

Memorandum 2000-4

Access to Rulemaking Information Under the APA (Comments on Tentative Recommendation)

In October 1999, the Commission circulated a tentative recommendation on *Improving Access to Rulemaking Information under the Administrative Procedure Act*. The tentative recommendation proposed three changes to the rulemaking provisions of the APA:

- (1) A notice of proposed rulemaking action would include an explanation of how to obtain a copy of the agency's final statement of reasons for the proposed rulemaking action.
- (2) An agency would be required to provide notice of a decision not to proceed with a proposed rulemaking action.
- (3) An agency that maintains a website would be required to publish any initial statement of reasons, final statement of reasons, or notice of a decision not to proceed on its website.

We received four letters commenting on the tentative recommendation. The letters are reproduced in the Exhibit as follows:

	<i>Exhibit p.</i>
1. Carolina Rose, Legislative Research Incorporated, Sacramento (November 30, 1999)	1
2. Debbie Baity, Department of Motor Vehicles, Sacramento (December 13, 1999)	2
3. Aronna Granick, Board of Accountancy, Department of Consumer Affairs, Sacramento (December 13, 1999)	3
4. Nancy T. Yamada, California State Employees Association, Sacramento (January 19, 2000)	4

In addition, the Office of Administrative Law has suggested another change to the rulemaking procedure. That suggestion is also discussed below.

The Commission should decide whether to formally recommend any of the proposals discussed in this memorandum. Any changes that are recommended can be added to the general rulemaking bill that the Commission is sponsoring this year.

All statutory references in this memorandum are to the Government Code.

GENERAL RESPONSE

In general, the response to the tentative recommendation was positive. The Department of Motor Vehicles and the California State Employees Association both support the reforms proposed in the tentative recommendation. None of the commentators opposed any of the proposed reforms. However, some of the commentators expressed technical concerns about how the proposed reforms would be implemented. Those concerns are discussed below.

NOTICE OF HOW TO OBTAIN THE FINAL STATEMENT OF REASONS

After receiving public comment regarding a proposed regulation, an agency must prepare a final statement of reasons, updating the findings and determinations it made earlier in the process and presenting its responses to public comments. The final statement of reasons is a public document. However, an agency is not required to provide any notice of the final statement's availability or instructions on how to obtain it. This is inconsistent with the existing requirement that an agency's notice of proposed rulemaking action include an explanation of how to obtain a copy of the *initial* statement of reasons. The proposed amendment to Section 11346.5(a)(18) would require that the notice of proposed action also include an explanation of how to obtain a copy of the *final* statement of reasons. Legislative Research Incorporated, the Department of Motor Vehicles, and the California State Employees Association all support the proposed change. See Exhibit pp. 1-2, & 4.

However, Legislative Research Incorporated is concerned that an agency may provide information that later becomes outdated:

The statute does not specify that a statement that was *once accurate* must be monitored and updated as necessary. If the agency states how to obtain a copy of the statement of reasons at one point in time — it may be technically in compliance with the statute even if the information later becomes outdated.

See Exhibit p. 1 (emphasis in original). This could be addressed by requiring an agency to provide updated contact information if the original contact information becomes outdated. If the intent is to provide the update to the same people that received the original information, the update would need to be

mailed to the agency's rulemaking mailing list and published in the California Regulatory Notice Register.

It isn't clear that the benefit of requiring an agency to update outdated contact information would justify the cost of preparing and distributing the updates. Even if contact information does become outdated, the final statement of reasons should still be accessible as part of the permanent rulemaking file. Legislative Research Incorporated is concerned that some agencies may be careless in their maintenance of rulemaking files, but the law is fairly strict in this regard. An agency is required to maintain a rulemaking file without making any change to its contents, until the agency elects to transmit the file to the State Archives. See Section 11347.3(e)-(f). It would seem that the final statement of reasons should be reasonably accessible even if the contact information becomes outdated. **The staff recommends that the Commission adopt the proposed notice provision, as drafted, as its recommendation.**

NOTICE OF DECISION NOT TO PROCEED WITH PROPOSED RULEMAKING ACTION

Under existing law, an agency is not required to provide any notice if it decides not to proceed with a rulemaking action. This means that a person who is interested in a proposed rulemaking action may not realize that the agency has abandoned the proposal. Proposed Section 11347 would require an agency to publish a brief notice in the California Regulatory Notice Register if it decides not to proceed with a rulemaking action:

11347. If, after publication of a notice of proposed action pursuant to Section 11346.4, an agency decides not to proceed with a proposed rulemaking action, it shall deliver notice of its decision to the office for publication in the California Regulatory Notice Register.

