

California Administrative Procedure Act (APA), Public Records Act (PRA) and Bagley-Keene Open Meeting Act

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California Administrative Procedure Act

- ▶ Purpose: Provide the public with a meaningful opportunity to participate in the adoption of regulations by State agencies.
 - ▶ Ensure adequate record is created for the public, OAL review, and judicial review.
 - ▶ The APA sets forth the basic minimum procedural requirements to adopt, amend or repeal an administrative regulation.
 - ▶ Agencies and certain subjects may be specifically exempt, pursuant to statute.
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The APA and SGMA

- ▶ The process detailed in the upcoming slides *does not* apply to the Sustainable Groundwater Management Act (SGMA) regulations.
 - ▶ Water Code section 10733.2 specifically identifies SGMA regulations as emergency regulations, not subject to review by OAL and remaining in effect until revised.
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What is a regulation?

- ▶ A regulation is:

“...every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.”

Government Code section 11342.600

How to determine if a regulation is needed

- ▶ Look at the statute to determine if it is “self-executing.” (e.g. “The fine for XXX is \$150.”) *If no, then...*
- ▶ Is a policy or procedure a “rule or standard of general application”? *If yes, then...*
- ▶ Is it being used to implement, interpret, or make specific the law administered by the agency or does it govern the agency’s procedure? *If yes, then...*
- ▶ Is it expressly exempt by statute from the APA? *If no, then...*

A REGULATION IS REQUIRED.

WSIP is not exempt from the APA

- ▶ Water Code section 79705 exempts all programs under Proposition 1 except WSIP:

“Chapter 3.5 (commencing with Section 11340) ...of the Government code does not apply to the development or implementation of programs or projects authorized or funded under this division *other than Chapter 8* (commencing with Section 79750).” (Emphasis added.)

Water Storage Investment Program (WSIP) and the APA

- ▶ WSIP requires procedures to allocate funds from Proposition 1. All project applicants will be subject to the same rules and requirements. These procedures are a “standard of general application.”
- ▶ The policies and procedures of the application and evaluation process implement and interpret Water Code sections 79750 through 79760.
- ▶ The policies and procedures are excluded from the exemption afforded other Proposition 1 programs.
- ▶ REGULATIONS ARE REQUIRED FOR ALL ASPECTS OF WSIP.

The APA process

- Pre-Rulemaking Workshop (Discretionary; no Commissioners present)
- Notice (45-day comment period)

Commission Hearing

- Comments may be made
 - May adopt or direct changes based on staff recommendations or comments, or Commission desires
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The APA process

If there are direct substantial and sufficiently related changes:

- 15-day notice and comment period
- Return to Commission for approval or additional changes

If there are NO direct substantial and sufficiently related changes:

- Adopt regulations
- Staff writes final Statement of Reasons
- Submission of entire rulemaking file to OAL
- OAL review (30 working days)

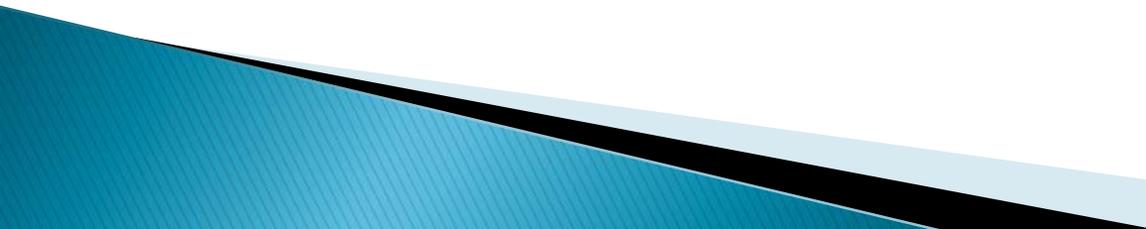
Step 1: Pre-Rulemaking Activity (Discretionary)

- ▶ Agencies may hold one or more public workshops to discuss potential concepts of regulations with the public.
 - ▶ Commissioners/Board members are NOT usually present
 - ▶ Purpose: Staff provides information about possible regulatory proposals
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Step 2: Publication of Notice

