

REGULATION DEVELOPMENT AND ANALYSIS UNDER THE CALIFORNIA APA—FEBRUARY 2012

PART I -- STATUTORY CHANGES

These materials cover procedural requirements that apply to all rulemaking actions initiated through the publication of a notice of proposed rulemaking in the California Regulatory Notice Register after January 1, 2012. They do not cover the requirements for a standardized regulatory impact analysis that will be required for a major regulation (one having an economic impact on California business enterprises and individuals in an amount exceeding \$50 million) proposed on or after November 1, 2013, as the Department of Finance must adopt regulations to implement those requirements.

A. SB 617 (Stats. 2011, Ch. 496) added the following new provisions, now in effect, primarily affecting policy development and economic impact analysis during the pre-notice stage of rulemaking:

- 1) An agency must consider reasonable alternatives including those which are proposed as less burdensome and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation.
- 2) An agency must prepare an economic impact analysis that includes the benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment to inform the agencies and the public of the economic consequences of regulatory choices.
- 3) The analyses conducted on proposed regulations are intended to provide agencies and the public with tools to determine whether the regulatory proposal is an efficient and effective means of implementing the policy decisions enacted in statute or by other provisions of law in the least burdensome, cost effective manner.
- 4) The baseline for regulatory analysis shall be the most cost-effective set of regulatory measures that are equally effective in achieving the purpose of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation.
- 5) An initial statement of reasons must now include:
 - an identification of the problem the agency intends to address,
 - the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to address the problem for which it is proposed,
 - an enumeration of the benefits anticipated from the regulatory action, including the benefits or goals provided in the authorizing statute, and
 - a description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives.

6) A Notice of Proposed Rulemaking must now include:

- A policy statement overview of the benefits anticipated by the proposed adoption, amendment, or repeal of a regulation, including, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things;
- An evaluation of whether a proposed regulation is inconsistent or incompatible with existing state regulations;
- A statement of the results of the economic impact analysis/assessment; and,
- 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, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

7) A final statement of reasons must now include a determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Also, in any explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses, the agency shall include, as supporting information, the benefits of the proposed regulation identified pursuant to paragraph (3) of subdivision (a) of Section 11346.5.

8) The rulemaking record or file must now include the economic impact analysis/assessment.

9) OAL must now return a regulation to the rulemaking agency:

- if the agency has failed to complete the economic impact analysis/assessment,
- if the agency has failed to include the analysis/assessment in the rulemaking record or file,
- if the proposed regulation conflicts with an existing regulation and the agency has not identified the manner in which the conflict may be resolved,
- if the agency has not made a determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

10) Notwithstanding any other law, the return of a regulation to the adopting agency by OAL is now the exclusive remedy for a failure to complete the economic impact analysis/assessment or failure to include the analysis/assessment in the rulemaking record or file.

B. AB410 (Stats. 2011, Ch. 495) added new provisions, now in effect, requiring the provision, on request, of rulemaking materials that can be read by reading software used by the visually impaired in the following rulemaking actions:

- regulations proposed by the Department of Rehabilitation,
- disability access regulations that must be submitted to the California Building Standards Commission,
- special education regulations proposed by the State Department of Education, and
- Medi-Cal regulations proposed by the State Department of Health Care Services.

When such a request is made, the agency must provide a 45 day comment period for the requester before the regulation can be adopted as final.

PART II -- PRE-NOTICE REGULATION DEVELOPMENT AND REGULATORY IMPACT ANALYSIS WORKSHEET

The APA establishes procedural requirements that must be followed by a state agency in the adoption, amendment or repeal of a regulation. These mandatory requirements involve a method for policy development and impact analysis that must be accomplished, and documented prior to publishing a notice of proposed rulemaking. The rulemaking documents prepared by a rulemaking agency and made available to the public must demonstrate that the agency has followed these procedures. These documents include the Notice of Proposed Rulemaking, the Initial Statement of Reasons, the Fiscal Impact Statement, and the Economic Impact Analysis/Assessment. OAL reviews these documents to ensure APA compliance.

The following is a worksheet that uses the policy development and analysis method imbedded in the APA to prepare these documents. All citations are to provisions in the California Government Code, unless otherwise indicated.

Pre-notice consultation with the public. During the pre-notice stage of rulemaking, you may consult with interested persons in carrying out these activities. 11346(b). You must involve parties who would be subject to complex or a large number of proposed regulations in pre-notice public discussions regarding those proposed regulations. 11346.45(a). If you do not or cannot comply, you must state the reasons for noncompliance with reasonable specificity in the rulemaking record.