The Department of Motor Vehicles and the California State Employees Association support this proposal. See Exhibit pp. 2 & 4. However, the Department of Motor Vehicles and the Board of Accountancy both raise technical concerns. These concerns are discussed below.

Relation to One-Year Deadline

Existing law provides that a notice of proposed rulemaking action is only effective for one year. See Section 11346.4(b). If an agency takes longer than a year to complete a rulemaking action, it must issue a new notice before it can

proceed. The Department of Motor Vehicles believes that the proposed law should clearly address how the notice requirement would relate to the one-year deadline. There are two principal alternatives:

(1) Clarify that the deadline does not affect the agency's obligation to provide notice (i.e., an agency must provide notice of its decision not to proceed with a rulemaking action even if the deadline has passed). This could be best addressed by revising the Comment:

Comment. Section 11347 is new. Under this section, an agency is required to give notice of a decision not to proceed with a proposed rulemaking action regardless of whether the one-year limit on the effectiveness of the notice of proposed action has passed. See Section 11346.4(b) (limit on effectiveness of notice of proposed action). See also Section 11342(b) ("office" means Office of Administrative Law").

(2) Limit the notice requirement to situations where an agency decision not to proceed occurs *before* the one-year limit has passed. This could be implemented by revising proposed Section 11347 as follows:

11347. If, after publication of a notice of proposed action pursuant to Section 11346.4, but before the notice of proposed action becomes ineffective pursuant to subdivision (b) of Section 11346.4, an agency decides not to proceed with a proposed rulemaking action, it shall deliver notice of its decision to the office for publication in the California Regulatory Notice Register.

The staff believes that either approach would be acceptable. The first would provide slightly better information to the public. The second would provide a slight savings to the state (by eliminating the need for notice in those cases where an agency decides to abandon a rulemaking action after the deadline for completing the action has passed).

Objective Abandonment Standard

The Department of Motor Vehicles is concerned that the proposed law does not "provide a time frame or period of inactivity ... that indicates an agency has decided not to proceed with a rulemaking proposal." See Exhibit p. 2. It might be helpful to set some sort of objective standard to determine whether an agency has in fact decided not to proceed with a proposed rulemaking action. Otherwise, an agency that is leery of giving public notice of its decision could simply remain

“indecisive” about whether to proceed, despite a lack of any activity to further the process.

However, an objective standard would probably be too inflexible. There will be times when an agency deliberates for an extended period of time before reaching a decision about whether to proceed, or where an agency intends to proceed but events prevent the agency from taking further action for an extended period of time (e.g., where vacancies prevent a decisionmaking body from achieving a quorum). In those cases, the mere passage of time would not be an indication of the agency’s intentions. **The staff does not recommend any change to the proposed law regarding this issue.**

Identification of Proposal

The Department of Motor Vehicles also raises the question of how an agency that has decided not to proceed with a rulemaking action would identify the action in the notice of its decision. As the Department of Motor Vehicles suggests, this is an issue that should probably be resolved administratively. The Office of Administrative Law controls the form of the California Regulatory Notice Register. It can determine the best way to refer to a proposed rulemaking action (perhaps by citing the volume and page numbers of the originally published notice of proposed action). **The staff does not recommend any change to the proposed law regarding this issue.**

Printing Fee

The Department of Motor Vehicles also suggests that the Office of Administrative Law would need to amend its regulations to exempt the required notice from the regular printing fee. However, it doesn’t appear that any change is necessary. The existing regulation provides that an agency does not pay a printing fee for a notice that is “required by statute to be published in the California Regulatory Notice Register.” See 1 Cal. Code Regs. § 5. The proposed notice of a decision not to proceed would be required by statute and would therefore be exempt from the printing fee. **The staff does not recommend any change to the proposed law regarding this issue.**

Partial Abandonment

The Board of Accountancy notes that it is unclear whether the notice requirement would be triggered if an agency were to decide not to proceed with

part of a proposed rulemaking action, while proceeding with the remainder. This should be clarified.

In drafting the tentative recommendation, the staff assumed that the notice requirement would only apply to a decision to completely abandon a proposed rulemaking action. It is only where an agency decides to completely abandon a proposed rulemaking action that the agency is not required to provide any public notice of its decision. If an agency decides to drop part of a proposed rulemaking action, while proceeding with the remaining parts, the agency's decision will be disclosed to the public when the regulatory changes resulting from the completed rulemaking action are published in the California Regulatory Notice Register. See Section 11344.1(a)(2). This approach could be implemented by revising the Comment to proposed Section 11347 as follows:

Comment. Section 11347 is new. The purpose of this section is to require notice where an agency decides to completely abandon a proposed rulemaking action. A decision not to proceed with part of a proposed rulemaking action, while proceeding with the remainder, would not require notice under this section. See also Section 11342(b) ("office" means Office of Administrative Law").

