations.*

The Department of Toxic Substances Control (DTSC) hazardous waste program regulates both federally and "non-federally" regulated hazardous waste. Therefore, DTSC's regulations, regarding storage, shipping, enforcement, etc. apply to both types of waste. Therefore, changes to the federal regulations which are incorporated into DTSC's regulations affect the entire State program. Since California's program to regulate hazardous waste *is* more stringent and broader in scope, the exemption provided by section 25159.1 is rarely used.

We recommend expanding the exemption provided in section 25159.1 to allow "qualified" incorporation of federal changes to apply to both components of the State's program. Rulemakings could qualify for the expanded exemption by being public noticed for 45 days and receiving no comments objecting to treating the rulemaking as nonsubstantive.

Mr. Brian Hebert

December 1, 1997

Page 2

The savings that would result from such a change could be on the order of 1 PY (approximately \$81,000) per year which could be redirected to more cost effective activities.

ECONOMIC IMPACT

The August 1997 version of standard form 399, Economic and Fiscal Impact (see <http://commerce.ca.gov/business/corporate/regulation/#impact>), provides an exemption to completing the Economic Impact Statement (EIS) portion for emergency regulations. We believe consideration should be given to expanding this exemption to include noncontroversial rulemaking as well.

The new form 399, for example, requires an estimate of the number or percentage of small businesses impacted. Because of the way section 11342(h)(1) of the Government Code defines "small business," agencies promulgating regulations will need to collect, at a minimum, information on SIC code(s), number of employees, and gross annual receipts. We see this as an unnecessary intrusion which is unlikely to yield useful results, especially in cases where costs or savings are likely to be de minimis. Exempting noncontroversial packages from the EIS portion of the form might save anywhere from a few hours to a few days on such rulemakings.

Thank you for the opportunity to comment. If you have questions or wish to followup on our concerns, please contact Mr. James McRitchie, Chief of our Environmental Analysis and Regulations Section, at (916) 327-1194.

Very truly yours,



Jesse R. Huff
Director

cc: Ms. Charlene Mathias, Director
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814-4602

Mr. Brian Hebert

December 1, 1997

Page 3

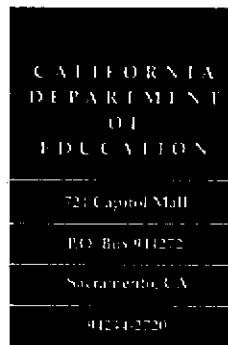
cc: Mr. Don Perry, Director
Office of Economic Research
Trade and Commerce Agency
801 K Street, Suite 1700
Sacramento, California 95814

Mr. Val F. Siebal
Special Assistant to the Secretary
555 Capitol Mall, Suite 525
California Environmental Protection Agency
Sacramento, California 95814

Mr. James McRitchie, Chief
Environmental Analysis and Regulations Section
Office of Program Audits and Environmental Analysis
Department of Toxic Substances Control
P.O. Box 806
Sacramento, California 95812-0806



DELAINÉ EASTIN
 State Superintendent of Public Instruction



December 2, 1997

Law Revision Commission
 RECEIVED

DEC - 3 1997

Brian Hebert, Staff Counsel
 California Law Revision Commission
 4000 Middlefield Road, Room D-1
 Palo Alto, CA 94303-4739

File: _____

Dear Mr. Hebert:

The California Department of Education (CDE) is responding to your November 5, 1997 request for information on the rulemaking process. Thank you for requesting our input.

The cost and delay associated with rulemaking procedures is, for the most part, dependent upon the complexity and public sensitivity of the regulations being adopted. However, the CDE has an estimated timeline for completing each part of the rulemaking process, depending upon whether the regulations are simple, complex, or emergency. The CDE's timeline is enclosed.

Preparation of the notice of proposed regulatory action and the updated informative digest are not time-consuming or costly. However, under the Administrative Procedures Act (APA), regardless of whether or not there are very minor effects or no public opposition, the public must receive notice of a public hearing, if one is scheduled, and 45 days in which to submit written comments on proposed regulations. The law provides in Government Code section 11346.8(a) that a public hearing need not be scheduled unless the state agency receives a written request to hold a public hearing no later than 15 days prior to the close of the written comment period. The department policy is to hold a hearing on every regulation proposal. The APA also requires that the adopting agency respond in the rulemaking file to all public comments received. The public comment period is time-consuming and responding to the public comments can be both costly and time-consuming, depending on the length and complexity of the regulations and the volume of public comment received.



Brian Hebert
California Law Revision Commission
December 1, 1997
Page 2

Generally, the CDE completes an assessment of the potential for significant adverse economic impacts as part of the fiscal impact analysis, which is the more time-consuming procedure depending upon the complexity of the proposed regulations. If there is a cost impact to the state or local government, the concurrence of the Department of Finance is required. The latter approval process takes an additional 30 days.

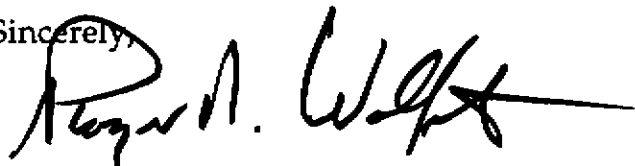
The most costly and time-consuming processes of those listed in your first question are the preparation of the initial statement of reasons and the final statement of reasons. The APA requires that the statement of reasons includes the specific justification and rationale for adopting each regulation. Preparation of the justification and rationale requires extensive staff time.

The Office of Administrative Law's review of rulemaking files can take, by law, up to 30 working days. This is time-consuming; however, the APA also provides for emergency regulations and expedited reviews by OAL if the adoption of the regulation is urgent.

The CDE does not feel that any of the procedures enumerated in question 1 could be skipped or abbreviated, except those already exempted as a "change without regulatory effect" pursuant to California Code of Regulations, Title 1, Section 100. As mentioned above, public hearings can be omitted during the rulemaking process unless specifically requested. The law makes no distinction of regulations based on their "effects" or whether there is "public opposition." The APA must be followed regardless of the type of regulation.

If you have questions about the above information or require additional information, please feel free to contact the Department of Education's Audits Response Coordinator Peggy Peters at (916) 657-4440.

Sincerely,



Roger Wolfertz
Deputy General Counsel

Enclosure

TIMELINE FOR ADOPTION OF
CALIFORNIA DEPARTMENT OF EDUCATION REGULATIONS

	Number of Calendar Days		
	Based on Type of Regulations	Simple	Complex
	Emergency		
Development of Regulations	90	540	20
Preparation of Initial Statement of Reasons, Informative Digest and Approvals	30	90	20
Fiscal Impact Statement	30	30	10
Submission of Notice and Conduct of Public Comment Period (includes Information State Board meeting and Public Hearing)	60	60	N/A
Prepare Responses to All Public Comments and Present Final Regulations for State Board Action.	30	90	N/A
Prepare Final Statement of Reasons and Rulemaking File for Submittal to OAL.	30	90	N/A
OAL Review and Approval	45	45	10
Regulations Effective Date*	30	30	0
<hr/>			
Total Time for Adoption of Regulations.345	975	60

*With demonstration of good cause, Department may receive approval of an earlier effective date.

Enclosure

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512

December 2, 1997

Bert Hebert, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303Law Revision Commission
RECEIVED

DEC - 5 1997

File: _____

SUBJECT: DIRECT FINAL RULEMAKING

Dear Mr. Hebert:

This letter is in response to your November 8, 1997, inquiry regarding how much cost and delay is associated with various statutorily required rulemaking steps for simple, noncontroversial rulemakings.

The approach suggested by the Law Revision Commission's letter is to list the major components of the rulemaking process and to ask how much time is associated with each. Although this approach has a certain logic and is understandable, it risks missing the fundamental problem with the current rulemaking process. The sum total of the rulemaking requirements currently deters agencies from engaging in discrete, noncontroversial rulemakings; instead, they rely on oral advice, written protocols, or other "underground regulation" devices. To provide a realistic alternative to underground regulations the "direct final" procedure must be significantly more efficient than the current standard rulemaking procedure.

