Study N-300 September 16, 1998

Memorandum 98-71

Administrative Rulemaking: Miscellaneous Issues

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 all of the unresolved issues in categories (2), (4), and (5), with one exception — the question of how to improve the terminology used in the APA will be addressed in a later memo. Once the Commission has resolved the issues presented in this memorandum and in the forthcoming memorandum addressing terminological issues the staff will prepare a draft tentative recommendation incorporating all of the Commission's recommendations regarding rulemaking procedure.

The following material is attached in the Exhibit:

Exhibit pp.

Unless otherwise indicated, all statutory references are to the Government Code.

Amendments to Water Quality Plans and Policies

The APA provides special procedures for Office of Administrative Law (OAL) review of certain policies, plans, and guidelines of the State Water Resources Control Board. See Section 11353(b). Unlike the general rulemaking procedures, these special procedures do not require the use of strikeout and underscore in documents submitted to OAL for review. According to OAL, the current practice is to use strikeout and underscore in such documents. OAL would like this practice to be required by statute. See Exhibit pp. 7-8. This proposal is supported by the Bay Planning Coalition. See Exhibit p. 15. The proposed change would be consistent with a parallel section governing OAL review of plans of the San Francisco Bay Conservation and Development Commission. See Section 11354.1(d)(2)(B). **The staff sees no problem with OAL's suggestion, which could be implemented by amending Section 11353(b)(2) as follows:**

> 11353. …
>
> (b) …
>
> (2) The State Water Resources Control Board shall include in its submittal to the office all of the following:
>
> (A) A clear and concise summary of any regulatory provisions adopted or approved as part of that action, for publication in the California Code of Regulations.
>
> (B) The administrative record for the proceeding. <u>Proposed additions to a policy, plan, or guideline shall be indicated by underlined text and proposed deletions shall be indicated by strike-through text in documents submitted as part of the administrative record for the proceeding.</u>
>
> (C) A summary of the necessity for the regulatory provision.
>
> (D) A certification by the chief legal officer of the State Water Resources Control Board that the action was taken in compliance with all applicable procedural requirements of Division 7 (commencing with Section 13000) of the Water Code.
>
> …
>
> **Comment.** Section 11353 is amended to require that amendments and deletions be clearly indicated in material submitted to the Office of Administrative Law for review. For a similar provision, see Section 11354.1(d)(2)(B) (underscore and strike-through required to indicate changes in plans of San Francisco Bay Conservation and Development Commission).

Adding Material to Rulemaking File

Existing law prohibits an agency from adding any material to the rulemaking file after public comment, but also requires an agency to add specified material to the rulemaking file after public comment. See Sections 11346.8(d) and 11347.3(b)(2). This logical inconsistency was considered by the Commission earlier, and it was decided that Section 11346.8(d) should be amended as follows:

> (d) No state agency shall add any material to the record of the rulemaking proceeding after the close of the public hearing or comment period, unless adequate provision is made for public comment on that matter. <u>This subdivision does not apply to the final statement of reasons.</u>

In reexamining this section, the staff has realized that the proposed solution is too narrow. It is not just the final statement of reasons that is required to be added to the rulemaking file after public comment. The updated informative digest is also required. Section 11347.3(b)(2). **The staff recommends amending Section 11346.8(d) as follows:**

> (d) No state agency shall add any material to the record of the rulemaking proceeding after the close of the public hearing or comment period, unless adequate provision is made for public comment on that matter. <u>This subdivision does not apply to material prepared pursuant to Section 11346.9.</u>

This would exempt both the final statement of reasons and the updated informative digest from the prohibition on adding material to the file.

PUBLIC ACCESS TO REGULATIONS

A number of issues relating to the accessibility of regulatory materials have been raised by the Northern California Association of Laws Libraries and the Council of Californian Law Librarians ("Law Librarians"), and by OAL. These issues are discussed below.

Publication of Water Quality Plans and Policies

The APA does not require that policies, plans, and guidelines of the State Water Resources Control Board (SWRCB) be published in the California Code of Regulations (CCR). Only summaries of regulatory provisions included in these policies, plans, and guidelines are required to be published in the CCR. See Section 11353(b)(2). OAL suggests that all such policies, plans, and guidelines be

published in full in the CCR. See Exhibit p. 8. This suggestion is supported by the Bay Planning Coalition. See Exhibit p. 15.