If the Commission believes that more direct and immediate notice of a decision not to proceed with *part* of a rulemaking action should be required, proposed Section 11347 could be revised to read:

11347. If, after publication of a notice of proposed action pursuant to Section 11346.4, an agency decides not to proceed with a proposed rulemaking action the adoption, amendment, or repeal, of a regulation that is included in the express terms of the proposed action made available to the public pursuant to paragraph (15) of subdivision (a) of Section 11346.5, it shall deliver notice of its decision to the office for publication in the California Regulatory Notice Register.

The staff favors the first approach. It is simpler and easier to administer, providing a benefit to interested members of the public without adding unduly to the burden on agencies.

INTERNET PUBLICATION OF NOTICES

In its recommendation on *Administrative Rulemaking*, the Commission proposed adding Section 11340.8 to authorize, and in some cases require, use of

the Internet to distribute rulemaking notices. The tentative recommendation proposed adding language to that section to require an agency that already maintains a website, to publish the following documents on its website:

- (1) The initial statement of reasons (which sets out various findings and declarations in support of a proposed rulemaking action).
- (2) The final statement of reasons (updating the initial statement of reasons and providing responses to public comments).
- (3) Any notice of a decision not to proceed with a proposed rulemaking action (discussed above).

The Department of Motor Vehicles and the California State Employees Association support this proposal. See Exhibit pp. 2 & 4. We received no other comments regarding this topic. **The staff recommends that the Commission adopt the proposed Internet publication provision as its recommendation.**

PUBLICATION OF RULEMAKING DECISIONS IN NOTICE REGISTER

Section 11344.1(a)(3) provides that the California Regulatory Notice Register shall contain: “All regulation decisions issued in the previous week detailing the reasons for disapproval of a regulation, the reasons for not filing an emergency regulation, and the reasons for repealing an emergency regulation.” In practice, the Office of Administrative Law does not publish entire regulation decisions in the California Regulatory Notice Register. Instead, it publishes detailed summaries of the decisions. The full decisions are preserved by the Office of Administrative Law and are available for public inspection. It may be appropriate to amend Section 11344.1(a)(3) to ratify the existing practice, thus:

11344.1. The Office shall do all of the following:

(a) Provide for the publication of the California Regulatory Notice Register, which shall be an official publication of the State of California and which shall contain the following:

...

(3) All Summaries of all regulation decisions issued in the previous week detailing the reasons for disapproval of a regulation, the reasons for not filing an emergency regulation, and the reasons for repealing an emergency regulation. The California Regulatory Notice Register shall also include a quarterly index of regulation decisions.

Comment. Subdivision (a)(3) of Section 11344.1 is amended to authorize the publication of detailed summaries of regulation decisions, rather than the decisions themselves. The complete decisions are public documents and can be obtained from the Office of Administrative Law.

The staff sees no harm in the proposed change and recommends that it be added to the recommendation.

Respectfully submitted,

Brian Hebert
Staff Counsel



Law Revision Commission
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File: _____

November 30, 1999

TO: California Law Revision Commission
FROM: Carolina Rose, President *CR*
RE: Proposed revisions: Gov't Code § 11346.5 (a) (18)

The intent of the proposed amendment is laudable -- "The notice of proposed rulemaking action should include instructions on how to obtain a copy of the final statement of reasons."

In my experience, agency filings in the administrative notice registers (the "Z" registers) typically provide the name and phone number of the staff person responsible for the filing for additional follow-up. My concern is that the proposed amendment is drafted broadly enough to permit this practice as a form of compliance with the underlying intent -- albeit temporary. The problem with the existing approach is obvious -- when the inevitable staffing changes occur, the public can reach a brick wall.

The statute does not specify that a statement that was *once accurate* must be monitored and updated as necessary. If the agency states how to obtain a copy of the statement of reasons at one point in time -- it may be technically in compliance with the statute even if the information later becomes outdated.

