

## Memorandum 2004-12

**Administrative Rulemaking: Judicial Review of Emergency Rulemaking**

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In 1999 the Commission recommended a number of improvements to the law governing rulemaking by state administrative agencies. See *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n 459 (1999). The Commission's recommendation was implemented in Chapter 1060 of the Statutes of 2000.

The staff recently received a phone call from an attorney concerned about an apparent technical problem in Government Code Section 11346.1, one of the sections amended on the Commission's recommendation.

This memorandum discusses the problem and proposes a solution. All statutory references in the memorandum are to the Government Code.

## OVERVIEW OF RULEMAKING LAW

In order to provide context for the discussion that follows, this section of the memorandum provides a brief overview of the structure of rulemaking law. The rulemaking chapter of the Administrative Procedure Act contains the following articles:

- Article 1. General (§§ 11340-11342.4)
- Article 2. Definitions (§§ 11342.510-11342.610)
- Article 3. Filing and Publication (§§ 11343-11343.8)
- Article 4. The California Code of Regulations, the California Code of Regulations Supplement, and the California Regulatory Notice Register (§§ 11344-11345)
- Article 5. Public Participation: Procedure for Adoption of Regulations (§§ 11346-11348)
- Article 6. Review of Proposed Regulations (§§ 11349-11349.6)
- Article 7. Review of Existing Regulations (§§ 11349.7-11349.9)
- Article 8. Judicial Review (§§ 11350-11350.3)
- Article 9. Special Procedures (§§ 11351-11361)

The meat of the chapter is in Article 5, which sets out the fairly elaborate public notice and comment rulemaking procedure, and Article 6, which provides for review of proposed regulations by the Office of Administrative Law ("OAL").

OAL reviews regulations for compliance with procedure and with specified substantive criteria. See Section 11349 (criteria defined).

Articles 1 and 2 govern general matters. Articles 3 and 4 relate to the printing of regulations and rulemaking notices in official state publications, and the filing of regulations with the Secretary of State. Article 7 provides mechanisms for OAL review and possible repeal of regulations in certain unusual circumstances. Article 8 provides rules for judicial review of regulations. Article 9 provides special agency-specific exceptions to the general rules.

#### JUDICIAL REVIEW OF EMERGENCY REGULATIONS

Section 11346.1 provides a special expedited procedure for the emergency adoption, amendment, or repeal of a regulation — an “emergency regulation.” Subdivision (a) of that section provides:

11346.1. (a) The adoption, amendment, or repeal of an emergency regulation is not subject to any provision of this chapter except this section and Section 11349.6.

The attorney who contacted the staff wondered whether that language precludes judicial review of an emergency regulation under Section 11350.

The answer isn’t entirely clear. Read literally, the section specifies what law governs the *adoption, amendment, or repeal* of an emergency regulation. It governs the emergency rulemaking *process*, rather than the *result* of that process. Strictly speaking, judicial review of a regulation is not a part of the rulemaking process. It occurs, if at all, after rulemaking is complete. Under that reading, Section 11346.1(a) does not affect the application of Section 11350.

However, the distinction between the rulemaking process and the result of that process is a fine one. To a reader who does not draw that distinction, Section 11346.1(a) would appear to preclude application of Section 11350 to an emergency regulation. This is a problem because Section 11350 includes language that specifically refers to judicial review of an emergency regulation. This creates an apparent inconsistency between Sections 11346.1(a) and 11350.

To the extent that there is an inconsistency, it should be resolved in favor of Section 11350 — emergency regulations should be subject to judicial review under that section. Section 11350 was intended to govern judicial review of an emergency regulation and it includes rules specific to that purpose (e.g., it provides that an emergency regulation is invalid if the statement justifying use of

the emergency rulemaking procedure does not meet the statutory standard for an emergency).

#### OTHER PROVISIONS

The potential problem of inconsistency with Section 11346.1(a) is not limited to Section 11350. The staff has identified four other sections of the rulemaking chapter that specifically apply to an emergency regulation but are not listed in Section 11346.1(a). See Sections 11340.85(c)(10) (website publication of emergency regulation), 11343 (filing regulation with Secretary of State), 11344.1(a)(3) (publication of emergency regulation decisions in California Regulatory Notice Register), 11349.5(e) (gubernatorial review of emergency regulation decisions), 11350.3 (judicial review of emergency regulation decisions).

In addition, there are a number of general rulemaking provisions that should also apply to an emergency regulation. See, e.g., §§ 11340.9 (exemptions from rulemaking requirements), 11342.2 (standard for validity of administrative regulation), 11342.510-11342.610 (definitions). Section 11346.1(a) could be read as precluding application of these provisions to emergency regulations.

#### RECOMMENDATION

The staff recommends that Section 11346.1(a) be revised to read as follows:

11346.1. (a) The adoption, amendment, or repeal of an emergency regulation is not subject to any provision of this chapter ~~except this section and Section~~ article or Article 6 (commencing with Section 11349) except Sections 11346.1, 11349.5, and 11349.6.

