Study N-300 May 29, 1996

Memorandum 96-38

Administrative Rulemaking: Scope of Project

BACKGROUND

At the outset of the administrative law and procedure study, the Commission divided the study into four segments:

(1) Adjudication
(2) Judicial Review
(3) Rulemaking
(4) Nonjudicial Review

We have completed work on adjudication and are nearing completion of judicial review. The next segment is rulemaking. The final segment — nonjudicial review (legislative oversight and ombudsman concepts) — has always been tentative; the Commission has planned to make a decision whether to get into this at all after the main administrative law and procedure work is done.

Based on the difficult experience we have had with adjudication and judicial review, the staff has wondered whether we really want to go forward with the final phases of the study. However, a number of persons have informed us that the Commission can make a real contribution in the area of rulemaking, since the existing statute is clearly amenable to improvement and there are a number of issues that can and should be addressed. In the Fall of 1995, when the Commission reviewed topics on its agenda and set priorities, the Commission decided to activate the rulemaking phase of the study during 1996.

In January of 1996 we circulated a notice of the Commission's intent to begin work on the rulemaking phase of the administrative law and procedure study, and solicited suggestions for specific improvements in the rulemaking statute. We have received letters from Prof. Gregory Ogden (Exhibit pp. 1-2), the Northern California Association of Law Libraries and the Council of California

Law Librarians (Exhibit pp. 3-7), and the Office of Administrative Law (Exhibit pp. 14-40). OAL indicates that this is the first of several letters.

OVERVIEW OF CALIFORNIA ADMINISTRATIVE RULEMAKING

California state administrative agencies have always exercised rulemaking power. Until the 1940's there were two main problems with the rulemaking process. First, there were no laws dictating the steps state agencies were required to take before adopting regulations. Second, California did not require that regulations of agencies be formalized or registered. Thus, it was difficult to obtain through any official or reliable source the actual text of a regulation.

The Legislature responded in 1941 by adopting procedures for the publication of regulations. State agencies were required to file with the Secretary of State a copy of each regulation and citation of authority under which it was adopted. A Codification Board was established, responsible for periodic publication of regulations in the "California Administrative Register." The filing or publication of a regulation created a rebuttable presumption of its due adoption.

The California Administrative Procedure Act (APA) was enacted in 1945. Although the original statute lacked rulemaking provisions, it was revised in 1947 to include a system of notice, comment, and publication, similar to the Federal Administrative Procedure Act of 1946. Under this system, an agency was required to give notice of proposed rulemaking at least thirty days in advance of the agency action. The notice identified the statutory authority for the regulation, included the text or an informative summary of the regulation, and referred to the time, place, and nature of the proceedings. The notice was both mailed to interested persons and published. The agency was required to provide a hearing, or opportunity to present views in writing, to all interested persons before acting.

These procedural requirements did not apply to emergency regulations. If a state agency made a finding that rulemaking was necessary for the immediate preservation of the public peace, health and safety or general welfare, and that the notice and hearing requirements were impracticable, unnecessary, or contrary to the public interest, the agency could enact emergency regulations. Almost immediately concerns were raised about the excessive use of emergency regulations. The Legislature amended the APA in 1953 to require agencies to file a statement of the facts constituting the emergency, and to allow interested parties to obtain a judicial declaration of whether or not an emergency existed on

those facts. In 1957, the APA was further amended to make emergency regulations effective for no more than 120 days.

The Administrative Procedure Act was dramatically revised in 1979. The goals of the revision were to reduce the number of unnecessary administrative regulations, and to improve the quality of those regulations that are adopted. To achieve these goals, many additional procedural requirements were added to agency rulemaking. Most significantly, the Office of Administrative Law was created to act as a watchdog over the rulemaking of almost all state agencies. Further requirements have been added since the 1979 overhaul.

Today, before engaging in rulemaking, an agency must give notice at least forty-five days before a hearing on the proposed regulation. In addition to the previously required mailings and publications, notice must be published in the California Notice Register. Notice must include:

- Reference to the authority under which the regulation is proposed
- An informative digest of existing laws related to the proposed action and the effect of the proposed action
- An estimate of the costs and benefits, or other impacts, of the proposed regulation on business, private persons, housing costs, job and business creation, and state or local government
- An analysis of the specific purpose of the regulations and the rationale for the agency's determination that the regulation is reasonably necessary to carry out those purposes
- The technical, empirical, or theoretical studies on which the agency relied
- A description of the alternatives to the regulation considered by the agency and the agency's reasons for rejecting those alternatives

A public hearing must be held if an interested person requests one. If there is any change from the originally proposed regulation, the agency must renotice the regulation for an additional comment period of at least fifteen days. If the change goes beyond the scope of the original notice, the agency is required to begin the entire rulemaking procedure anew.

After adoption of a regulation, the agency must submit to OAL the text of the regulation and a final statement of purpose. The statement must include:

- An updated version of everything that was contained in the original notice

- A summary of each objection or recommendation made regarding the regulation and an explanation of how the proposed action has been changed to accommodate each comment, or the reasons for making no change
- A determination with supporting information that no alternative considered by the agency is superior to the regulation adopted
- A variety of other factors

OAL reviews all newly adopted regulations for necessity, authority, clarity, consistency, reference, nonduplication, and compliance with the procedural requirements set forth in the APA. OAL also reviews any finding of emergency. If a regulation survives OAL scrutiny, it is sent to the Secretary of State for filing. If the regulation does not pass OAL scrutiny, it is returned to the agency. The agency may rewrite and resubmit the regulation within 120 days unless the agency significantly changes the substantive provisions. If the regulation is substantively changed, the agency must start the adoption procedures anew.

Once a regulation is promulgated, an interested person may obtain a judicial declaration as to its validity. The courts may declare a regulation invalid if the agency substantially failed to comply with procedural requirements, or if the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute is not supported by substantial evidence in the rulemaking file.

An outline of the rulemaking process is attached to this memorandum as Exhibit pp. 8-9.

SCOPE OF STUDY

At the outset, the Commission must determine the scope of the rulemaking study. In previous discussions at Commission meetings we have assumed we would not do a comprehensive revision of the rulemaking statute but would narrowly focus on individual identified problem areas.

The staff believes the scope of the administrative rulemaking study should be limited. Specifically, we think the study should address narrow identified problems in the state agency rulemaking procedure and should not attempt comprehensively to revise the rulemaking statute.

In support of this suggestion, the staff notes the following considerations:

(1) The rulemaking statute, unlike the adjudication and judicial review statutes, is relatively modern. It was extensively revised in 1979 and 1994, and has regularly been reviewed and amended by the Legislature. Attached as Exhibit pp. 10-13 is a summary of legislation affecting the rulemaking part of the Administrative Procedure Act enacted since 1991, prepared by OAL.

(2) The rulemaking statute is a battleground between opposing political viewpoints — the philosophy that an activist government is needed to address social problems, versus the philosophy that the role of government in society should be minimized. The conflict is played out in the context of administrative rulemaking through a focus on the ease or difficulty of the procedure by which an agency is allowed to promulgate regulations. A comprehensive revision of the rulemaking statute would plunge us into the thick of this debate and hinder our ability to propose reasonable improvements to the rulemaking process. Of course, this tension would also affect work on narrowly-defined issues somewhat, but not nearly to the same degree.

(3) A comprehensive revision of the rulemaking statute would require an in-depth background study by an expert, which would substantially delay this phase of the project.

(4) A comprehensive revision of the rulemaking statute would consume Commission and staff time to the detriment of other topics that may be of greater importance to Commission members. We have a sense that another comprehensive study in the administrative law and procedure area would start to "burn out" Commissioners.

The staff believes that if we attack specific narrow problems in the rulemaking area, we can accomplish some useful reforms expeditiously and avoid getting bogged down in another administrative law and procedure quagmire. This basic approach to the project is supported by OAL. Exhibit pp. 15-18.

CONSULTANTS

In the administrative adjudication study, in addition to our principal consultant (Prof. Asimow), we named six persons — primarily private practitioners — to give the Commission private sector perspective on issues that arose. The staff was disappointed by the relatively low level of involvement of the six private sector consultants. However, this confirms the Commission's

historical experience that a lawyer in private practice will find it difficult to escape the demands of the lawyer's practice when it comes to serving in a consultant capacity.

The staff suggests that for the rulemaking study we again name expert consultants, but this time stick with the tried and true academic sector. We have spoken with Prof. Asimow, who is willing to be involved in this study to the extent of attending meetings and reacting to ideas, when convenient for him to do so. We have also spoken with Prof. Gregory Ogden, author of the three-volume Matthew Bender treatise on *California Public Agency Practice*. He is likewise interested in participating on that basis, although he also has something more ambitious in mind. See discussion of "Role of OAL", below. Other possible consultants with whom we have not spoken include Profs. Cohen, Fait, and Fellmeth, all of whom have been active and prominent in the area of California administrative law. It would be helpful to include individuals who are familiar with or sensitive to private sector concerns ("the regulated"), as well as those familiar with public sector concerns ("the regulators"), if we can identify them.

The staff proposes that we make contracts with these law professors to pay their travel expenses plus the standard per diem for attending meetings and hearings at the Commission's request. We have no funds for such contracts during the current fiscal year, but next fiscal year looks more promising, and the start of the next year is imminent.

PENDING LEGISLATION

The Commission should be aware of bills introduced in 1996 (or introduced in 1995 and amended in 1996) that would affect the rulemaking process and are still pending. These include:

AB 1179 (Bordonaro et al.) would preclude regulations affecting business absent an agency finding of necessity for health, safety, or welfare, and would require agencies to submit information to OAL concerning comments of the Secretary of Trade and Commerce on proposed agency regulations.

AB 2570 (Margett) would exempt Department of Personnel Administration regulations governing state employees excluded from collective bargaining from the APA.

AB 2772 (Cortese) would exempt State Personnel Board regulations from the APA.

AB 2793 (Baldwin) would require quadrennial review by agencies of regulations that affect the private sector.

AB 2896 (Goldsmith) would allow objection to an adjudicative hearing based on an underground or an ambiguous regulation and would require agency reexamination of environmental regulations when federal regulations are promulgated addressing the same matter.

AB 3146 (Brewer) would require all agencies to avoid duplication or conflict with federal regulations addressing the same matter.

AB 3158 (Olberg) would require the Director of Finance, Secretary for Environmental Protection, and Secretary of Trade and Commerce to evaluate the success and progress of agencies in conducting cost-effective evaluations of major environmental regulations.

SB 1507 (Petris) would require agency rulemaking files to be available for public inspection and require them to be transmitted to State Archives for permanent retention and public access within three years after adoption of the regulations.

SB 1910 (Johannessen) would invalidate and prohibit enforcement of regulations not made available to the public for 30 days or provided to affected individuals, and would require the text of regulations to be provided to Legislative Counsel and made available to the public in electronic form.

ISSUES

In 1988, at the outset of the administrative law and procedure project, the Commission engaged Prof. Asimow to prepare a memorandum on the possible scope of the study. Prof. Asimow's memorandum identified a few issues relating to rulemaking. When the memorandum was circulated for comment, we received comments on the rulemaking portion from the Department of Corporations, the State Personnel Board, and OAL. A summary of these issues and comments is included in this memorandum, although because they were made eight years ago, they may no longer accurately represent agency positions.

We have also received current letters from Prof. Ogden, the Northern California Association of Law Libraries and the Council of California County Law Librarians, and OAL. Their suggestions are also summarized in this memorandum.

The purpose of setting out these issues is twofold — to give the Commission a sense of the range of issues interested persons think need to be dealt with, and to get preliminary Commission direction on these matters. The staff would include all of the suggested topics in this project, with one exception. We would not question the basic system of OAL enforcement of the rulemaking process; this is discussed at some length below.

Levels of Rulemaking

The Department of Corporations has suggested that California follow the federal model, which recognizes several levels of rulemaking and imposes different and less burdensome requirements on an agency for each level. The staff is not sure how this would work in practice, but it is at least worth looking into. We had some success in the administrative adjudication project enabling informal hearing procedures for small cases, and something similar may be feasible in the rulemaking area.

