

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

## **Administrative Rulemaking Refinements**

February 2002

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

**NOTE**

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Administrative Rulemaking Refinements*, 31 Cal. L. Revision Comm'n Reports 259 (2001). This is part of publication #212 [*2001-2002 Recommendations*].

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CALIFORNIA LAW REVISION COMMISSION

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February 11, 2002

To: The Honorable Gray Davis  
*Governor of California*, and  
The Legislature of California

The Law Revision Commission has previously proposed a number of improvements to the law governing rulemaking by state administrative agencies. This recommendation proposes additional refinements, which include the following:

- Clarification of the requirement that an agency consider reasonable alternatives to a proposed rulemaking action.
- Clarification of the requirement that an agency answer substantive inquiries regarding a proposed rulemaking action.
- Revision of the existing Internet publication requirement, to require posting of the text of a proposed emergency rulemaking action and to specify when and for how long documents must be posted.

This recommendation is submitted pursuant to Resolution Chapter 78 of the Statutes of 2001.

Respectfully submitted,

Joyce G. Cook  
*Chairperson*



## ADMINISTRATIVE RULEMAKING REFINEMENTS

The Law Revision Commission has recommended a number of reforms of the law governing rulemaking by state administrative agencies.<sup>1</sup> Most of these recommendations have been enacted into law.<sup>2</sup> This recommendation addresses rulemaking issues not previously considered by the Commission.

### Description of Alternatives

Existing law requires that an agency describe reasonable alternatives to a rulemaking action it is proposing, as well as separately describing reasonable alternatives that would lessen any adverse impact on small business.<sup>3</sup> However, an agency is not required “to artificially construct alternatives or to justify why it has not identified alternatives.”<sup>4</sup> Although this limitation on the duty to describe alternatives appears to apply to both types of “reasonable alternatives,” there is some ambiguity on this point. The proposed law would redraft the limitation provision to make its application clear. The proposed law would also revise the provision requiring a description of alternatives that would lessen any adverse impact on small business so that it more closely parallels the provision requiring a description of reasonable alternatives generally.

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1. See *Administrative Rulemaking: Consent Regulations and other Noncontroversial Regulations*, 28 Cal. L. Revision Comm’n Reports 625 (1998); *Administrative Rulemaking: Advisory Interpretations*, 28 Cal. L. Revision Comm’n Reports 657 (1998); *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); *Administrative Rulemaking Cleanup*, 30 Cal. L. Revision Comm’n Reports 533 (2001); *Rulemaking Under Penal Code Section 5058*, 30 Cal. L. Revision Comm’n Reports 545 (2001).

2. See 2000 Cal. Stat. ch. 1060; 2001 Cal. Stat. ch. 59; 2001 Cal. Stat. ch. 141.

3. Gov’t Code § 11346.2(b)(3).

4. *Id.*

### **Designation of Agency Representative**

Existing law requires that the notice of proposed rulemaking action designate an agency representative to whom inquiries regarding the proposed rulemaking action may be directed, and, “where appropriate,” designate a person to respond to substantive questions regarding the proposed rulemaking action.<sup>5</sup> It is not clear whether the phrase “where appropriate” vests discretion in the rulemaking agency to determine whether to designate a substantive contact. This ambiguity may lead to disputes where an agency has decided that designation of a substantive contact is not appropriate. The proposed law would delete the ambiguous provision and add a new provision requiring that any question that an agency representative cannot answer be referred to another person in the agency for a prompt response.

### **Internet Publication**

Existing law requires that an agency that maintains an Internet Web site publish certain rulemaking documents.<sup>6</sup> The proposed law would expand this requirement to include publication of: (1) the text of a proposed emergency rulemaking action, and (2) the date the proposed emergency rulemaking action is submitted to the Office of Administrative Law. Existing law provides a very abbreviated opportunity for public comment regarding an emergency rulemaking action.<sup>7</sup> Internet posting of information regarding a proposed emergency rulemaking action would enhance the opportunity for public review and comment, without significantly delaying the emergency rulemaking process.

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5. Gov’t Code § 11346.5(a)(14).

6. Gov’t Code § 11340.85(c).

7. See Section 11349.6 (review of emergency regulation), 1 Cal. Code Regs. § 55 (public comments regarding emergency regulation).

Existing law does not specify when or for how long rulemaking documents must be posted on the Internet. The proposed law would require that rulemaking documents be posted within a reasonable time after issuance and remain posted until at least 15 days after the rulemaking process has been completed.