Regarding time spent on particular rulemaking components, the amount of time spent on any particular portion of a rulemaking generally varies with the subject or the assigned staff. Moreover, the maxim that "the whole is greater than the sum of its parts" seems particularly applicable to standard rulemaking. In the experience of the agency I represent, the notice, initial statement of reasons, economic impact analysis, informative digest, and the like is much more than a brief word processing exercise.

The "direct final" concept appears to rely on an informative description of the proposed action to enable the regulated public to make timely objection. The most useful and informative documents in this regard are typically the initial statement of reasons and the informative digest, the latter of which is part of the notice of proposed action, or "NOPA." Accordingly, the informational content of the initial statement of reasons and informative digest should be combined and published with (or as part of) the NOPA.

The NOPA itself should be greatly simplified; in current

Bert Hebert, Staff Counsel
December 2, 1997
Page 2

rulemaking it is required to be loaded with features that are pure boilerplate for the kinds of proposals that are appropriate for direct final rulemaking. It is at least questionable whether the great elaboration required for standard NOPAs (the required contents of Section 11346.5 run for two and one half pages in the OAL publication) is useful for any rulemaking; it is increasingly hard to find the important information (who, what, when, and where) that the NOPA must convey. For example, I recently reviewed a draft NOPA that failed to have the date, time, and place of the hearing prominently displayed--largely due to the staff's conscientious efforts to address the multitude of other bells and whistles that adorn the current statute's requirements.

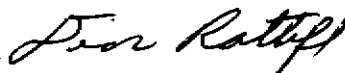
An economic impact statement should not be required. If there is a significant economic impact, the "direct final" option should probably be precluded.

Public hearings are time-consuming and resource intensive, and should be required only if there is objection or express request. In any case, the Open Meetings Act requires multi-member bodies such as the one I serve to provide a public hearing opportunity. I believe the rulemaking record should be filed with OAL, whose review would be discretionary. The rulemaking record should be limited to 1) the simplified NOPA (which would include the initial statement of reasons), 2) a list of persons noticed, 3) the express terms, 4) any public comments received, and the agency's response to such comments, and 5) a public hearing transcript, if any hearing was held.

How much time and money would be saved by this abbreviated process at the Energy Commission? Such things are difficult to estimate, but I would expect the savings to be small. The most significant difference might be that the agency would be more willing to make timely, rapid, changes to regulations rather than "batching" a collection of problems and issues for one major regulation "cleanup." These larger actions may typically occur after three or four years, depending on the nature of the issues involved. However, the process outlined above may still be too elaborate to move agencies away from their "underground" habits.

I greatly appreciate the Law Revision Commission's efforts to address problems with rulemaking. If you need further explanation, please feel free to contact me at (916) 653-1653.

Yours truly,



DICK RATLIFF
Senior Staff Counsel

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE



300 SOUTH SPRING STREET, SUITE 5212
LOS ANGELES, CA 90013
(213) 897-2000

FACSIMILE: (213) 897-2804
(213) 897-2532

December 3, 1997

Brian Herbert
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Law Revision Commission
RECEIVED

DEC - 5 1997

File: _____

Re: Streamlined Procedure for the Adoption
of Noncontroversial Regulations

Dear Mr. Herbert:

I am responding to the questions posited in your November 5, 1997 letter to Chief Assistant Attorney General Robert L. Mukai concerning the Commission's consideration of a recommendation to streamline the procedures for the adoption of noncontroversial regulations. Our response is based on the experience of programs within the Department of Justice that enact regulations under the current legislative scheme, as well as the experience of attorneys within our office who advise client agencies with regard to regulation promulgation.

The first question presented relates to the nature of the costs and delays associated with the current procedures relating to the adoption of "a regulation that has only minor effects, and to which there is no public opposition...". Our response is that the costs and delays are significant. The attorney time necessary to prepare the initial statement of reasons, the notice of proposed regulatory action, and an assessment of the potential for significant adverse economic impact runs about 15 to 30 hours (our attorney hourly rate is currently \$100). The staff work of the program promulgating the rule can involve even more time. The costs associated with the remaining procedures would run somewhat less; however, the delays involved can be considerable. For example, the time it takes for OAL review a regulation is a minimum of 30 days and can take as long as 7 to 8 months.

The second question presented relates to the procedures that "could be skipped or abbreviated when adopting a regulation that has only very minor effects, and to which there is no public opposition, without substantially affecting the quality of

[our] deliberations and without compromising the essentials of public notice and comment...".

We believe sound policy considerations require only that a noncontroversial regulation be subject to public review before adoption. This could easily be accomplished by one statement which sets forth the regulation, the reasons therefore, and an opportunity for a hearing, if requested. After the hearing, if any, the regulation should be published, with OAL review eliminated or greatly restricted.

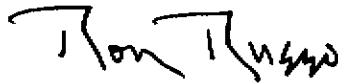
The last question raised relates to the savings which would result from the implementation of the procedures discussed in our response to the second question. While it is difficult to quantify the exact savings that would result from a streamlined process because of the differing levels of remuneration provided to those involved in the process, it is clear that the savings would be significant.

In summary, we are strongly in favor of streamlining the procedures involved in the promulgation and adoption of noncontroversial regulations. As the Commission's consultant, Michael Asimow, stated: "The California rulemaking provisions are exacting and costly to comply with; the rulemaking path bristles with time-consuming hurdles." (See "The Influence of the Federal APA on California's New APA," U. Tulsa L.J., Vol. 32, No. 2, p. 303 (Winter 1996))

One caveat, the definition of "noncontroversial" should be carefully drafted to minimize the costs and delays that would necessarily attend disputes over which regulations qualify for "streamlined" treatment.

Sincerely,

DANIEL E. LUNGREN
Attorney General



RON RUSSO
Senior Assistant Attorney General
Licensing Section

RR:cvt

cc: Robert L. Mukai, CAAG-Sacto

DEPARTMENT OF SOCIAL SERVICES

744 P Street, Sacramento, CA 95814
(916) 657-2586



December 4, 1997

Law Revision Commission
RECEIVED

DEC - 8 1997

File: _____

Mr. Brian Hebert
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Mr. Hebert:

**SUBJECT: CALIFORNIA LAW REVISION COMMISSION LETTER DATED
NOVEMBER 5, 1997**

Thank you for allowing the California Department of Social Services (CDSS) to participate in your review of developing a streamlined procedure for the adoption of noncontroversial regulations. The major issue for CDSS would be the definitions of a "noncontroversial regulation" or a "regulation of minor effects." It may be difficult for CDSS to determine if a proposed regulation meets the above definitions until after a public hearing or at least a public comment period. With that in mind CDSS would like to answer your questions below.

Preparing the Initial Statement of Reasons (ISOR)

There could be some delay and costs associated with the development and review of the ISOR. The delay and costs would be in relation to the bulk of the proposed regulations. It is anticipated that most of CDSS's regulations that may fall under this type of filing would be relatively small. Therefore, the delay for this step would probably be a few days to a few weeks. The costs would be for staff time to develop and review the ISOR which would include review by our legal department. The costs in staff time could easily reach 25 or more staff hours. The time delay would probably be insignificant.

Preparing the Notice of Proposed Regulatory Action

There is a delay and costs associated with this step. For CDSS there is significant printing and mailing costs every time we go out for a public hearing. The general mailing for CDSS is approximately 500 addresses with special mailings sometimes adding several hundred more addresses to the list. It is common for CDSS to receive no testimony at a public hearing despite the size of our mailing list. If CDSS could avoid mailing a public notice for certain types of regulations then there would be significant savings. The notice of proposed regulatory action must be approved through the ranks in CDSS with final approval from the Director's office; reviewed by the Office of Administrative Law (OAL); and sent out to printing for the California Z Register and concurrently for CDSS's mailing list, therefore, there is a delay of several weeks associated with this step.

