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CALIFORNIA LEGISLATURE—2005—06 REGULAR SESSION

ASSEMBLY BILL

No. 1302

Introduced by Assembly Member Jerome Horton

February 22, 2005

An act to amend Sections 11340.85, 11346.1, 11349.6, and 11350 of, and to add Section 11342.545 to, the Government Code, and to amend Section 5058.3 of the Penal Code, relating to state agencies.

LEGISLATIVE COUNSEL'S DIGEST

AB 1302, as amended, Jerome Horton. Office of Administrative Law: regulations.

Existing law provides that, 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. Under existing law, a regulation, amendment, or order of repeal adopted as an emergency

regulation remains in effect no more than 120 days unless the adopting agency and the Office of Administrative Law comply with certain requirements.

This bill would require an agency that is adopting an emergency regulation to send, at least 5 working days prior to submission of an emergency regulation to the office, a notice of proposed emergency action to every person who has filed a request for notice of regulatory action with the agency unless the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest. The bill would extend to 180 days the maximum period of time a regulation, amendment, or order of repeal initially adopted as an emergency regulation would remain in effect. The bill would authorize the office to approve not more than 2 readoptions of an emergency regulation, each for a period not to exceed 90 days, as specified. The bill would require the office, after posting a notice of the filing of a proposed regulation on its Internet Web site, to allow interested persons 5 calendar days to submit comments on the proposed emergency regulations unless delaying action to allow public comment would be inconsistent with the public interest. It would make these changes applicable to emergency regulations first submitted to the office on or after January 1, 2007.

Existing law authorizes the Secretary of Corrections and Rehabilitation to prescribe rules and adopt regulations for the administration of the prisons and administration of paroles. Existing law provides that, in general, these regulations shall be adopted pursuant to the Administrative Procedure Act, but exempts emergency adoption, amendment, or repeal of a regulation by the secretary from certain requirements of that act.

This bill would exempt the emergency adoption, amendment, or repeal of a regulation by the secretary from certain notice requirements, as specified.

Vote: majority. Appropriation: no. Fiscal committee: yes.
 State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 11340.85 of the Government Code is
 2 amended to read:

1 11340.85. (a) As used in this section, “electronic
2 communication” includes electronic transmission of written or
3 graphical material by electronic mail, facsimile, or other means,
4 but does not include voice communication.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 (8) The effective date of a rulemaking action.

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

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

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

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

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

31 SEC. 2. Section 11342.545 is added to the Government Code,
32 to read:

33 11342.545. "Emergency" means a situation that calls for
34 immediate action to avoid serious harm to the public peace,
35 health, safety, or general welfare.

36 SEC. 3. Section 11346.1 of the Government Code is amended
37 to read:

38 11346.1. (a) (1) The adoption, amendment, or repeal of an
39 emergency regulation is not subject to any provision of this

1 article or Article 6 (commencing with Section 11349), except this
2 section and Sections 11349.5 and 11349.6.

3 (2) At least five working days before submitting an emergency
4 regulation to the office, the adopting agency shall, except as
5 provided in paragraph (3), send a notice of the proposed
6 emergency action to every person who has filed a request for
7 notice of regulatory action with the agency. The notice shall
8 include both of the following:

9 (A) The specific language proposed to be adopted.

10 (B) The finding of emergency required by subdivision (b).

11 (3) An agency is not required to provide notice pursuant to
12 paragraph (2) if the emergency situation clearly poses such an
13 immediate, serious harm that delaying action to allow public
14 comment would be inconsistent with the public interest.

15 (b) (1) Except as provided in subdivision (c), if a state agency
16 makes a finding that the adoption of a regulation or order of
17 repeal is necessary to address an emergency, the regulation or
18 order of repeal may be adopted as an emergency regulation or
19 order of repeal.