1. **PROBLEM.** Identify the problem the agency intends to address. This will be a problem in the enforcement or administration of the statutes or other provisions of law the agency is responsible to enforce or administer that may be addressed through the adoption of a regulation that specifies a procedure to follow or that implements, interprets, or makes specific one or more statutes or other provisions of law. You will state this problem in the initial statement of reasons for a regulation. 11346.2(b)(1).
2. **REFERENCE.** Identify the specific statute(s) or other provision(s) of law the problem (see 1, above) relates to. The statute(s) will be found among those that are enforced or administered by the agency. A regulation that addresses the problem will implement, interpret, or make specific these statutes. You will list these statutes or other provisions of

law in the Reference note following the text of the regulation that addresses the problem (11346.2(a)(2)), and in the notice of proposed rulemaking. 11346.5(a)(2).

3. **AUTHORITY.** Identify the specific statute(s) that give the agency the power to adopt regulations to implement, interpret or make specific the statute(s) or other provision(s) of law identified in 2 (above). In the first instance look for a statute or statutes that contain the words “shall adopt regulations” or “may adopt regulations” or some variation on these themes that cover the statute(s) identified in 2 (above). If you cannot find any such statutes, consult with your legal resources about implied rulemaking authority. You will list these statutes in the Authority note following the text of the regulation (11346.2(a)(2)), and in the notice of proposed rulemaking. 11346.5(a)(2).

4. **PURPOSE, BENEFITS, GOALS.** Identify the purpose(s) of the statute(s) or other provision(s) of law identified in 2 (above) that relate to the particular problem identified in 1, above. The purpose of the statute may be to achieve some benefit or goal. (For example, the purposes of the APA are to provide a meaningful opportunity for public participation and to create a record for judicial review.) “The benefits may include, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things.” 11346.2(b)(1). So, think about and articulate the benefits and goals provided in the relevant statute(s) that will be addressed by the particular regulation. You will use the purpose(s), benefit(s), and goal(s) in drafting the initial statement of reasons (11346.2(b)(1)) and the notice of proposed rulemaking. 11346.5 (a)(3)(C). You will also use the benefits and goals to prepare your economic impact analysis/assessment. 11346.3(b)(1)(D).

Another critically important reason you want to identify the purpose(s) of the statutes you are implementing, interpreting or making specific involves the Necessity standard. To satisfy the Necessity standard you must demonstrate that your regulation is reasonably necessary to effectuate the purpose(s) of the statute(s) the regulation implements, interprets, or makes specific. 11349(a). Obviously to be able to do this you need to be able to articulate the purpose(s) or goals of the statute(s) you are targeting. You do this in the initial statement of reasons. 11346.2(b)(1).

Courts use the following approach to state the purpose of a statute. Look first for the purpose(s) in the words of the statute somewhere, maybe at the beginning of the chapter or article, or maybe in uncodified statutory provisions. If purpose is not set out in the words of the statute, perhaps purpose may be gleaned from legislative history materials. Sometime the purpose is obvious from what the statute addresses. You may actually find the purpose of a statute articulated in a court decision.

5. **PURPOSE AND BENEFITS OF THE REGULATION.** State the specific purpose of the regulation the agency will propose in the initial statement of reasons. 11346.2(b)(1) And, state it within the context of the purpose(s) of the statute(s) that the regulation will implement, interpret, or make specific. Don’t just say, “The purpose of the regulation is to implement, interpret, or make specific the statute.”, or, “The purpose of the regulation is to clarify the statute.” Remember you need to demonstrate that the regulation is reasonably

necessary to effectuate the purpose(s) of the statute(s) the regulation implements, interprets, or makes specific. 11349(a).

In the initial statement of reasons, you are also required to provide a statement enumerating “the benefits anticipated from the regulatory action,... The benefits may include, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things.” 11346.2(b)(1) As part of the informative digest in the notice, you are required to provide a “policy statement overview explaining the broad objectives of the regulation and the specific benefits anticipated by the proposed adoption, amendment, or repeal of a regulation, including to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things.” 11346.5(a)(3)(C).