Assessing the Potential for Significant Adverse Economic Impacts

This step is completed by CDSS's Estimates Branch with input from the appropriate program. There could be a delay of two or three weeks if the regulation arrives in Estimates during work on the Governor's Budget for CDSS. The costs would be staff time for development and review of the above impact statements. Overall, the delay and costs of this step are expected to be minor.

Holding a Public Hearing

CDSS's policy for noncontroversial regulations is to hold a public hearing only in Sacramento. However, the regulation may go out to public hearing in other cities if another regulation on the agenda requires it. The costs for a public hearing in Sacramento are minor. However, as mentioned above under Preparing the Notice of Proposed Regulatory Action there are significant costs associated with the printing and mailing of the notice for a public hearing. Also, the public comment period currently required for a public hearing is at least 45 days. If a public hearing were still required may be the time for this type of regulation could be cut to 15 working or calendar days. Better yet, perhaps a hearing could be avoided and we would have a 15 calendar day written comment period. However, what would be required if the public requested a public hearing?

Preparing a Final Statement of Reasons

For CDSS if a package were to have no public opposition, then the Final Statement of Reasons would require little effort. For the FSOR, CDSS uses the ISOR and adds to it any necessary modifications (ex. summarized testimony and CDSS's responses). Therefore, if there were no public opposition there should be little change to convert the ISOR into the FSOR.

Preparing an Updated Informative Digest

The above response also applies here. CDSS uses the Informative Digest portion of the public notice to form the Updated Informative Digest (UID). If there are no changes to the proposed regulations following the public hearing then there is little additional work necessary on the UID.

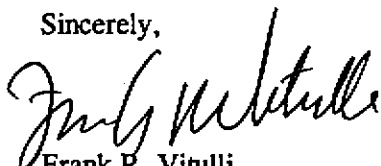
OAL Review

This is probably the area where there is the most time delay. OAL has 30 working days to review the regulations which are typically effective 30 calendar days after OAL approves the regulations and files the regulations with the Secretary of State. Also, staff time is required to put together the rulemaking file which is filed with OAL. However, the costs associated with this step to CDSS are relatively minor.

In conclusion, due to the nature of CDSS and its regulations it would be difficult for CDSS to determine prior to the public hearing which regulations could fall in this category. And as stated earlier, if there were no public opposition at the public hearing then the remaining work required on CDSS would be minimal. However, staff time would be required and there would be a time delay to complete the remaining steps.

Again, thank you for seeking our comments. If you have any questions you can contact me at (916) 657-2586.

Sincerely,



Frank R. Vitulli

Chief

Office of Regulations Development

Enclosure

DEPARTMENT OF GENERAL SERVICES
OFFICE OF PUBLIC SCHOOL CONSTRUCTION
 1130 K STREET, SUITE 400
 SACRAMENTO, CA 95814
<http://www.dgs.ca.gov/opsc>



December 5, 1997

Law Revision Commission
 RECEIVED

DEC 10 1997

Brian Hebert
 Staff Council
 4000 Middlefield Road, Room D-1
 Palo Alto, CA 94303-4739

File: _____

Dear Mr. Herbert:

Thank you for your recent letter soliciting input in relation to regulations promulgated by the Office of Public School Construction (OPSC). I would, however, like to provide a cautionary note that the regulation terminology utilized in your letter "very minor effect" could be perceived very differently from Agency to Agency. For purposes of this correspondence "very minor effect" as it pertains to OPSC regulation changes, is defined as a regulation that is procedural and non-complex in nature and has no public opposition.

The average cost and delays associated with the following regulation processes are as follows:

REGULATION PROCESS	PROCESS TIME	COST PER AGPA at \$30 per hour
Preparing the initial statement of reasons.	2-3 hours	\$60 - \$90
Preparing the notice of proposed regulation.	4-6 hours	\$120 - \$180
Assessing the potential for significant adverse economic impacts.	2-3 hours	\$60 - \$90
Holding a public hearing.	4-12 hours (depending on number of public comments)	\$120- \$360
Preparing a final statement of reasons.	2-4 hours	\$60 - \$120
Preparing an updated informative digest.	2-4 hours	\$60 - \$120
OAL review.	30 days (Normal OAL review/bin/time)	Depends on actual amount of time spent reviewing regulation.

I believe the following regulation adoption procedures could be eliminated if the regulation change was advertised in the California Regulatory Notice Register (Statutory Requirement) and no public comments nor oppositions are noted:

Herbert Letter (Continued)
December 5, 1997

REGULATION PROCESS TO BE ELIMINATED	PROCESS TIME SAVED	COST SAVINGS
Holding a public hearing (if any).	4-12 hours	\$120 - \$360
Preparing a final statement of reasons	2-4 hours	\$60 - \$120
Preparing an updated informative digest.	2-4 hours	\$60 - \$120
TOTAL SAVINGS	8-20 hours	\$240 - \$600 per minor regulation change

I appreciate the opportunity for input and would like to be appraised of your progress. If you should require any clarification or further information, please contact Dave Zian of my staff at (916) 322-5263.

Sincerely,



LUISA PARK
Deputy Executive Director
Office of Public School Construction

LP:DZ:jv



THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

Nat Sterling, Executive Secretary
California Law Revision Commission
400 Middle field Road, Room D-1
Palo Alto, CA 94303-4739

Law Revision Commission
RECEIVED

DEC 12 1997

File: _____

DATE: December 10, 1997
FROM: KIM ZELDIN, Committee on Administration of Justice

RE: 97-69 [CAN 98-3] ADMINISTRATIVE RULEMAKING: DIRECT FINAL
RULEMAKING/CONSENT REGULATION.

Recommendation: Approve with amendment

I. BACKGROUND.

The Law Revision Commission has proposed the implementation of a form of the Federal "direct final rule" exception to California rulemaking law. We have been asked to review and comment on their proposed amendment and addition to the Government Code.

A. What is the current California law regarding Administrative Rulemaking?

The procedure employed by most state agencies in adopting, amending, or repealing regulations is subject to Chapter 3.5 of the Administrative Procedure Act (See Govt. C. S 11340 et seq.). California's current rulemaking provisions were adopted in 1979. The 1979 revision established the Office of Administrative Law (O.A.L.) to supervise and review the enactment of administrative regulations. (Govt.c 11340.2). The 1987 Legislature directed the California Law Revision Commission to study whether the Administrative Procedure Act (APA) rulemaking provisions should be further revised. 25 Call Rev.Com. Reports p. 75.

The Administrative Procedure Act rulemaking provisions apply to most state agencies and their regulations. Govt.c 11342(a) and (g). (Examples of agencies to which it does not apply include agencies in the judicial and legislative departments of state government. Govt.c. 11342(a).)

A "regulation" within the scope of the Act is broadly defined as "every rule, regulation, order or standard of general application" (or its amendment, supplement, or revision) by any state agency to implement, interpret, or make specific law enforced or administered by it or to govern its procedure, other than one relating only to its internal management. Govt.c. 11342(g).

There are three basic procedures followed in creating an administrative regulation: notice and comment, O.A.L. review and post-comment analysis.

1. **Notice and Comment Procedures:** Every state agency "responsible for implement a statute which requires interpretation pursuant to the Administrative Procedure Act" must prepare by January 30 of each year, a rulemaking calendar for that year. The calendar must specify projected dates on which the agency plans to (1) publish the notice of proposed action for each rulemaking, (2) schedule a public hearing if required or requested, (3) adopt the regulations and (4) submit the regulations to the Office of Administrative Law for review. Govt.c 11017.6. Notice of proposed action on the regulation must be given at least 45 days prior to the hearing and close of the public comment period on the proposed action. Govt.c. 11346.4(a).

2. **O.A.L. review:** The agency must also prepare, submit to the O.A.L. with the notice of the proposed action, and make available to the public on request (1) a copy of the express terms of the proposed regulation and (2) an initial statement of reasons for the proposing action. The initial statement must include, but is not limited to, specified criteria. Govt.c. 11346.2. The O.A.L. revised the proposed regulations to determine whether they satisfy specified criteria (necessity, authority, clarity, consistency, reference etc.).

