

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

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.

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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

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

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).³

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.⁴ The Commission recommends that Section 11346.1 be amended to
12 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

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 finding of emergency
37 prepared pursuant to subdivision (b) of Section 11346.1 do not constitute an
38 emergency within the 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~~ finding of emergency prepared pursuant to subdivision
11 (b) of Section 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.
17 Subdivisions (a) and (d)(2) are amended to make clear that it is the entire finding of emergency
18 that is subject to review, and not just the "written statement" that is required as part of the finding
19 of emergency. See Section 11346.1(b). These are nonsubstantive changes.