In the world of rulemaking research it is well known that single copies of valuable records can be "lost", "misplaced" or "misfiled." Since the underlying intent of the *APA* + PRA is that such records must be preserved and made available to the courts and public, then it would be far better, at minimum, to mandate the preservation of all statements of reasons with a central source such as the State Archives or the Government Publications Division of the State Library in Sacramento. (In a perfect world, all depository libraries would receive them as well.) Another approach could be to require each agency to maintain a central internal archives for a period of time before sending them to the State Archives. (Hopefully the agencies would also send on the entire rulemaking files as well. Currently the preservation practices in this area are quite disparate.)

Many thanks for the opportunity to comment on the proposed revisions.

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From: "Baity, Debbie J." <dbaity@DMV.CA.gov>
To: "Brian Hebert (E-mail)" <bhebert@uop.edu>
Cc: "Eubanks, Joan L." <jeubanks@DMV.CA.gov>
Subject: Improving Access to Rulemaking
Date: Mon, 13 Dec 1999 13:41:59 -0800

Gentlemen,

These comments are in response to the California Law Revision Commission (CLRC) request dated November 15, 1999, for public comment concerning the tentative recommendation on Improving Access to Rulemaking Information Under the Administrative Procedure Act (APA). The tentative recommendations were taken from the 1999 Program Report of the Trade and Commerce Agency, Regulation Review Unit, entitled Improving Regulations and Rulemaking.

The Department of Motor Vehicles (department) supports the proposed recommendations to require information in the notice on how to obtain a copy of the Final Statement of Reasons, and publication of rulemaking documents and information on an agency website. The department also agrees with the concept of providing notice of a decision not to proceed with a proposed rulemaking action, and has, in fact, mailed such notices to interested persons when appropriate.

Government Code Section 11346.4(b) requires that a rulemaking proposal must be completed within the one-year effective period of the notice date, or a new notice of proposed action must be reissued (if the agency wishes to proceed with the regulatory action). Proposed Government Code Section 11347 is not sufficiently clear as it does not specify how the "notice not to proceed" relates to the one-year notice period, nor would it provide a time frame or period of inactivity within the one-year period that indicates an agency has decided not to proceed with rulemaking proposal.

Further, proposed Section 11347 does not require a form or means by which the agency is to identify the proposal. The department presumes that the intent in this instance is to allow the Office of Administrative Law to interpret the statutory requirements by regulation.

Finally, it should be noted that the language proposed by the CLRC would need to be included in the list in Section 5 of Title 1, Office of Administrative Law, of notices exempt from the printing fee established by the Office of Administrative Law (OAL) for publication of notice in the Notice Register.

Please contact me if you have any questions.
Sincerely,

Debbie Baity (7-5690)
Regulations Branch
Legal Affairs Division



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December 20, 1999

Law Revision Commission
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DEC 23 1999

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

File: 7L-300

Dear Commissioners:

This letter is to comment on the October 1999 Tentative Recommendation regarding Improving Access to Rulemaking Information Under the Administrative Procedure Act.

We have no concerns regarding the first recommendation related to access to the final statement of reasons or the third recommendation related to publishing information on the agency's Internet website

However, we do have a minor concern with regard to the second recommendation which would require that an agency publish a notice when it determines not to proceed with a rulemaking action. There have been occasions when the Board of Accountancy published a notice to amend several regulations and then decided to proceed with only a portion of the proposal. It is unclear whether Section 11347 would require publication of a notice in these situations. Is it the intent that this be clarified by regulations adopted by the Office of Administrative Law?

Thank you for the opportunity to comment. If you have questions regarding this letter, I can be reached at (916) 263-3788.

Sincerely,

Aronna Granick
Regulation Coordinator

c: Carol Sigmann, Executive Officer



California State Employees Association

Local 1000, SEIU, AFL-CIO, CLC

Tel.: (916) 326-4208

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January 19, 2000

Law Revision Commission
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JAN 20 2000

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

File: _____

Attention: Brian Hebert

Re: Improving Access to Rulemaking Information Under the APA
Study N-300
October 1999 Tentative Recommendation

Dear Commission Members:

The California State Employees Association (CSEA) has reviewed the above-referenced tentative recommendation and supports the Commission's recommended changes to the Administrative Procedure Act (APA). Specifically, CSEA supports providing notice to the public that includes instructions on how to obtain a copy of the Final Statement of Reasons (Government Code §11346.5 amendment) and notice that rulemaking actions have been abandoned (proposed Government Code §11347); as well as increased public access to this information, and other rulemaking notices via the internet (Government Code §11340.8 amendment). These amendments to the APA will increase public notice and participation.

Thank you for your consideration. Please contact me if you have any questions.

Sincerely,


NANCY T. YAMADA
Attorney

NTY/map

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