FINDING OF EMERGENCY

The Office of Administrative Law ("Office" or "OAL") finds that the emergency order of repeal of sections 121 – 128, and Appendix A ("Request for Determination – Form 1013 (1/02)") is necessary for the immediate preservation of the public peace, health and safety, or general welfare.

Faced with a sudden and significant reduction in state funding for its activities, OAL has determined that it must immediately suspend its discretionary function of accepting requests for determination and issuing determinations pursuant to Government Code section 11340.5. Section 11340.5, subdivision (b), provides, in part:

> "If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office *may* issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in Section 11342.600." (Emphasis added.)

Thus empowered, in 1985 OAL adopted regulations [currently CCR, Title 1, sections 121 through 128] to provide an orderly process for any person to challenge agency rules that had not been formally adopted pursuant to the Administrative Procedure Act ("APA"; Gov. Code sec. 11340 et seq.). Since then, OAL has accepted requests for a determination and issued determinations in accordance with these regulations, with the result that over 200 regulatory determinations have been issued. Experience has shown that each determination requires many hours of legal research and careful writing by OAL's legal staff, with the process effectively consuming a substantial portion of OAL's limited financial and staff resources.

In the early years when OAL wrote the rules for the determination process, OAL had a staff of approximately 51 persons, including 18 attorneys. OAL underwent a significant downsizing in 1991 to approximately 21 persons, yet continued reviewing proposed regulations pursuant to its mandated duties under the APA, overseeing publication of the California Code of Regulations and California Regulatory Notice Register, providing agency training, and processing determinations. However, determination requests developed into a significant backlog during the ensuing period, one that OAL was only able to bring under control with the aid of several volunteer attorneys temporarily loaned to OAL for this purpose. In this way, 47 determinations were issued in 1998. The volunteers have long since returned to their respective agencies. To continue at that pace with the recent significant reduction in state funding for OAL is impossible. OAL's budget was cut 6 percent in FY 2001-2002, and an additional 11 percent in FY 2002-2003. OAL will now incur an additional 20% reduction for the FY 2003-2004. It is plainly impractical for OAL to continue the time consuming work of processing determination requests only to see an unmanageable backlog of work accumulate as the

result. At the present time the office cannot afford to devote the necessary resources to preparing regulatory determinations and we have no prospects for additional personnel or loaned staff to handle the work. To cope with this problem in a forthright manner, without misleading potential requesters, we believe the prudent course is to suspend the process of determination requests immediately.

Today, OAL is a small agency with a staff of only 22 persons facing a 20% reduction, and a large role to fulfill in meeting its statutorily mandated responsibility of reviewing substantially all state rulemaking actions to assure agency compliance with the APA prior to the time the new or changed rules take effect. OAL must determine that each regulation meets the APA standards of necessity, clarity, consistency, authority, reference, and nonduplication. This requires careful review of not only the proposed regulations of over 200 other state agencies, but all notices, statements of reasons, public comments, and pertinent statutes. This duty to review the adoption, amendment and repeal of regulations within 30 working days is mandatory, with no leeway for delay, as any completed rulemaking would be deemed approved by operation of law if OAL failed to make a timely decision. It is important to keep in mind that many of the proposed regulations submitted to OAL for review deal with safety issues and public benefits. To allow such regulations to go into effect without the benefit of OAL's review could result in the reduction or loss of safety protections or benefits to the public. With due consideration of these facts, it is readily apparent that continuing to complete OAL's characteristically thorough, mandated review on time does not allow OAL to perform the discretionary process for reviewing and researching determination requests and writing determinations.

The issuance of determinations has achieved its principal goal of heightening agencies' and the public's awareness of the requirements of the APA. Although it has not eliminated use by some agencies of rules or standards informally promulgated, it would be fair to say that it has inhibited such practices and fulfilled a broader educational role that makes agency use of rules subject to the APA less likely. Determinations themselves, although entitled to deference, are only advisory. Many inquiries concerning rules suspected to be improper regulations have already been effectively answered and resolved informally. OAL has therefore decided that it should at this time suspend the process of accepting determination requests and issuing determinations in order to conserve its available personnel so they can adequately perform OAL's statutory responsibility to thoroughly review proposed regulatory changes. Having all legal staff available for such review is vitally important to assure that all proposed regulations are clearly written, legally valid and based in reason. This review is also important because it helps assure public access to regulations, opportunities for meaningful public participation in rulemaking, and the availability of the complete records of rulemaking proceedings. The resulting improvements in the quality of regulations provide a general benefit to the public welfare of the State of California.

OAL proposes to repeal the regulations that created and control the process of accepting determination requests and issuing determinations. Although the issuance of a determination is discretionary under Government Code section 11340.5, the current

regulations oblige the Office to review, process, and ultimately write a determination for each properly prepared request. Continued allocation of the Office's limited staff resources to this activity would jeopardize the sufficiency of its legal review of proposed regulatory actions. The immediate repeal of the determinations regulations is therefore necessary to enable OAL to suspend the process of accepting determination requests and issuing determinations and to reallocate its resources to the review of proposed regulations, all for the benefit and protection of the public welfare.

1/14/03