6. **DEVELOP REASONABLE ALTERNATIVES.** Describe alternative regulations that are reasonable approaches to achieving the purpose sought. You will use these alternatives in drafting the initial statement of reasons. 11346.2(b)(4). In doing this you are not required to artificially construct alternatives. For example, you need not construct alternatives without regard to the particular needs of a situation. Neither are you required to describe unreasonable alternatives. For example, you need not describe alternatives not in accordance with practical realities. However, the reasonable alternatives you must consider include, but are not limited to:

- Alternatives that are proposed by the public and the agency as less burdensome and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific;
- Alternatives that would lessen the impact on small business;
- An alternative that is a performance standard. If the regulation you ultimately propose would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, you *must* consider as an alternative the imposition of performance standards. If you ultimately decide to mandate the use of specific technologies or equipment anyway, you must specifically explain in the statement of the reasons why the agency believes these mandates or prescriptive standards are required (i.e., the reason for rejecting of the performance standard).

(Note: For all alternatives considered above, the agency is required to provide its reasons for rejecting those alternatives. See item 8, below.)

Provisions on prescriptive and performance standards in the APA:

“The imposition of prescriptive standards upon private persons and entities through regulations where the establishment of performance standards could reasonably be expected to produce the same result has placed an unnecessary burden on California citizens and discouraged innovation, research, and development of improved means of achieving desirable social goals.” 11340(d).

Prescriptive standard defined. “‘Prescriptive standard’ means a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means.” 11342.590.

Performance standard defined. “‘Performance standard’ means a regulation that describes an objective with the criteria stated for achieving the objective.” 11342.570.

Performance standard alternative. “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.” 11346.2(b)(5)(A).

7. **ANALYZE ALTERNATIVES.** Analyze the alternatives considering the following:
 - A proposed regulation shall be based upon adequate information concerning the need for, and consequences of the regulation. 11346.3(a)(1).
 - An agency shall avoid the imposition of unnecessary or unreasonable reporting, recordkeeping, or compliance requirements. 11346.3(a).
 - “[A]gencies shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities by substituting performance standards for prescriptive standards wherever performance standards can be reasonably expected to be as effective and less burdensome,…” 11340.1(a).
 - Alternatives that may lessen adverse impact on business may involve (A) establishing differing compliance or reporting requirements or timetables that take into account the resources available to businesses, (B) consolidation or simplification of compliance or reporting requirements, (C) the use of performance standards rather than prescriptive standards, and (D) exemptions or partial exemptions. 11346.5
 - At the end of the rulemaking process, a rulemaking agency must find: “[N]o alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.” The rulemaking agency must include supporting information for this finding. 11346.9(a)(4).

8. **SELECT PREFERRED ALTERNATIVE, EXPLAIN REASONS FOR REJECTING OTHERS.** Select the preferred alternative from the reasonable alternatives, and for each of the reasonable alternatives not selected, draft an explanation of the reasons for rejecting that alternative. These explanations will be used in the initial statement of reasons. 11346.2(b)(5)(A).

9. **DRAFT TEXT.** Draft the proposed regulation text in plain straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style. 11346.2(a)(1). See Martineau and Salerno, *Legal, Legislative, And Rule Drafting In Plain English* (Thompson-West) pp. 33-82 for many useful drafting tips.

10. **CONSISTENCY EVALUATION.** Evaluate whether the proposed regulation is inconsistent or incompatible with existing state regulations. You will use the results of this evaluation in drafting the notice. 11346.5(a)(3)(D).

11. **RATIONALE.** For the selected alternative, draft a statement:

- explaining why the selected alternative regulation is reasonably necessary to effectuate the purposes of the statute(s) or other provisions of law the regulation implements, interprets or makes specific (see 5, above), and
- explaining why the selected alternative is reasonably necessary to address the problem the agency intends to address (see 1, above).

This will be used in the initial statement of reasons. 11346.2(b)(1). This part is essential. This is primarily how the agency demonstrates that the proposed regulation satisfies the Necessity standard. 11349(a).

12. **MATERIAL RELIED UPON.** Identify each technical, theoretical, and empirical study, report, or similar document, if any, the agency is relying upon to make the demonstrations discussed in 11 (above). This will be used in drafting the initial statement of reasons. 11346.2(b)(3). Sometimes an explanatory statement will itself be adequate. Other times the statement or one or more of its parts will have to be demonstrated by the use of studies, reports, documents or other material relied upon by the agency and included in the rulemaking record. The bottom line is that the rulemaking record must contain "substantial evidence" to demonstrate that the regulation is (A) reasonably necessary to effectuate the purposes of the statute(s) or other provisions of law the regulation implements, interprets or makes specific, and (B) is reasonably necessary to address the problem the agency intends to address. "Substantial evidence" is such evidence as a reasonable person reasoning from the evidence would accept as adequate to support these two conclusions. 11349(a).