Negotiated Rulemaking

Prof. Asimow reports that federal agencies have had a positive experience with negotiated rulemaking, whereby affected parties negotiate the content of a regulation before it is proposed for public comment, and that this may be appropriate for California also. The State Personnel Board finds its existing open meeting approach suitable. The Department of Corporations feels negotiated rulemaking can help simplify the process.

OAL observes that many state agencies currently use an informal negotiation process (usually a "workshop") before formally adopting regulations. This has been an effective technique. Since the negotiation process is currently available, there appears to be no need to establish such a mechanism by statute.

Critics of negotiated rulemaking believe it encourages agencies to adopt a rule approved by all the parties even if it doesn't embody the intent of the law. Moreover, it may waste everyone's time if agreement of all parties is impossible due to the political climate or other factors that complicate the negotiation process.

Interpretive Rules

Prof. Asimow states that California's notice and comment rulemaking scheme applies even to rules that are strictly interpretive, whereas federal law excepts such rules from notice and comment requirements; he thinks the California

position is unrealistic and probably ignored in practice. In a 1992 article, he argues that the requirement that interpretive rules be adopted as regulations discourages agencies from providing useful advice to the regulated public. He strongly recommends that the restrictions on interpretive rules be liberalized, and offers several ways to do it, with particular emphasis on newly-enacted Washington state legislation.

The State Personnel Board and Department of Corporations concur, indicating that the California rule is unduly burdensome and provides no real public benefits.

OAL disagrees, pointing out the legislative effort to eliminate underground regulations. They also indicate that the federal approach to "guidelines" is not simple, and involves characterizing the content of the rules. The OAL experience has been that the objective of eliminating illegal rules is both realistic and worthy of attaining. However, Prof. Fellmeth, in a 1995 article, suggests that OAL is not funded adequately to enable it to perform this task, noting that now "the agency is wallowing in years of backlogged requests for determinations about possible underground regulations."

A recent Court of Appeal decision exempted interpretive guidelines from Administrative Procedure Act coverage. The Supreme Court has granted a hearing, vacating the decision. See *Tidewater Marine Western Inc. v. Bradshaw*. OAL had requested depublication of the decision, stating in part:

> The Legislature has asked the California Law Revision Commission to study the area of administrative law, including rulemaking. ... The Commission has formally announced its plan to review a proposal to exempt interpretive guidelines from rulemaking requirements. ... OAL suggests that the question of whether or not all state agencies should have the benefit of an interpretive guideline exception be left up to the duly appointed body, the Law Revision Commission. All interested parties will have the opportunity to state their positions before the Commission; the Legislature will likely enact the Commission-recommended resolution of the issue.

In 1995, the Commission recommended and obtained enactment of a provision — part of the administrative adjudication bill of rights — that precludes a penalty based on an agency "guideline" unless it has been adopted as a regulation. This provision was proposed as a specific application of existing

law. It should not, however, preclude the Commission from examining the underlying policy considerations involving underground regulations.

Internal Management Rules

The State Personnel Board points out that there is an exception from the notice and comment requirements for internal management regulations, and suggests that this exception be extended to interagency memoranda, directives, and manuals, as well as other communications between state agencies. We do not know whether in fact these interagency communications are currently passing through the rulemaking process, but the issue seems appropriate for the Commission to make inquiry into.

Emergency Procedures

California allows ordinary notice and comment procedures to be dispensed with in the event of an emergency. Prof. Asimow believes the existing law is unduly restrictive and the instances in which emergency regulations are authorized should be liberalized. The Department of Corporations sees some utility in expanding California law to include business and financial emergencies.

OAL notes that an emergency regulation is not actually exempt from ordinary notice and comment procedures, since an emergency regulation has a life of only 120 days during which the agency must pursue standard procedures if the regulation is to survive. The Legislature intentionally limited emergency authority in 1979 as a result of its unwarranted use by agencies. OAL does not perceive that current law imposes any unnecessary burdens on state government.

The staff notes that the history in California of agencies seeking to avoid the rulemaking process through issuance of emergency regulations, and the legislative response to clamp down on emergency regulations, is instructive. Perhaps there is room for some liberalization, though, now that emergency regulations have a limited duration.

Procedures Unnecessary, Impracticable, or Contrary to Public Interest

Federal law and other states provide an exemption from notice and comment procedures where the procedures would be unnecessary, impracticable, or contrary to the public interest. We could investigate the possibility of incorporating such an exemption into California law, although its administration would be problematic. The State Personnel Board notes that it has not

encountered any problems of this type under existing California law. Its main use may be in the context of emergency regulations.

Notice of Proposed Adoption

Existing law prohibits an agency from proposing a regulation that requires any business to make a report unless the agency has made a finding that this is necessary for health, safety, or welfare. However, the law does not indicate how this finding is to be reported. OAL would make clear that the finding should be included in the notice of proposed adoption of the regulation. Exhibit p. 26.

Oral Hearing

Any interested person may demand a public hearing on the proposed adoption of a regulation. To prevent abuse of this right, Prof. Cohen argues that it should be limited to those regulatory actions that would have a significant impact on the public, the state, or the regulated group. She offers some suggestions for the definition of "significant". Cohen, 1983 Duke L.J. at 252.

OAL would make clear that the right demand a public hearing includes the right to submit either oral or written comments, but that the agency may impose reasonable time limitations on oral testimony. Exhibit pp. 26-28. The existing statute is not clear on this point. The staff believes this matter should be clarified, one way or the other.

Public Access to Water Quality Plans and Policies

Existing law subjects water quality plans and policies to the rulemaking process of notice and publication. OAL suggests that the law be revised to require that these plans and policies be published in full, rather than summarized, and that any changes be indicated in strikeout and underscore, for the convenience of the affected public. OAL notes that the Water Board likely would oppose setting out the plans in full and states that, "If the public is satisfied with the status quo, we will withdraw this proposal." Exhibit pp. 30-31.

Response to Comments

The rulemaking statute requires the agency to make a response to every comment received. Prof. Cohen states that this requirement seems designed to drown agencies in paperwork rather than to improve the quality of rulemaking. Agencies may be required to respond to massive sets of suggestions even if the suggestions are absurd. A better provision would merely require that agencies

must respond to "primary considerations". Cohen, Regulatory Reform: Assessing the California Plan, 1983 Duke L.J. 231, 250.

Prof. Cohen also notes that OAL purports to gauge the sufficiency or merits of the agency's response, which is an inappropriate intrusion into substance, as opposed to procedure. She argues that the California statue requires too much and should be redrafted to instruct OAL to require only a good faith response by agencies to the most important criticisms of their proposals. She points to the federal APA, under which an agency is not expected to discuss every item of fact or opinion included in a submission made to it — only a statement of the major policy issues ventilated by the proceedings and why the agency reacted to them as it did. Cohen, 1983 Duke L.J. at 251.

The OAL believes the response to comments requirement is invaluable. It also believes that the present statutory framework is fundamentally sound, but welcomes the opportunity to discuss suggestions for specific improvement. Exhibit pp. 18-19.

Public Access to Rulemaking File Pending Adoption of Regulation

OAL indicates that, although the law requires an agency to make the rulemaking file available to the public, the statute is not clear whether and when the file must be made available, particularly during the period before the regulation is adopted. See Gov't Code § 11347.3. OAL suggests that the law should make clear that the file is available before adoption, consistent with the purpose of the APA to maximize public input during the rulemaking process (Exhibit pp. 20-21):

> Commencing no later than the date that the rulemaking notice is published in the California Regulatory Notice Register, and during all subsequent periods of time that the file is in the agency's possession, the agency shall make the file available to the public for inspection and copying during regular business hours.

Supplements to Rulemaking File

OAL suggests that detailed procedures are needed to cover the situation where an agency discovers documents it wishes to rely on after issuance of the notice and initial statement of reasons (Exhibit pp. 22-24):

> (1) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies upon the

document in proposing the adoption, amendment, or repeal of the regulation shall make the document available as required by this section.

(2) At least 15 calendar days prior to the adoption, amendment, or repeal of the regulation, the agency shall mail to the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:

(A) all persons who testified at the public hearing;

(B) all persons who submitted written comments at the public hearing;

(C) all persons whose comments were received by the agency during the public comment period; and

(D) all persons who requested notification from the agency of the availability of changes to the text of the regulation pursuant to section 11346.8(c).

(3) Documents shall be available for public inspection at the location described in the notice for at least 15 calendar days prior to the adoption of the regulation.

(4) Any written comments regarding the documents or information received by the agency during the availability period shall be summarized and responded to in the final statement of reasons as specified in Government Code section 11346.9.

(5) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice was mailed.

(6) If there were no persons in the categories listed in (2)(A) through (2)(D), then the rulemaking record shall contain a confirming statement to that effect.

Final Statement of Reasons

The law prohibits an agency from adding any material to the rulemaking file after public comment, but also requires an agency to add a final statement of reasons to the rulemaking file after public comment. OAL suggests that this logical inconsistency be resolved by making clear that the addition of the final statement of reasons is an exception to the prohibition on adding material to the rulemaking file after public comment. Exhibit pp. 20-21.

Role of OAL

Prof. Asimow's initial report for the Commission on the scope of the administrative law study suggested that "it may not be premature to ask whether the system serves the public interest. Does OAL review improperly encourage

non-experts to second-guess judgments of agency experts? Should OAL review be narrowed or dispensed with in favor of other oversight mechanisms?"

This comment struck a chord with several agencies, which responded that the scope of OAL review should be narrowed, a response with which OAL disagreed. Prof. Asimow has now indicated to the staff that he is preparing an article along these lines which will be available in the Fall and which he will provide to the Commission.

Prof. Ogden also proposes a study that:

> Would assess the effectiveness of the 1979 legislation in providing for mandated OAL review of state agency regulations according to the legislatively set criteria (See Cal. Gov. Code Sections 11349 et seq.) The study would examine all phases of the rulemaking legislation to determine if the legislation met the articulated goals for this type of regulation review. The study would include not only California case law interpreting the provisions of the California administrative procedure act governing rulemaking (Cal. Gov. Code Sections 11240 to 11356) but also a survey and extensive interview of both OAL and state agency officials who have been participants in the process.

He anticipates that basic questions answered by the study would include:

> (1) Has the OAL review process achieved the goals set forth in the legislation?
>
> (2) Can OAL continue to play a viable role in review of regulations?
>
> (3) What are the benefits of OAL review, as seen by various actors in the process, such as OAL staff, agency rulemaking staff, and the private sector?
>
> (4) What are the costs of OAL review, as seen by the same set of various actors in the process?
>
> (5) Are there alternatives to OAL review, such as returning to the pre-OAL system, in which the adopting agency reviews the regulations, or such as using an OMB type of internal review without the right of judicial review, or such as mandating that agencies systematically review existing regulations to repeal obsolete rules, or such as having legislative correction days?

OAL responds concerning the importance of OAL review. Exhibit p. 17. They also suggest that in evaluating any proposals for change, the Commission should inquire whether or not the changes will advance the primary purposes of the rulemaking statute, which OAL fosters (Exhibit pp. 19-20):

- Meaningful public participation (upholding democratic values)
- Complete administrative record (effective judicial review)
- Insuring clarity, necessity, and legality (independent OAL review)
- Central, accessible publication (all agency rules in one place)
- Control of underground regulations (channel agency rules into APA process)
- Reduce the number of adopted regulations (preventing the issuance of unnecessary regulations)

The staff will not address the details of the proposed study here, since we think the Commission would be ill-advised to include in this project the question of OAL's supervisory role. The impact of OAL review on the rule-making process is the most tendentious issue in this entire area. Agencies hate the "interference" of OAL in their ability to regulate, and businesses think the intervention of OAL is critical to limit "unfettered" regulation and the proliferation of bureaucratic red tape. The staff thinks that we can legitimately inquire into some of the details of OAL review, but should not try to do more. This is a political issue that is the subject of annual legislative battles in both policy and budgetary committees. We're better off trying to improve the system, and leave to the politicians the task of striking the appropriate balance between the regulators and the regulated.

