Study N-303 September 16, 1998

Memorandum 98-60

Administrative Rulemaking: Administrative Review Procedure and Standards

In July, 1996, the Commission decided on the basic scope and organization of the administrative rulemaking project. Issues for Commission review were identified and organized into general categories, as follows:

(1) Exemptions from rulemaking procedure.

(2) Revision of rulemaking procedure.

(3) Administrative review procedure and standards.

(4) Public access to regulations.

(5) Miscellaneous matters.

This memorandum discusses issues that have been raised in category (3), relating to the procedures and standards that govern review of proposed regulations by the Office of Administrative Law (OAL). Once the Commission has resolved the issues presented in this memorandum, the staff will prepare a draft tentative recommendation.

The following material is attached in the Exhibit:

All statutory references are to the Government Code.

BACKGROUND

The APA rulemaking procedure can be divided into two phases — (1) notice and comment and (2) OAL review. During the notice and comment phase an agency develops a proposed regulatory action, with input from the public. Once an agency has satisfied the notice and comment requirements the proposed regulatory action is submitted to OAL for review. OAL reviews the regulatory

action for compliance with a number of substantive standards and compliance with the notice and comment procedures. Once OAL determines that the proposed regulatory action was properly promulgated and meets the applicable standards, the regulatory action is forwarded to the Secretary of State for filing and becomes effective.

OAL review serves a number of ends. It helps ensure that regulations are understandable, necessary, authorized, and consistent with existing law. It also ensures agency compliance with the notice and comment procedures.

In reviewing a proposed regulatory action, OAL is not permitted to substitute its judgment for that of the agency proposing the action with regard to the substance of the proposed action. This is a potential source of inconsistency within existing law, as determinations regarding an agency's necessity, authority, and consistency with controlling law all implicate substitution of judgment by OAL.

REVIEW PROCEDURES

OAL has identified two issues relating to the procedures used in reviewing proposed regulations. These issues are discussed below.

Review Periods

OAL has pointed out an inconsistency between the period provided for review of regulations generally (see Section 11349.3(a) ("30 working days")) and the period provided for review of an agency proposal to make an emergency regulation permanent (see Section 11349.6(d) ("30 days")). According to OAL, this inconsistency creates administrative problems. See Exhibit p. 4. OAL suggests eliminating the inconsistency by changing the review period for emergency regulations to 30 working days. The proposed change would add approximately two weeks to the time OAL has to review proposals to make emergency regulations permanent. **The staff sees no obvious problem with making this change.** See the proposed amendment to Section 11349.6.

In addition, Professor Asimow suggests that the 30 working day period for review of proposed regulations may be inadequate in some cases. Some agency staff that he interviewed asserted that:

> OAL reviewers sometimes cannot complete their work within this period when they must deal with large and complex rulemaking packages; as a result, reviewers disapprove the package

on pretextual grounds and thus require the agency to resubmit the rule.

See Exhibit p. 9. He proposes allowing an extension of the time period in the case of an unusually large or complex regulatory proposal, on the approval of the Director of OAL. **This seems sensible.** The proposal could be implemented by adding subdivision (e) to Section 11349.3, as follows:

> 11349.3. …
> …
> (e) The 30 working day period provided in subdivisions (a) and (b) may be extended to 45 working days if the director of the Office of Administrative Law certifies in writing that additional time is required due to the size or complexity of a proposed regulatory action. A certification under this subdivision shall explain why additional time is required and shall be delivered to the agency proposing the regulatory action within the 30 working day period provided in subdivisions (a) and (b).
>
> **Comment.** Subdivision (e) is added to authorize an extension of the time period for review of unusually large or complex regulatory actions.