13. **FISCAL IMPACT STATEMENT.** For the selected alternative, prepare estimates of the cost or savings to state and local government and an estimate of the effect on federal funding of state programs. The State Administrative Manual (SAM) explains how to prepare these estimates. SAM 6601. This will be used in completing the Fiscal Impact Statement part of the STD 399 Form and in preparing the notice. 11346.5(a)(6).

Additionally you may wish to develop this information and use it to analyze alternatives under step 7 above. Doing so may help you compare the various alternatives.

14. **COST IMPACT ASSESSMENT.** For the selected alternative, describe all cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed regulation.

"'Cost impact' means the amount of reasonable range of direct costs, or a description of the type and extent of direct costs, that a representative private person or business necessarily incurs in reasonable compliance with the proposed action." 11342.535.

In preparing this assessment, remember, a proposed regulation must be based upon adequate information concerning the consequences of the regulation. 11346.3(a)(1).

You will use this information in drafting the notice of proposed rulemaking (11346.5(a)(9)) and you may use it in preparing an Economic Impact Assessment (11346.3) and in determining whether the proposal may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. 11346.5(a)(7).

Additionally you may wish to develop this information and use it to analyze alternatives under step 7 above. Doing so may help you compare the various alternatives.

15. **ECONOMIC IMPACT ANALYSIS/ASSESSMENT.** For the selected alternative, prepare an Economic Impact Analysis/Assessment that analyzes whether and to what extent the selected alternative will affect:

- (A) The creation or elimination of jobs within the State of California,
- (B) The creation of new businesses or the elimination of existing businesses within the State of California,
- (C) The expansion of businesses currently doing business within the State of California, and
- (D) The benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment.

In preparing this analysis/assessment, remember, a proposed regulation must be based upon adequate information concerning the consequences of the regulation.

You may make the Economic Impact Analysis/Assessment a part of the Initial Statement of Reasons, or it may be a stand-alone document. 11346.3(b)(2), 11346.3(e). If it is a stand-alone document, you must list the Economic Impact Analysis/Assessment as a document relied upon in the initial statement of reasons, and make it available to the public. 11346.2(b)(3), 11346.3(e), 11347.3(a)(7). The bottom line is the Economic Impact Analysis/Assessment must be prepared (11346.3(b)), must be made available to the public (11346.3(e)), and must be included in the rulemaking record. 11347.3(a)(7).

You will use the results of this analysis/assessment in drafting the notice of proposed rulemaking. 11346.5(a)(10). Additionally, you may wish to develop this information and use it to analyze alternatives under step 7 above. Doing so will help you compare the various alternatives.

16. **SIGNIFICANT, STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS.** For the selected alternative, consider its impact on potentially affected businesses, including the ability of California businesses to compete with businesses in other states, and determine whether the selected alternative:

- *may have* a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, *or*

- *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.

You will use this determination in drafting the notice of proposed rulemaking. 11346.5(a)(7) and (a)(8). If you determine that the selected alternative “may have,” then you must identify the types of businesses that would be affected by the proposed action and draft a description of the resulting reporting, recordkeeping, and other compliance requirements. You must also state whether you have or have not considered proposed alternatives that would lessen any adverse economic impact on business. 11346.5(a)(7). You will include this and the solicitation for input on lessening the impact in drafting the notice of proposed action specified in 11346.5(a)(7).

If you determine the selected alternative “will not have,” then you must obtain or develop for inclusion in the initial statement of reasons facts, evidence, documents, testimony, or other evidence upon which the agency relies to support this determination. 11346.2(b)(6) and 11346.5(a)(8). The material relied upon could be from your Economic Impact Analysis/Assessment.

Carefully note: A court may declare a regulation invalid if a notice of proposed rulemaking declares that a regulation “*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, and there is substantial evidence to the contrary in the record. Section 11350(b). A court may also declare a regulation invalid if the rulemaking agency fails to show the foundation for its conclusions in rulemaking documents.

Additionally, you may wish to develop this information and use it to analyze alternatives under step 7 above. Doing so will help you compare the various alternatives.