OAL Review Period

The OAL review period is 30 working days in the case of agency adoption of a regular regulation, but 30 calendar days where the agency is proposing to adopt an emergency regulation as a permanent regulation. OAL proposes that the 30 calendar day review period be changed to 30 working days. This would "maintain consistency" and "permit effective operation of OAL's internal file tracking system". Exhibit p. 31.

Adding to File During OAL Review

OAL has a practice of allowing an agency to supplement the rulemaking file during OAL review if the review indicates some material was inadvertently omitted when the file was submitted to OAL. Exhibit pp. 24-25. This practice could be validated by a provision along the following lines:

> An adopting agency may augment the rulemaking record as submitted to the office for any of the following reasons:

1. to augment the final statement of reasons to summarize or respond to public comments.

2. to add documents to the file if the agency certifies in writing that the documents were in fact identified and made available to the public as required by law earlier in the rulemaking process.

3. to provide, in the final statement of reasons, the rationale for a specific regulation, to better demonstrate that the proposed regulation is reasonably necessary to effectuate the purpose of the statute.

4. to add other documentation or statements as required by the APA if both of the following conditions are satisfied:

(a) the absence of such documentation in the rulemaking file has not misled the public concerning the scope and effect of the regulations;

(b) adding such material does not violate subdivision (e) of section 11346.8 [the new provision set out above beginning on p. 9 of this letter].

Scope of Administrative Review

OAL is required to review administrative rules on the grounds of necessity, authority, clarity, nonduplication, reference, and consistency with other law. The Department of Corporations suggests that these requirements should be revised in a way that will simplify the present excessively wordy and burdensome statement of reasons and in a way that will clarify the standards by which to measure the appropriateness of a proposed regulation.

Prof. Fellmeth agrees that rulemaking files have become too lengthy and that OAL review on grounds such as necessity may be inappropriate. He suggests that OAL review might be limited to "authority" and "clarity". Likewise, the State Personnel Board feels that OAL should not be allowed to substitute its interpretation of a statute (except the APA) for that of the rulemaking agency.

OAL states that it does not and cannot substitute its judgment. The administrative review process was created by the Legislature "to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted." Gov't Code § 11340.1.

Necessity Review

Prof. Asimow believes that OAL inquiry into necessity for a regulation is unduly intrusive and substitutes OAL judgment for that of agency experts.

Prof. Cohen argues that necessity review is ambiguous and causes serious administrative difficulty. This is the major focus of her article on California

rulemaking procedure. She points out that OAL often inappropriately substitutes its judgment for that of the regulating agency in applying the necessity standard. She recommends completely rewriting the necessity standard while continuing to prohibit substitution of judgment:

> If the need for a regulation is factually demonstrable, taking into account the state of the art in any given technological field, it is appropriate to require substantial support for its factual basis in the rulemaking file. Without such support, the OAL should disapprove the rule. To the extent that a regulation is based on a policy choice, the OAL should require the agency to explain its choice in the rulemaking file, and ensure that the choice is not arbitrary. An arbitrary policy choice is one that is not reasonably supported by fact, testimony, or logic. The OAL should have the power to disapprove agency policy judgments only when they are arbitrary. This view of necessity would give substance to the existing APA prohibition on substitution of judgment, while fully retaining the explanations of judgment for judgment-determined decisions. Expertise as a foundation for judgment would be recognized in the limited areas in which it is appropriate. This solution is in harmony with the various legislative goals behind the creation of the OAL: the OAL would still be effective in reducing regulation and improving its quality, but would not be substituting its judgment for that of the adopting agencies.
> Cohen, Regulatory Reform: Assessing the California Plan, 1983 Duke L.J. 231, 276-277 (fns. omitted)

Consistency Review

Existing law requires OAL review of regulations for consistency with law.

OAL believes it would be useful to codify case law and OAL practice where there is more than one possible interpretation of the law (Exhibit pp. 28-29):

> The office shall approve a regulation as consistent with other law if the proposed regulation is any one of several reasonable interpretations of a statute, court decision or other provision of law.
>
> **Comment.** This section does not apply when the provision of law being implemented has only one reasonable interpretation, and the proposed regulation is inconsistent with this interpretation. Sometimes the language of a statute " is so clear that no reasonable mind can differ as to the meaning of the words used. . . ." *Estate of Sahlender* (l948) 89 Cal.App.2d 329, 346.

Conversely, where there is only one reasonable interpretation of the law, OAL would not require an agency rule on the matter to go through the rulemaking

process. Exhibit pp. 29-30. This proposal would likewise codify existing case law and OAL practice. This would be accomplished in the statute by limiting the definition of a "regulation" to which the rulemaking statute applies:

> "Regulation" does not include the only reasonable interpretation of a statute, court decision, or other provision of law.

The Comment would cite cases noting that some statutes have only one reasonable interpretation, while other statutes have two or more. Key OAL determinations would also be cited.

Closed Record

Prof. Cohen argues that limiting OAL review of rulemaking to the record is unduly restrictive. She believes it is appropriate to demand that the factual foundations for agency policy choices should be reflected in the record, but that the present statue fails to distinguish factual premises from policy choices. She says the closed record requirement should be amended to limit its applicability to the factual premises of agency rules. Cohen, Regulatory Reform: Assessing the California Plan, 1983 Duke L.J. 231, 255-6.

Preservation of Rulemaking File

The law librarians urge legislation requiring preservation and accessibility of rulemaking files, including the possibility of storage in electronic form. Senate Bill 1507 (Petris), summarized above, would address some of these issues. "Regardless of the final outcome of this legislation, the concepts contained within it would benefit from review and consideration by the California Law Revision Commission." Exhibit p. 5. OAL raises the same issue, also noting that location information could be made available electronically and that SB 1507 would localize custodianship in the Secretary of State. Exhibit p. 33.

The staff agrees that the Commission should monitor the progress of SB 1507 and determine whether any further work needs to be done after the Legislature has addressed the issues raised in the bill.

Historical Information Concerning Regulations

The law librarians suggest standardization and improvement of historical annotations to regulations to enable the public to research the source, content and effective date of regulatory adoptions, recodifications, and amendments. They note that prior law designations are insufficient, even though they are

critical when a reorganization or recodification occurs. They point out that descriptions of amendments to regulations included in the published compilations are inadequate. Exhibit pp. 5-6.

OAL likewise believes the public needs help tracking down superseded versions of regulations. They ask whether each agency should be required to maintain in house one complete set of prior versions of its own regulations. Exhibit p. 33.

Preserve Old Notice Registers from Extinction

The law librarians state that the published notice registers from 1945-1980 are an endangered species (there are only five known complete extant sets available to the public). They recommend that a copy of the early set be microfilmed and preserved permanently in State Archives, and copies made available in county libraries. Exhibit p. 6.

The staff is not sure how useful a Commission recommendation on this matter would be. It appears to be mainly a question of funds, and at this point we have no sense of the cost involved. Perhaps the Commission could serve a limited role in helping get key players talking to each other.

Improve Publication and Distribution of Official Regulatory Code

The law librarians have some suggestions for improving the format and distribution of published regulations to make them more accessible to the public. Exhibit pp. 6-7. We would transmit these suggestions to OAL for its reaction and possible implementation.

Judicial Review of Regulations

Government Code Section 11350 provides a judicial proceeding for a declaration as to the validity of a regulation. OAL would make clear that this proceeding applies only to a "duly adopted" regulation, as opposed to an "underground regulation" which should have been regularly adopted but wasn't. Exhibit pp. 31-32. OAL notes that the Commission's tentative recommendation on judicial review includes a special provision on review of underground regulations, and would refer to this provision in the Comment.

This raises the question why judicial review of rulemaking is dealt with in two different places in the codes, and whether the provisions should be consolidated. The staff would include this matter in the present study.

Terminology

OAL notes that the words “adopt”, “department”, and “regulation” are used in different senses in the Administrative Procedure Act, and that clarification of the appropriate usage in different contexts may be helpful. Exhibit pp. 32-35. The staff would investigate simple alternatives to accomplish this. In this connection, OAL would refer in section Comments to relevant statutory definitions, where appropriate.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

PEPPERDINE UNIVERSITY

SCHOOL OF LAW

February 15, 1996

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, Ca 94303-4739

Re: Revision of statutes governing state agency regulations

Dear Nat:

The Commission's review of statutes governing adoption of regulations by state agencies is of great interest to me. Reform of rulemaking is a hot topic right now, both in Washington, D.C., and in various states. The current California rulemaking statutes were adopted in 1979, effective July 1, 1980. The Office of Administrative Law was created to provide centralized review of all state agency regulations according to statutory criteria. OAL review has been implemented in California administrative law for over fifteen years. It is time to assess whether the rulemaking reforms adopted by the 1979 legislation have achieved the goals set forth by the legislature, and whether any further reforms or revisions are desirable at this time.

I propose to do a study, as a consultant for the Law Revision Commission, that would assess the effectiveness of the 1979 legislation in providing for mandated OAL review of state agency regulations according to the legislatively set criteria (See Cal. Gov. Code Sections 11349 et. seq.). The study would examine all phases of the rulemaking legislation to determine if the legislation met the articulated goals for this type of regulation review. The study would include not only California case law interpreting the provisions of the California administrative procedure act governing rulemaking (Cal. Gov. Code Sections 11340 to 11356) but also a survey and extensive interviews of both OAL and state agency officials who have been participants in the process. If it would be useful I can also interview private sector lawyers and others, such as regulatory compliance officers of corporations that have experience with agency regulations and the OAL process. My approach to the study would be nonpartisan, good government in the best traditions of the California Law Revision Commission. Based on what I found in the study, I would make recommendations of the traditional law reform type. Basic questions to be addressed include whether: 1) Has the OAL review process achieved the goals set forth in the legislation? 2) Can OAL continue to play a viable role in review of regulations? 3) What are the benefits of OAL review, as seen by various actors in the process, such as OAL staff, agency rulemaking staff, and the private sector? 4) what are the costs of OAL review , as seen by the same set of various actors in the process? 5) Are their alternatives to OAL review, such as returning to the pre-OAL

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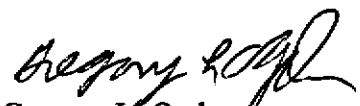
system, in which the adopting agency reviews the regulations, or such as using an OMB type of internal review without the right of judicial review, or such as mandating that agencies systematically review existing regulations to repeal obsolete rules, or such as having legislative correction days? I would design a study proposal in conjunction with the Commission staff.

I am enclosing a current resume with this letter to inform you of my background and experience. I have taught administrative law at Pepperdine since 1978. I am teaching Administrative law this semester at USC Law School. Since 1988, when the set was published, I have been the general editor, and annual revision author, for California Public Agency Practice, a three volume treatise on California Administrative Law. I have done administrative law studies in the past. My LL.M. thesis, from Columbia University School of Law, is entitled "Problems in the Regulation of Energy Facilities: Lessons From the S.O.H.I.O. Project," and it was a study of regulatory complexity related to permitting of an environmentally sensitive oil pipeline facility that was never built. I have been a consultant for the Administrative Conference of the United States on two different projects. The first project, 1982-84, was a study of Public Regulation of Siting of Industrial Development Projects. That study was the basis for A.C.U.S. Recommendation Number 84-1. The second project, 1987-1989, was a study entitled Governmental Ethics and the Federal employee, the standards of conduct approach. I prepared and completed an extensive survey for the first project that would be quite similar to the proposed concultant's study of the rulemaking review process.

I am also aware that there are many reform proposals being advocated in other states, such as Florida, and by the current Governor Wilson administration in California. I also noticed that the OAL has statutory authority to study rulemaking under Cal. Gov. Code Section 11340.4 (effective July 1, 1997). I do not know how the law revision commission study would impact the OAL study.

Please contact me if you have any questions.