20 (2) Any finding of an emergency shall include a written
21 statement that contains the information required by paragraphs
22 (2) to (6), inclusive, of subdivision (a) of Section 11346.5 and a
23 description of the specific facts demonstrating the existence of an
24 emergency and the need for immediate action, and
25 demonstrating, by substantial evidence, the need for the proposed
26 regulation to effectuate the statute being implemented,
27 interpreted, or made specific and to address only the
28 demonstrated emergency. The finding of emergency shall also
29 identify each technical, theoretical, and empirical study, report,
30 or similar document, if any, upon which the agency relies. The
31 enactment of an urgency statute shall not, in and of itself,
32 constitute a need for immediate action.

33 A finding of emergency based only upon expediency,
34 convenience, best interest, general public need, or speculation,
35 shall not be adequate to demonstrate the existence of an
36 emergency. If the situation identified in the finding of emergency
37 existed and was known by the agency adopting the emergency
38 regulation in sufficient time to have been addressed through
39 nonemergency regulations adopted in accordance with the
40 provisions of Article 5 (commencing with Section 11346), the

1 finding of emergency shall include facts explaining the failure to
2 address the situation through nonemergency regulations.

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

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

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

15 (e) No regulation, amendment, or order of repeal initially
16 adopted as an emergency regulatory action shall remain in effect
17 more than 180 days unless the adopting agency has complied
18 with Sections 11346.2 to 11347.3, inclusive, either before
19 adopting an emergency regulation or within the 180-day period.
20 The adopting agency, prior to the expiration of the 180-day
21 period, shall transmit to the office for filing with the Secretary of
22 State the adopted regulation, amendment, or order of repeal, the
23 rulemaking file, and a certification that Sections 11346.2 to
24 11347.3, inclusive, were complied with either before the
25 emergency regulation was adopted or within the 180-day period.

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

32 (g) If a regulation is originally adopted and filed as an
33 emergency and the adopting agency fails to comply with
34 subdivision (e), this failure shall constitute a repeal of the
35 regulation and after notice to the adopting agency by the office,
36 shall be deleted.

37 (h) The office may approve not more than two readoptions,
38 each for a period not to exceed 90 days, of an emergency
39 regulation that is the same as or substantially equivalent to an
40 emergency regulation previously adopted by that agency.

1 Readoption shall be permitted only if the agency has made
2 substantial progress and proceeded with diligence to comply with
3 subdivision (e).

4 SEC. 4. Section 11349.6 of the Government Code is amended
5 to read:

6 11349.6. (a) If the adopting agency has complied with
7 Sections 11346.2 to 11347.3, inclusive, prior to the adoption of
8 the regulation as an emergency, the office shall approve or
9 disapprove the regulation in accordance with this article.

10 (b) Emergency regulations adopted pursuant to subdivision (b)
11 of Section 11346.1 shall be reviewed by the office within 10
12 calendar days after their submittal to the office. After posting a
13 notice of the filing of a proposed emergency regulation on its
14 Internet Web site, the office shall allow interested persons five
15 calendar days to submit comments on the proposed emergency
16 regulations unless the emergency situation clearly poses such an
17 immediate serious harm that delaying action to allow public
18 comment would be inconsistent with the public interest. The
19 office shall disapprove the emergency regulations if it determines
20 that the situation addressed by the regulations is not an
21 emergency, or if it determines that the regulation fails to meet the
22 standards set forth in Section 11349.1, or if it determines the
23 agency failed to comply with Section 11346.1.

24 (c) If the office considers any information not submitted to it
25 by the rulemaking agency when determining whether to file
26 emergency regulations, the office shall provide the rulemaking
27 agency with an opportunity to rebut or comment upon that
28 information.

29 (d) Within 30 working days of the filing of a certificate of
30 compliance, the office shall review the regulation and hearing
31 record and approve or order the repeal of an emergency
32 regulation if it determines that the regulation fails to meet the
33 standards set forth in Section 11349.1, or if it determines that the
34 agency failed to comply with this chapter.