3. **Post-Comment analysis:** After action is taken, the agency must submit to the O.A.L., with the adopted regulation, a final statement of reasons. Govt.c. 11346.9.

B. What is Direct Final Rulemaking?

Direct Final Rulemaking is a streamlined process, developed by federal agencies, for the adoption of regulations that are entirely noncontroversial. Under this process an agency publishes the "final" text of a regulation that it believes to be noncontroversial. It solicits public comment. If no adverse comment is received during the specified time period, the rule becomes effective after an additional prescribed period has elapsed. If a single adverse comment is received, the proposed rule is withdrawn and does not become effective. The agency then must pursue the rule through the full rulemaking procedures.

To use this procedure, an agency publishes a rule in the Federal Register with a statement that the rule will become effective unless the agency receives an adverse comment or a written notice that someone intends to submit an adverse comment.

C. What is "Consent Regulation"?

What is being proposed by the Law Revision Commission is an abbreviated procedure when no adverse comment is received during the public comment period. The only part of the process that will be eliminated will be the Post-Comment Analysis.

The term "direct final rulemaking" refers to a rule published "directly" in the final rules section of the Federal Register, circumventing publication as a proposed rule. California does not require publication of "final rules." The Law Revision Commission calls its proposed legislation "consent regulation."

II. ANALYSIS AND RECOMMENDATIONS.

The Law Revision Commission suggests the elimination of the procedures set forth in Government Code section 11346.9 when there is no opposition (or there is a "consensus") to the proposed rule. The Commission's proposed amendment to the Government Code seems very reasonable. There is no reason to require an agency to respond to comments or reassess the analyses submitted as part of the initial notice if the regulation as proposed is noncontroversial.

The notice requirement and the O.A.L. review are preserved. The notice and comment procedures are necessary to ensure that members of the public have the opportunity to receive notice and have an opportunity to raise an objection. O.A.L.'s review continues to be a necessary procedural safeguard because it addresses non-substantive defects.

CAN endorses the L.C. proposed subject to the following revision: The definition of "adverse comment" should be modified to be: "A comment that does not address the substance *or any perceived procedural infirmities of the proposed regulation.*"

DEPARTMENT OF AGING

1600 K STREET
SACRAMENTO, CA 95814
Internet Home Page www.aging.state.ca.us
TDD Only 1-800-735-2929
FAX Only (916) 324-1911
(916) 323-0178



December 17, 1997

Law Revision Commission
RECEIVED

DEC 23 1997

File: _____

Mr. Brian Hebert
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Dear Mr. Hebert:

The following is the Department's response to your letter of November 5, 1997 requesting the Department's views on streamlining the procedures to adopt noncontroversial regulations.

Although the Department believes the existing rulemaking process is necessary, to include the review by the Office of Administration (OAL), the Department would agree that the rulemaking process could be reviewed for simplification.

As you know, the "Publication of Changes Without Regulatory Effect" rulemaking process (California Code of Regulations, Title 1, Chapter 1, Article 2, Section 100), allows the promulgation of regulations without going through the entire rulemaking process. The regulations are only subject to review by OAL. Subject to proper definition of a "noncontroversial" regulation, it is suggested that the requirements of this section could be expanded to include "noncontroversial" regulations.

The Commission may also wish to suggest a rulemaking process similar to the emergency rulemaking process, that provides immediate "temporary approval" of a regulation subject to the completion of the rest of the rulemaking process within 120 days. This "temporary approval" process would prevent the cost of an extended rulemaking process.

In addition, the Commission may wish to contact Steve Unger, currently the Regulations Analyst for the Department's Ombudsman Program, whose 1992 Master's thesis was "A History of the Regulatory Process in California: A Case Study of the Office of Administrative Law." In his thesis, Mr. Unger makes several suggestions for changes to the rulemaking process, which may be of value to the Commission as well.

As Director, I am pleased to note that the California Department of Aging is in the process of developing regulations and will take a very proactive approach to the development of regulations by inviting the participation of the public and/or regulated community during the development of regulations before the Notice and Public Hearing.

If you have any questions concerning this response, please contact Donald Minnich, Regulations Analyst, Long-Term Care and Aging Services Division, Special Projects Unit, at 323-0178.

Sincerely,

A handwritten signature in black ink, appearing to read "Dixon Arnett", with a stylized flourish extending from the end of the name.

DIXON ARNETT
Director

cc: Jim Gavin, Chief Counsel
Steve Unger, Regulations Analyst

M e m o r a n d u m

To : Brian Hebert, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Date: December 23, 1997

Place: Law Revision Commission
RECEIVED

DEC 29 1997

File: _____

From : Department of Pesticide Regulation - 1020 N Street, Room 100
Sacramento, California 95814-5624

Subject: STREAMLINE PROCEDURE FOR THE ADOPTION OF
NONCONTROVERSIAL REGULATIONS

Your recent letter to Steven Monk, Legislative Coordinator of the Department of Pesticide Regulation, regarding streamlined procedures for the adoption of noncontroversial regulations has been referred to me for response.

The concept proposed by the California Law Revision Commission to streamline the regulation adoption process for certain actions is a good one and merits further consideration. While the actual process currently outlined in statute can be completed in 120 days, in actual practice it usually requires up to one year to complete due to the background documentation required for fiscal impacts, alternatives, etc. In all fairness to the current process, we must separate internal delays from actual required work time and statutory delays. Certainly there are regulation changes that can and should go forward without the time and expense involved in the current process.

A determination needs to be made as to when a proposed regulation meets the criteria as being noncontroversial. There have been times when proposed regulations seemed to be noncontroversial, but turned out there was interest expressed. The public would likely demand some mechanism that would allow them to challenge an agency's determination that the regulation is actually noncontroversial.



Brian Hebert
December 23, 1997
Page 2

Holding a public hearing is probably the biggest source of delays and costs in the rulemaking process. Sometimes a public hearing is requested; however, no one shows up or at least no one shows up that wishes to provide testimony. I think that the idea of the public hearing is the most misunderstood aspect of the process. People attend thinking that there will be a "free-for-all" discussion of the proposed regulation. The public hearing is really just a way for people to give their comments orally rather than having to submit them in writing. Most of the time people just read a prepared text and then turn the text in. The time spent on the hearing could have been saved by them just mailing in their written speech.

In addition, the delay associated with preparation of a final statement of reasons and updated informative digest depend upon how many comments are received and whether further changes were made to the text of the regulation. If the regulation change is noncontroversial, then there should not be any comments to address, and the time taken to prepare these documents would be minimal.

Also, a more time consuming aspect is assessing adverse economic impacts. However, for a regulation change to be truly noncontroversial it would have to be obvious that there were no economic impact. If there was any question as to economic impacts, I would not think it could be considered noncontroversial.

Current OAL review time period is 30 working days. The time period should be reduced to 20 working days for regulations adopted under a noncontroversial criteria.

It is difficult to accurately quantify anticipated savings. I do, however, feel that they would be significant. In addition, the ability to get noncontroversial positive changes in place more rapidly is likely to have a positive impact on the regulated community also.

Brian Hebert
December 23, 1997
Page 3

If you have any questions or other issues regarding rulemaking , please contact me at the number below.



Linda Irokawa-Otani
Regulations Coordinator
(916) 445-3991

1 C.C.R. § 100. Publication of "Changes Without Regulatory Effect."

(a) Subject to the approval of OAL as provided in subsections (c) and (d), an agency may add to, revise or delete text published in the California Code of Regulations without complying with the rulemaking procedure specified in Article 5 of the APA only if the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision. The addition, revision or deletion is a "change without regulatory effect." Changes without regulatory effect include, but are not limited to:

- (1) renumbering, reordering, or relocating a regulatory provision;
- (2) deleting a regulatory provision for which all statutory or constitutional authority has been repealed;
- (3) deleting a regulatory provision held invalid in a judgment that has become final, entered by a California court of competent jurisdiction, a United States District Court located in the State of California, the United States Court of Appeals for the Ninth Circuit, or the United States Supreme Court; however, OAL shall not approve any proposed change without regulatory effect if the change is based on a superior court decision which invalidated the regulatory provision solely on the grounds that the underlying statute was unconstitutional;
- (4) revising structure, syntax, cross-reference, grammar, or punctuation;
- (5) changing an "authority" or "reference" citation for a regulation; and,
- (6) making a regulatory provision consistent with a changed California statute if both of the following conditions are met:
 - (A) the regulatory provision is inconsistent with and superseded by the changed statute, and
 - (B) the adopting agency has no discretion to adopt a change which differs in substance from the one chosen.