Very Truly Yours,



Gregory L. Ogden
Professor of Law

RECOMMENDATIONS OF THE NORTHERN CALIFORNIA ASSOCIATION OF LAW LIBRARIES AND THE COUNCIL OF CALIFORNIA LAW LIBRARIANS

TO THE CALIFORNIA LAW REVISION COMMISSION

REGARDING THE STUDY ON THE RULEMAKING PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT

INTRODUCTION

The members of the Northern California Association of Law Libraries (NOCALL) and the Council of California County Law Librarians (CCCLL) are strongly interested in participating in the California Law Revision Commission's review and analysis of the administrative rulemaking process under the Administrative Procedures Act (APA).

There are several issues our organizations would like the California Law Revision Commission to consider:

1. Strengthen the requirement for permanent retention of the historical, regulatory rulemaking file at the State Archives.

2. Standardize and improve the historical and regulatory notes in the *California Code of Regulations*, using the California annotated codes as a model.

3. Preserve the early published Notice Registers (1945 - 1980).

4. Improve the publication and distribution of the Code: a) Publish Title 24 and the Master Index as part of the official code; b) publish the full-text as well as summaries of proposed regulations in the Weekly Register; and, c) add underlining for additions and changes and asterisks for deletions in newly adopted regulations.

Following is a brief summary of the major problems law librarians are aware of in the area of California regulatory law research.

STATEMENT OF ISSUES

I. PERMANENT RETENTION OF THE HISTORICAL RULEMAKING FILE

The rulemaking file is the legislative history of the regulation. It is used by the courts and members of the public to ascertain the intent of the adopted regulation. While Government Code Section 11347.3 (c) sets forth the requirement for retention of the complete rulemaking file, improvements are needed to clarify this requirement as well as to specify that files are not to be purged.

Such a strengthening of the statutes is necessary because several instances have occurred where the rulemaking files could not be found. In a 1989 Sacramento Superior Court case[1] the challenged regulations were invalidated because the promulgating agency could not produce its 1976 rulemaking file. The court held that the rulemaking file was necessary to prove consistency between the challenged regulations and the authorizing statute. The court refused to allow the promulgating agency to provide substitute expert witness testimony or other offers of evidence to make such a showing.[2] In so ruling, the court said:

> The extended function regulations for registered dental hygienists, Title 16, California Code of Regulations section 1089 (c) and (d), are declared to be invalid. This court is not declaring the regulations invalid because they are inconsistent with the statute. The court is not ruling on the merits of the regulations. The 1976 rule-making record before the court does not contain sufficient facts from which the court can determine whether or not the extended functions regulations for registered dental hygienists ... are 'consistent with the standards of good dental practice and the health and welfare of patients' as required by Business and Professions Code Section 1762.[3]

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[1] Californians for Safe Dental Regulations and Ted M. Nakata, D.D. S. vs. Board of Dental Examiners of California, Committee on Dental Auxiliaries, Sacramento County Superior Court No. 336624, Judgement, filed February 3, 1989.

[2] Government Code Section 11350 (b) states:

(b) In addition to any other ground that may exist, a regulation may be declared to be invalid if ...

(1) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or make specific by the regulation is not supported by *substantial evidence*. (Emphasis added)

In effect, the court in Californian's for Safe Dental Regulations required that "substantial evidence" in the record must be shown to prove consistency between the regulation and the underlying statute.

[3] Reference footnote 1, page 3.

If files were preserved and centrally located at the State Archives they would thereby be available for the courts and public to use. If such a requirement was to be adopted, agencies needing to retain their files for a period of time should be allowed to do so prior to transferring them to the State Archives for permanent storage. Lastly, there should be consideration and study of the possibility for storage of these files in electronic form.

On February 9, 1996, Senator Nicholas C. Petris introduced Senate Bill 1507 on behalf of NOCALL to address the preservation of legislative and rulemaking files. With regard to the latter, and as proposed to be amended, SB 1507 would:

1. Amend Government Code Section 11347.3 of the Administrative Procedures Act to specifically prohibit the alteration or removal of any item from the official rulemaking file and to require all agencies to submit their rulemaking files to the State Archives no later than three years after the filing of the regulation with the Secretary of State pursuant to Government Code Section 11349.3.

2. Amend Government Code Section 14755 of the State Records Management Act to specifically prohibit the Director of General Services from authorizing the destruction of all or part of an agency rulemaking file subject to Section 11347.3.

Regardless of the final outcome of this legislation, the concepts contained within it would benefit from review and consideration by the California Law Revision Commission.

II. STANDARDIZE AND IMPROVE THE HISTORICAL ANNOTATIONS IN THE *CALIFORNIA CODE OF REGULATIONS*, USING THE CALIFORNIA ANNOTATED CODES AS A MODEL

The historical annotations are critical for reconstructing the law that existed on any given date. As summarized below, there are a number of deficiencies in the form and substance of the historical annotations which follow the text of the regulations published in the *California Code of Regulations* (CCR).

1. ***Overall lack of uniformity in annotation methods used.*** The historical notes lack uniformity with regard to the manner in which the public can research the source, content and effective date of regulatory adoptions, recodifications and amendments. For example, within the same title, guiding annotations may appear at the beginning of a series of regulations, where elsewhere annotations will follow each individual regulation. Furthermore, as summarized below, essential prior law references are rarely provided and brief descriptions of the amendments are not provided in a uniform manner.

2. ***Insufficient prior law designations.*** Prior law designations are rarely given in the CCR. These designations are critical when a reorganization or recodification takes place. Conversion tables, common for the California statutes, are rarely published in two of the primary regulatory law publications, the CCR and the *California Administrative Register.*[4]

3. ***Lack of uniformity in the amendatory annotations.*** The CCR does not provide the type of annotations appearing in *West's* and *Deering's* annotated codes which briefly summarize each amendment, giving notice of the date that specific amendatory language took effect, and which designate the most recent changes in underlined form for additions or by asterisk to designate deletions. Brief amendment descriptions of California regulatory law have not been provided at all from 1945 through 1989. After Barclays assumed publishing responsibilities for the state in March of 1990 the CCR has included amendatory descriptions for some, but not all, of the regulatory enactments.

Thorough and accurate research of California regulatory law suffers from the problems summarized above. If the historical notes were standardized and improved such research would be considerably enhanced.

III. PRESERVE THE EARLY PUBLISHED NOTICE REGISTERS, 1945 - 1980

There are only a few known complete sets of the early weekly regulatory supplements dating back to 1945.[5] These supplements provide the only resource for tracing the legislative history of the early regulations. A copy of the early set should be microfilmed and preserved as a historical record at the State Archives. Additional copies of the early registers in microfilm should be available in every county.

IV. IMPROVE THE PUBLICATION AND DISTRIBUTION OF THE OFFICIAL REGULATORY CODE:

A. PUBLISH TITLE 24 AND THE MASTER INDEX AS PART OF THE OFFICIAL CODE.

B. PUBLISH THE FULL-TEXT AS WELL AS SUMMARIES OF PROPOSED REGULATIONS IN THE WEEK REGISTER, AND

C. ADD UNDERLYING FOR ADDITIONS AND CHANGES AND ASTERISKS FOR DELETIONS IN NEWLY ADOPTED REGULATIONS

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[4] Microfilmed conversion tables and indices from 1980 to date are available from a private, unofficial source, University Microfilm International (UMI).

[5] We have found public copies at: the Office of Administrative Law in Sacramento; the county law libraries in San Francisco, Orange and Los Angeles counties; and at Boalt Law School, U.C. Berkeley. A more thorough survey should be undertaken to determine the actual extent of public access to this vital collection.

The format and distribution of the published regulations impact the public's access to current regulatory law and the public's ability to research earlier regulations. The publication and distribution of the official code should meet both of the following requirements:

1. ***Depository Library distribution.*** The depository copies should include all titles, as well as the Master Index and binders. The CD-ROM version should include the Master Index and Title 24. County Law Libraries should be designated depositories and sent the official directly and not through the Office of the County Clerks, as is presently the practice. Depository copies should contain the same information as any other published version of the code. The Master Index should not have to be separately purchased.

2. ***Full text publication of proposed regulations.*** Proposed regulations are published as summaries in the Weekly Register. The full-text of the proposed regulation should be published in addition to the summaries. Members of the public should not have to ask agencies for a review copy of the proposed text language during the comment period. The current process provides a hurdle for members of the public who want access to the proposed changes by requiring them to look in the Weekly Register to find the summary and then to ask the agency for the full-text.

3. ***Designation of changes.*** Researching the previous language of a regulation can be very difficult for certain years. The publication of new regulations should contain underlining for additions and changes and asterisks for deletions to determine easily what changes occurred. This could be done as part of the annotations (see part II above) and/or separately in the Notice Registers to assist in researching early regulatory language.

SUMMARY

The NOCALL and CCCLL organizations have identified four areas for study and comment pertaining to problems encountered in the research of California regulatory law. Not all of the issues raised require legislative remedy, but the issues are all important as they impact the public's access to current and past regulatory language. Our organizations would appreciate the opportunity to participate in the Law Revision Commission's study of these issues and to assist in the development of appropriate solutions.

OUTLINE OF RULEMAKING PROCESS*

[Adapted from OAL, *Rulemaking by California State Agencies* (1995-96)]

I. CONSTITUTION GIVES LAWMAKING POWER OF STATE TO LEGISLATURE

II. LEGISLATURE GIVES LIMITED LAWMAKING POWER TO STATE AGENCY WHEN LEGISLATURE, BY STATUTE, GIVES AGENCY A TASK

Authority to adopt regulations granted to state agency
Agency does preliminary rulemaking activities

III. AGENCY'S PUBLIC NOTICE MUST EXPLAIN REASON FOR REGULATION, COSTS TO STATE AND LOCAL GOVERNMENT AND IMPACT ON BUSINESS

Agency publishes notice; rulemaking record open
- Notice of proposed rulemaking published and mailed
- Text of proposed regulations available to the public
- Statements of reasons available to the public

IV. PUBLIC GETS MEANINGFUL OPPORTUNITY TO PARTICIPATE IN STATE AGENCY LAWMAKING

Minimum 45 day public comment period
Agency holds public hearing as scheduled or by request

V. STATE AGENCY MUST CONSIDER PUBLIC INPUT AND FIND REGULATION LEAST BURDENSOME ALTERNATIVE

Agency considers comments
- Major changes (not sufficiently related) — new notice (go back to III)
- "Sufficiently related" changes (go on to VI)
- Nonsubstantial or no changes (go on to VII)

VI. AGENCY PROPOSES CHANGES

Notice of proposed changes is mailed
15 day public comment period
Agency considers comments

VII. AGENCY PREPARES FINAL STATEMENT OF REASONS AND "ADOPTS REGULATION"

Summary and response to comments
- Changed to accommodate
- Reason for rejection

VIII. STATE AGENCY MUST MAKE PERMANENT PUBLIC RECORD OF RULEMAKING PROCEEDING

Rulemaking record closed

Rulemaking record must be submitted to OAL within one year of publication of notice

IX. OAL REVIEW

OAL has 30 days to review regulation

Review limited to rulemaking record

OAL does not review wisdom of regulation

When possible, OAL works with rulemaking agency to iron out wrinkles that do not involve public

Does regulation satisfy:

- authority?
- reference?
- consistency?
- non-duplication?
- necessity?

Have required procedures been followed?

OAL's decisions available to public

- No (go on to X)
- Yes (go on to XI)

X. OAL DISAPPROVAL

Returned to agency

Disapproval published in Notice Register and Calif. Code Regs. Decisions

- Agency may revise, have 15 day comment period, and resubmit within 120 days (go back to IX)
- Agency can appeal to Governor (appeal procedure set by statute)
- Agency can start over with new public notice (go back to IV)

XI. OAL APPROVAL

Regulation filed with Secretary of State

Usually effective in 30 days

Printed in Cal. Code Reg.

