

First Supplement to Memorandum 2004-12

Administrative Rulemaking: Judicial Review of Emergency Rulemaking

Memorandum 2004-12 proposes an amendment to Government Code Section 11346.1, to make clear which provisions of rulemaking law govern emergency rulemaking (with an initial emphasis on whether an emergency regulation is subject to judicial review under Section 11350). In exploring that issue, the staff noted a typographical error in Section 11350, which is corrected in the proposed law.

The staff has since received a suggestion for another nonsubstantive change to Section 11350. That suggestion is discussed below. All statutory references in this memorandum are to the Government Code. All italics are added for emphasis.

“Statement” v. “Description”

Existing Section 11346.1(b) requires that an agency make a finding of emergency in order to justify use of the emergency rulemaking procedure, and describes the contents of the required finding:

Any finding of an emergency shall include a *written statement* which contains the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of Section 11346.5 and a *description* of the specific facts showing the need for immediate action.

In other words, the finding of emergency consists of two parts, a statement (which sets out certain information about the proposed regulation) and a description (which documents the circumstances justifying use of the emergency rulemaking procedure).

Judicial Review of “Statement”

The provision for judicial review of an emergency regulation refers only to the “statement” prepared under Section 11346.1. Section 11350(a) provides in part:

The regulation or order of repeal may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case

of an emergency regulation or order of repeal, upon the ground that the facts recited in the *statement* prepared pursuant to subdivision (b) of Section 11346.1 do not constitute an emergency within the provisions of Section 11346.1.

Section 11350(d)(2) provides:

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

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

The Problem

The attorney who raised the issue discussed in this memorandum is concerned that use of the term “statement” in Section 11350 could be confusing. A reader might conclude that it is only the statement part of the finding that is subject to judicial review, and not the description part of the finding. This is clearly not the intended meaning. Section 11350 provides for invalidation of an emergency regulation if the “facts recited” by the agency “do not constitute an emergency” under Section 11346.1. In order to conduct such a review a court must review the description part of the agency’s finding, for it is only the description that addresses the existence of an emergency.

Possible Solution

A simple way to avoid confusion would be to amend Section 11350 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. The right to judicial determination shall not be affected by the failure either to petition or to seek reconsideration of a petition filed pursuant to Section 11340.7 before the agency promulgating the regulation or order of repeal. The regulation or order of repeal may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order of repeal, upon the ground that the facts recited in the statement finding of emergency prepared pursuant to subdivision (b) of Section 11346.1 do not constitute an emergency within the provisions of Section 11346.1.

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

...
(2) The ~~written statement~~ finding of emergency prepared pursuant to subdivision (b) of Section 11346.1.

...
Comment. Subdivision (a) of Section 11350 is amended to correct a typographical error. Subdivisions (a) and (d)(2) are amended to make clear that it is the entire finding of emergency that is subject to review, and not just the “written statement” that is required as part of the finding of emergency. See Section 11346.1(b). These are nonsubstantive changes.

This approach uses the broad term “finding of emergency,” which would encompass both the “statement” and the “description.”

Conclusion

There is a potentially confusing incongruity between the language used in Sections 11346.1 and 11350. We are already proposing to amend Section 11350 for purely technical reasons. It would be a simple matter to include this change in the proposed law as well. The staff sees no harm in doing so.

Respectfully submitted,

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