(b) In submitting a change without regulatory effect to OAL for review the agency shall:

- (1) submit seven copies of the regulations with an addition shown in underline or italics and a deletion shown in strike-out; and
- (2) attach to each copy a completed Form 400, with at least one Form 400 bearing an original signature; and
- (3) submit a written statement explaining why the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision.

(c) OAL shall determine whether a change submitted is a change without regulatory effect within 30 working days of its receipt. OAL shall send written notification of the determination to the agency which submitted the changes.

(d) If OAL determines that the submitted change is a change without regulatory effect, OAL shall file it with the Secretary of State and have it published in the California Code of Regulations.

PROPOSED LEGISLATION

1 **Gov't Code §11346.9 (amended). Post-comment analysis**

2 SECTION 1. Section 11346.9 of the Government Code is amended to read:

3 11346.9. ~~Every~~ Except as provided in Section 11347, every agency subject to
4 this chapter shall do the following:

5 (a) Prepare and submit to the office with the adopted regulation a final statement
6 of reasons that shall include all of the following:

7 (1) An update of the information contained in the initial statement of reasons. If
8 the update identifies any data or any technical, theoretical or empirical study,
9 report, or similar document on which the agency is relying in proposing the
10 adoption or amendment of a regulation that was not identified in the initial
11 statement of reasons, or which was otherwise not identified or made available for
12 public review prior to the close of the public comment period, the agency shall
13 comply with subdivision (d) of Section 11346.8.

14 (2) A determination as to whether the regulation imposes a mandate on local
15 agencies or school districts. If the determination is that the regulation does contain
16 a local mandate, the agency shall state whether the mandate is reimbursable
17 pursuant to Part 7 (commencing with Section 17500) of Division 4. If the agency
18 finds that the mandate is not reimbursable, it shall state the reasons for that
19 finding.

20 (3) A summary of each objection or recommendation made regarding the
21 specific adoption, amendment, or repeal proposed, together with an explanation of
22 how the proposed action has been changed to accommodate each objection or
23 recommendation, or the reasons for making no change. This requirement applies
24 only to objections or recommendations specifically directed at the agency's
25 proposed action or to the procedures followed by the agency in proposing or
26 adopting the action.

27 (4) A determination with supporting information that no alternative considered
28 by the agency would be more effective in carrying out the purpose for which the
29 regulation is proposed or would be as effective and less burdensome to affected
30 private persons than the adopted regulation.

31 (5) An explanation setting forth the reasons for rejecting any proposed
32 alternatives that would lessen the adverse economic impact on small businesses.

33 (b) Prepare and submit to the office with the adopted regulation an updated
34 informative digest containing a clear and concise summary of the immediately
35 preceding laws and regulations, if any, relating directly to the adopted, amended,
36 or repealed regulation and the effect of the adopted, amended, or repealed
37 regulation. The informative digest shall be drafted in a format similar to the
38 Legislative Counsel's Digest on legislative bills.

39 (c) A state agency that adopts or amends a regulation mandated by federal law or
40 regulations, the provisions of which are identical to a previously adopted or

41 amended federal regulation, shall be deemed to have complied with this section if
42 a statement to the effect that a federally mandated regulation or amendment to a
43 regulation is being proposed, together with a citation to where an explanation of
44 the provisions of the regulation can be found, is included in the notice of proposed
45 adoption or amendment prepared pursuant to Section 11346.5. However, the
46 agency shall comply fully with this chapter with respect to any provisions in the
47 regulation which the agency proposes to adopt or amend that are different from the
48 corresponding provisions of the federal regulation.

49 **Comment.** Section 11346.9 is amended to allow an exception for consent regulations. See
50 Section 11347.

51 **Gov't Code § 11347 (added). Consent regulations**

52 SEC. 2. Section 11347 is added to the Government Code, to read:

53 11347. (a) If the adopting agency receives no adverse comments regarding the
54 proposed regulation during the public comment period, the agency shall follow the
55 procedures provided in this subdivision instead of the procedures provided in
56 Section 11346.9:

57 (1) Certify to the office that no adverse comment regarding the proposed
58 regulation was received during the public comment period.

59 (2) Submit the adopted regulation to the office for review.

60 (b) This section does not apply if the substance of the proposed regulation is
61 changed after submission to the public pursuant to Section 11346.5.

62 (c) For the purposes of this section, an “adverse comment” is a comment
63 suggesting that the proposed regulation should not be adopted or should be
64 changed. “Adverse comment” does not include any of the following:

65 (1) A comment in favor of the proposed regulation.

66 (2) A comment suggesting that the proposed regulation be applied to other
67 matters, unless support for the proposed regulation is expressly conditioned on the
68 regulation being applied to such matters.

69 (3) A comment that does not address the substance of the proposed regulation or
70 any perceived procedural infirmities of the proposed regulation.

71 **Comment.** Section 11347 creates an exception to the procedures provided in Section 11346.9.
72 Certification that no adverse comment is received regarding a regulation is subject to review by
73 the Office of Administrative Law. See Section 11349.1(b) (OAL review standards include
74 compliance with Chapter 3.5 of Division 3 of Title 2 of the Government Code).

75 Paragraph (2) of subdivision (b) provides that this section does not apply if the adopting agency
76 has changed the substance of the regulation after circulation of the proposed regulation for
77 comment. This does not preclude application of this section after making purely grammatical or
78 other nonsubstantive changes.

79 Paragraph (3) of subdivision (c) provides that a comment is not adverse for the purpose of this
80 section if it does not address the substance or procedural infirmities of the proposed regulation.
81 For example, a simple statement of opposition, without any explanation, or a statement of
82 opposition based on clearly irrelevant grounds would not constitute an adverse comment.

83 “Office” means the Office of Administrative Law. See Section 11342(b).

PROPOSED LEGISLATION

1 **Gov't Code §§ 11365.010-11365.080 (added). Consent Regulations**

2 SEC. ____ . Article 11 (commencing with Section 11365.010) is added to Chapter
3 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, to read:

4 Article 11. Consent Regulation Procedure

5 **11365.010. Purpose and scope**

6 11365.010. (a) The purpose of this article is to provide an efficient procedure
7 that an agency may use when taking a regulatory action that the agency believes
8 will be unopposed.

9 (b) The procedure provided in this article is intended as an optional alternative to
10 the procedure provided in Article 5 (commencing with Section 11346). Nothing in
11 this article requires an agency to take a regulatory action using this procedure.

12 (c) Except as provided in subdivision (d), any regulatory action that is subject to
13 Article 5 (commencing with Section 11346) may instead be taken pursuant to this
14 article.

15 (d) This article does not apply to a regulatory action affecting a building
16 standard, as defined in Section 18909 of the Health and Safety Code.

17 **Comment.** Section 11365.010 states the legislative intent of this article to provide a simplified
18 alternative to the procedure provided in Article 5 (commencing with Section 11346). Note,
19 however, that this procedure can only be used to take a regulatory action that has no significant
20 adverse financial effect and is unopposed in the public comment period. See Section
21 11365.030(b).

22 Subdivision (d) is consistent with Section 11356. A regulatory action affecting a building
23 standard is subject to Article 5 (commencing with Section 11346), but is not subject to review and
24 disapproval by the Office of Administrative Law. See Section 11356.

25 Nothing in this article repeals or diminishes any additional requirements that are imposed by
26 any statute. See Section 11346 (application of chapter).