OAL ensures that all regulations are in print and available to public

XII. AT REQUEST OF LEGISLATURE, OAL REVIEWS EXISTING REGULATION FOR COMPLIANCE WITH APA STANDARDS

(* Temporary, emergency regulation can become effective immediately, before agency starts process)

SUMMARY OF LEGISLATION AFFECTING THE RULEMAKING PART OF THE ADMINISTRATIVE PROCEDURE ACT ENACTED SINCE 1991

STATUTES OF 1991

Ch. 794 (AB 2061 (Polanco)):

1) Requires a state agency proposing to adopt or amend a regulation to assess the potential for adverse economic impact on California small business enterprises and individuals.

2) Authorizes a court to declare a regulation invalid if a declaration by the adopting agency that the regulation will not have a significant adverse economic impact on small business is in conflict with substantial evidence in the record.

Ch. 899 (SB 327 (Hill)):

1) Requires a state agency, when responding to a rulemaking petition, to respond in writing, to include specified information in the response, and to transmit a copy of the response to the Office of Administrative Law (OAL) for publication in the California Regulatory Notice Register.

2) Exempts any action by the Department of Finance to adopt instructions to any state or local agency for the preparation, development, or administration of the state budget from the rulemaking requirements of the APA.

STATUTES OF 1992

Ch. 1112 (AB 3359 (Sher)):

1) Exempts from the rulemaking requirements of the APA the issuance, denial, or revocation of specified waste discharge requirements and permits.

2) Exempts from the rulemaking requirements of the APA the adoption or revision of water quality control plans and guidelines by the State Water Resources Control Board and regional boards.

3) Requires the Board to submit policies, plans, or guidelines adopted after June 1, 1992 to OAL for review.

Ch. 1306 (AB 3511 (Jones)) applies provisions of current law to proposed regulations that affect *any* business, rather than to proposed regulations that affect *small* business. For example, under Ch. 1306, the following provisions apply to proposed regulations that affect any business.

1) A state agency is required to consider the impact on business when initiating and adopting regulations. If an agency determines that its regulatory action may have a significant adverse economic impact, it is required to include specified information in the notice of its proposed action.

2) No regulation that requires a report shall apply to a business unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people that the regulation apply.

STATUTES OF 1993

Ch. 870 (SB 726 (Hill)) requires a state agency, when proposing to adopt or amend a regulation that affects small business, to adopt a plain English policy statement overview regarding each regulation, to draft the regulation in plain English, and, if the regulation is technical in nature, to make available to the public a noncontrolling plain English summary of the regulation.

Chapter 1038 (AB 969 (Jones)) requires a state agency to include in its assessment of the economic impact of a proposed regulation the ability of California businesses to compete with businesses in other states.

Chapter 1046 (AB 1144 Goldsmith)):

1) Requires a state agency to include in the informative digest--a part of the notice of proposed rule making--a summary of the agency's efforts to minimize duplication and conflicts with federal regulations pursuant to specified provisions of law; and

2) Authorizes departments, boards, and commissions within the Environmental Protection Agency, the Resources Agency, and the Office of the State Fire Marshal to adopt regulations that are different from regulations contained in the Code of Federal Regulations that address the same issues upon a finding of one or both of the following justifications. The differing state regulations are authorized by state. The cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment.

Chapter 1063 (SB 513 (Morgan)) requires state agencies to assess whether and to what extent proposed regulations will affect: a) the creation or elimination of jobs in the State of California; b) the creation of new businesses or the elimination of existing businesses within the state; and c) the expansion of businesses currently doing business with the state. Agencies are required to include a statement of the results of the assessment in the notice of proposed action.

STATUTES OF 1994

Chapter 1039 (AB 2531 (Gotch)):

1) Changes the name of the rulemaking portion of the APA from "Office of Administrative Law" to "Administrative Regulations and Rulemaking."

2) Reorganizes, consolidates, and renumbers articles and sections of the act to put them in a logical sequence.

3) Reorganizes the procedural requirements of the act by consolidating all requirements that pertain to a specific topic. Topics include content of the notice of proposed regulatory action, initial statement of reasons, final statement of reasons, and assessment of the impact of proposed regulations on businesses and the economy.

4) Clarifies that the *entire* rulemaking portion of the APA, rather than just the article setting forth rulemaking *procedure*, applies to the exercise of all quasi-legislative power conferred on a state agency by statute, a clarification consistent with the interpretation of the APA by the courts (See Grier v. Kizer (1990) 219 Cal.App. 3d 422, 431).

5) Deletes a provision regarding Fair Political Practices Commission regulations to conform the APA to the ruling in Fair Political Practices Commission v. Office of Administrative Law, Sacramento Superior Court, Case No. 512795.

6) Deletes an obsolete reference to publishing notice of proposed regulations in a newspaper, a requirement that was repealed years ago.

7) Requires the California Regulatory Notice Register, rather than the California Regulatory Code Supplement (code updates), to contain: a) a summary of all regulations filed with the Secretary of State in the previous week; b) all OAL decisions disapproving regulations issued in the previous week; and c) the Governor's actions in reviewing OAL disapprovals.

8) Requires the California Regulatory Notice Register to contain OAL determinations, rather than *summaries* of determinations, concerning "underground" regulations.

9) Makes technical, conforming amendments.

STATUTES OF 1995

Chapter 938 (SB 523 (Kopp)) primarily addresses administrative *adjudication* issues. However, the act makes clean-up amendments to Stats. 1994, ch. 1039 (see above) and, in addition, impacts administrative *rulemaking* in the following significant respects.

1) Chapter 938 *expressly* requires licensing agency disciplinary guidelines to be adopted as regulations. The rulemaking part of the APA so requires; however, some agencies have ignored this requirement and have uncodified, and in some cases, unwritten, rules that they apply in adjudicatory hearings. Chapter 938 is intended to make clear to agencies that their disciplinary guidelines must be adopted according to APA procedures.

2) Chapter 938 sets up a streamlined system for adopting interim and permanent regulations needed to implement various parts of the new statute.

Chapter 951 (AB 1102 (Sher)), among other things, exempts any policy, plan, or guideline adopted by the San Francisco Bay Conservation and Development Commission (BCDC) prior to January 1, 1996, from the rulemaking requirements of the APA and requires any change made by BCDC to specified plans after January 1, 1996, to be submitted to the Office of Administrative Law for review in accordance with the new statute.

STATE OF CALIFORNIA

PETE WILSON, Governor

OFFICE OF ADMINISTRATIVE LAW
555 CAPITOL MALL, SUITE 1290
SACRAMENTO, CA 95814
(916) 323-6225

May 24, 1996

California Law Revision Commission
Att'n: Nat Sterling
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Improvements to rulemaking part of Administrative Procedure Act; *First* OAL Submission

Meeting of Thursday, June 13, 1996 (9 a.m. to 5 p.m.), State Capitol, Room 2040 (meeting formerly scheduled for June 14)--Agenda item no. 7 on tentative agenda dated 5/17/96:

"Administrative Rulemaking (Study N-300)
Scope of Study
Memorandum 96-38 (NS) (to be sent)"

Dear Commissioners:

INTRODUCTION

The Office of Administrative Law ("OAL")[1] is charged with administering the rulemaking part of the California Administrative Procedure Act ("APA").

OAL appreciates the opportunity to take part in the rulemaking phase of your administrative law project. There appear to be three main options in approaching the rulemaking phase of the project: (1) move in the direction of fundamentally restructuring the current statutory system; (2) do nothing in the rulemaking area, on the grounds that the statutes and regulations have already been extensively updated in recent years; and (3) conduct a limited review of rulemaking law, focusing on incremental improvements rather than fundamental changes.

1988 "SCOPE OF STUDY"

The option no. 1 approach is spelled out in the Commission's 1988 "Scope of Study" document, prepared by Prof. Michael Asimow. In the rulemaking area, the Scope of Study makes the following points.

First, the starting point for Commission review should be the 1981 Model Administrative Procedure Act, drafted by the National Conference of Commissioners on Uniform State Laws. The Scope of Study states:

> The Model Act covers the entire field: public information, adjudication, *rulemaking*, judicial review, and legislative and *executive oversight of agencies*. It is an integrated approach to protecting the rights of the public while achieving economic and efficient government and making agencies politically responsive. It would be a fresh start for California. This might be a better approach than to perform countless bits of minor surgery on the existing statutory and decisional law which is often outdated and confusing. Needless to say, however, the Model Act would only serve as a starting point. . . . (pp. 2-3; emphasis added.)

Second, the Scope of Study states that the less desirable approach is "the piecemeal approach, under which one studies existing California law and compares it with the Model Act." Ideally, however--it is stated--the study should take the Model Act as the starting point. "If the Model Act is the starting point, one might need a stronger justification to depart from it than if one takes existing law as the starting point."

The Scope of Study lists several rulemaking concerns under the general heading "piecemeal changes." (pp. 6-7.)

> 2. Issues relating to rulemaking:
>
> > a. Interpretive rules: California notice and comment rulemaking procedures apply even to rules that are strictly interpretive (such as explanatory bulletins) if they are of general applicability. *Armistead v. State Personnel Board*, 22 Cal.3d 198 (1978); GC secs

11,342(b) [now 11342(g)], 11347.5(a) [now 11340.5]. Federal law does not require notice and comment for interpretive rules or policy statements. The 1981 Model Act strikes a compromise position. California law may be unrealistic and is probably often ignored in practice (because every agency puts out masses of interpretive communications). Should California adopt some exception for interpretive rules and policy statements?"

b. Emergencies: The ordinary notice and comment procedures can be dispensed with in the event of emergencies. GC sec. 11346.1. However, federal and state acts usually contain a somewhat broader exemption, allowing an agency to dispense with notice and comment procedures upon a finding of good cause because the procedures are unnecessary, impracticable, or contrary to the public interest. This is considerably broader than the "emergency" standard. Should California broaden the exemptions from notice and comment to take account of situations other than emergencies?

c. Office of Administrative Law (OAL): California provides for review of all rules by the OAL on the grounds of necessity, authority, clarity, and consistency with other law. GC secs. 11340.2-.3 [sic]. Although OAL review is relatively new, it may not be premature to ask whether the system serves the public interest. Does OAL review improperly encourage non-experts to second-guess judgments of agency experts? Should OAL review be narrowed or dispensed with in favor of other oversight mechanisms?

d. Alternate dispute resolution: Federal agencies have experimented successfully with negotiated rulemaking. In these proceedings, all affected parties get together and negotiate a satisfactory rule; then it is proposed for public comment. Should California statutes permit or encourage alternate methods to formulate rules?

As noted, the material quoted above is taken from the 1988 Commission

document which initiated the current study on administrative law. One of the key issues identified in 1988 was whether or not to retain OAL's independent legal review function. This independent legal review issue came to the fore in a dramatic 1993 Commission meeting in Sacramento.

Prior to its September 1993 meeting, the Commission had circulated a proposal from a state agency to the effect that OAL review of all regulations implementing the new adjudication statute be wholly "dispensed with." (Memorandum 93-47, p. 5.) This was a direct challenge to the fundamental principle of independent legal review. Accordingly, a large number of private sector representatives attended the Commission meeting to defend the role of OAL in the rulemaking process. This resulted in the best attended meeting since the Commission began the administrative law study in 1988. The Bay Planning Coalition submitted a letter supporting independent legal review (attached to the minutes of the meeting of Sept. 23-24, 1993).

At the meeting, state agency representatives attacked the role of OAL on various grounds. "A number of persons representing private organizations," the Minutes state at p. 16, " indicated they felt OAL review was important to keep government regulations in check." Our records indicate that representatives of the California Medical Association, the California Association of Realtors, the Bay Planning Coalition, a Sacramento law firm, and a prisoners rights group spoke at the hearing in opposition to the state agency's proposal to eliminate OAL review. After listening to the various points of view for several hours, the Commission unanimously decided to reject the state agency proposal to dispense with OAL review of adjudication-related regulations. The Commission expressed a preference for exploring other means of simplifying and expediting adoption of these regulations.