17. **REPORTING REQUIREMENT.** Determine whether the selected alternative establishes a reporting requirement that applies to business. 11346.3(d). You will use this determination to decide whether to include the following finding in the notice of proposed rulemaking: It is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses.” 11346.5(a)(11). “Any administrative regulation . . . that requires a report shall not apply to businesses, unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses. 11346.3(d).
18. **SMALL BUSINESS.** Determine whether the selected alternative affects small business using the definition of “small business” in the APA at section 11342.610. You are going to use this information in drafting the notice of proposed rulemaking (Cal. Code Regs., tit. 1, sec. 4) and in deciding who to mail your notice to. 11346.4(a)(3). If you decide the selected alternative does not affect small business, draft a brief explanation of the reasons for that decision. Cal. Code Regs., tit. 1, sec. 4. You will use the explanation in drafting the notice of proposed rulemaking.
19. **COMPARABLE FEDERAL REGULATION OR STATUTE.** Determine whether the selected alternative differs substantially from an existing comparable federal regulation or

statute. If it does, draft a brief description of the significant differences and identify the full citation of the federal regulations or statutes. You will use this in drafting the notice of proposed rulemaking. 11346.5(a)(3)(B).

20. UNNECESSARY DUPLICATION OR CONFLICT WITH FEDERAL REGULATIONS.

This one applies only to a department, board, or commission within the Environmental Protection Agency, the Natural Resources Agency, and the Office of the State Fire Marshal. Draft a description of your efforts to avoid unnecessary duplication or conflict with federal regulations addressing the same issues. You may adopt differing regulations upon a finding of one or more of the following justifications:

- The differing state regulations are authorized by law.
- The cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment.

You will use this in drafting the initial statement of reasons. 11346.2(b)(6).

21. HOUSING COSTS. If you have determined that the selected alternative would have a significant effect on housing costs, you will use that determination in drafting the notice and you will have to make that evaluation available to the public, upon request. You will use this in drafting the notice. 11346.5(a)(12).

22. EFFECTIVE COMMUNICATION. Upon request, you must provide a description of the proposed action in a manner that allows for accurate translation by reading software used by the visually impaired with regard to the following rulemaking actions:

- regulations proposed by the Department of Rehabilitation,
- disability access regulations that must be submitted to the California Building Standards Commission,
- special education regulations proposed by the State Department of Education, and
- Medi-Cal regulations proposed by the State Department of Health Care Services.

11346.6.

23. OTHER MATTERS. Are there any other matters that must be addressed in the notice that are prescribed by statute applicable to your state agency or to any specific regulation or class of regulations? You will use this information in drafting the notice. 11346.5(a)(4).

A practical note on the use of this method: Avoid unnecessary repetition in the drafting of the initial statement of reasons.

PART III –A RULEMAKING AGENCY MUST SHOW THE FOUNDATIONS FOR ITS CONCLUSIONS REGARDING ECONOMIC IMPACT ANALYSIS OF REGULATIONS. MERE STATEMENTS THAT MIRROR THE LANGUAGE OF THE APA ARE INADEQUATE.

A recently issued appellate decision explains what the APA requires with regard to the foundation for a rulemaking agency's economic impact analysis. *Western States Petroleum Association v. State Board of Equalization* (January 19, 2012, BC403167) __Cal.App.4th __, Certified for Publication, Court of Appeal of the State of California, Second Appellate District.

In part, this litigation involved the adequacy of the State Board of Equalization's (SBE's) economic impact statement (EIS) under the APA for regulations directing county assessors to assess the value of the "real property" at petroleum refineries by applying new valuation formulas uniquely applied to petroleum refineries. (See Cal. Code Regs., tit. 18, § 474.) Several paragraphs from the opinion are instructive regarding the obligations of a rulemaking agency in preparing and making available its economic impact analysis of a proposed regulation. We quote below from the courts opinion.

The trial court correctly ruled that SBE's EIS failed as an informational document. Generously construed, the EIS consists of a bald statement, devoid of any understandable foundation, that Rule 474 would cause petroleum refineries to pay \$1.4 million more in property taxes in the first year of the rule's implementation. The statement is without any reference to supporting facts or evidence in the rule-making file. The "calculations" provided are little more than a numbers dump, with no explanation of how or from where the numbers are derived. It is not altogether clear in our view whether the numbers used in the "calculations" reflect actual facts. Moreover, even if the accuracy of the numbers is accepted, the calculations do not provide a comprehensible road map to follow to show how Rule 474 will impact petroleum refineries in actual implementation. The EIS leaves a reader without an understanding of what the taxes on a representative refinery would have been under the formerly applicable Rule 461(e), and what the taxes would be under the new rule Rule 474(d)(2). (See Gov. Code, § 11346.5, subd. (a)(9) [an agency shall evaluate the costs to be incurred by a "representative business" affected by a proposed regulation].) Alternatively, even an aggregated, industry-wide comparative analysis (with estimated figures) under Rule 461(e) and Rule 474(d)(2) would have helped to understanding economic impact. SBE would have the public simply accept the agency's ultimate conclusion (\$1.4 million) without the ability to evaluate the conclusion.

