Study N-300 October 8, 1999

First Supplement to Memorandum 99-69

Administrative Rulemaking (Comment on Draft Recommendation)

The staff received a comment by telephone from the California Energy Commission (CEC) pointing out a perceived problem with proposed Section 11347.1 (providing a procedure for additional public notice and comment on material that was not made available to the public earlier in the rulemaking process). That problem is discussed below. All statutory references are to the Government Code.

Background

Under existing law, an agency that is proposing a regulatory action must prepare an "initial statement of reasons" for the proposed action at the same time that it prepares its "notice of proposed action." The initial statement of reasons must identify any technical, theoretical, or empirical study, report or similar document on which the agency is relying in proposing the action. See Section 11346.2(b)(3). Those documents must be included in the rulemaking file. See Section 11347.3(b)(7). After the notice of proposed action is published, there is a 45-day public comment period. Once the public comment period has ended, the agency must prepare, among other things, an update to its initial statement of reasons — a "final statement of reasons." See Section 11346.9(a).

Sometimes an agency will discover new documents supporting a proposed regulatory action, after it has prepared its initial statement of reasons. If it wishes to rely on these documents, it must identify them in its final statement of reasons and place them in the rulemaking file. See Sections 11346.9(a)(1), 11347.3(b)(7). It must then provide an opportunity for public comment regarding those documents. See Sections 11346.8(d), 11346.9(a)(1).

The statutes do not specify what constitutes adequate provision for additional public comment. However, the Office of Administrative Law has adopted a regulation providing a procedure for additional comment. An agency that follows that procedure is deemed to have complied with the statutory requirements. See 1 Cal. Code Regs. § 45. OAL requested that we codify the

procedure provided in its regulation. Proposed Section 11347.1 was added to the recommendation to do so.

The Problem

On its face, existing law appears to require an opportunity for additional comment only if material is added to the rulemaking file *after the close of public comment*. This is stated expressly in Section 11346.8(d), which is incorporated in Section 11346.9(a)(1). However, proposed Section 11347.1 provides that additional comment is required regarding any document that is added to the rulemaking file *after publication of the notice of proposed action*. Thus, CEC maintains that proposed Section 11347.1 would expand the circumstances in which an opportunity for additional comment is required. For example, under a strict reading of the statutes, an agency could add a document on which it is relying to the rulemaking file during the public comment period (i.e. after the notice of proposed action was published) and would not be required to provide for additional public comment on that document. Under proposed Section 11347.1, it is clear that an opportunity for additional comment would be required.

CEC maintains that this is an undesirable change. If an agency places new material in the rulemaking file during the public comment period, then the public has an opportunity to review and comment on those documents. Requiring an additional mailing of notice and a 15-day comment period regarding those documents would be a waste of time and resources.

Counter-Argument

It has been the practice of the Office of Administrative Law (OAL), for over ten years, to require additional public comment in any case where new materials relied on by the agency are added to the rulemaking file. If an agency adds a document to the rulemaking file during the public comment period, and does not comply with the procedure for additional comment, OAL disapproves the proposed regulation. OAL maintains that no one has ever challenged that practice. They conclude that CEC's concern is merely theoretical.

What's more, OAL argues that a rule requiring additional notice and comment whenever a document is added to the file after the notice of proposed action reflects the best policy — if an agency relies on new authority, it should be

required to notify interested members of the public. Merely adding the document to the rulemaking file provides inadequate notice.

Discussion

Regardless of the proper interpretation of the existing language, we should consider what the best policy would be. Existing law clearly requires additional comment if material is added to the rulemaking file after the close of public comment. This suggests that an agency should not be able to rely on such material without the public having had an opportunity to comment on it. The question then is whether inclusion of a document in the rulemaking file provides an adequate opportunity for the public to comment on that document, or if something more is required. The staff agrees with OAL that simply placing a document in the rulemaking file is probably insufficient. Interested persons would need to constantly monitor the rulemaking file in order to discover that a document had been added. No notice would be provided. There would also be nothing preventing an agency from adding material to the rulemaking file on the last day of the comment period, effectively precluding meaningful public review and comment.

The procedure set out in Section 11347.1 for additional comment does not seem very burdensome. It simply requires another round of mailed notices to interested persons and an additional 15 days of comment. If an agency accumulates multiple new documents on which it would like to rely, it could aggregate them and provide a single notice and 15-day notice comment period for all of them at once. The staff believes that the burden imposed by this procedure is probably justified as a means of ensuring an adequate opportunity for public review of materials relied on by an agency in proposing a regulatory action. What's more, this procedure has apparently been required, as a matter of practice, for several years — and CEC's comment is the first suggestion that the procedure is unduly burdensome.

Furthermore, existing law requires that an agency provide an analogous 15 day opportunity for additional comment if it has substantively changed the text of its proposed regulation from what was originally proposed. See Section 11346.8(c), 1 Cal. Code Regs. § 44. According to OAL, this occurs in most rulemakings. If an agency is providing notice and 15 additional days for comment on a text change, it can use the same notice and 15 day period to

provide for comment on new material relied on by the agency. This would impose only a minimal additional burden on the agency.

Options

There does appear to be an inconsistency between the letter of existing law and proposed Section 11347.1. There are three basic ways that the inconsistency could be addressed:

(1) Revise proposed Section 11347.1 to conform to the letter of existing law. This would mean affirming that an additional opportunity for comment is *only* required regarding comments that are added after the close of public comment. This would contradict OAL's existing practice.

(2) Leave proposed Section 11347.1 as it is and revise the comment and the preliminary part of the recommendation to indicate that we are making a change to existing law, but codifying existing practice.

(3) Delete proposed Section 11347.1 from the recommendation. We could then take time to solicit further commentary on the issue raised by CEC.

Of these, the staff is inclined to favor option (2). Requiring an agency to provide an opportunity for additional comment regarding any document added to the rulemaking file after the notice of proposed action is published ensures that the public is aware of new material relied on by the agency and imposes only a slight procedural burden. We have already provided ample opportunity to comment on proposed Section 11347.1 and this is the only objection that we have received. What's more, the issue raised by CEC raises a fairly straightforward policy question. It probably makes sense to decide the matter now.

Respectfully submitted,

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