SWRCB opposes this suggestion, maintaining that the current system, which was the result of a political compromise, is working well. See Exhibit pp. 12-13. In addition, SWRCB identifies the following reasons not to require publication of the plans in full:

> (1) To do so would more than double the size of Title 23.
>
> (2) The plans are useful only to a few people, all of whom can and do obtain printed copies from the relevant Regional Water Quality Control Boards.
>
> (3) Much of the material in the plans is descriptive in nature, rather than regulatory.

Considering the public availability of the plans, it is not clear that the cost of full publication of the plans in the CCR is justified. It also seems unwise to disturb a recent political compromise that appears to be working. **Unless a more persuasive case for full publication of the plans is made, the staff recommends against requiring full publication.**

Preservation of Rulemaking File

In their 1996 letter, the Law Librarians expressed concern that rulemaking files were not being adequately preserved and made available to the public. See Exhibit pp. 2-3. Legislation to address these concerns was subsequently enacted on the Law Librarians' request. See 1996 Cal. Stat. ch. 928. This legislation added subdivisions (e) and (f) to Section 11347.3. The relevant subdivisions of that section now provide as follows:

> (d) The rulemaking file shall be made available by the agency to the public, and to the courts in connection with the review of the regulation.
>
> (e) Upon filing a regulation with the Secretary of State pursuant to Section 11349.3, the office shall return the related rulemaking file to the agency, after which no item contained in the file shall be removed, altered, or destroyed or otherwise disposed of. The agency shall maintain the file unless it elects to transmit the file to the State Archives pursuant to subdivision (f).
>
> (f) The agency may transmit the rulemaking file to the State Archives. The file shall include instructions that the Secretary of State shall not remove, alter, or destroy or otherwise dispose of any

> item contained in the file. Pursuant to Section 12223.5, the Secretary of State may designate a time for the delivery of the rulemaking file to the State Archives in consideration of document processing or storage limitations.

The staff believes that Section 11347.3 now adequately addresses the concerns raised by the Law Librarians and that no action is required by the Commission on this issue.

On a related point, OAL suggests that the location of rulemaking files be centrally cataloged to simplify access to these files, but is unsure how this should be done or by whom. See Exhibit p. 10. Such a catalog would be useful where an agency has difficulty locating a rulemaking file, because the agency would be required to locate the file in advance of any request to review it. However, it isn't clear that the added convenience in these cases would justify the cost of cataloging all rulemaking files. The same issue arises with any government document that is open to public inspection — an agency may have difficulty locating a requested file, causing delay to the person requesting it. Clearly, this would not justify creating and maintaining a central catalog of all government documents that are open to public inspection. **The staff sees no reason why rulemaking files should be treated as a special case.**

However, if the Commission decides that a centralized catalog of the location of rulemaking files should be created, OAL would probably be the best organization to maintain it. OAL sits at the center of the regulatory process, handling all rulemaking files and communicating with every agency that adopts rules under the APA. If the Commission wishes to pursue the idea of a centralized catalog, the staff will consult with OAL to determine how it might be implemented.

Historical Information Concerning Regulations

The Law Librarians and OAL have pointed out a number of problems with the form and availability of historical information regarding regulations:

(1) Manner of presentation. The Law Librarians note that the manner in which historical annotations are presented in the CCR is not uniform. "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." See Exhibit p. 3.

(2) Prior law annotations. The Law Librarians note that the CCR rarely provides annotations or tables indicating the relationship of current regulations to prior ones. This makes it difficult to track the history of regulations that have been reorganized. See Exhibit p. 4.

(3) Amendatory annotations. The Law Librarians note that the CCR does not consistently provide annotations indicating how an amendment has affected a regulation. This makes it difficult to determine the text of a regulation at a time before its most recent amendment. See Exhibit p. 5. OAL also notes this problem. They suggest an alternative to amendatory annotations in the CCR — requiring each agency to maintain a complete set of all of that agency's superseded regulations. See Exhibit p. 10.