Apart from the vagueness of the EIS itself, we agree with WSPA that the record in this matter, i.e., the rule-making file, does not show that SBE's actual underlying analysis of the potential economic impact of Rule 474 was based on "adequate" facts as required under the APA. (See Gov. Code, §§ 11346, subd. (a)(1); 11346.2, subd. (b)(4); 11346.3, subds. (a), (b); 11346.5, subds. (a)(8), (a)(9); 11347.3.) We agree with the trial court's conclusion that SBE's economic impact analysis lacked meaningful quantification of Rule 474's "real world" impact. That is, an economic impact based on data concerning fixture depreciation on assessed values. SBE tells us the trial court's conclusion is wrong because "[t]here is no evidence in the record in conflict with [SBE's EIS]." This may be true, but SBE misses the point. Assuming SBE is correct that there is an "absence of evidence" in the rule-making file conflicting with the final conclusions in its EIS, it does

not follow that the trial court was required to give the EIS a passing grade. The trial court's better-focused examination looked for evidence in the record supporting the final conclusions set forth in SBE's EIS.

In the final examination, we reject SBE's argument that it satisfied Government Code section 11346.5 merely by making this statement in its EIS: "The cost impact on private persons or businesses will be insignificant." In our view, the APA requires more than mere statements that mirror the language of the APA. Public participation in the rule-making process requires that an adopting agency show the foundation for its conclusions, if only so that the foundation and conclusions may be subject to meaningful scrutiny. SBE did not satisfy this standard in adopting Rule 474.

PART IV—OAL’S NOTICE REVIEW CHECKLIST

OAL CHECKLIST - NOTICE REVIEW

Z-No. _____ Agency: _____

Reviewer: _____ Due Date: _____

(All citations are to the Government Code unless otherwise specified. CCR means California Code of Regulations)

<u>REQUIREMENT</u>	<u>PROBLEMS</u>		
Are FOUR COPIES of the text of the notice included? (1 CCR 5)	Y	N	
Are TWO COPIES of Form 400 included? (1 CCR 5)	Y	N	
Is ONE COPY EACH of the proposed text and Initial Statement of Reasons submitted? (11346.2(a) and (b))	Y	N	
Is ONE COPY of STD Form 399 submitted?	Y	N	
Is the Fiscal Impact Statement portion of the 399 complete, signed by Agency Secretary or by the highest ranking official in the rulemaking agency if not under an Agency Secretary? (<i>SAM 6601-6616; 11346.5(a)(6)</i>)	Y	N	
FORM 400: Is Part A of Form 400 completed? (1 CCR 5)	Y	N	
BUILDING STANDARDS: If changes to title 24 are indicated, is approval by Building Standards Commission provided? (Health & Safety Code 18935(a))	Y	N	
<i>NOTICE OF PROPOSED RULEMAKING</i>			
HEARING: <i>If a hearing is scheduled</i> , is the time, place, and nature of proceeding included? (11346.5(a)(1))	Y	NA	N
-- <i>If “yes,”</i> Are there at least 45 days (or other time period specified by statute) between publication date and hearing? (11346.4(a))	Y	NA	N
<i>If no hearing is scheduled</i> , is information on opportunity to request one included? (11346.5(a)(17))	Y	NA	N
WRITTEN COMMENT PERIOD (11346.4(a); 11346.5(a)(15)): Is the date the written comment period closes included?	Y		N
Are there at least 45 days (or other time period specified by statute) between publication date and close of written comment period?	Y		N
AUTHORITY and REFERENCE: Are citations included? (11346.5(a)(2); 1 CCR 14)	Y		N