Adding to Rulemaking File During OAL Review

It is OAL's practice to allow an agency to supplement a rulemaking file after it has been submitted for review, to add necessary items that have been inadvertently omitted from the file. This informal practice avoids the delay associated with formal disapproval and resubmission of a proposed regulation. OAL would like a statutory provision to be added authorizing this practice. See Exhibit pp. 1-3. **To implement this suggestion, the staff recommends the addition of Section 11349.2, as follows:**

> **11349.2. Adding to rulemaking file after submission**
> 11349.2. An agency proposing a regulatory action may add material to a rulemaking file that has been submitted to the office for review pursuant to Section 11349.3 where addition of the material does not violate other requirements of this chapter.
> **Comment.** Section 11349.2 allows an agency to add inadvertently omitted material to a rulemaking file that has been submitted for review by the Office of Administrative Law. See Sections 11346.8(d) (limitation on addition of material to rulemaking file after close of public comment), 11346.9(a)(1) (limitation on use of new data in final statement of reasons).

The qualifying clause at the end of Section 11349.2 preserves important limitations on the use of new material. Section 11346.8(d) is a general prohibition on adding material to the rulemaking file after the close of public comment, unless the agency has provided an adequate opportunity for comment on the new material. The Commission is proposing that Section 11346.8(d) be amended to exempt material that is required to be added to the file after public comment (see Memorandum 98-71). Section 11346.9(a)(1) prohibits reliance on new data in the final statement of reasons unless it was first made available for public review and comment.

STANDARDS OF REVIEW

Regulations are reviewed by OAL to determine whether they satisfy six substantive standards: necessity, authority, clarity, consistency, reference, and nonduplication. These standards are discussed below.

NECESSITY

Ambiguity

The necessity standard is rather circular and ambiguous in its meaning. See Section 11349(a) ("Necessity" means the record demonstrates the need for a regulation). Professor Marsha N. Cohen suggests two ways in which the meaning of necessity could be clarified:

(1) Make clear that "necessary" is not meant literally:

> Regulations are, of course, an extremely useful tool that an agency may use to make its operations more efficient, effective, and fair. But even if all the regulations in the California Administrative Code were to vanish overnight, California's administrative agencies would continue to function and regulation would continue. Published regulations are thus not "necessary" in an absolute sense. Therefore to interpret the language of the necessity standard literally seems absurd.

See Cohen, Regulatory Reform: Assessing the California Plan, 1983 Duke L.J. 231, 266-69 (hereinafter "Cohen"). Professor Cohen proposes adopting a standard of "reasonable necessity." *Id.* OAL makes the same suggestion. See Exhibit p. 6. Such a change would harmonize the necessity standard with other similar provisions of the APA. See Sections 11342.2 (regulation must be reasonably

necessary to be valid), 11350 (regulation may be declared invalid if not reasonably necessary). **The staff agrees with Professor Cohen and OAL that the necessity standard should be expressed in terms of "reasonable necessity."** See the proposed amendment to Section 11349(a), set out at page 8.

(2) Place necessity in context. It is difficult to judge necessity without reference to a desired result. As Professor Cohen asks, "Necessary for what?" *Id.* at 268-69. OAL has adopted a regulation that partially addresses this concern. Under OAL's regulation, an agency seeking to demonstrate the necessity of a proposed regulatory action must describe the problem that the action would solve and explain why the action is required to solve that problem. See 1 C.C.R. § 10(b). In other words, OAL evaluates the necessity of a regulatory action by reference to its stated purpose.

OAL also proposes amending 11349(a) to provide that a regulation satisfies the necessity standard if it is shown to be reasonably necessary "to effectuate the purpose of the statute." See Exhibit p. 6. This would provide a clear and sensible context for application of the necessity standard. It would also be consistent with the other APA provisions governing necessity review. See Sections 11342.2 (regulation must be "reasonably necessary to effectuate the purpose of the statute"), 11350 (regulation must be "reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation"). **The staff agrees with OAL that the necessity standard should be expressed by reference to the purpose of the statute or other provision of law that the regulation implements, interprets or makes specific.** See the proposed amendment to Section 11349(a), set out at page 8.