The staff agrees that consistently formatted annotations indicating the relationship between current and prior regulations and setting out the effect of amendments would be useful. There are at least two ways that this might be achieved, without enacting new legislation. OAL could exercise its authority to prescribe the style of regulations submitted for filing and simply require that agencies include the annotations in a specified form when they submit regulations. These annotations could then be published in the CCR along with the text of the regulation. See Section 11343.1(a) (OAL's authority to prescribe style of regulations submitted). Alternatively, OAL could create the annotations itself in preparing regulations for publication in the California Code of Regulations. See Section 11344(c) (OAL responsible for the manner and form in which regulations are printed). **The staff does not see any need for new legislation, but would be interested in hearing from OAL as to whether the proposed changes are feasible under existing law.**

OAL's alternative suggestion, that all agencies be required to preserve a complete set of their superseded regulations, would not offer much improvement over existing practice. Currently, when a regulation is sent to the Secretary of State for filing, it is promptly forwarded to the State Archives for permanent retention. State Archives preserves all regulations, including superseded ones, sorted in chronological order by promulgating agency. It isn't clear that requiring the promulgating agency to keep their own set would add much to the accessibility of these materials. Annotations in the CCR seem to be a much more effective way to convey historical information about regulations.

MISCELLANEOUS MATTERS

Scope of Section 11350

Section 11350 provides a judicial proceeding for a declaration as to the validity of a regulation. OAL maintains that this section only provides for review of a "duly adopted" regulation (a regulation that has been formally adopted under APA procedures), and does not provide for review of an "underground regulation" (an agency statement that meets the APA's definition of "regulation" but has not been formally adopted). OAL proposes amending Section 11350 to indicate that it only provides for review of a duly adopted regulation.

It isn't entirely clear that OAL's interpretation of Section 11350 is correct. There is nothing in the section that expressly limits it to review of duly adopted regulations. To the contrary, it provides for review of "any regulation." See Section 11350(a). However, the section does contain one paragraph that supports OAL's interpretation:

> For purposes of this section, the record shall be deemed to consist of all material maintained in the file of the rulemaking proceeding as defined in Section 11347.3.

This limitation of the record of review to the rulemaking file would seem to preclude review of underground regulations, which are not the subject of rulemaking files. To challenge an underground regulation you would at least need to introduce the text of the challenged regulation, which would not be permitted under a strict reading of the paragraph quoted above.

On the other hand, Section 11350 expressly provides for review of emergency regulations, which are also not the subject of rulemaking files. See Section 11346.1(a) (emergency regulations not subject to Section 11347.3). If the record limitation provision is defective as to the review of emergency regulations (which it seems to be), then it may also be defective as to the review of underground regulations. This undermines the implication that might be drawn from the record limitation provision — that the section was not intended for review of underground regulations.

Regardless of the proper interpretation of Section 11350, the question remains whether Section 11350 *should* be limited to review of duly adopted regulations. In other words, does judicial review of an underground regulation under Section 11350 pose some problem that justifies eliminating the remedy?

The staff does not see any obvious problems with review of an underground regulation under Section 11350. If declaratory relief is an appropriate remedy where an agency substantially fails to comply with the APA, it should also be appropriate where the agency entirely fails to comply. Declaratory relief under Section 11350 is not an exclusive remedy, so allowing review of underground regulations would not preclude other existing means to challenge the validity of an underground regulation (e.g., administrative mandamus). **Unless some problem with review of an underground regulation under Section 11350 can be demonstrated, the staff is reluctant to eliminate the remedy.**

Record of Review Under Section 11350

As discussed above, the paragraph limiting the record of review to the rulemaking file seems to be defective in that it excludes material relevant to determining the validity of emergency regulations and underground regulations. It may also exclude material relevant to review of a duly adopted regulation. For example, if an agency ignores public comment letters and does not discuss them in the final statement of reasons or include them in the rulemaking file, the agency may have substantially failed to comply with the APA. Substantial failure to comply with the APA is a ground for invalidity of a regulation under Section 11350. However, the record limitation provision would preclude consideration of letters that were improperly omitted from the rulemaking file, because they would not be part of the record of review.

It may make sense to draft a new section that would preserve the general policy of closed record review of regulations, while correcting the apparent defects in the present provision. This could be achieved by deleting the record limitation provision in Section 11350 and adding the following section:

> 11350.1. The record for review in a proceeding under Section 11350 shall be limited to the following material:
>
> (a) The text of the regulation under review.
>
> (b) The written statement prepared under paragraph (b) of Section 11346.1.
>
> (c) Evidence of a procedural defect in the adoption of the regulation.
>
> (d) The rulemaking file prepared under Section 11347.3.
>
> **Comment.** Section 11350.1 governs the record of review in a proceeding under Section 11350.
>
> Subdivision (a) permits consideration of the text of a regulation where the regulation was required to be adopted under this chapter

but was not. In such a case, the text of the regulation is not part of a rulemaking file.