<p>INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW (11346.5(a)(3)):</p> <p>Is the format similar to the Legislative Counsel’s digest?</p> <p>Is it in plain English?</p> <p>Does it include a clear and concise summary of existing laws, and regulations (if any) related directly to the proposed rulemaking?</p> <p>Does it include a clear and concise summary of the effect of the proposed rulemaking?</p> <p>If there is a substantial difference from an existing, comparable federal regulation or statute, are significant differences briefly described?</p> <p>If so, is a full citation to federal regulation or statute included? (11346.5(a)(3)(B))</p> <p>Does it include a policy statement overview explaining the broad objectives of the regulation AND explaining the specific benefits anticipated from the proposed action, including, to the extent applicable, non-monetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in transparency in business and government?</p> <p>Does it include an evaluation of whether the proposed regulation is inconsistent or incompatible with existing state regulations?</p>	<p>Y N</p> <p>Y N</p> <p>Y N</p> <p>Y N</p> <p>Y N</p> <p>Y N</p> <p>Y N</p> <p>Y N</p>
<p>FORMS INCORPORATED BY REFERENCE (Identified in the Informative Digest)</p> <p><i>If document(s) or form(s) are incorporated by reference, are they listed by title and date? (1 CCR 20(c)(3))</i></p>	<p>Y NA N</p>
<p>MANDATED BY FEDERAL LAW OR REGULATIONS (11346.2(c); 11346.9): <i>If adopting or amending regulations on this basis that are identical to previously adopted or amended federal regulation, is a statement included to that effect, together with a citation to where an explanation of the provisions of the regulation can be found?</i></p>	<p>Y NA N</p>
<p>OTHER STATUTORY REQUIREMENTS (11346.5(a)(4)): Are there any other requirements identified in the Notice that are specific to the agency or type of regulation?</p>	<p>Y NA N</p>

<p>LOCAL MANDATE (11346.5(a)(5)): Is a determination (policy or expenditure) included as to whether a mandate is imposed on local agency or school district that requires reimbursement pursuant to 17500 et seq.?</p> <p>--Is a mandate imposed?</p> <p><i>If "yes," is reimbursement required pursuant to 17500 et seq.?</i></p>	<p>Y N</p> <p>Y N</p> <p>Y N</p>
<p>FISCAL IMPACT (11346.5(a)(6)): The following estimates must be prepared in accordance with DOF instructions (SAM 6601-6616):</p> <p>--Is there an estimate included as to any cost to any local agency or school district requiring reimbursement pursuant to 17500 et seq.?</p> <p>--Is there an estimate included as to any cost or savings to any state agency?</p> <p>--Is there an estimate included as to any other non-discretionary cost or savings imposed upon local agencies?</p> <p>--Is there an estimate included as to any cost or savings in federal funding to the state?</p>	<p>Y N</p> <p>Y N</p> <p>Y N</p> <p>Y N</p>
<p>HOUSING COSTS (11346.5(a)(12)): <i>If agency makes initial determination of significant effect on housing costs, is a statement of that effect included?</i></p>	<p>Y NA N</p>
<p>SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE (11346.3(a); 11346.5(a)(7); 11346.5(a)(8)):</p> <p><i>If agency makes initial determination that proposal may have such an impact, does the determination:</i></p> <p>--Identify types of businesses affected?</p> <p>--Describe projected compliance requirements?</p> <p>--Solicit proposed alternatives using boilerplate at 11346.5(a)(7)(C)?</p> <p><i>If agency makes initial determination that proposal will not have such an impact, does Notice make a declaration to that effect? (11346.5(a)(8))</i></p>	<p>Y NA N</p> <p>Y NA N</p> <p>Y NA N</p> <p>Y NA N</p>

<p>STATEMENT OF THE RESULTS OF THE ECONOMIC IMPACT ASSESSMENT (11346.5(a)(10))</p> <p>Is a statement of the results of the economic impact assessment included?</p> <p>Does it specify whether and to what extent the proposed regulation will affect:</p> <ul style="list-style-type: none"> • Creation of jobs within California • Elimination of jobs within California • Creation of new businesses within California • Elimination of existing businesses within California • Expansion of businesses currently doing business within the state • Benefits of the regulation to the health and welfare of California residents, worker safety, and the state’s environment 	<p>Y N</p> <p>Y N</p> <p>Y N</p> <p>Y N</p> <p>Y N</p> <p>Y N</p>
<p>COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS (11346.5(a)(9)):</p> <p>Is a description included of all cost impacts known to the agency that a representative person or business would necessarily incur in reasonable compliance with the proposed action?</p> <p><i>If no cost impacts are known to the agency does the notice say: “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?”</i></p>	<p>Y NA N</p> <p>Y NA N</p>
<p>BUSINESS REPORT (11346.5(a)(11); 11346.3(d)):</p> <p>Does the regulation require a report to be made?</p> <p>Does the report requirement apply to business?</p> <p>--<i>If “yes,”</i> is there a finding that: “It is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses”?</p>	<p>Y N</p> <p>Y N</p> <p>Y N</p>
<p>SMALL BUSINESS (1 CCR 4(a) and (b)):</p> <p>Is a statement included that the proposed action does/does not affect small businesses? (1 CCR 4(a))</p> <p>If “does not affect” determination is made, is a brief explanation included? (1 CCR 4(b))</p>	<p>Y N</p> <p>Y N</p>

