Study N-307 January 10, 2002

Memorandum 2002-4

Administrative Rulemaking: Deferred Issues
(Comments on Tentative Recommendation)

Commission-recommended revisions of the administrative rulemaking procedure were enacted in 2000. See *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 469 (1999); *Improving Access to Rulemaking Information*, 30 Cal. L. Revision Comm'n Reports 517 (2001); 2000 Cal. Stat. ch. 1060. Following that enactment, a small number of new rulemaking issues were raised. Some of those were addressed in cleanup legislation last year. See *Administrative Rulemaking Cleanup*, 30 Cal. L. Revision Comm'n Reports 533 (2001); 2001 Cal. Stat. ch. 141. Others were deferred for later consideration.

In November 2001, the Commission approved circulation of a tentative recommendation relating to the remaining issues. We have received a letter from the Department of Insurance ("Department") commenting on the tentative recommendation. The letter is attached. Issues raised by the Department are discussed below. In addition, this memorandum discusses a minor issue raised by the Fish and Game Commission.

The Commission needs to decide whether to make the tentative recommendation its final recommendation, with any changes necessary to address the issues raised in this memorandum. Assembly Member Wayne has indicated that he will introduce a bill to implement the recommendation if approved.

DEPARTMENT COMMENTS

The Department of insurance is generally supportive of the tentative recommendation. However, they have three concerns, which are discussed below:

Consideration of Alternatives

Government Code Section 11346.2(b) describes the contents of the initial statement of reasons that an agency must prepare as part of the rulemaking process. The proposed law would revise subdivision (b)(3) of that section as follows:

(3)(A) A description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.

(B) A description of ~~any~~ reasonable alternatives ~~the agency has identified or that have otherwise been identified and brought to the attention of the agency~~ to the regulation that would lessen any adverse impact on small business and the agency's reasons for rejecting those alternatives.

(C) It is not the intent of ~~this paragraph~~ subparagraph (A) or (B) to require the agency to artificially construct alternatives or to justify why it has not identified alternatives.

The changes to subdivision (b)(3)(B) are intended to make the language in (b)(3)(A) and (B) more parallel. This was intended to be a nonsubstantive change, except that an agency would be required to provide reasons for rejecting alternatives that would lessen any adverse impact on small business, which they presently are not required to do.

The Department is concerned that the deletions proposed for subdivision (b)(3)(B) would have an undesirable substantive effect (see Exhibit p. 2):

> By mandating that the initial statement of reasons shall include (as the language remaining after the deletions have been made would , in fact require) "reasonable alternatives that would lessen any adverse impact on small business," whether or not any such alternatives actually exist, the revised § 11346.2(b)(3)(B) would appear to force state agencies, at least in some cases, to manufacture artificial alternatives, in spite of subparagraph (C)'s explicit statement that agencies are not intended to be required to do so. In the event an agency declined to invent alternatives, the proposed language would appear to require the agency to explain the omission, for example, by stating that the proposed regulations would have no adverse impact on small business, even though any such requirement would, again, be at odds with subparagraph (c), which specifies that agencies are not to be required to justify the decision not to include alternatives.

The staff does not see how the language in the proposed law gives rise to the problem described. It does not say that alternatives must be described "whether or not any such alternatives actually exist." In fact, subparagraph (C) says the opposite. Nor is there any language that requires an agency to explain why it has not identified alternatives. Again, subparagraph (C) provides that an agency

need not do so. One might argue that language requiring description of reasonable alternatives, without any acknowledgement that there may be no reasonable alternatives, requires that *something* be described, even an unreasonable alternative. However, subparagraph (C) seems to answer that argument directly.

Still, it might be helpful to revise (b)(3)(C) to make clear that it is controlling:

> (C) ~~It is not the intent of this paragraph to require the agency to~~ Notwithstanding subparagraph (A) or (B), an agency is not required to artificially construct alternatives, describe unreasonable alternatives, or ~~to~~ justify why it has not ~~identified~~ described alternatives.

Response to Inquiries

Under existing law, an agency's notice of proposed rulemaking action must include the name and telephone number of an "agency representative" and of a person designated to answer substantive questions "where appropriate." The proposed law revises Section 11346.5(a)(14) & (b) in order to: (1) eliminate the somewhat ambiguous requirement that the name and number of a person who can answer substantive questions be listed, and (2) add language aimed at ensuring that substantive questions are answered promptly. Thus:

> (14) The name and telephone number of the ~~following~~:
> ~~(A) The~~ agency representative and designated backup contact person to whom inquiries concerning the proposed administrative action may be directed.
> ~~(B) An agency person or persons designated to respond to questions on the substance of the proposed regulations, where appropriate~~.
> …
> (b) The agency representative designated in paragraph (14) of subdivision (a) shall make available to the public upon request the express terms of the proposed action. The representative shall also make available to the public upon request the location of public records, including reports, documentation, and other materials, related to the proposed action. If the representative receives an inquiry regarding the substance of the proposed action that the representative cannot answer, the representative shall refer the inquiry to another person in the agency for a prompt response.