Subdivision (b) permits consideration of an agency statement prepared under Section 11346.1(b) (justifying emergency regulation). Such a statement is not part of a rulemaking file prepared under Section 11347.3. See Section 11346.1(a)

Subdivision (c) permits consideration of evidence of procedural noncompliance. This is necessary where proof of procedural noncompliance depends on material that is not included in the rulemaking file. E.g., proof that an agency failed to include written public comments in a rulemaking file requires consideration of the excluded comments.

Subdivision (d) restates part of the substance of the former second paragraph of Section 11350(b)(2), limiting the record for review to the rulemaking file prepared under Section 11347.3.

EXECUTIVE ORDER

In 1997, the Governor issued Executive Order W-144-97 ("Executive Order"). See Exhibit pp. 16-18. This order adds a new layer of complexity to the rulemaking process. While many of the provisions of the Executive Order seem to run contrary to the Commission's efforts to make the rulemaking process more efficient, it is probably best to accept the Executive Order as a given. The Executive Order is recent, and is the product of an ongoing series of Regulatory Review Roundtables conducted by the Office of Planning and Research. If the provisions of the order prove problematic, they are always subject to modification by a subsequent executive order.

The principal effects of the Executive Order on rulemaking procedures are as follows:

(1) Contents of rulemaking calendar expanded. Under statutory law, agencies must publish an annual rulemaking calendar, indicating the schedule that the agency intends to follow in its rulemaking activity for the upcoming year. See Section 11017.6. Under the Executive Order, the rulemaking calendar must also include a substantive overview and summary for each scheduled rulemaking action. See Exhibit pp. 16-17. The required contents of the summary and overview is substantially similar to the information required in the initial notice of proposed rulemaking under the APA.

(2) Rulemaking calendar exception narrowed. Under statutory law, an agency is not barred from adopting a regulation as a result of its omission from the rulemaking calendar if the regulation is "required by circumstances not

reasonably anticipated at the time that the rulemaking calendar is prepared." See Section 11017.6. The Executive Order sets a much higher hurdle for adoption of a regulation that was not scheduled in the rulemaking calendar — such a regulation may not be adopted "unless otherwise required by state or federal law or as required by a Declaration of a State of Emergency, Executive Order, or by the need to protect immediate public health, safety, and welfare." See Exhibit p. 17.

(3) Inconsistency with other law. An agency must identify how a proposed regulation "diverges from a comparable state, federal, or local law or regulation which governs the same program or conduct" and must identify the costs and benefits of this difference. *Id.*

(4) Sunset review of regulations. Agencies must establish a schedule to review all existing regulations by 1999. This "sunset review" includes review of the continuing necessity and cost effectiveness of the regulation, an updated estimate of economic impacts, identification of changes that would minimize overlaps and conflicts with other laws, and identification of changes that would make the regulation less intrusive and more cost effective. Agencies must identify changes that will reduce the total "compliance cost" of the regulation by 5 percent per year. *Id.*

(5) Economic impact statements. The Executive Order requires the development of a standardized economic impact statement form. *Id.* Economic impact information must be submitted to the regulation review unit of the Trade and Commerce Agency "as provided in Section 15363.6 of the Government Code and Section 57005 of the Health and Safety Code…." It isn't clear what the language quoted above means. Neither Government Code Section 15363.6 nor Health and Safety Code Section 57005 require submission of economic impact information to the Trade and Commerce Agency.

Respectfully submitted,

Brian Hebert
Staff Counsel

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" <u>in the record</u> 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.

STATE OF CALIFORNIA PETE WILSON, *Governor*

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May 24, 1996

California Law Revision Commission
Att'n: Nat Sterling
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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)"

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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.)

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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).

Cal/EPA

State Water Resources Control Board

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Pete Wilson
Governor

June 13, 1996

Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

PROPOSED ADMINISTRATIVE RULEMAKING PROJECT

The State Water Resources Control Board welcomes a proposal for the Law Revision Commission to study administrative rulemaking. There are many problems that should be addressed and we will be pleased to submit specific comments at the appropriate time.