<p>ALTERNATIVES STATEMENT (11346.5(a)(13)): Does the notice include the following statement: A rulemaking 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, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.</p>	Y	N
<p>CONTACT PERSON (11346.5(a)(14)): Is the name and telephone number of agency representative and backup contact person included?</p>	Y	N
<p>AVAILABILITY STATEMENTS (11346.5(a)(16)): Are the following statements included:</p> <p>--Availability of express terms?</p> <p>--Availability of initial statement of reasons?</p> <p>--Availability of information upon which proposed rulemaking is based? (11346.5(a)(16); 11346.5(b); 11346.2(a))</p> <p>--Availability of substantial changes to original proposal for at least 15 days prior to agency adoption/repeal/ amendment of resulting regulation (11346.5(a)(18))</p>	Y	N
<p>FINAL STATEMENT OF REASONS (11346.5(a)(19)): Is a statement included explaining how to get a copy of the final statement of reasons?</p>	Y	N
<p>INTERNET ACCESS (11346.4(a)(6); 11346.5(a)(20)): Is a statement included explaining how materials published or distributed through the agency's Internet website, <i>if the agency has one</i>, can be accessed?</p>	Y	N

INITIAL STATEMENT OF REASONS (11346.2(b))		
Does it include a statement of the specific purpose of each adoption, amendment, or repeal?	Y	N
Does it state the problem the agency intends to address?	Y	N
Does it state the rationale for the agency's determination that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose(s) of the statute(s) or other provision(s) of law that the action is implementing, interpreting or making specific AND to address the problem for which it is proposed?	Y	N
Does it enumerate the benefits anticipated from the regulatory action, including the benefits or goals provided in the authorizing statute? These benefits may include, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things.	Y	N
Is the Economic Impact Assessment (EIA) prepared pursuant to 11346.3(b) either: 1) identified as a document relied upon by the agency in proposing the regulatory action (11347.3(b)(7)), or 2) set out in full within the ISOR?	Y	N
Does it identify every other technical, theoretical or empirical study, report, or similar document relied upon, if any, by the agency in proposing the proposed regulatory action?	Y	N
Does it describe reasonable alternatives to the regulatory action proposed by the agency or public, including alternatives that would lessen any adverse impact on small business?	Y	N
Does it explain the agency's reasons for rejecting those alternatives, including alternatives that would lessen any adverse impact on small business?	Y	N
Does it describe alternatives proposed as less burdensome and equally effective in achieving the purposes of the regulation in a manner that achieves the purposes of the statute or other law being implemented and explain a reason for rejecting each such alternative, OR state that no such alternative has been proposed.	Y	N
If the proposed regulatory action mandates the use of specific technologies or equipment, or prescribes specific actions or procedures, does it show that the agency considered a performance standard as an alternative, AND explain why the agency believes these mandates or prescriptive standards are required?	Y	NA N

Does it contain facts, evidence, documents, testimony, on which the agency relies to support an initial determination that the action WILL NOT have a significant adverse economic impact on business?	Y	NA	N
APPLICABLE ONLY TO AGENCY WITHIN Cal/EPA, NATURAL RESOURCES AGENCY, FIRE MARSHAL			
Does it describe efforts to avoid unnecessary duplication or conflicts with federal regulations?	Y	NA	N
Does it include finding that differing regulations are authorized by law, or that cost is justified by benefit?	Y	NA	N
REGULATIONS MANDATED BY FEDERAL LAW (11346.2(c))			
Does proposal contain one or more regulations which are identical to one or more corresponding federal regulations?	Y		N
Have all the initial statement of reasons requirements for such regulations been satisfied? Alternatively, does the notice contain a statement that a federally mandated regulation is being proposed along with a citation to where an explanation of the provisions of the regulations can be found?	Y		N