Scope of Scrutiny

Should an agency be required to demonstrate the necessity of each provision of a regulatory proposal, or should it be sufficient to show the need for the proposed regulation as a whole? Under OAL's regulations, an agency must show the necessity of "each provision" of a regulation. See 1 C.C.R. § 10(b). Depending on how OAL determines what constitutes a separate "provision", this could impose a significant burden on an agency adopting a lengthy and complex regulation. For example, suppose the Department of Corrections proposes a detailed rule prescribing a procedure for the investigation of inmate complaints. The department would probably have no trouble demonstrating the overall

necessity of the regularized procedures. However, it would be costly, difficult, and probably pointless to require that the department justify *every* detail of the proposed procedure. On the other hand, there will surely be *some* provisions that are more significant or controversial than others and should be subject to necessity review. For example, suppose the hypothetical procedure requires that all inmate statements be made available for inspection by other inmates. On its face, such a rule seems unnecessary and potentially dangerous. The department's general justification of the proposal as a whole would do nothing to explain why that particular provision is necessary.

The problem is that an agency has no way of knowing in advance which provisions will be controversial and should be justified. Professor Asimow has suggested a solution: (1) As a general rule, an agency need only show the necessity of a regulatory proposal as a whole. (2) If any public comments are received challenging a specific provision of the regulatory proposal, the agency must also show the necessity of the challenged provision. See Exhibit p. 10. This would replace the inefficient "shotgun" approach of justifying all provisions with a targeted analysis of only those provisions that are problematic.

The staff recommends the approach suggested by Professor Asimow. See the proposed amendments to Section 11349(a) (set out below at p. 8).

Evidentiary Standard

Under existing law, necessity must be demonstrated by "substantial evidence" in the record, "taking into account the totality of the record." See Section 11349(a). The evidence can include facts, studies, and opinions. *Id.* However, if the evidence is based on "policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information." See 1 C.C.R. § 100(b)(2). In other words, every demonstration of necessity must be supported by factual evidence or "expert opinion."

Requiring a strict factual basis for a showing of necessity is problematic. Sound policymaking often requires decisions based on informed judgment, in the absence of clear factual support. Professor Cohen cites the adoption of training standards as an example of such "judgment-determined" policymaking:

> The propriety of a training standard … can be judged, if at all, only in relation to intangibles. Whether a standard is effective in attaining a set goal is an elusive question. The answer requires a multifactoral analysis of data that often will be impossible to obtain as a practical matter; any collectible data would likely fail to yield

> definitive conclusions. Perspective, philosophy, and judgment — particularly expert judgment — will ultimately play a significant role in formulating such standards.

See Cohen at 273.

Professor Asimow provides another example of "judgment-dependent" policymaking:

> a statute requires that 25% of solid waste be "diverted" rather than "disposed of." Each day landfills must cover the exposed face of the waste. Landfills can use "green waste" such as lawn clippings as cover. When green waste is used in this manner, has it been "diverted" from landfills or "disposed of" in landfills? The agency compromised; green waste used for cover is "diverted" up to 7% of the total amount of solid waste, but "disposed of" to the extent it exceeds 7% of the total solid waste. OAL disapproved the regulation because the agency failed to justify the 7% figure.

See Exhibit pp. 11-12. As Professor Asimow points out, the 7% figure was probably a political compromise. Factual support for a choice of 7%, rather than 6% or 8%, would be difficult or impossible to produce. Nonetheless, it seems that a rule setting some degree of "diversion credit" is reasonably necessary for implementation of the waste diversion statute. A strict requirement for factual evidentiary support would probably be impossible to meet and would prevent adoption of the rule.

Of course, OAL's regulation does permit reliance on "expert opinion" to support an explanation of necessity that is based on "policies, conclusions, speculation, or conjecture." See 1 C.C.R. § 10(b)(2). For the purpose of this regulation, an "'expert' … is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question." *Id.* The regulation is not clear on whether "expert opinion" includes the opinion of a policymaker within the rulemaking agency. If it does, then the provision is sufficient to address the concern raised by Professors Asimow and Cohen. Where the necessity of a regulation cannot, as a practical matter, be demonstrated factually, an agency could explain the rationale for its policy decision and cite its own expertise as support for its conclusions. However, such an interpretation of "expert opinion" could lead to abuse. An agency could rely on its own expert opinion in order to avoid collecting and presenting factual support for its regulation, even where such support is readily available. It would therefore

probably be wise to limit an agency's reliance on its own expert opinion to cases where factual support is not reasonably available.