The Department raises two issues relating to this language: First, why should the sentence added to subdivision (b) be limited to inquiries regarding the substance of a proposed action? See Exhibit p. 2. This is a good point. The

limitation arose because the provision was drafted as a substitute for direct contact with someone who can answer substantive questions. However, the staff sees no reason why it should be limited in that way. If the agency representative cannot answer a procedural question, it seems appropriate to require that it be referred to another person in the agency for a prompt response. **The staff recommends** that the words "the substance of" be deleted from the proposed revision of subdivision (b), as suggested by the Department.

The Department is also concerned that requiring a prompt response to inquiries would put an unreasonable burden on agencies to answer questions that "cannot be answered because it would be improper or impracticable to answer them." They postulate that "a series of questions could be crafted by design to demand a response that would require an inordinate amount of labor and resources, for the sole purpose of distracting or encumbering the agency, thereby illegitimately obstructing its rulemaking effort." See Exhibit p. 3. The Department proposes adding the word "reasonable" to the sentence being added to subdivision (b), thus:

> If the representative receives ~~an~~ a reasonable inquiry regarding the substance of the proposed action that the representative cannot answer, the representative shall refer the inquiry to another person in the agency for a prompt response.

Keep in mind that the proposed law would also delete the requirement that a contact person be listed to answer substantive questions. The staff of Assembly Member Wright, who authored that provision, has made it clear that the intent was to cut through bureaucracy and improve public access. A provision allowing an agency to ignore an inquiry it deems unreasonable seems contrary to that purpose. All that the proposed language requires is a response. It shouldn't be too burdensome for an agency to at least respond, even if that response is nothing more than a brief statement explaining why the question is unreasonable and cannot be answered. **The staff recommends** against making this proposed change.

FISH AND GAME COMMISSION EXEMPTION

Pursuant to Fish and Game Code Section 202, regulations of the Fish and Game Commission are not subject to the time periods specified in Government Code Sections 11343.4 (effective date of regulation), 11346.4 (period for public

comment regarding proposed regulation), or 11346.8 (period to request hearing; period for additional comment on revised regulation).

Prior to its revision in 2000, Section 11346.8(d) provided:

> 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.

On the Commission's recommendation, Section 11347.1 was added to elaborate the requirement that "adequate provision" be made for public comment. Section 11347.1 provides for a 15-day comment period. If the new comment procedure had been drafted as part of Section 11346.8, the Fish and Game Commission would be exempt from this 15-day comment period. However, because it was added as a new section, which is not within the scope of the Fish and Game Code Section 202 exemption, the 15-day comment period applies.

The decision to draft the detailed procedure as a separate section did not reflect any intention to circumvent the exemption provided in Fish and Game Code Section 202. **The staff recommends** that the Fish and Game Code Section 202 be revised as follows:

> **Fish & Game Code § 202 (amended). Regulations**
>
> 202. The commission shall exercise its powers under this article by regulations made and promulgated pursuant to this article. Regulations adopted pursuant to this article shall not be subject to the time periods for the adoption, amendment, or repeal of regulations prescribed in Sections 11343.4, 11346.4, ~~and~~ 11346.8, and 11347.1 of the Government Code.
>
> **Comment**. Section 202 is amended to make clear that the Fish and Game Commission is not subject to the time period provided in Government Code Section 11347.1. That section merely elaborates the requirements of Government Code Section 11346.8(d).

If this provision is acceptable to the Commission, it can be added to the recommendation.

Respectfully submitted,

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STATE OF CALIFORNIA HARRY W. LOW, *Insurance Commissioner*

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January 2, 2002

SUBJECT: California Law Revision Commission's Tentative Recommendation on Administrative Rulemaking Refinements, dated November 2001

Dear Mr. Hebert:

Thank you for the opportunity to comment and, hopefully, improve upon the Commission's Tentative Recommendation for revisions to the rulemaking provisions of the Government Code. This letter will provide the response of the Department of Insurance to certain proposed changes announced in the Tentative Recommendation with respect to California Government Code, section 11340.85, subdivision (c), paragraph (10) (hereinafter § 11340.85(c)(10)); section 11346.2, subdivision (b), paragraph (3), subparagraph (B) (hereinafter § 11346.2(b)(3)(B)); and section 11346.5, subdivision (b) (hereinafter § 11346.5(b)). The Department commends the Law Revision Commission's sustained effort to refine the rulemaking provisions of the Administrative Procedure Act and submits that the two minor adjustments to the language of the Tentative Recommendation that are outlined in this letter will promote the Commission's objective of bringing rationality and consistency to this area of the law.

