

AMENDED IN ASSEMBLY APRIL 12, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 1213

Introduced by Assembly Member Nielsen

February 18, 2011

An act to ~~add Section 11340.15 to amend Sections 11349, 11349.7, and 11350~~ of the Government Code, relating to regulations.

LEGISLATIVE COUNSEL'S DIGEST

AB 1213, as amended, Nielsen. ~~Regulations: philosophy and principles of regulation.~~ *Regulations.*

~~Existing law, the~~

(1) The Administrative Procedure Act, governs the procedure for the adoption, amendment, or repeal of regulations by state agencies and for the review of those regulatory actions by the Office of Administrative Law. The office is required to review the regulation, among other things, for "necessity" which is defined to mean that the record of the rulemaking proceeding demonstrates the need for the regulation by substantial evidence.

~~This bill would adopt the regulatory philosophy and the principles of regulation, as outlined in Presidential Executive Order 12866 and Presidential Executive Order 13563, in order to achieve the same regulatory benefits within the state by directing agencies, among other things, to improve public participation in the rulemaking process, to reduce redundant, inconsistent, or overlapping regulations through increased agency coordination to improve flexibility, and to develop and submit to the office a preliminary plan under which the agency will periodically review its existing significant regulations to determine~~

~~whether any regulations should be modified, streamlined, expanded, or repealed.~~

This bill would revise the definition of “necessity” to require that the need for the regulation be demonstrated by a preponderance of the evidence.

(2) The act requires the office to initiate, at the request of a standing, select, or joint committee of the Legislature, a priority review of an existing regulation, that uses prescribed procedures to determine whether the regulation continues to satisfy specified standards.

This bill would additionally require the office to initiate a priority review of a regulation at the request of a chair or vice chair of those legislative committees.

(3) The act authorizes any interested person to obtain a judicial declaration as to the validity of any regulation or order of repeal by bringing an action for declaratory relief in superior court, as specified. The act authorizes the court to declare a regulation to be invalid for, among other things, a substantial failure to comply with the act or if the agency’s determination that a regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other law is not supported by substantial evidence.

This bill would require, instead of authorize, a court to invalidate a regulation if the specified conditions exist. The bill would require that an agency’s determination that a regulation is reasonably necessary to effectuate the purpose of a statute, court decision, or other law be supported by a preponderance of the evidence. The bill would require that a court invalidate a regulation upon a determination that it exceeds the scope of authority delegated to the agency by statute or, where the plain meaning of the language of the authorizing statute is determined to be ambiguous, the regulation is not consistent with the legislative intent in enacting the statute that is being interpreted, implemented, or made specific.

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 11349 of the Government Code is
- 2 amended to read:
- 3 11349. The following definitions govern the interpretation of
- 4 this chapter:

1 (a) “Necessity” means the record of the rulemaking proceeding
2 demonstrates by ~~substantial~~ *a preponderance of the* evidence the
3 need for a regulation to effectuate the purpose of the statute, court
4 decision, or other ~~provision~~ of law that the regulation implements,
5 interprets, or makes specific, taking into account the totality of the
6 record. For purposes of this standard, evidence includes, but is not
7 limited to, facts, studies, and expert opinion.

8 (b) “Authority” means the ~~provision~~ of law ~~which~~ *that* permits
9 or obligates the agency to adopt, amend, or repeal a regulation.

10 (c) “Clarity” means written or displayed so that the meaning of
11 ~~regulations~~ *a regulation* will be easily understood by those persons
12 directly affected by ~~them~~ *it*.

13 (d) “Consistency” means being in harmony with, and not in
14 conflict with or contradictory to, ~~an existing statutes~~ *statute*, court
15 ~~decisions~~ *decision*, or other ~~provisions~~ of law.

16 (e) “Reference” means the statute, court decision, or other
17 ~~provision~~ of law ~~which~~ *that* the agency implements, interprets, or
18 makes specific by adopting, amending, or repealing a regulation.

19 (f) “Nonduplication” means that a regulation does not serve the
20 same purpose as a state or federal statute or another regulation.
21 This standard requires that an agency proposing to amend or adopt
22 a regulation must identify any state or federal statute or regulation
23 ~~which~~ *that* is overlapped or duplicated by the proposed regulation
24 and justify any overlap or duplication. This standard is not intended
25 to prohibit state agencies from printing relevant portions of
26 enabling legislation in regulations when the duplication is necessary
27 to satisfy the clarity standard in paragraph (3) of subdivision (a)
28 of Section 11349.1. This standard is intended to prevent the
29 indiscriminate incorporation of statutory language in a regulation.