The staff recommends revising the standard to make clear that an agency's expert opinion can be relied on as evidence of necessity, while limiting such reliance to cases where factual support is unavailable as a practical matter. An attempt to draft such a distinction is set out below.

Recommendation

The revised necessity standard, incorporating all of the changes recommended so far, would read as follows:

> 11349. ~~The following definitions govern the interpretation of this chapter~~:
>
> (a) ~~"Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.~~ A proposed regulatory action satisfies the necessity standard if the regulatory action as a whole and any specific provisions of the regulatory action that have been challenged by public comment are shown by substantial evidence in the rulemaking file to be reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that the regulatory action implements, interprets, or makes specific. For the purposes of this subdivision, the following terms have the following meanings:
>
> (1) "Evidence" includes rationales, facts, studies, and expert opinion. Where the need for a regulatory action is based on policy judgments and cannot, as a practical matter, be demonstrated by facts or expert opinion, a statement of the adopting agency's rationale for the necessity of the regulatory action shall be considered substantial evidence.
>
> (2) A provision is "challenged" if a public comment specifically opposes the provision, recommends a substantive change in the provision, or asserts that the provision is unnecessary.
>
> …
>
> **Comment.** Section 11349 is amended to clarify operation of the standards for administrative review of proposed regulatory actions.
>
> Subdivision (a) is amended to make three changes: (1) The meaning of "necessity" is elaborated. The subdivision now provides that the necessity standard is met if a regulatory action is reasonably necessary to achieve the purpose of the provision of law that it implements, interprets, or makes specific. (2) The scope of the standard's application is clarified. The subdivision now provides

that an adopting agency need only established the necessity of a regulatory action as a whole and the necessity of specific provisions that are challenged in public comment. (3) The evidentiary standard for demonstrating necessity has been changed to recognize that the necessity of some policy decisions is not, as a practical matter, factually demonstrable. However, the reasonable necessity of such decisions must still be explained by the adopting agency.

CONSISTENCY

The consistency standard requires that a proposed regulation be "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." See Section 11349(d). OAL proposes amending the consistency standard to provide that the standard is satisfied "if the proposed regulation is any one of several reasonable interpretations of a statute, court decision or other provision of law." See Exhibit p. 3. According to OAL, such a rule would be consistent with relevant case law and OAL's current practice. It would also be consistent with the requirement that OAL not substitute its judgment for that of the adopting agency as to the substantive content of the proposed regulation. See Sections 11340.1 (OAL shall not substitute judgment), 11349.1 (OAL regulations shall ensure that OAL does not substitute judgment). OAL's suggestion is supported by Professor Asimow. See Exhibit p. 9.

The staff agrees with OAL and Professor Asimow and recommends that the consistency standard be amended to read as follows:

11349. …

…

(d) ~~"Consistency" means being~~ A proposed regulatory action satisfies the consistency standard if it is in harmony with, and not in conflict with or contradictory to, any reasonable interpretation of existing statutes, court decisions, or other provisions of law.

…

Comment. …

Subdivision (d) is amended to provide that the consistency standard is met if a proposed regulation is consistent with any reasonable interpretation of the law. Where there is more than one reasonable interpretation of a law, the Office of Administrative Law may not substitute its judgment as to which of those interpretations is correct. See Section 11340.1(a) (OAL may not substitute judgment on matters of substance).

AUTHORITY

The authority standard requires that an agency proposing a regulatory action cite the provision of law that permits or requires the action. See Section 11349(b). In reviewing the adequacy of an agency's authority citation, OAL must evaluate the substance of the cited law to determine whether it does in fact confer the authority the agency claims. This creates the potential for substitution of judgment by OAL.