§ 11340.85(c)(10)

Even though the statute does not presently require it, the Department's current practice is to post on its website the texts of emergency regulations at the time they are noticed, prior to submittal to the Office of Administrative Law for review and filing. The Commissioner has taken the initiative proactively to web-publish emergency regulations, in furtherance of the Department's larger policy goal of promoting public participation in its rulemaking process. The Department applauds the Law Revision Commission's attempt, by means of the proposed revisions to this section, to foster a similar ethic on the part of other state agencies by prompting them to follow the Commissioner's lead with respect to Internet publishing of emergency regulations.

§ 11346.2(b)(3)(B)

The suggested revisions to this subparagraph may, as indicated in the section of the Tentative Recommendation entitled "Administrative Rulemaking Refinements," cause the language more closely to parallel that of the preceding subparagraph (section 11346.2, subdivision (b), paragraph (3), subparagraph (A)). However, the proposed deletion of both the pronoun "any" preceding "reasonable alternatives" and the

trailing restrictive clause "the agency has identified or that have otherwise been brought to the attention of the agency" amplifies the dissonance between this subparagraph and section 11346.2, subdivision (b), paragraph (3), subparagraph (C) (hereinafter subparagraph (C)).

Subparagraph (C) announces the legislature's intent not "to require the agency to artificially construct alternatives or to justify why it has not identified them." Yet this is precisely the effect of the above-identified deletions. By mandating that the initial statement of reasons shall include (as the language remaining after the deletions have been made would, in fact, require) "reasonable alternatives that would lessen any adverse impact on small business," whether or not any such alternatives actually exist, the revised § 11346.2(b)(3)(B) would appear to force state agencies, at least in some cases, to manufacture artificial alternatives, in spite of subparagraph (C)'s explicit statement that agencies are not intended to be required to do so. In the event an agency declined to invent alternatives, the proposed language would appear to require the agency to explain the omission, for example by stating that proposed regulations would have no adverse impact on small business, even though any such requirement would, again, be at odds with subparagraph (C), which specifies that agencies are not to be required to justify the decision not to include alternatives.

Because the changes to the language of § 11346.2(b)(3)(B) discussed above would worsen rather than improve the problem of inconsistency among the provisions of this section, and would appear to encourage, in some circumstances, the very sort of artificial gesturing on the part of state agencies that is denounced elsewhere in the statute, the Department suggests that the above-identified changes be left out of the Commission's recommendation.

§ 11346.5(b)

More problematic are the revisions to § 11346.5(b), which could be construed to impose a newly created absolute duty on state agencies to answer frivolous or unreasonable inquiries, regardless of how impracticable it might be to do so. The new language would also appear, incongruously, to carve out from the group of inquiries which must be answered the subset of inquiries that consist of questions as to procedure and form, as opposed to substance, no matter how reasonable or how easily answered the inquiry may be.

For these reasons, the Department suggests that the following change be made to the sentence that in the Tentative Recommendation is inserted into § 11346.5(b): "If the representative receives ~~an~~ reasonable inquiry regarding the ~~substance of the~~ proposed action that the representative cannot answer, the representative shall refer the inquiry to another person in the agency for a prompt response." The problem with the language the Commission currently proposes to insert is that it does not admit of the possibility that the cause of an agency representative's inability to answer certain kinds of questions

might be other than ignorance of the substance of proposed regulations; rather, some questions cannot be answered because it would be improper or impracticable to answer them. Indeed, it is conceivable that a series of questions could be crafted by design to demand a response that would require an inordinate amount of labor and resources, for the sole purpose of distracting or encumbering the agency, thereby illegitimately obstructing its rulemaking effort.

Because the language of the Tentative Recommendation could thus furnish cynical or unscrupulous parties a vehicle by which to hamstring, as it were, state agencies so that they would be prevented from efficiently performing their legitimate rulemaking function, and because the statute should require agencies to respond to reasonable questions as to procedure and form, as well as substance, the Commission should adopt the modified language suggested above as part of its final recommendation.

Provided the modifications urged in this letter are ultimately incorporated into the Commission's recommendation for administrative rulemaking refinements, the Department may be in a position to offer its support for the document at that time. Thank you once again for the opportunity to participate in this process.

Sincerely,

George Teekell
Staff Counsel