

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Emergency Rulemaking Under the
Administrative Procedure Act

June 2004

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. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

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June 10, 2004

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

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.

Respectfully submitted,

Frank Kaplan
Chairperson

EMERGENCY RULEMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT

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

Existing law 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).³ That exemption is too broad. It could be read to preclude the application of a number of provisions that clearly should apply to emergency rulemaking.⁴ The Commission recommends that Section 11346.1 be revised to correctly state the scope of the emergency rulemaking exemption.

The proposed law would also make minor nonsubstantive improvements to the law governing judicial review of an emergency regulation.

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 this section and Sections 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).

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.