**Comment.** Subdivision (a) of Section 11346.1 is amended to make clear that the exemption of emergency rulemaking from the requirements of this chapter only applies to the procedures provided in this article and in Article 6 (commencing with Section 11349). Former subdivision (a) could be read to preclude application of a number of sections that should apply to an emergency regulation. See, e.g., Sections 11340.85(c)(10) (Internet publication of emergency regulation), 11343 (filing regulation with Secretary of State), 11344.1(a)(3) (publication of emergency regulation decisions in California Regulatory Notice Register), 11350 (judicial review of emergency regulation), 11350.3 (judicial review of emergency regulation decisions).

Under this approach, the only sections precluded are those that make up the Article 5 procedure for non-emergency rulemaking and the Article 6 procedure

for OAL review of a non-emergency regulation. The proposed language would not preclude application of any of the sections described earlier in the memorandum.

Nor would it preclude application of any of the other provisions of Articles 1-4 and 7-9 of the rulemaking chapter. That should not be a problem. Most of those provisions are not relevant to emergency regulations. Those that would be relevant to an emergency regulation appear to be harmless or beneficial in their application. The Commission should specifically request public comment on whether application of Articles 1-4 and 7-9 to an emergency regulation would create any problems.

On a related point, the staff discovered a typographical error in Section 11350(a), which was introduced in the legislation that implemented the Commission's recommendation. If the Commission decides to recommend a revision to Section 11346.1, the error in Section 11350(a) could be corrected at the same time, as follows:

11350 (a) Any interested person may obtain a judicial declaration as to the validity of any regulation or order ~~or~~ of repeal by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure....

**Comment.** Subdivision (a) of Section 11350 is amended to correct a typographical error.

A staff draft tentative recommendation implementing the recommended changes is attached. The staff recommends that it be circulated for comment.

Respectfully submitted,

Brian Hebert  
Assistant Executive Secretary

## EMERGENCY RULEMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT

1 The Administrative Procedure Act governs the adoption, amendment, or repeal  
2 of a state agency regulation.<sup>1</sup> Under specified emergency conditions, an expedited  
3 rulemaking procedure replaces the regular procedure.<sup>2</sup>

4 Government Code Section 11346.1 provides that the adoption, amendment, or  
5 repeal of an emergency regulation is not subject to any provision of the  
6 rulemaking chapter other than Sections 11346.1 (emergency rulemaking  
7 procedure) and 11346.9 (Office of Administrative Law review of proposed  
8 emergency regulation).<sup>3</sup>

9 The exemption provided in Section 11346.1 is too broad. It could be read to  
10 preclude the application of a number of provisions that should govern emergency  
11 rulemaking.<sup>4</sup> The Commission recommends that Section 11346.1 be amended to  
12 refine the scope of the emergency rulemaking exemption.

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1. See Gov't Code §§ 11340-11361

2. See Gov't Code § 11346.1.

3. See Gov't Code § 11346.1(a).

4. See, e.g., Gov't Code §§ 11340.85(c)(10) (Internet publication of emergency regulation), 11343 (filing of regulation with Secretary of State), 11344.1(a)(3) (publication of emergency regulation decisions in California Regulatory Notice Register), 11349.5 (gubernatorial review of emergency rulemaking decisions), 11350 (judicial review of emergency regulation).



## PROPOSED LEGISLATION

1 **Gov't Code § 11346.1 (amended). Emergency rulemaking**

2 SECTION 1. Section 11346.1 of the Government Code is amended to read:

3 11346.1. (a) The adoption, amendment, or repeal of an emergency regulation is  
4 not subject to any provision of this chapter ~~except this section and Section article~~  
5 or Article 6 (commencing with Section 11349) except Sections 11346.1, 11349.5,  
6 and 11349.6.

7 (b) Except as provided in subdivision (c), if a state agency makes a finding that  
8 the adoption of a regulation or order of repeal is necessary for the immediate  
9 preservation of the public peace, health and safety or general welfare, the  
10 regulation or order of repeal may be adopted as an emergency regulation or order  
11 of repeal.

12 Any finding of an emergency shall include a written statement which contains  
13 the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of  
14 Section 11346.5 and a description of the specific facts showing the need for  
15 immediate action. The enactment of an urgency statute shall not, in and of itself,  
16 constitute a need for immediate action.

17 The statement and the regulation or order of repeal shall be filed immediately  
18 with the office.

19 (c) Notwithstanding any other provision of law, no emergency regulation that is  
20 a building standard shall be filed, nor shall the building standard be effective,  
21 unless the building standard is submitted to the California Building Standards  
22 Commission, and is approved and filed pursuant to Sections 18937 and 18938 of  
23 the Health and Safety Code.