30 *SEC. 2. Section 11349.7 of the Government Code is amended*
31 *to read:*

32 11349.7. The office, at the request of any standing, select, or
33 joint committee of the Legislature; *or the chair or vice chair of*
34 *one of those committees*, shall initiate a priority review of any
35 regulation, group of regulations, or series of regulations that the
36 committee believes does not meet the standards set forth in Section
37 11349.1.

38 The office shall notify interested persons and shall publish notice
39 in the California Regulatory Notice Register that a priority review
40 has been requested, shall consider the written comments submitted

1 by interested persons, the information contained in the rulemaking
2 record, if any, and shall complete each priority review made
3 pursuant to this section within 90 calendar days of the receipt of
4 the committee's written request. During the period of any priority
5 review made pursuant to this section, all information available to
6 the office relating to the priority review shall be made available
7 to the public. ~~In the event that~~ *If* the office determines that a
8 regulation does not meet the standards set forth in Section 11349.1,
9 it shall order the adopting agency to show cause why the regulation
10 should not be repealed and shall proceed to seek repeal of the
11 regulation as provided by this section in accordance with the
12 following:

13 (a) ~~In the event~~ *If* it determines that ~~any of the regulations~~
14 *regulation* subject to the review ~~do~~ *does* not meet the standards
15 set forth in Section 11349.1, the office shall within 15 days of the
16 determination order the adopting agency to show cause why the
17 regulation should not be repealed. In issuing the order, the office
18 shall specify in writing the reasons for its determination that the
19 regulation does not meet the standards set forth in Section 11349.1.
20 The reasons for its determination shall be made available to the
21 public. The office shall also publish its order and the reasons
22 therefor in the California Regulatory Notice Register. In the case
23 of a regulation for which ~~no, or inadequate,~~ information relating
24 to its necessity can *not* be furnished by the adopting agency *or is*
25 *inadequate*, the order shall specify the information which the office
26 requires to make its determination.

27 (b) No later than 60 days following receipt of an order to show
28 cause why a regulation should not be repealed, the agency shall
29 respond in writing to the office. Upon written application by the
30 agency, the office may extend the time for an additional 30 days.

31 (c) The office shall review and consider all information
32 submitted by the agency in a timely response to the order to show
33 cause why the regulation should not be repealed, and determine
34 whether the regulation meets the standards set forth in Section
35 11349.1. The office shall make this determination within 60 days
36 of receipt of an agency's response to the order to show cause. If
37 the office does not make a determination within 60 days of receipt
38 of an agency's response to the order to show cause, the regulation
39 shall be deemed to meet the standards set forth in subdivision (a)
40 of Section 11349.1. In making this determination, the office shall

1 also review any written comments submitted to it by the public
2 within 30 days of the publication of the order to show cause in the
3 California Regulatory Notice Register. During the period of review
4 and consideration, the information available to the office relating
5 to each regulation for which the office has issued an order to show
6 cause shall be made available to the public. The office shall notify
7 the adopting agency within two working days of the receipt of
8 information submitted by the public regarding a regulation for
9 which an order to show cause has been issued. If the office
10 determines that a regulation fails to meet the standards, it shall
11 prepare a statement specifying the reasons for its determination.
12 The statement shall be delivered to the adopting agency, the
13 Legislature, and the Governor and shall be made available to the
14 public and the courts. Thirty days after delivery of the statement
15 required by this subdivision the office shall prepare an order of
16 repeal of the regulation and shall transmit it to the Secretary of
17 State for filing.

18 (d) The Governor, within 30 days after the office has delivered
19 the statement specifying the reasons for its decision to repeal, as
20 required by subdivision (c), may overrule the decision of the office
21 ordering the repeal of a regulation. The regulation shall then remain
22 in full force and effect. Notice of the Governor's action and the
23 reasons therefor shall be published in the California Regulatory
24 Notice Register.

25 The Governor shall transmit to the rules committee of each house
26 of the Legislature a statement of reasons for overruling the decision
27 of the office, plus any other information that may be requested by
28 either of the rules committees.

29 (e) ~~In the event that~~ If the office orders the repeal of a regulation,
30 it shall publish the order and the reasons therefor in the California
31 Regulatory Notice Register.