- ▶ Notice of the proposed regulations is published in the California Notice Register
 - ▶ Public has 45 days to comment
 - ▶ The notice filing with the Office of Administrative Law (OAL) must include the notice, Initial Statement of Reasons and text of the proposed regulations.
 - ▶ Unless statutorily required, Commission/Board approval is *not* required to file the notice of proposed rulemaking with OAL.
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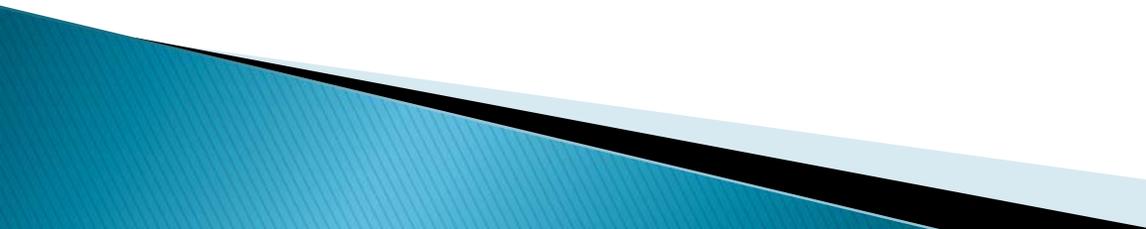
Step 3: Public Hearing

- ▶ A public hearing may be held at least 45 days after the publication of the notice of proposed rulemaking.
 - *A hearing is not required under the APA. If one is not scheduled, it may be requested by the public.*
 - ▶ Oral and written statements may be submitted at the hearing.
 - ▶ Written comments submitted outside the hearing and after the close of the 45-day public comment period do not require a response in the Final Statement of Reasons.
 - ▶ Commission may adopt or direct changes to the proposed regulations.
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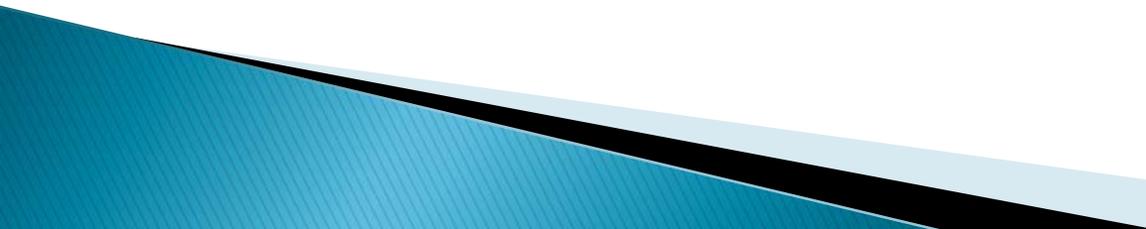
Step 4: 15-day changes (may be more than one)

- ▶ If comments made by the public or recommendations from staff result in substantial and sufficiently related changes, the agency must provide a notice that explains the changes and 15 days for comment.
- ▶ 15-day comments are limited to the *changes proposed by the agency to the proposed regulations only*.
 - Comments submitted that do not address the proposed changes do not require a response from the agency.
- ▶ Commission must approve the final version of the regulations after 15-day changes.

Step 5 (or 3, if no 15-day changes): Commission approval

- ▶ Commission must consider comments
 - ▶ Written responses to comments *are not required* to be presented to the Commission under the APA.
 - Not required by statute.
 - Administratively infeasible.
 - ▶ Commission can adopt regulations after close of public comment.
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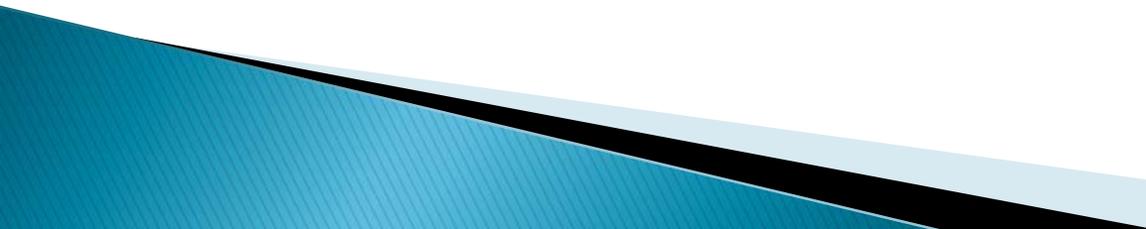
Step 6: Final Statement of Reasons (FSOR)