CURRENT APPROACH

Last year, the Commission informally and tentatively took the view that there is no need for an in-depth consultant-prepared study recommending fundamental changes to the statutory rulemaking procedures. This change in approach reflects not only the OAL review discussion of 1993, but also recognizes the fact that

the rulemaking provisions were completely revised in 1979, and have been regularly amended in the intervening years (e.g., extensively, in AB 2315, Chapter 1039, Statutes of 1995). Instead of commissioning an exhaustive written study, the Commission issued a news release in January 1996, inviting "written suggestions from the public for *specific improvements* in the state rulemaking statutes." (Emphasis added; see Attachment "A.")

By contrast, earlier phases of the administrative law project (administrative adjudication; judicial review of agency action) involved lengthy written studies prepared by the person retained by the Commission to serve as consultant on these phases, Professor Michael Asimow of UCLA Law School. It thus seems to us that the Commission has indicated a tentative preference for option no. 3. OAL recommends that the Commission formally adopt the approach reflected in option no. 3. *We support this focus on specific improvements, on incremental rather than fundamental change*. We do not think it would be wise to throw out a system that works, is well established and widely understood, in the interests of conforming more closely to a national model that, while sound in theory, may or may not reflect the real-life needs of a large, industrialized, and heavily regulated state such as California.

We hope that suggestions are received by the Commission not only from the state agencies that are subject to the APA, *but also from representatives of the various segments of the general public that are regulated by particular agencies*, and who thus have a strong interest in effective notice and comment procedures, etc. For example, some agency representatives have at various times expressed doubts concerning the wisdom of the statutory requirement that all public comments concerning proposed regulations be summarized and responded to by the adopting agency. (Government Code sections 11346.9(a)(3) & 11346.8(c).)

In sharp contrast, representatives of the various regulated publics typically perceive this summary-and-response requirement as a vital means of guaranteeing meaningful public participation in agency rulemaking. OAL strongly recommends retention of this requirement. (This crucial summary-and-response requirement is missing from the Model APA.) In our experience, this requirement provides an invaluable vehicle for public input, helps to sharpen agency policy and legal analysis, warns agencies of unintended negative

consequences of proposed regulations (including impact on small business and other elements of the economy), helps to weed out proposals that are inconsistent with statute, and strengthens the record of the rulemaking proceeding, thus decreasing the likelihood of litigation. OAL carefully reviews each rulemaking record, to ensure that each public comment has been summarized and responded to.

Though we believe that the present statutory framework is fundamentally sound, we welcome the opportunity to discuss suggestions for specific improvements. OAL's long term objective is to make the rulemaking part of the APA less burdensome for state agencies, while preserving public participation and the benefits of independent legal review of proposed regulations. Last year's adjudication statute (SB 523), contained a provision endorsed by OAL which significantly enhanced state agency flexibility in the rulemaking area. This new provision--expressly exempting precedent decisions from the APA--is one of the most significant APA changes since its original enactment in 1947.

We suggest that specific suggestions for improving rulemaking law be evaluated in terms of whether or not they advance the primary purposes of the APA. After reviewing the APA and the cases interpreting it, a regulatory determination issued in 1990[2] by OAL pursuant to Government Code section 11340.5 identified six primary APA purposes:

1. **Meaningful Public Participation**
   (upholding democratic values)[3]

2. **Complete Administrative Record**
   (Effective Judicial Review)[4]

3. **Insuring Clarity, Necessity, and Legality**
   (Independent OAL review)[5]

4. **Central, Accessible Publication**
   ("All agency rules in one place")[6]

5. **Control of Underground Regulations**

(Channel agency rules into APA process)[7]

6. **Reducing the number of adopted regulations**
(preventing the issuance of unnecessary regulations)[8]

The Commission has requested that OAL submit a list of suggested improvements to the rulemaking part of the APA. This is our first series of suggestions. Additional letters will follow.

Unless otherwise specified, all references are to the Government Code. In addition to specific suggested improvements, we have also identified--at the end of this letter--several issues that should be considered.

IMPROVEMENTS

1. Early Public Access to Pre-Adoption File of Rulemaking Proceeding

We frequently get questions concerning *whether* agencies must allow the public to view rulemaking files during the period of time between (1) the publication of the 45 day notice of proposed action and (2) the public hearing. We also get questions concerning *when* during this pre-adoption period the agency must first grant such access. Language concerning public access is found in section 11347.3(c), but the wording of this subdivision, together with its placement in the section, may give some readers the impression that the APA does not mandate public access to the rulemaking file until after the regulation has been adopted. Clearly, given the APA purpose of promoting meaningful public participation in agency rulemaking, it is desirable to maximize public access to the official rulemaking file *during* the rulemaking process. The following amendment to subdivision (a) of section 11347.3 would solve the problem:

> (a) Every agency shall maintain a file of each rulemaking that shall be deemed to be the record for that rulemaking proceeding. Commencing no later than the date that the rulemaking notice is published in the California

Regulatory Notice Register, and during all subsequent periods of time that the file is in the agency's possession, the agency shall make the file available to the public for inspection and copying during regular business hours. [Remainder of subdivision (a) unchanged.]

2. Adding Material to the rulemaking file

(a) The Final Statement of Reasons

Section 11346.8, subdivision (d) forbids agencies from adding material to the rulemaking file after the close of the public comment period, unless adequate provision is made for public comment. However, section 11346.9 directs adopting agencies to prepare a Final Statement of Reasons, which includes summaries and responses to public comments. Section 11347.3 (a)(2) then directs agencies to place the Final Statement of Reasons in the rulemaking file. Agencies do not to our knowledge make the Final Statement of Reasons available for public comment prior to adding it to the rulemaking file, despite the mandate of section 11346.8. Reading all of these sections together, in the context of the whole APA, we conclude that it was not the intent of the Legislature to mandate agencies to make the Final Statement of Reasons available for public comments. If, however, the Final Statement of Reasons "identifies any data or any empirical study, report, or similar document on which the agency is relying in proposing the adoption . . . that was not identified in the *initial* statement of reasons" (Section 11346.9(a)(1); emphasis added), then the new material identified would have to be made available for public comment. (See this letter's heading (b), just below.)

If each Final Statement of Reasons were in fact circulated for comment, interested parties could submit comments on it, which would in turn have to summarized and responded to, which summaries and responses which then have to be incorporated into the Final Statement of Reasons, which then would have

to be re-circulated. This could lead to a never-ending cycle of public availability, comment, etc.

We have not developed specific language to accomplish the above objective. If both this suggestion and the one that follows immediately are accepted, however, appropriate language will need to be drafted.

(b) Documents other than the Final Statement of Reasons (documents that are relied upon)

Documents that the agency wants to rely upon to demonstrate that the regulation meets the necessity standard are sometimes discovered after the notice and initial statement of reasons are issued. Sometimes they appear as part of public comments. Section 11346.9(a)(1) provides that such material may be added to the file if the adopting agency complies with "subdivision (d) of Section 11346.8." Unfortunately, subdivision (d) does not contain the specific notice procedures than one might anticipate. We propose to add appropriate procedures to section 11346.8, drawing upon an OAL regulation (Title 1, California Code of Regulations, section 45), which addresses precisely this point.

Perhaps these procedures could be added to section 11346.8 as subdivision (e), or placed in some other convenient place, with appropriate cross references:

(1) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies upon the document in proposing the adoption, amendment, or repeal of the regulation shall make the document available as required by this section.

(2) At least 15 calendar days prior to the adoption, amendment, or repeal of the

regulation, the agency shall mail to the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:

(A) all persons who testified at the public hearing;

(B) all persons who submitted written comments at the public hearing;

(C) all persons whose comments were received by the agency during the public comment period; and

(D) all persons who requested notification from the agency of the availability of changes to the text of the regulation pursuant to section 11346.8(c).

(3) Documents shall be available for public inspection at the location described in the notice for at least 15 calendar days prior to the adoption of the regulation.

(4) Any written comments regarding the documents or information received by the agency during the availability period shall be summarized and responded to in the final statement of reasons as specified in Government Code section 11346.9.

(5) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which

the notice was mailed.

(6) If there were no persons in the categories listed in (2)(A) through (2)(D), then the rulemaking record shall contain a confirming statement to that effect.

(c) Adding to the file during OAL review

OAL review often identifies deficiencies in the rulemaking files submitted by state agencies. Deficiencies are noted at two points in the OAL review process. First, immediately after the regulatory filing is received at OAL, a legal assistant reviews it pursuant to section 11349.1, subdivision (f). This is not an in-depth review, rather it is intended to verify at the outset that major elements of the file are present, such as the index or table of contents, the rulemaking notice, and the final statement of reasons. Sometimes an item is listed on in the table of contents, but missing. Missing elements are immediately obtained from the rulemaking agency.

During the second part of the review process, the assigned attorney will review the filing in detail. Various problems may be noted at this point. For example, we have seen files in which we receive only odd-numbered pages of the final statement of reasons. Or, summaries of and responses to several public comments may be missing. Taking this latter example, sometimes the material is present in the original rulemaking file maintained by the rulemaking agency (and was made available to public), but was erroneously not included in the copy of the file submitted to OAL. On other occasions, due to an oversight, the missing summaries and responses were not drafted. In both of these missing summary and response cases, if the filing is otherwise approvable, OAL will advise the agency of the deficiency and allow the agency to supply the missing material without any further public notice. The file could be formally disapproved because of the missing items, but typically this will not be done because this would serve only to delay the process.

In short, on occasion, OAL will tell an agency that a regulatory filing is immediately approvable, if certain missing items are added to the file. The following is intended to codify this existing practice. The agency cannot,

however, add material to the rulemaking file in this way if the material consists of technical, theoretical, or empirical studies, reports or similar documents upon which the agency relies in proposing the regulation. (section 11346.2(b)(3) & 11336.9(a)(1).) If the agency wishes to rely upon the missing material, then it must be put out for public comment pursuant to section 11346.8(d) and Title 1, California Code of Regulations, section 45.

The following could be added to section 11349.3:

"An adopting agency may augment the rulemaking record as submitted to the office for any of the following reasons::

1. to augment the final statement of reasons to summarize or respond to public comments.

2. to add documents to the file if the agency certifies in writing that the documents were in fact identified and made available to the public as required by law earlier in the rulemaking process.

3. to provide, in the final statement of reasons, the rationale for a specific regulation, to better demonstrate that the proposed regulation is reasonably necessary to effectuate the purpose of the statute.

4. to add other documentation or statements as required by the APA if both of the following conditions are satisfied:

(a) the absence of such documentation in the rulemaking file has not misled the public concerning the scope and effect of the regulations;

(b) adding such material does not violate subdivision (e) of section 11346.8 [the new provision set out above beginning on p. 9 of this letter].

4. Need to specify where to put statutorily required finding

The problem here is that section 11346.3, subdivision (c), requires rulemaking agencies to make a finding under specified circumstances, but fails to tell them when to make it or where it should appear. The amendment proposed above tells agencies to put the finding *in the rulemaking notice*. This is a good place because this will put the public on notice early in the process that the proposed regulation will require business to file a report and will contain the required finding that "it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to business." Interested parties will then be able to immediately submit comments challenging the terms of regulation or the finding, if they so desire.

We propose adding to section 11346.5(a) a new subdivision (11), to read:

"The finding set forth in subdivision (c) of section 11346.3, if required."

5. Make clear that members of the public can both speak and submit written comments at public rulemaking hearings held pursuant to the APA

We suggest amending subdivision (a) of section 11346.8 to make clear beyond

any doubt that the person participating in the public rulemaking hearing has the option of submitting oral comments, written comments, or both. We recently encountered an interpretation of this subdivision to the effect that the rulemaking agency has the option of allowing *only* written comments or only *oral* comments at the public hearing.