An example from the early days of OAL review illustrates the problem: In 1980, the Fish and Game Commission proposed a regulation to list two species of butterfly as rare or endangered under the Endangered Species Act. However, the enabling legislation only authorized the listing of birds, mammals, fish, amphibians, and reptiles. Thus, the agency appeared to lack authority to list insects. On closer scrutiny, the Commission determined that it did have authority, because the applicable definition of "fish" included invertebrates, without limiting the definition to aquatic invertebrates. The Commission sought an attorney general opinion on the issue, and the attorney general confirmed the Commission's reading of the law, based largely on an examination of legislative intent. Nevertheless, OAL rejected the regulation as failing to satisfy the authority standard. OAL's decision was based on their conclusion that "insects are not fish." See discussion in Price, Report to the Administrative Conference of the United States: California Office of Administrative Law 12-13 (1981).

OAL's conclusion was zoologically correct — insects are not fish. But the statute's definition of "fish" was not strictly zoological (it included invertebrates such as shrimp or clams, which are also not fish). Thus, the Commission's (and the Attorney General's) reading of the law, while perhaps strained, was not unreasonable. In disapproving the regulation, OAL seems to have substituted its judgment as to the proper interpretation of the Commission's authority.

OAL has a regulation that provides some protection against substitution of judgment on questions of authority. See 1 C.C.R. § 15. It provides that OAL shall treat an agency's interpretation of its own rulemaking authority as conclusive, unless certain exceptions apply. *Id.* § 15(c). However, these exceptions are broad, precluding deference to the agency's interpretation where any of the following three conditions are met:

(1) The agency's interpretation alters, amends, or enlarges the scope of the power conferred on it.

(2) A public comment challenges the agency's authority.

(3) A judicial interpretation contradicts the agency's interpretation.

Id. The first exception seems to swallow the rule, providing that an agency's interpretation is conclusive unless OAL determines that the agency has overstated its authority. To apply this exception, OAL must review the merits of the agency's interpretation.

A better approach might be to amend the authority standard to incorporate a concept of reasonableness, along the lines of what is proposed for the necessity and consistency standards:

> 11349. …
>
> …
>
> (b) ~~"Authority" means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.~~ A proposed regulatory action satisfies the authority standard if the agency proposing the regulatory action identifies a statute that, under any reasonable interpretation of that statute, authorizes or requires the regulatory action.
>
> …
>
> **Comment.** …
>
> Subdivisions (b) is amended to provide that the authority standard is met if the authority cited by the agency can be reasonably interpreted as authorizing or requiring the proposed regulatory action. Where there is more than one reasonable interpretation of a law, the Office of Administrative Law may not substitute its judgment as to which of those interpretations is correct. See Section 11340.1(a) (OAL may not substitute judgment on matters of substance).

This language would clarify that OAL may not substitute its judgment for that of the adopting agency if the agency's position is one of several reasonable interpretations. This would not preclude disapproval of a proposed regulatory action where OAL determines that no reasonable interpretation of the cited authority supports the proposed action. **The staff would like to receive input on the proposed change.**

CLARITY, REFERENCE, AND NONDUPLICATION

The standards of clarity, reference, and nonduplication appear to be unproblematic. Their meanings are relatively clear and they do not seem to

present any potential for OAL to substitute its judgment for that of the adopting agency on matters of substance. The staff recommends nonsubstantive revisions to these standards to avoid the awkwardness of the existing law, which treats the standards as if they were definitions:

> 11349. …
>
> …
>
> (c) ~~"Clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.~~ A proposed regulatory action satisfies the clarity standard if it is drafted so that it can be easily understood by those who will be directly affected by it.
>
> …
>
> (e) ~~"Reference" means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.~~ A proposed regulatory action satisfies the reference standard if the agency proposing the action identifies each provision of law that the regulatory action is intended to implement, interpret, or make specific.
>
> (f) ~~"Nonduplication" means that a regulation~~ A proposed regulatory action satisfies the nonduplication standard if the regulatory action does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard ~~in paragraph (3) of subdivision (a) of Section 11349.1~~ provided in subdivision (c). This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation.
>
> **Comment.** …
>
> …
>
> Subdivisions (c), (e), and (f) are amended to improve their clarity. The substance of these provisions is continued without change.

Respectfully submitted,

Brian Hebert
Staff Counsel

STATE OF CALIFORNIA PETE WILSON, *Governor*

OFFICE OF ADMINISTRATIVE LAW
555 CAPITOL MALL, SUITE 1290
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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:

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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].