### **Fish and Game Commission**

Existing law exempts the Fish and Game Commission from the time periods that ordinarily apply to the rulemaking procedure.<sup>8</sup> On the Law Revision Commission's recommendation, a new time period was added to the rulemaking procedure.<sup>9</sup> At that time, the Law Revision Commission was unaware of the Fish and Game Commission's special exemption and did not recommend expansion of that exemption to cover the new time period. The proposed law would correct this oversight.

### **Technical Revisions**

The tentative recommendation also includes a small number of technical, nonsubstantive revisions.<sup>10</sup>

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8. Fish & Game Code § 202.

9. Gov't Code § 11347; 2000 Cal. Stat. ch. 1060, § 28.

10. See proposed amendments to Gov't Code §§ 11343(f), 11346.5(a)(7)(C), 11347.6, *infra*.





## PROPOSED LEGISLATION

### **Fish & Game Code § 202 (amended). Regulations**

SECTION 1. Section 202 of the Fish and Game Code is amended to read:

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).

### **Gov't Code § 11340.85 (amended). Electronic communications**

SEC. 2. Section 11340.85 of the Government Code is amended to read:

11340.85. (a) As used in this section, “electronic communication” includes electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication.

(b) Notwithstanding any other provision of this chapter that refers to mailing or to oral or written communication:

(1) An agency may permit and encourage use of electronic communication, but may not require use of electronic communication.

(2) An agency may publish or distribute a document required by this chapter or by a regulation implementing this chapter by means of electronic communication, but shall not make that the exclusive means by which the document is published or distributed.

(3) A notice required or authorized by this chapter or by a regulation implementing this chapter may be delivered to a person by means of electronic communication if the person has expressly indicated a willingness to receive the notice by means of electronic communication.

(4) A comment regarding a regulation may be delivered to an agency by means of electronic communication.

(5) A petition regarding a regulation may be delivered to an agency by means of electronic communication if the agency has expressly indicated a willingness to receive a petition by means of electronic communication.

(c) An agency that maintains an Internet Web site or other similar forum for the electronic publication or distribution of written material shall publish on that Web site or other forum information regarding a proposed regulation or regulatory repeal or amendment, that includes, but is not limited to, the following:

(1) Any public notice required by this chapter or by a regulation implementing this chapter.

(2) The initial statement of reasons prepared pursuant to subdivision (b) of Section 11346.2.

(3) The final statement of reasons prepared pursuant to subdivision (a) of Section 11346.9.

(4) Notice of a decision not to proceed prepared pursuant to Section 11347.

(5) The text of a proposed action or instructions on how to obtain a copy of the text.

(6) A statement of any decision made by the office regarding a proposed action.

(7) The date a rulemaking action is filed with the Secretary of State.

(8) The effective date of a rulemaking action.

(9) A statement to the effect that a business or person submitting a comment regarding a proposed action has the right to request a copy of the final statement of reasons.

*(10) The text of a proposed emergency adoption, amendment, or repeal of a regulation pursuant to Section 11346.1 and the date it was submitted to the office for review and filing.*

*(d) A document that is required to be posted pursuant to subdivision (c) shall be posted within a reasonable time after issuance of the document and shall remain posted until at least 15 days after (1) the rulemaking action is filed with the Secretary of State, or (2) notice of a decision not to proceed is published pursuant to Section 11347.* Publication under subdivision (c) supplements any other required form of publication or distribution. Failure to comply with this section is not grounds for disapproval of a proposed regulation. Subdivision (c) does not require an agency to establish or maintain a Web site or other forum for the electronic publication or distribution of written material.

(e) Nothing in this section precludes the office from requiring that the material submitted to the office for publication in the California Code of Regulations or the California Regulatory Notice Register be submitted in electronic form.

(f) This section is intended to make the regulatory process more user-friendly and to improve communication between interested parties and the regulatory agencies.

**Comment.** Subdivision (c) of Section 11340.85 is amended to extend the existing Internet publication requirement to include the text of a proposed emergency rulemaking action. See Section 11349.6 (review of emergency regulation), 1 Cal. Code Regs. § 55 (public comments regarding emergency regulation).

Subdivision (d) is amended to specify when and for how long a document must be posted under subdivision (c).

**Gov't Code § 11343 (amended). Transmission and filing**

SEC. 3. Section 11343 of the Government Code is amended to read:

11343. Every state agency shall:

(a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one that is a building standard.