27 "Regulatory action" means the adoption, amendment, or repeal of a regulation. See Section
28 11342(h).

29 **11365.020. "Adverse comment"**

30 11365.020. (a) As used in this article, "adverse comment" means a written
31 comment raising any of the following objections:

32 (1) A proposed regulatory action should not be undertaken or should be changed.

33 (2) The consent regulation procedure should not be used to take a proposed
34 regulatory action.

35 (3) An agency did not satisfy the requirements of this article in taking a proposed
36 regulatory action.

37 (b) "Adverse comment" does not include a comment to the effect that a proposed
38 regulatory action should be applied to other matters, unless support for the

1 proposed regulatory action is expressly conditioned on the regulatory action being
2 so applied.

3 **Comment.** Section 11365.020 defines “adverse comment.” A regulatory action may not be
4 taken under this article if an adverse comment is received during the public comment period. See
5 Section 11365.030(b) (limitations on use of procedure).

6 Note that written comment includes a comment that is electronically delivered, if the agency
7 agrees to electronic delivery. See Section 11340.9(b)(3).

8 “Regulatory action” means the adoption, amendment, or repeal of a regulation. See Section
9 11342(h).

10 ☞ **Staff Note.** Section 11340.9, referred to in this Comment, and in the Comments to Sections
11 11365.030, 11365.040, and 11365.080 is a new section proposed by the Commission as a general
12 reform of rulemaking procedure. It would permit communications required under this chapter to
13 be delivered electronically, if the recipient agrees. See Memorandum 97-13.

14 **11365.030. Procedure for taking a regulatory action**

15 11365.030. (a) To take a regulatory action under this article, an agency shall do
16 all of the following:

17 (1) Prepare a preliminary text of the proposed regulatory action.

18 (2) Assess the potential financial impact of the proposed regulatory action on
19 California businesses, individuals, housing costs, state agencies, local agencies,
20 and school districts.

21 (3) Give public notice of the proposed regulatory action.

22 (4) Accept written public comment for at least 45 days after giving public notice.

23 (5) Certify in writing that all written public comments received in the public
24 comment period were read and considered by the agency and that no adverse
25 comment was received.

26 (6) Prepare the final text of the proposed regulatory action.

27 (7) Transmit to the office the final text of the proposed regulatory action, the
28 certification required by paragraph (5), and the rulemaking file.

29 (b) An agency may not take a regulatory action under this article in any of the
30 following circumstances:

31 (1) The proposed regulatory action will have a significant adverse financial
32 effect on California businesses, individuals, or housing costs, or will impose costs
33 on state agencies, or on local agencies or school districts entitled to reimbursement
34 under Part 7 (commencing with Section 17500) of Division 4.

35 (2) An adverse comment is received during the public comment period provided
36 in subdivision (a) or in Section 11365.050.

37 **Comment.** Section 11365.030 summarizes the procedure that an agency may follow in taking a
38 regulatory action that it expects to be unopposed. This procedure is an alternative to proceeding
39 under Article 5. See Section 11365.010.

40 Note that written comment received pursuant to subdivision (a)(4) can be delivered
41 electronically if the agency agrees to electronic delivery. See Section 11340.9(b)(3).

42 “Adverse comment” is defined in Section 11365.020(b). “Office” means the Office of
43 Administrative Law. See Section 11342(b). “Regulatory action” means the adoption, amendment,
44 or repeal of a regulation. See Section 11342(h).

1 **§ 11365.040. Public notice**

2 11365.040. (a) The agency shall mail public notice of a proposed regulatory
3 action to the office and to any person who has requested notice of agency
4 regulatory actions. If the agency is within a state department, the agency shall also
5 mail or deliver notice to the director of the department.

6 (b) Public notice of a proposed regulatory action shall include each of the
7 following:

8 (1) Instructions on how to obtain a copy of the preliminary text of the proposed
9 regulatory action and how to submit a written comment relating to the proposed
10 regulatory action. The instructions shall specify the deadline for submission of
11 written comment.

12 (2) The following statement: “This proposed regulatory action is taken under the
13 consent regulation procedure. Unless withdrawn by the proposing agency, the
14 proposed regulatory action will automatically become final if no adverse comment
15 is received within the public comment period. See Government Code Section
16 11365.010-11365.080.”

17 (3) A clear overview explaining the purpose and effect of the proposed
18 regulatory action.

19 (4) Reference to the authority under which the regulatory action is proposed and
20 a reference to a code section or other provision of law that is implemented,
21 interpreted, or made specific by the regulatory action.

22 (5) A statement that the proposed regulatory action will have no significant
23 adverse financial impact on California businesses, individuals, or housing costs,
24 and will not impose costs on state agencies, or on local agencies or school districts
25 entitled to reimbursement under Part 7 (commencing with Section 17500) of
26 Division 4, and a statement of the basis for this assessment.

27 **Comment.** Section 11365.040 specifies the notice required when proceeding under this article.
28 A notice to be mailed under this section may be delivered electronically if the recipient agrees to
29 electronic delivery. See Section 11340.9(b)(3).

30 “Office” means the Office of Administrative Law. See Section 11342(b). “Regulatory action”
31 means the adoption, amendment, or repeal of a regulation. See Section 11342(h).

32 **§ 11365.050. Limitation on final text of proposed regulatory action**

33 11365.050. (a) The final text of a proposed regulatory action taken under this
34 article shall not be changed from the preliminary text, except in the following
35 circumstances:

36 (1) The change is solely grammatical in nature or is otherwise nonsubstantial.

37 (2) The change is substantial, but is sufficiently related to the preliminary text so
38 that the public was adequately placed on notice that the change could result from
39 the originally proposed regulatory action.

40 (b) If a change is made pursuant to paragraph (2) of subdivision (a), the final text
41 of the proposed regulatory action shall be made available to the public for at least
42 15 additional days of written public comment before the agency submits the final
43 text to the office.

1 **Comment.** Section 11365.050 limits the permissible contents of the final text of a proposed
2 regulatory action. This limitation is similar to the limitation expressed in Section 11346.8(c).
3 Note that an adverse comment received in the public comment period required by subdivision (b)
4 has the same effect as an adverse comment received in the initial public comment period — it
5 precludes use of this procedure. See Section 11365.030(b) (limitation on use of procedure).

6 “Regulatory action” means the adoption, amendment, or repeal of a regulation. See Section
7 11342(h).

8 **§ 11365.060. Publication and filing**

9 11365.060. (a) On receiving a public notice of a proposed regulatory action
10 taken under this article, the office shall publish the contents of the notice in the
11 California Regulatory Notice Register.

12 (b) On receiving the final text of a proposed regulatory action taken under this
13 article and certification that all timely public comment was read and considered
14 and that no adverse comments were received, the office shall file the final text of
15 the proposed regulatory action with the Secretary of State.

16 **Comment.** Section 11365.060 specifies the publication and filing responsibilities of the Office
17 of Administrative Law when an agency takes a regulatory action under this article. These
18 requirements are analogous to the publication and filing requirements that apply to regulatory
19 action taken under Article 5 (commencing with Section 11346). See Sections 11364.4(a)(5)
20 (notice publication), 11349.3 (filing with Secretary of State).

21 “Office” means the Office of Administrative Law. See Section 11342(b). “Regulatory action”
22 means the adoption, amendment, or repeal of a regulation. See Section 11342(h).

23 **§ 11365.070. Rulemaking file**

24 11365.070. (a) Except as provided in subdivision (b), an agency taking a
25 regulatory action under this article is subject to Section 11347.3.

26 (b) The requirements of the following paragraphs of subdivision (b) of Section
27 11347.3 do not apply to a rulemaking file prepared pursuant to this section:

28 (1) Paragraph (3).

29 (2) Paragraph (4).

30 (3) Paragraph (5).

31 (4) Paragraph (8).

32 **Comment.** Section 11365.070 provides that an agency taking a regulatory action under this
33 article is subject to the rulemaking file requirements provided in Section 11347.3. Subdivision (b)
34 provides specific exceptions for those requirements of Section 11347.3(b) that are not relevant
35 when taking a regulatory action under this article.

