Emergency Rulemaking Under the Administrative Procedure Act

February 2004

This tentative recommendation is being distributed so that interested persons will be advised of the Commission’s tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN April 30, 2004.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.
SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation would make clear which provisions of administrative rulemaking law apply when an agency is using the emergency rulemaking procedure provided in Government Code Section 11346.1. The proposed law would also make nonsubstantive technical improvements to Government Code Section 11350.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.
EMERGENCY RULEMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act governs the adoption, amendment, or repeal of a state agency regulation. Under specified emergency conditions, an expedited rulemaking procedure replaces the regular procedure. Government Code Section 11346.1 provides that the adoption, amendment, or repeal of an emergency regulation is not subject to any provision of the rulemaking chapter other than Sections 11346.1 (emergency rulemaking procedure) and 11346.9 (Office of Administrative Law review of proposed emergency regulation).

The exemption provided in Section 11346.1 is too broad. It could be read to preclude the application of a number of provisions that should govern emergency rulemaking. The Commission recommends that Section 11346.1 be amended to refine the scope of the emergency rulemaking exemption.

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

Gov’t Code § 11346.1 (amended). Emergency rulemaking

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

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.

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

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. The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action.

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

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

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

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

(f) In the event an emergency amendment or order of repeal is filed and the adopting agency fails to comply with subdivision (e), the regulation as it existed prior to the emergency amendment or order of repeal shall thereupon become
effective and after notice to the adopting agency by the office shall be reprinted in
the California Code of Regulations.

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

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

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).

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

Gov’t Code § 11350 (amended). Judicial review

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

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.

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

(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 made specific by the regulation is not
supported by substantial evidence.
(2) The agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5 is in conflict with substantial evidence in the record.

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

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

(1) The rulemaking file prepared under Section 11347.3.

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

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

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

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.