Although a "hyperliteral"[9] reading of the first sentence of subdivision (a) permits this interpretation, we think that it is an unreasonable one-- if the entire subdivision, other APA sections, legislative history, etc. are taken into account. In particular, the second sentence of subdivision (a) authorizes agencies to conduct a written-only public comment proceeding. The third sentence of subdivision (a) provides that an agency conducting a written-only proceeding must change its plans and schedule a public hearing if an interested person requests one in writing within a specified time frame. It does not seem reasonable to argue that an agency which correctly responded to such a demand for a "public hearing" by scheduling one, can then turn around and refuse to permit oral comments at the "hearing." Similarly, it seems unreasonable to argue that an agency can initially propose a public hearing (rather than shifting on request from an initially-announced written-only proceeding), and then refuse to accept written comments at the "public hearing." Indeed, agencies conducting public hearings often encourage those in attendance to simply submit any comments they have in written form, rather than reading aloud from already-drafted letters.

In addition, we propose amending subdivision (a) to make clear that the agency conducting the public hearing can impose reasonable time limitations on oral comments. All those attending a public hearing should have a fair chance to be heard; no one person should be permitted to monopolize the proceeding.

The proposed change would read:

> (a) If a public hearing is held, both oral and written statements, arguments, or contentions~~, either oral or in writing, or both~~, shall be permitted. The agency may impose reasonable time limitations on oral testimony. If a public hearing is not scheduled, the state agency shall, consistent with Section 11346.4, afford any interested person or his or her

duly authorized representative, the opportunity to present statements, arguments or contentions in writing. In addition, a public hearing shall be held if, no later than 15 days prior to the close of the written comment period, an interested person or his or her duly authorized representative submits in writing to the state agency, a request to hold a public hearing. The state agency shall, to the extent practicable, provide notice of the time, date, and place of the hearing by mailing the notice to every person who has filed a request for notice thereby with the state agency. The state agency shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation.

6. For OAL review purposes, any *reasonable* interpretation of a statute should satisfy the consistency requirement

A new subdivision (c) should be added to section 11349.1, to read:

> The office shall approve a regulation as consistent with other law if the proposed regulation is any one of several reasonable interpretations of a statute, court decision or other provision of law.

The comment should say that subdivision (c) does not apply when the provision of law being implemented has only one reasonable interpretation, and the proposed regulation is inconsistent with this interpretation. Sometimes the language of a statute " is so clear that no reasonable mind can differ as to the meaning of the words used. . . ." *Estate of Sahlender* (1948) 89 Cal.App.2d 329, 346.[10]

This amendment would codify existing case law and OAL practice. It is consistent with sections 11340.1 and the *current* subdivision (c) of section 11349.1, which prohibit OAL from substituting its judgment for that of the rulemaking agency concerning the substantive content of a proposed regulation. Rulemaking agencies have been given delegated legislative power to adopt regulations; they have discretion concerning just how to exercise that delegated

power. So long as the agency complies with the "minimum procedural requirements for the adoption of administrative regulations" (section 11346) contained in the APA, such as public notice and demonstration of necessity for the regulation, OAL--in applying the consistency standard--should be required to approve any regulation that is "consistent and not in conflict with the statute" (section 11342.2).

7. *Only* reasonable interpretation of statute need not be adopted through rulemaking process

This proposal parallels the suggested amendment to section 11349.1. The change to section 11349.1 would make explicit that OAL cannot disapprove on consistency grounds a proposed regulation that is in fact one of several reasonable interpretations of the statute or other provision of law.[11] The suggested amendment to the definition of "regulation" in section 11342, subdivision (g), would make explicit that an agency does not violate the APA's prohibition against "underground" regulations (section 11340.5) if an uncodified agency rule (i.e., one *not* adopted pursuant to the APA and printed in the California Code of Regulations) is in fact the *only* reasonable interpretation of the statute or other provision of law.

> (g) (1)"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency.
>
> (2) "Regulation" does not include the only reasonable interpretation of a

statute, court decision, or other provision of law.

(3) "Regulation" does not mean or include legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization, or any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.

The comment could cite cases noting that some statutes have only one reasonable interpretation, while other statutes have two or more. Key OAL determinations should also be cited. This proposal would codify existing case law and OAL practice.

8. Format of and public access to water quality plans and policies

Government Code sections 11353, 11354 and 11354.1 were added to the APA in 1992 by AB 3359. OAL review of water quality plans and policies pursuant to these sections has generally been a productive and successful undertaking, improving the quality and accuracy of these documents. Despite the generally superb cooperation from the State Water Resources Control Board, two issues have arisen.

First, amendments to existing plans, policies, etc. should be submitted to OAL *in strikeout/underline format* (or any method which accurately and clearly illustrates all changes to the original text). All concerned with plan amendments should be able to quickly see what the change does. Although informal arrangements with the Water Board have recently improved matters, many early submissions reviewed by OAL under the above noted sections were submitted

without the usual indications as to which language was new, requiring laborious word-by-word text comparisons of lengthy documents. We think it would be helpful to codify the existing practice.

Second, all plans, policies, etc., should be published in full in the California Code of Regulations. The current practice of publishing only *summaries* of regulatory provisions is confusing, and makes it harder for the regulated public to locate the current version of applicable agency policies. Attachment "D" is a photocopy of a page from the CCR showing these rules as they now appear. (The attached page begins with Title 23, California Code of Regulations, former section 3000.) These plans and policies were for a time published in the CCR in full, but were deleted at the request of the Water Board. We recall testimony from a legislative committee hearing involving the 1992 APA amendments to the effect that people often had trouble obtaining complete, correct, and up to date copies of plans and policies. It would be helpful to hear from members of the public whether or not they think CCR publication of these documents would be appropriate. The Water Board, we believe, opposes such publication. If the public is satisfied with the status quo, we will withdraw this proposal.

9. Make statutory OAL review periods consistent

Section 11349.3, subdivision (a) sets the OAL review period at 30 *working* days, where routine non-emergency adoptions are concerned. To maintain consistency, and to permit effective operation of OAL's internal file tracking system, the review period applying to agency proposals to make emergency regulations permanent should be changed in section 11349.6(d) from 30 calendar days to 30 working days.

10. Make clear that one particular judicial review provision applies only to *duly adopted* regulations

Specify that section 11350 (declaratory relief) applies solely to regulations duly adopted per the APA. If one reads the entire section in the context of the rulemaking part of the APA, it is reasonably clear that it applies solely to

regulations adopted pursuant to the APA and printed in the CCR. However, some interested parties have argued that use of the word "regulation" in the section means that it applies also to "underground" regulations, agency rules that should have been adopted per the APA, but were not. This brings up the point (mentioned again below under issue no. 3) that the APA uses the word "regulation" in several different senses, including (1) proposed regulations, (2) duly adopted regulations, and (3) underground regulations.

Two ways to fix the problem in section 11350 come to mind. First, revise the first sentence of subdivision (a) as follows:

> (a) Any interested person may obtain a judicial declaration as to the validity of any duly adopted regulation by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure.

Second, make clear in the comment that the section is limited to duly adopted regulations. Finally, it is important that there be a clearly identified procedure available for court challenges to underground regulations. The Commission's current study on judicial review, we believe, addresses that issue. It would be helpful to refer in the comment to section 11350(a) to the procedural vehicle for underground regulation court challenges.

11. "Branch," not "department"

The current usage, as in section 11340.1, is to refer to the legislative, executive and judicial *branches* of state government. An older tradition is continued in section 11342, subdivision (a), in which these subcategories are referred to as "departments." This is confusing. We suggest this amendment:

> (a) "Agency" and "state agency" do not include an agency in the judicial or legislative ~~departments~~ branches of the state government.

It would also be helpful if the comment were to provide a cross-reference to the general definition of "state agency" found in section 11000. This latter

definition applies here.

ISSUES

1. Helping the Public Track Down Superseded Versions of Regulations

People frequently need to know the precise wording of a regulation as it read several years earlier. Frequently, they phone OAL for help. Most of the time we can help them. Sometimes we can't find what they need in our records.

Should each agency be required to maintain in house one complete set of prior versions of its own regulations, so the agency can respond to public inquiries? Is another solution preferable? (Pending legislation--SB 1507(Petris)--addresses the related issue of retention of the administrative record of the rulemaking proceeding, but doesn't address the issue of access to prior versions of regulatory text.)

2. Helping the Public Locate Rulemaking Files

It is sometimes difficult for interested parties to locate the rulemaking file developed in support of a particular CCR provision. Even within a particular agency which maintains these materials in house, other units within the agency may not be aware of their location. Should there be centrally-maintained list of available rulemaking files, keyed by CCR title and section number? If so, which agency should maintain it? The Secretary of State, the Department of General Services, or OAL? Such a list could be on the Internet, and include the name and phone number of the custodian of the file, which would ordinarily be staff at the adopting agency or at the Secretary of State Archives. (SB 1507 aims at making the Secretary of State the primary custodian of rulemaking files.)

3. **Multiple Meanings of the word "regulation"**

The context indicates that the word "regulation" in subdivision (c) of section 11342, refers to a CCR provision (a *duly adopted* regulation). This highlights the fact that the APA uses the word "regulation" in three different senses: (1) an agency rule that by statute must be adopted pursuant to the rulemaking APA (section 11342(g)),[12] (2) a (duly adopted) CCR provision, and (3) a proposed regulation. This confuses many readers, especially those new to this area of the law. Subdivision (c) of section 11342 is not the only place where the term "regulation" appears in the APA.

We are not sure how to solve this problem. One solution would be to specify in a Comment accompanying each section which meaning is intended, if the context leaves any doubt at all. Other possible solutions: inserting "duly adopted" or "proposed" in front of the word regulation (1) each time it appears in a statutory section or (2) when the context does not make the intended meaning immediately clear. In OAL's regulations (Title 1, CCR, section 121(a-b)), we insert quotation marks around the word "regulation" when we use the term to denote that subset of agency rules which is subject to the APA.

Perhaps this is, currently, not a problem at all. It would be helpful to hear what private sector representatives, State Bar committees, and rulemaking agencies have to say on this point.

4. **Multiple Meanings of the word "adopt"**

The word "adopt" appears in section 11342, subdivision (g) in the sense of "issue." The word "adopt" (or "adoption") also appears in the APA in the sense of "promulgate in compliance with the APA"--as in sections 11340.6, 11340.7, and 11343(a). This latter sense seems to encompass two meanings; (1) take final rulemaking agency action and submit to OAL for review, as in section 11349.1(a) and (2) become legally effective following OAL approval and filing with the Secretary of State (see section 11349.8(a) ("adopting agency")). This last point is especially confusing.

The word "adopt" also appears in section 11357, subdivisions (a) and (b) in the sense of "issue"; this section goes on to exempt certain rules of the Department of Finance from the APA.

It would be helpful to hear suggestions from interested parties concerning how to deal with these multiple meanings. We don't have a specific solution in mind at this point.

CONCLUSION

We would be happy to discuss these matters with you at any time. Please feel free to contact either me or Herb Bolz, OAL's liaison to the Commission. We think the Commission has already made significant improvements in the area of rulemaking law (as in SB 523's express statutory exemption[11] covering adjudicatory precedent decisions) and look forward to assisting you in making further improvements in the future.

Sincerely,

John D. Smith
Director

1. See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 431 (upholding OAL regulatory determination; good summary of OAL duties); *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697, 702 (same); *Upjohn v. Brewer* (1990) 225 Cal.App.3d 353 (upholding OAL's decision to disapprove proposed regulation as "logically compelling and legally correct"). The legal treatise *California Public Agency Practice* contains two chapters on APA rulemaking requirements: chapter 20, "Agency Rules and Rulemaking," and chapter 21, "Rulemaking Procedure." OAL duties are discussed at various points throughout these two chapters, but especially in sections 20.02, 20.04[4], 20.05, 20.12, 21.01, 21.03[2], 21.04, and 21.06.

2. 1990 OAL Determination No. 12, California Regulatory Notice Register 90, No. 46-Z, p. 1679.

3. Government Code sections 11346.8 and 11346.4; California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 131 Cal.Rptr. 744. [The endnotes in this quotation are from the original 1990 OAL determination.]

4. Government Code section 11347.3; California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 131 Cal.Rptr. 744. See also Government Code section 11350.