*****

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).

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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.

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STATE OF CALIFORNIA PETE WILSON, *Governor*

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June 6, 1996

California Law Revision Commission
Attention: Nat Sterling
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Palo Alto, California 94303-4739

RE: Improvements to rulemaking part of Administrative Procedure Act
***Second* OAL Submission: Refining the "necessity" standard.**

Dear Commissioners:

The rulemaking part of the Administrative Procedure Act (APA) requires the Office of Administrative Law (OAL) to review all regulations submitted to it and make determinations using all of the following standards: necessity; authority; clarity; consistency; reference; and nonduplication. The "necessity" standard is probably the least understood of the standards. The regulated public sometimes complains that OAL approves regulations that are "unnecessary," meaning that the regulations are unnecessary in terms of *policy*. Some state agencies and legal scholars criticize the standard as too burdensome and assert that OAL has too much flexibility in determining whether or not the rulemaking record meets the standard.

In spite of the criticism, OAL believes that there is value to retaining a "necessity" standard in the APA. In a case where the validity of a regulation is challenged, a court may declare the regulation invalid if the record does not demonstrate that the regulation is reasonably necessary to effectuate the purpose of the statute. OAL review for compliance with the "necessity" standard makes it likely that an approved regulation will not be struck down based on a failure to make the required showing.

The definition of "necessity" in subdivision (a) of Government Code section 11349 has been revised several times since its enactment in 1979. The current definition follows.

> "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

The standard relates to two other provisions of the APA, Government Code sections 11342.2 and 11350.

Government Code section 11342.2 provides:

> Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and *reasonably necessary to effectuate the purpose of the statute.* (Italics added.)

Subsection (1) of subdivision (b) of Government Code section 11350 states that, in addition to any other ground that may exist, a regulation may be declared invalid if:

> 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 made specific by the regulation is not supported by substantial evidence. (Italics added.)

OAL suggests that amendments to the APA, similar in substance to those set forth below, would have the following effects: 1) promote consistency among code sections relating to the "necessity" standard--Government Code sections 11342.2, 11349, and 11350; 2) make the "necessity" standard less burdensome; and 3) clarify the scope of OAL's review for "necessity." At the same time, we believe, the amendments preserve one of the values of OAL legal review, i.e., providing the rulemaking agency and the regulated public with a measure of certainty that a regulation will survive a court challenge to its validity. Under the revised standard, OAL will review for "necessity" by applying the "rationality" test recommended in the commission's study of the scope of judicial review. (Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 U.C.L.A. Law Review 1157, 1231.)

1) Revise subdivision (a) of Government Code section 11349, as follows.

> "Necessity" means that the rulemaking record ~~of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation -- taking into account the totality of the record,~~ contains rationale, facts, studies, expert opinion, or other material sufficient to support a conclusion that the regulation is reasonably necessary to effectuate the purpose of the statute, ~~For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.~~

2) Revise subsection (1) of subdivision (b) of Government Code section 11350 to promote consistency among section 11350 and Government Code sections 11342.2 and 11349 and to remove the reference to the judicial standard of review. That

standard will be included in the bill that represents the culmination of the commission's current study of judicial review of actions taken under the APA.

The ~~agency's determination~~ rationale, facts, studies, expert opinion, or other material contained in the rulemaking record do not support a conclusion 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 made specific by the regulation is not supported by substantial evidence~~.

Sincerely,

John D. Smith
Director

RULEMAKING UNDER THE CALIFORNIA ADMINISTRATIVE PROCEDURE ACT: PROPOSALS FOR REFORM

by

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2. Time period for OAL consideration. OAL has 30 working days to approve or disapprove a rule. Some agency staff told me that OAL reviewers sometimes cannot complete their work within this period when they must deal with large and complex rulemaking packages; as a result, reviewers disapprove the package on pretextual grounds and thus require the agency to resubmit the rule. Perhaps there should be a provision that allows OAL a longer review period (for example, 15 working days) in the case of unusually complex reg packages. The director of OAL would have to sign off on such an extension and would have to explain why additional time was needed.