(b) Transmit to the office for filing with the Secretary of State a certified copy of every order of repeal of a regulation required to be filed under subdivision (a).

(c) Deliver to the office, at the time of transmittal for filing a regulation or order of repeal six duplicate copies of the regulation or order of repeal, together with a citation of the authority pursuant to which it or any part thereof was adopted.

(d) Deliver to the office a copy of the notice of proposed action required by Section 11346.4.

(e) Transmit to the California Building Standards Commission for approval a certified copy of every regulation, or order of repeal of a regulation, that is a building standard, together with a citation of authority pursuant to which it or any part thereof was adopted, a copy of the notice of proposed action required by Section 11346.4, and any other records prescribed by the State Building Standards Law (Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code).

(f) Whenever a certification is required by this section, it shall be made by the head of the state agency ~~or his or her~~ designee ~~which~~ *that* is adopting, amending, or repealing the regulation, *or by a designee of the agency head*, and the certification and delegation shall be in writing.

**Comment.** Subdivision (f) of Section 11343 is amended to reflect the fact that the head of an agency may be its governing body, rather than an individual officer. This is a technical, nonsubstantive change.

**Gov't Code § 11346.2 (amended). Documents submitted to Office of Administrative Law**

SEC. 4. Section 11346.2 of the Government Code is amended to read:

11346.2. Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:

(a) A copy of the express terms of the proposed regulation.

(1) The agency shall draft the regulation in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style. The agency shall draft the regulation in plain English.

(2) The agency shall include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations.

(3) The agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.

(b) An initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. This statement of reasons shall include, but not be limited to, all of the following:

(1) A statement of the specific purpose of each adoption, amendment, or repeal and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose for which it is proposed. Where the adoption or amendment of a regulation would mandate the use of specific technologies or equipment, a statement of the reasons why the agency believes these mandates or prescriptive standards are required.

(2) An identification of each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation.

(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. It is not the intent of this paragraph to require the agency to~~

*(C) 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.*

(4) Facts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse economic impact on business.

(5) A department, board, or commission within the Environmental Protection Agency, the Resources Agency, or the Office of the State Fire Marshal shall describe its efforts, in connection with a proposed rulemaking action, to avoid unnecessary duplication or conflicts with federal regulations contained in the Code of Federal Regulations addressing the same issues. These agencies may adopt regulations different from federal regulations contained in the Code of Federal Regulations addressing the same issues upon a finding of one or more of the following justifications:

(A) The differing state regulations are authorized by law.

(B) The cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment.

(c) A state agency that adopts or amends a regulation mandated by federal law or regulations, the provisions of which are identical to a previously adopted or amended federal regulation, shall be deemed to have complied with subdivision (b) if a statement to the effect that a federally mandated regulation or amendment to a regulation is being proposed, together with a citation to where an explanation of the provisions of the regulation can be found, is included in the notice of proposed adoption or amendment prepared pursuant to Section 11346.5. However, the agency shall comply fully with this chapter with respect to any provisions in the regulation that the agency proposes to adopt or amend that are different from the corresponding provisions of the federal regulation.

**Comment.** Subdivision (b)(3) of Section 11346.2 is amended to make clear that the former second sentence of subdivision (b)(3)(B) applies to subdivision (b)(3)(A) and (B). This is a technical, nonsubstantive change. Subdivision (b)(3)(B) is amended to more closely conform to subdivision (b)(3)(A). This is a nonsubstantive change except that an agency is now required to give reasons for rejecting reasonable alternatives that would lessen any adverse impact on small business.

**Gov't Code § 11346.5 (amended). Notice of proposed rulemaking action**

SEC. 5. Section 11346.5 of the Government Code is amended to read:

11346.5. (a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:

(1) A statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation.

(2) Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

(3) An informative digest drafted in plain English in a format similar to the Legislative Counsel's digest on legislative bills. The informative digest shall include the following:

(A) A concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and of the effect of the proposed action.

(B) If the proposed action differs substantially from an existing comparable federal regulation or statute, a brief description of the significant differences and the full citation of the federal regulations or statutes.

(C) A policy statement overview explaining the broad objectives of the regulation and, if appropriate, the specific objectives.

(4) Any other matters as are prescribed by statute applicable to the specific state agency or to any specific regulation or class of regulations.

(5) A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4.

(6) An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state.

For purposes of this paragraph, "cost or savings" means additional costs or savings, both direct and indirect, that a



public agency necessarily incurs in reasonable compliance with regulations.