32 *SEC. 3. Section 11350 of the Government Code is amended to*
33 *read:*

34 11350. (a) Any interested person may obtain ~~a judicial~~
35 ~~declaration~~ *judicial review* as to the validity of any regulation or
36 order of repeal by bringing an action ~~for declaratory relief~~ in the
37 superior court in accordance with the Code of Civil Procedure.
38 The right to judicial determination shall not be affected by the
39 failure either to petition or to seek reconsideration of a petition
40 filed pursuant to Section 11340.7 before the agency promulgating

1 the regulation or order of repeal. The regulation or order of repeal
2 ~~may shall~~ be declared to be invalid for a ~~substantial~~ failure to
3 comply with this chapter, or, in the case of an emergency regulation
4 or order of repeal, upon the ground that the facts recited in the
5 finding of emergency prepared pursuant to subdivision (b) of
6 Section 11346.1 do not constitute an emergency within the
7 provisions of Section 11346.1.

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

11 (1) The agency's determination that the regulation is reasonably
12 necessary to effectuate the purpose of the statute, court decision,
13 or other ~~provision~~ of law that is being implemented, interpreted,
14 or made specific by the regulation is not supported by ~~substantial~~
15 *a preponderance of the evidence*.

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

19 (3) *The regulation exceeds the scope of authority delegated to*
20 *the agency by a statute or, where the plain meaning of the language*
21 *of the statute is determined to be ambiguous, the regulation is not*
22 *consistent with the legislative intent in enacting the statute that is*
23 *being interpreted, implemented, or made specific. The court shall*
24 *exercise its independent judgment in determining whether a*
25 *regulation exceeds the scope of authority delegated to the agency*
26 *by statute or, if the plain meaning of the language of the statute*
27 *is determined to be ambiguous, the regulation is not consistent*
28 *with the legislative intent in enacting the statute that is being*
29 *interpreted, implemented, or made specific. The court may grant*
30 *deference to an agency interpretation of a statute with broad or*
31 *ambiguous terms or where the agency interpretation is consistent*
32 *and of long standing. However, the court shall be the final arbiter*
33 *of legal interpretation and shall invalidate an erroneous*
34 *interpretation consistent with the requirements of this section.*

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

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

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

4 (2) The finding of emergency prepared pursuant to subdivision
5 (b) of Section 11346.1.

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

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

11 ~~SECTION 1. Section 11340.15 is added to the Government~~
12 ~~Code, to read:~~

13 ~~11340.15. (a) The Legislature finds and declares all of the~~
14 ~~following:~~

15 ~~(1) An efficient regulatory planning and review process is vital~~
16 ~~to ensure that the state's regulatory system best serves the people~~
17 ~~of this state.~~

18 ~~(2) In 1993, President Clinton reviewed and revised the federal~~
19 ~~government's program for regulatory review and issued Executive~~
20 ~~Order 12866, titled "Regulatory Planning and Review,"~~
21 ~~establishing the general principle that the benefits of intended~~
22 ~~regulations should justify the costs.~~

23 ~~(3) In 2011, President Obama issued Executive Order 13563,~~
24 ~~titled "Improving Regulation and Regulatory Review," to reaffirm~~
25 ~~and expand upon the principles and structures of regulatory review~~
26 ~~established in Executive Order 12866.~~

27 ~~(b) In order to achieve the benefits associated with Executive~~
28 ~~Order 12866 and the anticipated benefits associated with Executive~~
29 ~~Order 13563, this state adopts the following regulatory philosophy,~~
30 ~~as outlined in Section 1 of Executive Order 13563:~~

31 ~~(1) Our regulatory system must protect public health, welfare,~~
32 ~~safety, and our environment while promoting economic growth,~~
33 ~~innovation, competitiveness, and job creation. It must be based on~~
34 ~~the best available science. It must allow for public participation~~
35 ~~and an open exchange of ideas. It must promote predictability and~~
36 ~~reduce uncertainty. It must identify and use the best, most~~
37 ~~innovative, and least burdensome tools for achieving regulatory~~
38 ~~ends. It must take into account benefits and costs, both quantitative~~
39 ~~and qualitative. It must ensure that regulations are accessible,~~
40 ~~consistent, written in plain language, and easy to understand. It~~

1 must measure, and seek to improve, the actual results of regulatory
2 requirements:

3 (e) (1) In order to achieve the benefits associated with Executive
4 Order 12866 and the anticipated benefits of Executive Order 13563,
5 this state adopts the expanded principles of regulation contained
6 in this subdivision, as reaffirmed in Section 1 of Executive Order
7 13563. Specifically, each agency shall, to the extent not
8 inconsistent with the existing provisions of this chapter, do each
9 of the following:

10 (A) Propose or adopt a regulation only upon a reasoned
11 determination that its benefits justify its costs, recognizing that
12 some benefits and costs are difficult to quantify.

13 (B) Tailor its regulations to impose the least burden on society,
14 consistent with obtaining regulatory objectives, taking into account,
15 among other things, and to the extent practicable, the costs of
16 cumulative regulations.