36 “Office” means the Office of Administrative Law. See Section 11342(b). “Regulatory action”
37 means the adoption, amendment, or repeal of a regulation. See Section 11342(h).

38 **11365.080. Review by Office of Administrative Law**

39 11365.080. (a) Any interested person may request, in writing, that the office
40 review a regulatory action taken under this article to determine whether it satisfies
41 the requirements of this article and the substantive standards set forth in Section
42 11349.1. Within 30 days of receiving the request, the office shall review the
43 regulatory action pursuant to the procedure provided in subdivisions (a)-(e) of
44 Section 11349.7, and in subdivision (b) of this section.

1 (b) Notwithstanding Section 11349.7, the following rules govern a review
2 pursuant to this section:

3 (1) Before beginning the review, the office shall notify interested persons of the
4 request for review and publish notice of the request in the California Regulatory
5 Notice Register.

6 (2) A failure to satisfy the requirements of this article shall be treated as a failure
7 to meet the standards set forth in Section 11349.1.

8 (3) As used in Section 11349.7, “regulation” means a regulatory action taken
9 under this article.

10 (4) As used in Section 11349.7, to “repeal” means to reverse the effect of a
11 regulatory action.

12 (c) A regulatory action that has been reviewed by the office under this section is
13 not subject to further review by the office under this section.

14 **Comment.** Section 11365.080 provides for review by the Office of Administrative Law (OAL),
15 on the request of an interested person, of a regulatory action taken under this article. The section
16 incorporates a portion of the procedure used to review whether an existing regulation satisfies the
17 standards prescribed in Section 11349.1(a). See Section 11349.7(a)-(e). The introductory
18 paragraphs of Section 11349.7 are not incorporated.

19 A written request for review may be delivered electronically if the agency agrees to electronic
20 delivery. See Section 11340.9(b)(3).

21 Subdivision (b) provides rules that are necessary to adapt the incorporated procedure for use in
22 reviewing regulatory action taken under this article.

23 The notification of interested persons required under subdivision (b)(1) can be provided
24 electronically if the recipient agrees. See Section 11340.9(b)(3).

25 Subdivision (b)(2) makes clear that a failure to satisfy the requirements of this article has the
26 same effect as a failure to satisfy the substantive standards prescribed in Section 11349.1(a).
27 Thus, under Section 11349.7(a), if OAL finds that a regulatory action taken under this article does
28 not satisfy the requirements of this article it shall order the “adopting agency to show cause why
29 the regulation should not be repealed.”

30 Subdivision (b)(3) makes clear that it is a regulatory action, and not necessarily the regulation
31 itself, that is reviewed under this section. For example, an agency may adopt a regulation in 1999
32 that is unobjectionable, then amend the regulation under this article in 2000, in a manner that does
33 not satisfy the requirements of this article. In such a case, a person may request review of the
34 amendment under this section.

35 On a related point, subdivision (b)(4) makes clear that the remedy for finding a defect in a
36 regulatory action is reversal of the action, not necessarily repeal of the regulation. So, in the
37 example in the preceding paragraph, the problematic amendment would be reversed, restoring the
38 original regulation. This is substantially different from repeal of the regulation.

39 Subdivision (c) provides that regulatory action may only be reviewed under this section once.
40 However, review under this section does not preclude review under other applicable provisions of
41 law. See, e.g., Sections 11349.7 (legislatively initiated review), 11349.8 (review of inoperative
42 regulation), 11350 (judicial review of invalidity of regulation), 11350.3 (judicial review of OAL
43 disapproval of a regulation).

44 “Office” means the Office of Administrative Law. See Section 11342(b). “Regulatory action”
45 means the adoption, amendment, or repeal of a regulation. See Section 11342(h).

1 company, an industrial finance company, a credit union, a mortgage and
2 investment banker, a securities broker-dealer, or an investment adviser.

3 (B) An insurance company, either stock or mutual.

4 (C) A mineral, oil, or gas broker; a subdivider or developer.

5 (D) A landscape architect, an architect, or a building designer.

6 (E) An entity organized as a nonprofit institution.

7 (F) An entertainment activity or production, including a motion picture, a stage
8 performance, a television or radio station, or a production company.

9 (G) A utility, a water company, or a power transmission company generating and
10 transmitting more than 4.5 million kilowatt hours annually.

11 (H) A petroleum producer, a natural gas producer, a refiner, or a pipeline.

12 (I) A business activity exceeding the following annual gross receipts in the
13 categories of:

14 (i) Agriculture, one million dollars (\$1,000,000).

15 (ii) General construction, nine million five hundred thousand dollars
16 (\$9,500,000).

17 (iii) Special trade construction, five million dollars (\$5,000,000).

18 (iv) Retail trade, two million dollars (\$2,000,000).

19 (v) Wholesale trade, nine million five hundred thousand dollars (\$9,500,000).

20 (vi) Services, two million dollars (\$2,000,000).

21 (vii) Transportation and warehousing, one million five hundred thousand dollars
22 (\$1,500,000).

23 (J) A manufacturing enterprise exceeding 250 employees.

24 (K) A health care facility exceeding 150 beds or one million five hundred
25 thousand dollars (\$1,500,000) in annual gross receipts.

26 **Comment.** The definition of “regulatory action” is added to Section 11342 for drafting
27 convenience. The term is used extensively in Article 11 (commencing with Section 11365.010)
28 (consent regulation procedure).

29 **Gov’t. Code § 11343 (amended). Transmittal and certification**

30 SEC. _____. Section 11343 of the Government Code is amended to read:

31 Every state agency shall:

32 (a) Transmit to the office for filing with the Secretary of State a certified copy of
33 every regulation adopted or amended by it except one which:

34 (1) Establishes or fixes rates, prices, or tariffs.

35 (2) Relates to the use of public works, including streets and highways, when the
36 effect of the regulation is indicated to the public by means of signs or signals or
37 when the order determines uniform standards and specifications for official traffic
38 control devices pursuant to Section 21400 of the Vehicle Code.

39 (3) Is directed to a specifically named person or to a group of persons and does
40 not apply generally throughout the state.

41 (4) Is a building standard, as defined in Section 18909 of the Health and Safety
42 Code.

1 (b) Transmit to the office for filing with the Secretary of State a certified copy of
2 every order of repeal of a regulation required to be filed under subdivision (a).

3 (c) Deliver to the office, at the time of transmittal for filing a regulation or order
4 of repeal six duplicate copies of the regulation or order of repeal, together with a
5 citation of the authority pursuant to which it or any part thereof was adopted.

6 (d) Deliver to the office a copy of the notice of proposed action required by
7 Section 11346.4 or 11365.030.

8 (e) Transmit to the State Building Standards Commission for approval a certified
9 copy of every regulation, or order of repeal of a regulation, that is a building
10 standard or administrative regulation that applies directly to the implementation or
11 enforcement of building standards, together with a citation of authority pursuant to
12 which it or any part thereof was adopted, a copy of the notice of proposed action
13 required by Section 11346.4, and any other records prescribed by the State
14 Building Standards Law (Part 2.5 (commencing with Section 18901) of Division
15 13 of the Health and Safety Code).

16 (f) Whenever a certification is required by this section, it shall be made by the
17 head of the state agency or his or her designee which is adopting, amending, or
18 repealing the regulation and the certification and delegation shall be in writing.

19 **Comment.** Section 11343 is amended to clarify the application of the section to regulations
20 adopted pursuant to Article 11 (consent regulation procedure).

21 **Gov't. Code § 11346.1 (amended). Application of article**

22 SEC. _____. Section 11346.1 of the Government Code is amended to read:

23 11346.1. (a) This article does not apply to any of the following:

24 (1) A regulation that is not required to be filed with the Secretary of State under
25 this chapter, and only this section and Sections 11343.4 and 11349.6 apply to an.