My immediate concern involves the letter from the Office of Administrative Law dated May 26, 1996, in which Mr. John D. Smith states quite correctly, with regard to the publication of all Water Quality Control Plans, that "[t]he Water Board . . . opposes such publication." After a lengthy lawsuit we negotiated a compromise that now appears in the Administrative Procedure Act at section 11353 of the Government Code. This compromise acknowledges that large portions of Water Quality Control Plans are nonregulatory and requires that OAL review only those limited portions that are regulatory in nature. We have done so and this system has worked well. Government Code section 11353 requires that summaries of the Water Quality Control Plans be published in the California Code of Regulations.

There is no reason to suddenly require the publication of the full texts of Water Quality Control Plans in Title 23 of the California Code of Regulations. There are many reasons not to publish the Plans:

- ★ To do so would more than double the size of that Title.
- ★ These Plans are useful only to a small handful of people, all of whom can and do obtain printed copies from the relevant Regional Water Quality Control Boards.
- ★ Much of the Plans are descriptive in nature and thus putting them in the same publication with normal regulations would make no sense.

* There is no indication that anyone has found the present system to be unworkable.

It is my understanding that the California Code of Regulations as published by Barclays is copyrighted and thus should not be copied without Barclays' permission. Publishing material that cannot be copied and distributed by a state agency to the public serves a very limited purpose.

I look forward to working with you on the study of administrative rulemaking. I hope we will not have to spend our time doing battle over this issue that should have been settled in 1992.

Sincerely,

William R. Attwater
Chief Counsel

cc: Mr. James M. Strock, Secretary
Mr. Peter Rooney, Undersecretary
California Environmental
Protection Agency
555 Capitol Mall, Suite 525
Sacramento, CA 95814

Mr. John Caffrey, Chairman
Mr. Walt Pettit, Executive Director
State Water Resources Control
Board

BAY PLANNING COALITION

303 WORLD TRADE CENTER • SAN FRANCISCO, CALIFORNIA 94111 (415) 397-2293 FAX (415) 986-0694
E-MAIL - ejohnck@emf.net

June 14, 1996

California Law Revision Commission
Attn: Nat Sterling
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94303-4739

Re: Improvements to Rulemaking Part of the Administrative Procedure Act (APA)

Dear Commissioners:

We support your focus on incremental improvements, rather than fundamental changes to the APA. Our organization represents various sectors of the regulated public including the maritime industry, petroleum and manufacturing industries, residential and commercial builders, and, we benefit greatly from and value highly the APA as implemented by the Office of Administrative Law (OAL) and in particular, the guarantee of public access to rulemaking and control of underground regulation.

We were active as a supporter in deliberations on the APA amendments in AB 3359 in 1992 regarding water quality plans and policies. Although the regulatory adoption process for amendments to water quality plans has improved, we encountered a new problem in the most recent amendment process (1995) for the S.F. Bay Regional Water Quality Control Board Basin Plan. The agency prepared a summary of proposed plan amendments that it considered "regulations" and a list of those amendments that it considers "non-regulatory." However, in our review of the proposed rulemaking, we considered some of the items in the non-regulatory section to be actual "regulations." Because the water board deemed these non-regulatory, there was no analysis done initially on whether these complied with the OAL six part criteria nor an economic impact analysis. This became very confusing during the public hearing process, and we were concerned that the agency's evaluations, and hence, our comments on the adequacy of the evaluations were not going to be incorporated as part of the official record for OAL review. We would like to revisit this matter with the Water Board and OAL because we are not sure whether this problem is a misunderstanding of the procedures

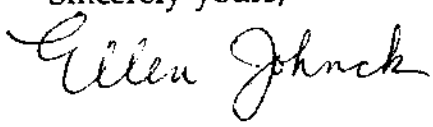
on our part or the agency's part or both, and /or whether an amendment to the APA is in order.

We support OAL's recommendation to require that amendments to existing policies and plans should be submitted in strikeout/underline format and that all regular provisions of all plans and policies should be published in full, instead of in summary form, in the CCR.

The limited amount of time that our organization has to spend on this review at the present time precludes us from presenting additional recommendations at the moment.

We are very interested in your process and look forward to staying involved in the future because we think that the OAL is very essential to fair and accessible regulations.