17 (C) Select, in choosing among alternative regulatory approaches,
18 those approaches that maximize net benefits, including but not
19 limited to, potential economic, environmental, public health and
20 safety, and other advantages.

21 (D) To the extent feasible, specify performance objectives,
22 rather than specifying the behavior or manner of compliance that
23 regulated entities must adopt.

24 (E) Identify and assess available alternatives to direct regulation,
25 including providing economic incentives to encourage the desired
26 behavior, such as user fees or marketable permits, or providing
27 information upon which choices can be made by the public.

28 (2) In applying the principles of this subdivision, each agency
29 should use the best available techniques to quantify anticipated
30 present and future benefits and costs as accurately as possible.
31 Where appropriate and permitted by law, each agency may consider
32 values that are difficult or impossible to quantify, including equity,
33 human dignity, fairness, and distributive impacts.

34 (d) (1) In order to achieve the benefits associated with Executive
35 Order 12866 and the anticipated benefits associated with Executive
36 Order 13563, this state adopts the expanded principles of regulation
37 contained in this subdivision, as outlined in Sections 2 to 6,
38 inclusive, of Executive Order 13563.

39 (2) (A) Regulations shall be adopted through a process that
40 involves public participation. To that end, regulations shall be

1 based, to the extent feasible and consistent with law, on the open
2 exchange of information and perspectives among state, local, and
3 tribal officials, experts in relevant disciplines, affected stakeholders
4 in the private sector, and the public as a whole.

5 (B) To promote an open exchange, each agency, consistent with
6 other applicable legal requirements, shall endeavor to provide the
7 public with an opportunity to participate in the regulatory process.
8 To the extent feasible and permitted by law, each agency shall
9 afford the public a meaningful opportunity to comment through
10 the Internet on any proposed regulation, with a comment period
11 that should generally be at least 60 days. To the extent feasible
12 and permitted by law, each agency shall also provide, for both
13 proposed and final rules, timely Internet access to the rulemaking
14 record on the Internet Web site of the agency, including relevant
15 scientific and technical findings, in an open format that can be
16 easily searched and downloaded. For proposed rules, access shall
17 include, to the extent feasible and permitted by law, an opportunity
18 for public comment on all pertinent parts of the rulemaking record,
19 including relevant scientific and technical findings.

20 (C) Before issuing a notice of proposed rulemaking, each
21 agency, where feasible and appropriate, shall seek the views of
22 those who are likely to be affected, including those who are likely
23 to benefit from and those who are potentially subject to the
24 rulemaking.

25 (3) Some sectors and industries face a significant number of
26 regulatory requirements, some of which may be redundant,
27 inconsistent, or overlapping. Greater coordination across agencies
28 could reduce these requirements, thus reducing costs and
29 simplifying and harmonizing rules. In developing regulatory actions
30 and identifying appropriate approaches, each agency shall attempt
31 to promote such coordination, simplification, and harmonization.
32 Each agency shall also seek to identify, as appropriate, means to
33 achieve regulatory goals that are designed to promote innovation.

34 (4) Where relevant, feasible, and consistent with regulatory
35 objectives, and to the extent permitted by law, each agency shall
36 identify and consider regulatory approaches that reduce burdens
37 and maintain flexibility and freedom of choice for the public. These
38 approaches include warnings, appropriate default rules, and
39 disclosure requirements as well as provision of information to the
40 public in a form that is clear and intelligible.

1 ~~(5) Each agency shall ensure the objectivity of any scientific~~
2 ~~and technological information and processes used to support the~~
3 ~~agency's regulatory actions.~~

4 ~~(6) (A) To facilitate the periodic review of existing significant~~
5 ~~regulations, agencies shall consider how best to promote~~
6 ~~retrospective analysis of rules that may be outmoded, ineffective,~~
7 ~~insufficient, or excessively burdensome, and to modify, streamline,~~
8 ~~expand, or repeal them in accordance with what has been learned.~~
9 ~~Such retrospective analyses, including supporting data, should be~~
10 ~~released online whenever possible.~~

11 ~~(B) Prior to July 1, 2012, each agency shall develop and submit~~
12 ~~to the office a preliminary plan, consistent with law and its~~
13 ~~resources and regulatory priorities, under which the agency will~~
14 ~~periodically review its existing significant regulations to determine~~
15 ~~whether any regulations should be modified, streamlined,~~
16 ~~expanded, or repealed so as to make the agency's regulatory~~
17 ~~program more effective or less burdensome in achieving the~~
18 ~~regulatory objectives.~~