35 SEC. 5. Section 11350 of the Government Code is amended
36 to read:

37 11350. (a) Any interested person may obtain a judicial
38 declaration as to the validity of any regulation or order of repeal
39 by bringing an action for declaratory relief in the superior court
40 in accordance with the Code of Civil Procedure. The right to

1 judicial determination shall not be affected by the failure either to
2 petition or to seek reconsideration of a petition filed pursuant to
3 Section 11340.7 before the agency promulgating the regulation
4 or order of repeal. The regulation or order of repeal may be
5 declared to be invalid for a substantial failure to comply with this
6 chapter, or, in the case of an emergency regulation or order of
7 repeal, upon the ground that the facts recited in the finding of
8 emergency prepared pursuant to subdivision (b) of Section
9 11346.1 do not constitute an emergency within the provisions of
10 Section 11346.1.

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

14 (1) The agency's determination that the regulation is
15 reasonably necessary to effectuate the purpose of the statute,
16 court decision, or other provision of law that is being
17 implemented, interpreted, or made specific by the regulation is
18 not supported by substantial evidence.

19 (2) The agency declaration pursuant to paragraph (8) of
20 subdivision (a) of Section 11346.5 is in conflict with substantial
21 evidence in the record.

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

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

29 (1) The rulemaking file prepared under Section 11347.3.

30 (2) The finding of emergency prepared pursuant to subdivision
31 (b) of Section 11346.1.

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

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

37 SEC. 6. The changes made by this act applicable to
38 emergency regulations shall apply only to regulations first
39 submitted to the Office of Administrative Law on or after
40 January 1, 2007.

1 SEC. 7. Section 5058.3 of the Penal Code is amended to read:
2 5058.3. (a) Emergency adoption, amendment, or repeal of a
3 regulation by the director shall be conducted pursuant to Chapter
4 3.5 (commencing with Section 11340) of Part 1 of Division 3 of
5 Title 2 of the Government Code, except with respect to the
6 following:

7 (1) Notwithstanding subdivision (e) of Section 11346.1 of the
8 Government Code, the initial effective period for an emergency
9 adoption, amendment, or repeal of a regulation shall be 160 days.

10 (2) Notwithstanding subdivision (b) of Section 11346.1 of the
11 Government Code, no showing of emergency is necessary in
12 order to adopt, amend, or repeal an emergency regulation if the
13 director instead certifies, in a written statement filed with the
14 Office of Administrative Law, that operational needs of the
15 department require adoption, amendment, or repeal of the
16 regulation on an emergency basis. The written statement shall
17 include a description of the underlying facts and an explanation
18 of the operational need to use the emergency rulemaking
19 procedure. This paragraph provides an alternative to filing a
20 statement of emergency pursuant to subdivision (b) of Section
21 11346.1 of the Government Code. It does not preclude filing a
22 statement of emergency. This paragraph only applies to the initial
23 adoption and one readoption of an emergency regulation.

24 (3) Notwithstanding subdivision (b) of Section 11349.6 of the
25 Government Code, the adoption, amendment, or repeal of a
26 regulation pursuant to paragraph (2) shall be reviewed by the
27 Office of Administrative Law within 20 calendar days after its
28 submission. In conducting its review, the Office of
29 Administrative Law shall accept and consider public comments
30 for the first 10 calendar days of the review period. Copies of any
31 comments received by the Office of Administrative Law shall be
32 provided to the department.

33 (4) Regulations adopted pursuant to ~~this section~~ *paragraph (2)*
34 *of subdivision (a)* are not subject to the requirements of
35 paragraph (2) of subdivision (a) of Section 11346.1 of the
36 Government Code.

37 (b) It is the intent of the Legislature, in authorizing the
38 deviations in this section from the requirements and procedures
39 of Chapter 3.5 (commencing with Section 11340) of Part 1 of
40 Division 3 of Title 2 of the Government Code, to authorize the

- 1 department to expedite the exercise of its power to implement
- 2 regulations as its unique operational circumstances require.

O