Sincerely yours,



Ellen Johnck
Executive Director

cc: Office of Administrative Law

EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

EXECUTIVE ORDER W-144-97

WHEREAS, as California continues to build a competitive, dynamic economy to meet our needs in the 21st Century, government must do its part by continually improving the regulatory structure to recognize and accommodate these dynamic changes; and

WHEREAS, just as Californians have demanded through the State Constitution that government limit its spending and taxing powers, so too must state agencies minimize the hidden taxes to consumers, business, and local government inherent in regulations; and

WHEREAS, the Legislature through measures such as AB 2061 (Polanco, 1991), AB 3511 (Jones, 1992), AB 969 (Jones, 1993), AB 1144 (Goldsmith, 1993), SB 513 (Morgan, 1993), and SB 1082 (Calderon, 1993) has repeatedly directed state agencies to consider the cost effectiveness of regulations, in an effort to minimize the regulatory impact on business, local governments, the state's business climate, and the state's economic competitiveness; and

WHEREAS, on February 8, 1996, I signed Executive Order W-131-96 which directed each state agency to forward all regulations identified as unnecessary or redundant to the Office of Administrative Law for appropriate action, and also directed the Governor's Office of Planning and Research to hold regional meetings throughout the state to receive public testimony on further reform; and

WHEREAS, more than 300 citizens, businesses, and organizations offered extensive and varied suggestions for regulatory improvements at the California Regulatory Roundtables held throughout California in the Spring of 1996; and

WHEREAS, as a result of Executive Order W-131-96 and the California Regulatory Roundtables, 3900 redundant and outdated regulations have been -- or are in the process of -- being repealed, with an additional 1700 regulations identified to date for modification; and

WHEREAS, on June 3, 1996, the Governor's Office of Planning and Research presented its final recommendations and findings in the report entitled "Recommendations from the Regulatory Review Roundtables."

NOW, THEREFORE, I, PETE WILSON, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effective immediately:

1. Consolidated Regulatory Program. By July 1, 1997 the Directors of the Office of Administrative Law and the Office of Planning and Research, in consultation with the Department of Finance and other members of the Cabinet, shall develop procedures for a Consolidated Regulatory Program. This program shall be based on the annual Rulemaking Calendar pursuant to Government Code section 11017.6, and shall incorporate the following provisions:

   a. Beginning in 1997 and by November 1 of each year thereafter, all state agencies shall develop a process of all regulations, regulatory policies, goals, and objectives that the agency proposes to pursue during the following year. The overview shall include: (1) the primary goals and authorities of the agency; (2) the specific statutory authority for the proposed regulation, including any specific legislative intent; (3) a statement of how the proposed regulation relates to those goals and authorities; (4) the relationship of the proposed regulation to other existing regulations, including federal and local requirements; and (5) estimated costs to develop and implement the regulations, including both state costs and compliance costs to be borne by the regulated community, local governments, and consumers.

b. For all agencies, the Rulemaking Calendar, published each year by January 30 pursuant to Government Code Section 110017.6, shall be expanded to include the following summary information for each newly proposed regulation: (1) the promulgating agency and contact person; (2) the title of regulation and proposed location in the California Administrative Code; (3) the legal authority to adopt regulations and the specific statute that will be implemented; (4) an abstract describing the problem the regulation will address; (5) alternatives being considered; (6) the intended benefits; (7) any legal deadline for the adoption of the regulation; (8) a sunset review date not to exceed five years by which the proposed rule, if adopted, would be reviewed for retention, revision, or proposed elimination; (9) a schedule for the proposed regulatory action; (10) all budget information required on Form 399; (11) the levels of government affected; (12) identification of any federal authority with which the regulatory action will comply; (13) the fiscal impact, including an initial estimate of costs to state and local governments; and (14) the economic impact, including an initial estimate of the economic impacts of the proposed regulations, the regulation's likely costs to the regulated community, local government, and consumers and whether or not the rule qualifies as a Major Regulation.

c. Any State agency that proposes adoption of a regulation that diverges from a comparable established state, federal, or local law or regulation which governs the same program or conduct shall: 1) identify the manner in which the proposed regulation is different than the applicable federal, state, or local law or regulation; 2) identify the benefit to the public health, safety, or welfare or the environment expected from adopting a regulation that is different from the existing law or regulation; and 3) identify whether having a different provision places an additional burden or cost on regulated persons, local governments, businesses, or consumers.

d. State agencies shall not issue new regulations unless they are first published in the annual Regulatory Overview and Rulemaking Calendar, unless otherwise required by state or federal law or as required by a Declaration of a State of Emergency, Executive Order, or by the need to protect immediate public health, safety, and welfare. Agencies proposing to issue new regulations that are not first published in the annual Regulatory Overview and Rulemaking Calendar shall provide a statement to the Cabinet Secretary documenting the requirement for such a regulation.