3. Consistency review. I agree with OAL's suggestion that it must accept an agency's interpretation of a statute when it is one of several reasonable interpretations.[57] In such situations, OAL should not substitute its interpretive judgment. While this may well be the existing practice, it apparently was not the prior practice. Therefore, it would be a good idea to codify it since OAL leadership philosophy may change.

I believe the judicial review statute should be amended to

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[56]See note 45.

[57]Letter from OAL to the Commission, May 24, 1996, p. 15-16.

make it clear that a reviewing court should defer to an agency's interpretation of the statute, not OAL's, where these conflict. On judicial review of an invalidly adopted underground regulation, the court should defer neither to OAL's nor the agency's interpretation of the statute, but should decide the interpretive question as if neither the agency nor OAL had weighed in on the issue.[58]

4. Necessity. OAL's regulations requires that the necessity of "each provision" of a regulation be established.[59] The statute, however, does not seem to require that the necessity of every single part of a lengthy regulation be separately established.

Instead, the statute should be amended to make clear that only the overall necessity for the regulation needs to be established by the rulemaking record. Of course, if a relevant comment questions a particular part of the regulation, the agency's response to that comment would be required to establish the necessity for that particular part. Dispensing with the requirement of establishing necessity for every single unquestioned provision of a regulation should simplify the task of both adopting agencies and OAL staff.[60]

In addition, the statute should make clear that factual

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[58]Thus Grier v. Kizer, note 37, 268 Cal.Rptr. at 251, should be disapproved on this point.

[59]Reg. §10(b)(1) and (2).

[60]See Unger, note 2 at 82-85.

support[61] is not required for an agency's judgment calls or political compromises. An agency is, of course, required to give reasons for its rules but it must be candidly recognized that it is not always possible to furnish factual backup or expert opinion for every judgment.[62]

For example, a statute requires that 25% of solid waste be "diverted" rather than "disposed of." Each day landfills must cover the exposed face of the waste. Landfills can use "green waste" such as lawn clippings as cover. When green waste is used in this manner, has it been "diverted" from landfills or "disposed of" in landfills? The agency compromised; green waste used for cover is "diverted" up to 7% of the total amount of solid waste, but "disposed of" to the extent it exceeds 7% of the total solid waste. OAL disapproved the regulation because the agency failed to justify the 7% figure.[63]

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[61]The statute requires "substantial evidence" of necessity; "evidence includes, but is not limited to, facts, studies, and expert opinion." GC §11349(a). OAL's regulations require "information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision." Information includes, "but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information." Reg. §10(b)(2).

[62]See Marsha N. Cohen, "Regulatory Reform: Assessing the California Plan," 1983 Duke L.J. 231, 271-77.

[63]Integrated Waste Management Board, 1995 Cal. Code of Reg. Dec. 6. Similarly, the Chiropractic Board set up a "preceptorship" program for students, providing that each preceptor could have no more than two students. OAL disapproved this regulation, questioning numerous parts of it. For example, it required the agency to justify why the limit of two students rather than one or three.

But this regulation reads like a political compromise in a situation where no one answer is better than any other; 6% or 8% really would be as justifiable as 7%. Probably many other formulas would be equally justifiable. OAL staff says that they will settle for any kind of statement of reasons that justifies such distinctions; it is the complete absence of any justification that attracts their disapproval. Agency staff members I interviewed generally agreed that OAL staffers seldom try to substitute judgment on necessity issues. However, in the past OAL was much more demanding of factual support for agency compromises or judgment calls. And the statute and regulations do seem to require factual support for every determination.[64]

I am not sure how to draft a statute that allows agencies more elbow room to strike compromises or make essentially political judgments. Perhaps this can be better expressed in a statutory comment. But the idea is that only reasons or rationale, not "information" or "evidence" or other "factual support," is required to back up judgment calls.

Incidentally, I was told that OAL will not permit factual findings in regulations. I see nothing wrong with a regulation that states "The agency finds that..." Such findings might be helpful to an agency when the rule is judicially reviewed. After all, such findings often appear in statutes.

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