26 (2) An emergency regulation adopted pursuant to subdivision (b), or to any
27 except that this section and Sections 11343.4 and 11349.6 do apply.

28 (3) A regulation adopted under Section 8054 or 3373 of the Financial Code.

29 (4) Adoption, amendment, or repeal of a regulation pursuant to Article 11
30 (commencing with Section 11365.010).

31 (b) Except as provided in subdivision (c), if a state agency makes a finding that
32 the adoption of a regulation or order of repeal is necessary for the immediate
33 preservation of the public peace, health and safety or general welfare, the
34 regulation or order of repeal may be adopted as an emergency regulation or order
35 of repeal.

36 Any finding of an emergency shall include a written statement which contains
37 the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of
38 Section 11346.5 and a description of the specific facts showing the need for
39 immediate action. The enactment of an urgency statute shall not, in and of itself,
40 constitute a need for immediate action.

41 The statement and the regulation or order of repeal shall be filed immediately
42 with the office.

1 (c) Notwithstanding any other provision of law, no emergency regulation that is
2 a building standard, as defined in Section 18909 of the Health and Safety Code,
3 shall be filed, nor shall the building standard be effective, unless the building
4 standards are submitted to the State Building Standards Commission, and are
5 approved and filed pursuant to Sections 18937 and 18938 of the Health and Safety
6 Code.

7 (d) The emergency regulation or order of repeal shall become effective upon
8 filing or upon any later date specified by the state agency in a written instrument
9 filed with, or as a part of, the regulation or order of repeal.

10 (e) No regulation, amendment, or order of repeal adopted as an emergency
11 regulatory action shall remain in effect more than 120 days unless the adopting
12 agency has complied with Sections 11346.2 to 11346.9, inclusive, prior to the
13 adoption of the emergency regulatory action, or has, within the 120-day period,
14 completed the regulation adoption process by formally adopting the emergency
15 regulation, amendment, or order of repeal or any amendments thereto, pursuant to
16 this chapter. The adopting agency, prior to the expiration of the 120-day period,
17 shall transmit to the office for filing with the Secretary of State the adopted
18 regulation, amendment, or order of repeal, the rulemaking file, and a certification
19 that either Sections 11346.2 to 11346.9, inclusive, were complied with prior to the
20 emergency regulatory action, or that there was compliance with this section within
21 the 120-day period.

22 (f) In the event an emergency amendment or order of repeal is filed and the
23 adopting agency fails to comply with subdivision (e), the regulation as it existed
24 prior to the emergency amendment or order of repeal shall thereupon become
25 effective and after notice to the adopting agency by the office shall be reprinted in
26 the California Code of Regulations.

27 (g) In the event a regulation is originally adopted and filed as an emergency and
28 the adopting agency fails to comply with subdivision (e), this failure shall
29 constitute a repeal thereof and after notice to the adopting agency by the office,
30 shall be deleted.

31 (h) A regulation originally adopted as an emergency regulation, or an emergency
32 regulation substantially equivalent thereto that is readopted as an emergency
33 regulation, shall not be filed with the Secretary of State as an emergency
34 regulation except with the express prior approval of the director of the office.

35 **Comment.** Section 11346.1 is amended to make clear that a regulation adopted as a consent
36 regulation is not subject to the requirements of Article 5.

37 ☞ **Staff Note.** It is not necessary to expressly exempt consent regulations from OAL review of
38 proposed regulations under Article 6. Such review only applies to regulations adopted under
39 Article 5. See Section 11349.1(a).

40 **Gov't. Code § 11347.3 (amended). Application of article**

41 SEC. _____. Section 11347.3 of the Government Code is amended to read:

1 11347.3. (a) Every agency shall maintain a file of each rulemaking that shall be
2 deemed to be the record for that rulemaking proceeding.

3 (b) The rulemaking file shall include:

4 (1) Copies of any petitions received from interested persons proposing the
5 adoption, amendment, or repeal of the regulation, and a copy of any decision
6 provided for by subdivision (d) of Section 11340.7, which grants a petition in
7 whole or in part.

8 (2) All published notices of proposed adoption, amendment, or repeal of the
9 regulation, and an updated informative digest, the initial statement of reasons, and
10 the final statement of reasons.

11 (3) The determination, together with the supporting data required by paragraph
12 (5) of subdivision (a) of Section 11346.5.

13 (4) The determination, together with the supporting data required by paragraph
14 (8) of subdivision (a) of Section 11346.5.

15 (5) The estimate, together with the supporting data and calculations, required by
16 paragraph (6) of subdivision (a) of Section 11346.5.

17 (6) All data and other factual information, any studies or reports, and written
18 comments submitted to the agency in connection with the adoption, amendment,
19 or repeal of the regulation.

20 (7) All data and other factual information, technical, theoretical, and empirical
21 studies or reports, if any, on which the agency is relying in the adoption,
22 amendment, or repeal of a regulation, including any cost impact estimates as
23 required by Section 11346.3.

24 (8) A transcript, recording, or minutes of any public hearing connected with the
25 adoption, amendment, or repeal of the regulation.

26 ~~(9) The date on which the agency made available to the public for 15 days prior~~
27 ~~to the adoption, amendment, or repeal of the regulation the full text as required by~~
28 ~~subdivision (c) of Section 11346.8 if the agency made changes to the regulation~~
29 ~~noticed to the public.~~

30 (9) The date on which a comment period pursuant to subdivision (c) of Section
31 11346.8 or subdivision (b) of Section 11365.050 began.

32 (10) The text of regulations as originally proposed and the modified text of
33 regulations, if any, that were made available to the public prior to adoption.

34 (11) Any other information, statement, report, or data that the agency is required
35 by law to consider or prepare in connection with the adoption, amendment, or
36 repeal of a regulation.

37 (12) An index or table of contents that identifies each item contained in the
38 rulemaking file. The index or table of contents shall include an affidavit or a
39 declaration under penalty of perjury in the form specified by Section 2015.5 of the
40 Code of Civil Procedure by the agency official who has compiled the rulemaking
41 file, specifying the date upon which the record was closed, and that the file or the
42 copy, if submitted, is complete.

1 (c) Every agency shall submit to the office with the adopted regulation, the
2 rulemaking file or a complete copy of the rulemaking file.

3 (d) The rulemaking file shall be made available by the agency to the public, and
4 to the courts in connection with the review of the regulation.

5 (e) Upon filing a regulation with the Secretary of State pursuant to Section
6 11349.3 or 11365.060, the office shall return the related rulemaking file to the
7 agency, after which no item contained in the file shall be removed, altered, or
8 destroyed or otherwise disposed of. The agency shall maintain the file unless it
9 elects to transmit the file to the State Archives pursuant to subdivision (f).

10 (f) The agency may transmit the rulemaking file to the State Archives. The file
11 shall include instructions that the Secretary of State shall not remove, alter, or
12 destroy or otherwise dispose of any item contained in the file. Pursuant to Section
13 12223.5, the Secretary of State may designate a time for the delivery of the
14 rulemaking file to the State Archives in consideration of document processing or
15 storage limitations.

16 **Comment.** Section 11347.3 is amended to extend its application to rulemaking files created
17 pursuant to Section 11365.070.

18 **Gov't. Code § 11350.3 (amended). Application of article**

19 SEC. _____. Section 11347.3 of the Government Code is amended to read:

20 11350.3. Any interested person may obtain a judicial declaration as to the
21 validity of a regulation which the office has disapproved or ordered repealed
22 pursuant to Section 11349.3, 11349.6, or 11349.7, or 11365.080 by bringing an
23 action for declaratory relief in the superior court in accordance with the Code of
24 Civil Procedure. The court may declare the regulation valid if it determines that
25 the regulation meets the standards set forth in Section 11349.1 and that the agency
26 has complied with this chapter. If the court so determines, it may order the office
27 to immediately file the regulation with the Secretary of State.

28 **Comment.** Section 11350.3 is amended to extend its application to review of regulatory actions
29 taken under Article 11 (commencing with Section 11365.010) (consent regulation procedure).
30