2. Sunset Review of Regulations. Beginning with the 1997 Annual Rulemaking Calendar, all state agencies shall establish a schedule to complete a sunset review of all existing regulations by 1999. This review shall include the following provisions:

a. A review of the authority and continued necessity for and cost effectiveness of each regulation, along with a determination to retain, modify, or repeal the regulation, including development of recommended legislation if required to implement the determination;

b. An updated estimate of the fiscal and economic impacts of the regulation on all levels of government, consumers, and the regulated community;

c. Changes to the regulation to minimize overlap and conflicts with comparable federal and local regulations, unless the differences in state requirements can be shown to provide additional benefits that exceed the additional costs; and

d. Changes to the regulation to consider alternative approaches that are less intrusive or more cost effective.

In completing the 1997-1999 regulatory sunset review, each agency shall identify sufficient efficiencies and cost reductions to meet a goal of reducing the total compliance costs—including fees—paid by business, local government, and the public by 5 percent per year. In calculating the projected compliance cost reductions, agencies may include cost efficiencies achieved as a result of actions taken in accordance with Executive Order W-131-96.

3. Economic Impact Statements. By July 1, 1997, the Department of Finance, the Trade and Commerce Agency, and the Governor's Office of Planning and Research, in consultation with the other Cabinet Members, Office of Emergency Services, and the Office of Administrative Law, shall develop a standard economic impact statement to be included in each rulemaking record. The economic impact statement shall provide for consistent application of all existing statutory requirements for economic analysis of regulations, shall be used as the basis for the determination of fiscal impacts, and shall be incorporated into the fiscal impact statement required for proposed regulations. As provided in section 15363.6 of the Government Code and section 57005 of the Health and Safety Code, the economic impact statement shall be submitted to the regulation review unit of the Trade and Commerce Agency, and all state agencies and departments shall respond to the Trade and Commerce Agency's comments.

4. Continuous Review. In order to ensure continuous improvement in California's regulatory structure and to identify areas where additional efficiencies or other changes are warranted, the following two provisions shall be implemented immediately:

   a. The Director of the Office of Planning and Research, in cooperation with the other members of the Cabinet, shall hold at least two Regulatory Review Roundtables annually and submit an annual report on further recommendations for regulatory improvement; and

   b. Each state agency shall institute a customer service survey process. Each Cabinet Officer shall develop procedures for the review, tracking, and response to surveys for each of their reporting boards, commissions, departments, and offices. For agencies not reporting to a Cabinet Officer, such procedures shall be developed by the chief executive officer in consultation with the Director of the Office of Planning and Research.

5. Open Regulatory Process. From existing resources, each agency shall develop a regulatory ombudsman program by designating an employee or employees reporting directly to the chief executive officer to serve as ombudsmen. The ombudsman program shall provide an opportunity for any person to raise regulatory issues at both headquarters and any regional offices of the agency.

6. Regulatory Consistency. The following provisions shall be implemented to ensure consistent implementation of regulations:

   a. The Director of the Office of Planning and Research shall compile a list of statutory deadlines set for the review of applications and other regulatory filings. In coordination with the Cabinet Officers, the Director shall complete by May 1, 1997 a review of the effectiveness of these deadlines, adherence of the agencies to deadlines, and existing enforcement mechanisms such as the refund of application fees when deadlines are exceeded without good cause. The Director's evaluation shall include recommendations for broader application of regulatory deadlines, improved tracking and reporting, and other applicable provisions to ensure timely action by the regulatory agencies.

   b. By May 1, 1997, the Legal Affairs Secretary shall complete a review of existing statutory and administrative provisions dealing with minor regulatory violations, and prepare recommendations to ensure consistent application by the affected agencies. This review shall include recommendations as appropriate for legislation that would extend recent provisions enacted by the Legislation such as AB 2937 (Brulte, 1996), AB 59 (Sher, 1995), and SB 1899 (Peace, 1994).

7. State Constitutional Officers, the University of California, the California State University, the California Community Colleges, the State Board of Education, and state agencies, departments, boards, and commissions not directly under the authority of the Executive Branch are requested to take all necessary action to comply with the intent and the requirements of this executive order.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 10th day of January 1997.

Governor of California

ATTEST:

Secretary of State

** TOTAL PAGE.