(7) If a state agency, in proposing to adopt, amend, or repeal any administrative regulation, makes an initial determination that the action may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, it shall include the following information in the notice of proposed action:

(A) Identification of the types of businesses that would be affected.

(B) A description of the projected reporting, recordkeeping, and other compliance requirements that would result from the proposed action.

(C) The following statement: “The (name of agency) has made an initial determination that the (adoption/amendment/repeal) of this regulation may have a significant, *statewide* adverse economic impact ~~on businesses~~ *directly affecting business*, including the ability of California businesses to compete with businesses in other states. The (name of agency) (has/has not) considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:

(i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.

(ii) Consolidation or simplification of compliance and reporting requirements for businesses.

(iii) The use of performance standards rather than prescriptive standards.

(iv) Exemption or partial exemption from the regulatory requirements for businesses.”

(8) If a state agency, in adopting, amending, or repealing any administrative regulation, makes an initial determination that the action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action. In making this declaration, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support its initial determination.

An agency's initial determination and declaration that a proposed adoption, amendment, or repeal of a regulation may have or will not have a significant, adverse impact on businesses, including the ability of California businesses to compete with businesses in other states, shall not be grounds for the office to refuse to publish the notice of proposed action.

(9) A description of all cost impacts, known to the agency at the time the notice of proposed action is submitted to the office, that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

If no cost impacts are known to the agency, it shall state the following:

“The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.”

(10) A statement of the results of the assessment required by subdivision (b) of Section 11346.3.

(11) The finding prescribed by subdivision (c) of Section 11346.3, if required.

(12) A statement that the action would have a significant effect on housing costs, if a state agency, in adopting, amending, or repealing any administrative regulation, makes

an initial determination that the action would have that effect. In addition, the agency officer designated in paragraph (14), shall make available to the public, upon request, the agency's evaluation, if any, of the effect of the proposed regulatory action on housing costs.

(13) A statement that the adopting agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

(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.~~

(15) The date by which comments submitted in writing must be received to present statements, arguments, or contentions in writing relating to the proposed action in order for them to be considered by the state agency before it adopts, amends, or repeals a regulation.

(16) Reference to the fact that the agency proposing the action has prepared a statement of the reasons for the proposed action, has available all the information upon which its proposal is based, and has available the express terms of the proposed action, pursuant to subdivision (b).

(17) A statement that if a public hearing is not scheduled, any interested person or his or her duly authorized representative may request, no later than 15 days prior to the close of the written comment period, a public hearing pursuant to Section 11346.8.

(18) A statement indicating that the full text of a regulation changed pursuant to Section 11346.8 will be available for at least 15 days prior to the date on which the agency adopts, amends, or repeals the resulting regulation.

(19) A statement explaining how to obtain a copy of the final statement of reasons once it has been prepared pursuant to subdivision (a) of Section 11346.9.

(20) If the agency maintains an Internet website or other similar forum for the electronic publication or distribution of written material, a statement explaining how materials published or distributed through that forum can be accessed.

(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 proposed action that the representative cannot answer, the representative shall refer the inquiry to another person in the agency for a prompt response.*

(c) This section shall not be construed in any manner that results in the invalidation of a regulation because of the alleged inadequacy of the notice content or the summary or cost estimates, or the alleged inadequacy or inaccuracy of the housing cost estimates, if there has been substantial compliance with those requirements.

**Comment.** Subdivision (a)(7)(C) of Section 11346.5 is amended to conform to the language used in the introductory paragraph of subdivision (a)(7). This is a technical, nonsubstantive change.

Subdivisions (a)(14) and (b) are amended to require that inquiries received by an agency representative be answered promptly, either by the agency representative or by another person in the agency.

**Gov't Code § 11347.6 (amended). Comments of specified agencies**

SEC. 6. Section 11347.6 of the Government Code is amended to read:

11347.6. Each state agency that adopts regulations shall, in the final statement of reasons, separately identify comments made by the Office of Small Business Advocate and the *Technology, Trade, and Commerce Agency* pursuant to subdivision (e) of Section 15363.6 and respond to each and every comment made by that office or agency directed at the proposed action or at the procedures followed by the agency in proposing or adopting the action, including providing a basis for why those comments were rejected, if applicable.

**Comment.** Section 11347.6 is amended to update the reference to the *Technology, Trade and Commerce Agency*. See Section 15310.1. This is a technical, nonsubstantive change.

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