5. Government Code sections 11349 and 11349.1.

6. Government Code sections 11344 and 11343.

7. Government Code section 11347.5 [now, 11340.5].

8. Government Code sections 11340 and 11340.1.

9. *People v. Martinez* (1995) 11 Cal.4th 434, 449.

10. See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 438, review denied (challenged agency rule violated section 11347.5--now 11340.5-- because it was not "only legally tenable" interpretation of statute); *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, review denied (agency need not adopt regulation pursuant to the APA if uncodified agency rule simply reiterates substance of what has already been articulated in statute; must follow APA if agency rule departs from or embellishes upon express statutory authorization and language). Compare 1988 OAL Determination No. 10 (Department of Corrections), California Regulatory Notice Register 88, No. 28-Z, July 8, 1988, p. 2313 (only *one* reasonable way to read prison credit statute; uncodified agency rule reflecting *this* interpretation did not violate APA) with 1989 OAL Determination No. 15 (Department of Fair Employment and

Housing), California Regulatory Notice Register 89, No. 44-Z, Nov. 3, 1989, p. 3122 (*two* reasonable ways to read statutes applying to pregnancy discrimination claims). These two OAL determinations, which were cited in the friend of the court brief filed by OAL in *Grier v. Kizer*, are enclosed as attachments "B" and "C," respectively.

11. The courts have noted that, for instance, a constitutional provision "may well have either of two meanings. . . ." *State Board of Education v. Honig* (1993) 13 Cal.App.4th 720, 755-56.

12. The Model APA uses the word "rule" for those enactments which must be adopted pursuant to the APA in order to be valid; the word "regulation" is used in section 11342(g) to cover this concept.

13. Government Code sections 11425.10(a)(7), 11425.50(e)(comment), and 11425.60.

Site Investigations and Remedial Actions

Here the testing is expected to proceed under a site-specific Quality Assurance Project Plan (QAPP). Immunoassay and other field measurements will be bracketed in time and space by qualitative and fully quantitative analyses. Generally, a site is first characterized by the use of approved, fully qualitative and quantitative analytical methods as to the nature and level of contamination in key sampling locations and as to the presence of substances that may interfere with the use of the immunoassay. After such initial characterization, the immunoassay can be used in the comprehensive mapping of the site with respect to identified contaminant(s) to which the immunoassay responds. The percentage of samples that would be confirmed by another approved, fully quantitative method would be as stipulated in the QAPP; the project manager could call for additional confirmatory testing if such a need is indicated in the course of the investigation. During site cleanup, the QAPP would provide for use of the immunoassay to monitor progress. Confirmatory laboratory testing would occur before a decision on site closure is made.

Regulatory Implications

DTSC's Certification is based on the technology's performance and by itself does not change the regulatory status of TNT testing; it should, however, facilitate and encourage the acceptance of this technology where a project's data quality objectives can be met by its use. To this end, DTSC's findings should contribute to a consideration of this technology in regulated activities, depending on each program's objectives and constraints. State-regulated disposal facilities may contact state permitting officers for use of the immunoassay for operational monitoring. Other local and state government permitting authorities may take this Certification under consideration when making their permitting decisions. Project leaders may use this assay if it meets data quality objectives.

CALIFORNIA LAW REVISION COMMISSION

NEWS RELEASE
January 26, 1996
For Immediate Release

Contact: Nathaniel Sterling
Executive Secretary
(415) 494-1335

REVISION OF STATUTES GOVERNING STATE AGENCY REGULATIONS

Law Revision Commission Begins Study

As the next phase in its continuing study of the state Administrative Procedure Act, the California Law Revision Commission will shortly begin its review of statutes governing adoption of regulations by state agencies.

The Law Revision Commission invites written suggestions from the public for specific improvements in the state rulemaking statutes.

Persons wishing to review the Commission's final or tentative recommendations on this topic who are not already on the Commission's administrative law mailing list may register their interest by writing to the Commission.

The Commission's address is:

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

OAL Attachments "C" and "D"

Attachments "C" and "D", referred to in footnote 10 consist of the following:

Attachment C: 1988 OAL Determination No. 10 (Department of Corrections), California Regulatory Notice Register 88, No. 28-Z, July 8, 1988, p. 2313 (only *one* reasonable way to read prison credit statute; uncodified agency rule reflecting *this* interpretation did not violate APA)

Attachment D: 1989 OAL Determination No. 15 (Department of Fair Employment and Housing), California Regulatory Notice Register 89, No. 44-Z, Nov. 3, 1989, p. 3122 (*two* reasonable ways to read statutes applying to pregnancy discrimination claims)

Copies of these attachments are on file in the office of the California Law Revision Commission and may be inspected there, or may be obtained from the Office of Administrative Law.

ble location for discharge, and 4) the need to dispose of treated ground water outweighs the need to prohibit the discharge south of the Dumbarton Bridge.

History

1. Adoption of section 2909 by Resolution 95–84 effective March 5, 1996 pursuant to Government Code section 11353. Section 2909 is a concise summary of an amendment to the "Water Quality Control Policy for the Enclosed Bays and Estuaries of California" which was adopted in 1974 by Board Resolution 74–43.

Chapter 23. Water Quality Control Plans

§ 3000. Inland Surface Waters, Amendments.

Note: Authority cited: Sections 1058 and 13170, Water Code. Reference: Sections 13160, 13170, 13241, 13242, 13370 and 13372, Water Code.

History

1. Plan as amended filed 5–19–93 with the Secretary of State; Inland Surface Waters Plan as adopted April 11, 1991, submitted for filing and publication, but not review by OAL, pursuant to Government Code Sections 11343.8 and 11353; amendment of Table 1, Table 2, Table 3, Chapter III B., Chapter III D., Chapter III E., Table 5, Chapter III G., Table 6, Table 7, Chapter III J., Chapter III K., Chapter III L., Chapter III M. and Appendix 1 approved by OAL and effective 5–18–93, pursuant to Government Code section 11353 (Register 93, No. 21).
2. Depublication of Inland Surface Waters Plan as filed 5–19–93, and publication instead of a summary of the amendments approved by OAL 5–18–93 to Inland Surface Waters Plan, filed with the Secretary of State 9–16–93 (Register 93, No. 38).
3. Change without regulatory effect repealing section filed 11–2–94 pursuant to section 100, title 1, California Code of Regulations (Register 94, No. 44).

§ 3001. Enclosed Bays and Estuaries, Amendments.

Note: Authority cited: Sections 1058, 13170 and 13391, Water Code. Reference: Sections 13160, 13170, 13241, 13242, 13370, 13372 and 13391, Water Code.

History

1. Plan as amended filed 5–19–93 with the Secretary of State; Enclosed Bays and Estuaries Plan as adopted April 11, 1991, submitted for filing and publication, but not review by OAL, pursuant to Government Code Sections 11343.8 and 11353; amendment of Table 1, Table 2, Table 3, Chapter III B., Chapter III D., Chapter III E., Table 5, Chapter III G., Table 6, Table 7, Chapter III J., Chapter III K., Chapter III L., Chapter III M. and Appendix 1 approved by OAL and effective 5–18–93, pursuant to Government Code section 11353 (Register 93, No. 21).
2. Depublication of Enclosed Bays and Estuaries Plan as filed 5–19–93, and publication instead of a summary of the amendments approved by OAL 5–18–93 to Enclosed Bays and Estuaries Plan, filed with the Secretary of State 9–16–93 (Register 93, No. 38).
3. Change without regulatory effect repealing section filed 11–2–94 pursuant to section 100, title 1, California Code of Regulations (Register 94, No. 44).

§ 3002. Summary of revised Water Quality Control Plan for the San Francisco Bay/Sacramento–San Joaquin Delta Estuary.

On May 22, 1995, the State Water Resources Control Board (SWRCB) adopted Resolution No. 95–24, entitled *Adoption of the Water Quality Control Plan for the San Francisco Bay/Sacramento–San Joaquin Delta Estuary* (Bay–Delta Plan). The Bay–Delta Plan supersedes the Water Quality Control Plan for Salinity for the San Francisco Bay/Sacramento–San Joaquin Delta adopted May 1991 (1991 Plan) and the Water Quality Control Plan for the Sacramento–San Joaquin Delta and Suisun Marsh adopted August 1978 (1978 Plan).

(a) Beneficial uses established in the 1978 Plan and the 1991 Plan are retained in the Bay–Delta Plan. Definitions are revised for "Municipal and Domestic Supply," "Industrial Process Supply," "Ground Water Recharge," "Navigation," "Non–Contact Water Recreation," "Shellfish Harvesting," "Commercial and Sport Fishing," "Warm Freshwater Habitat," "Cold Freshwater Habitat," "Migration of Aquatic Organisms," "Estuarine Habitat," "Wildlife Habitat," and "Rare, Threatened, or Endangered Species."

(b) Water Quality Objectives:

(1) Objectives for municipal and industrial beneficial uses and for agricultural beneficial uses are unchanged from the 1991 Plan, except the compliance date of the agricultural salinity objectives for the southern Delta stations on the Old River is extended from January 1, 1996, to December 31, 1997;

(2) Objectives for Fish and Wildlife beneficial uses:

(A) Dissolved oxygen in the San Joaquin River between Turner Cut & Stockton unchanged from the 1991 Plan, except a provision added for a compliance schedule;

(B) Salmon protection: narrative objective added to double the natural production of chinook salmon;

(C) San Joaquin River Salinity: objectives added for April–May;

(D) Eastern Suisun Marsh Salinity: unchanged from the 1978 Plan;

(E) Western Suisun Marsh Salinity: 1978 Plan objectives amended to include the Suisun Preservation Agreement (SMSA) deficiency standards for dry periods;

(F) Brackish Tidal Marshes for Suisun Bay: narrative objective added to maintain water quality conditions sufficient to support a brackish marsh;

(G) Delta Outflow: objectives added with greatest outflow during late winter and spring for various water year types;

(H) River Flows: Sacramento River fall and winter flow objectives added for various water year types; San Joaquin River spring and fall flow objectives added for various water year types;

(I) Export Limits: objectives added to reduce entrainment of fish with maximum limitation during spring;

(J) Delta Cross Channel Gates Closure: objectives added for winter and spring to reduce diversion of aquatic resources into the central Delta.

(c) Implementation Measures:

(1) SWRCB will initiate a water rights proceeding to address water–supply related objectives including Delta outflow, river flows, export limits, the Delta Cross Channel gates, salinity control, and will consider requiring implementation of measures and programs to reduce fish mortality at the State Water Project and Central Valley Project export facilities.

(2) SWRCB will consider habitat requirements where needed to meet water quality standards when approving Clean Water Act Section 401 certifications in appropriate cases, particularly with regard to construction or operation of hydroelectric projects.

(3) Implementation of the southern Delta agricultural salinity objectives will be accomplished through the release of adequate flows to the San Joaquin River and control of saline agricultural drainage to the San Joaquin river and its tributaries.

History

1. Summary of regulatory provisions filed 7–17–95. Regulatory provisions approved by OAL, plan effective 7–17–95 pursuant to Government Code section 11353 (Register 95, No. 29).

Chapter 24. Loans to Public Agencies

Article 1. General Provisions

§ 3580. Purpose.

The primary purpose of the State Water Quality Control Fund (defined in Water Code Section 13400) is to provide a fund from which loans may be made to designated public agencies for the construction of facilities for the collection, treatment, or export of waste when necessary to prevent water pollution for reclamation of wastewater and conveyance of reclaimed water, for conservation of water, or for any combination of the foregoing. Loans may also be made to designated public agencies for not more than one–half of the cost of studies and investigations made by such public agencies in connection with wastewater reclamation.

Note: Authority cited: Section 1058, Water Code. Reference: Chapter 6 (commencing with Section 13400), Chapter 12.5 (Section 13962(e)), Chapter 13 (Section 13976(d)) and Chapter 14 (Section 13991(d)) of Division 7, Water Code.

History

1. New subchapter 12 (articles 1–7, sections 3580–3598) filed 9–2–81; effective thirtieth day thereafter (Register 81, No. 36).