24 (d) The emergency regulation or order of repeal shall become effective upon  
25 filing or upon any later date specified by the state agency in a written instrument  
26 filed with, or as a part of, the regulation or order of repeal.

27 (e) No regulation, amendment, or order of repeal adopted as an emergency  
28 regulatory action shall remain in effect more than 120 days unless the adopting  
29 agency has complied with Sections 11346.2 to 11347.3, inclusive, either before  
30 adopting an emergency regulation or within the 120-day period. The adopting  
31 agency, prior to the expiration of the 120-day period, shall transmit to the office  
32 for filing with the Secretary of State the adopted regulation, amendment, or order  
33 of repeal, the rulemaking file, and a certification that Sections 11346.2 to 11347.3,  
34 inclusive, were complied with either before the emergency regulation was adopted  
35 or within the 120-day period.

36 (f) In the event an emergency amendment or order of repeal is filed and the  
37 adopting agency fails to comply with subdivision (e), the regulation as it existed  
38 prior to the emergency amendment or order of repeal shall thereupon become

1 effective and after notice to the adopting agency by the office shall be reprinted in  
2 the California Code of Regulations.

3 (g) In the event a regulation is originally adopted and filed as an emergency and  
4 the adopting agency fails to comply with subdivision (e), this failure shall  
5 constitute a repeal thereof and after notice to the adopting agency by the office,  
6 shall be deleted.

7 (h) The office shall not file an emergency regulation with the Secretary of State  
8 if the emergency regulation is the same as or substantially equivalent to an  
9 emergency regulation previously adopted by that agency, unless the director  
10 expressly approves the agency's readoption of the emergency regulation.

11 **Comment.** Subdivision (a) of Section 11346.1 is amended to make clear that the exemption of  
12 emergency rulemaking from the requirements of this chapter only applies to the procedures  
13 provided in this article and in Article 6 (commencing with Section 11349). Former subdivision (a)  
14 could be read to preclude application of a number of sections that should apply to an emergency  
15 regulation. See, e.g., Sections 11340.85(c)(10) (Internet publication of emergency regulation),  
16 11343 (filing regulation with Secretary of State), 11344.1(a)(3) (publication of emergency  
17 regulation decisions in California Regulatory Notice Register), 11350 (judicial review of  
18 emergency regulation), 11350.3 (judicial review of emergency regulation decisions).

19 ☞ **Note.** The proposed change to Section 11346.1(a) would narrow the scope of the exemption  
20 of emergency regulations from application of the rulemaking chapter. The Commission believes  
21 that the proposed change is technical and nonsubstantive. Many of the provisions of the  
22 rulemaking chapter are not relevant to emergency rulemaking. The provisions that are relevant  
23 to emergency rulemaking already appear, from their context or express terms, to govern emergency  
24 rulemaking. The Commission invites public comment on whether the proposed amendment  
25 would create any substantive change in the law.

26 **Gov't Code § 11350 (amended). Judicial review**

27 SEC. 2. Section 11350 of the Government Code is amended to read:

28 11350. (a) Any interested person may obtain a judicial declaration as to the  
29 validity of any regulation or order ~~or~~ of repeal by bringing an action for  
30 declaratory relief in the superior court in accordance with the Code of Civil  
31 Procedure. The right to judicial determination shall not be affected by the failure  
32 either to petition or to seek reconsideration of a petition filed pursuant to Section  
33 11340.7 before the agency promulgating the regulation or order of repeal. The  
34 regulation or order of repeal may be declared to be invalid for a substantial failure  
35 to comply with this chapter, or, in the case of an emergency regulation or order of  
36 repeal, upon the ground that the facts recited in the statement prepared pursuant to  
37 subdivision (b) of Section 11346.1 do not constitute an emergency within the  
38 provisions of Section 11346.1.

39 (b) In addition to any other ground that may exist, a regulation or order of repeal  
40 may be declared invalid if either of the following exists:

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

1 (2) The agency declaration pursuant to paragraph (8) of subdivision (a) of  
2 Section 11346.5 is in conflict with substantial evidence in the record.

3 (c) The approval of a regulation or order of repeal by the office or the  
4 Governor's overruling of a decision of the office disapproving a regulation or  
5 order of repeal shall not be considered by a court in any action for declaratory  
6 relief brought with respect to a regulation or order of repeal.

7 (d) In a proceeding under this section, a court may only consider the following  
8 evidence:

9 (1) The rulemaking file prepared under Section 11347.3.

10 (2) The written statement prepared pursuant to subdivision (b) of Section  
11 11346.1.

12 (3) An item that is required to be included in the rulemaking file but is not  
13 included in the rulemaking file, for the sole purpose of proving its omission.

14 (4) Any evidence relevant to whether a regulation used by an agency is required  
15 to be adopted under this chapter.

16 **Comment.** Subdivision (a) of Section 11350 is amended to correct a typographical error.