- ▶ Staff drafts summary and responses to comments received during the comment periods that are related to the regulations.
 - ▶ Other legally required information regarding alternatives and impacts are also included.
 - ▶ FSOR is made public when filed with OAL (see Step 7).
 - ▶ FSOR is *not* made available for comment or review in advance of filing with OAL.
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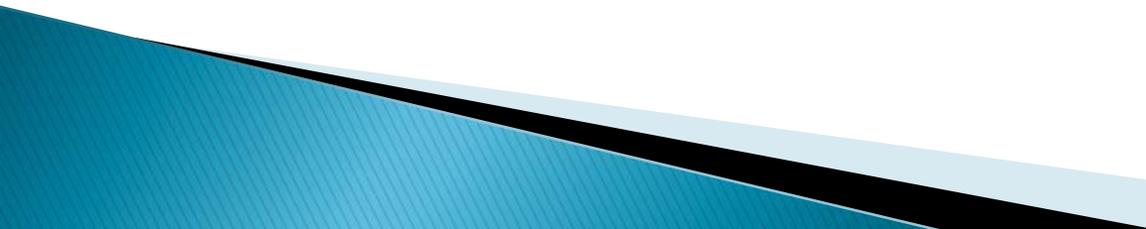
Step 7: File with OAL

- ▶ Staff prepares the final rulemaking file with all required documents
 - ▶ Final rulemaking file must be submitted to OAL within one year of the publication of the notice.
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Step 8: OAL review

- OAL reviews the regulations for authority, necessity, clarity, consistency, non-duplication and necessity.
 - OAL reviews the file to ensure it complied with all of the applicable requirements of the APA.
 - OAL has 30 *working* days to review. (Actual time ~6 weeks.)
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Standards of review: Clarity

- “‘Clarity’ means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” (Government Code section 11349(c).)
 - A regulation must be readily understandable to those who will refer to or be governed by it.
 - Clarity issues can sometimes be addressed during the review period.
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Standards of review: Necessity

- “‘Necessity’ means the...rulemaking...demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute...that the regulation implements, interprets, or makes specific taking into account the totality of the record...” (Government Code section 11349(a).)
- “Substantial evidence” means such evidence as a reasonable person reasoning from the evidence would accept as adequate to support a conclusion.

Standards of review: Necessity (2)

- Meeting the necessity standard requires sufficient explanation of the reasons for the regulation in the rulemaking record that a reasonable person would be convinced the regulation is needed to implement, interpret, or make specific the statute.
- “...good judges customarily tread lightly when they are impressed with the care, conscientiousness, and balance of the administrators, but they penetrate more deeply, sometimes even substituting judgment, when the administrative performance seems to them to have been slovenly.” (*California Hotel & Motel Assn. v. Indus. Welfare Com.*, 25 Cal. 3d 200, 213, 599 P.2d 31, 39 (1979).)

Standards of review: Authority

- “‘Authority’ means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.” (Gov. Code section 11349(b).)
- “Each regulation adopted...shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.” (Gov. Code section 11342.1)
- Essential question: does the agency have statutory authority to interpret the statute and implement regulations in the way the proposed regulations suggest?
- If “no,” regulations will be disapproved.

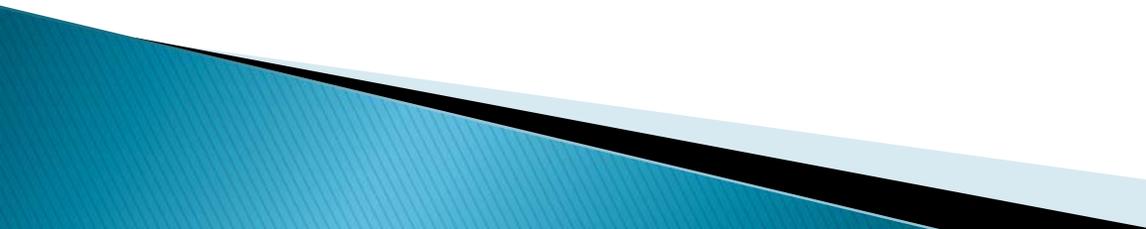
Standards of review: Reference

- “‘Reference’ means the statute...which the agency implements, interprets or makes specific by adopting, amending, or repealing a regulation.” (Gov. Code section 11349(e).)
- Authorities and references are often the same statutes.
- “References” are the specific statutes being implemented, interpreted or made specific.
- “Authorities” are the statutes that allow the agency to adopt the regulations.

Standards of review: Consistency

- ▶ “‘Consistency’ means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Gov. Code section 11349(d).)
 - ▶ A regulation is not inconsistent if the tasks specified in the regulation are designed to aid the statutory objective and do not create a conflict or contradict a statutory provision.
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Standards of review: Nonduplication

- ▶ “Nonduplication means a regulation does not serve the same purpose as a state or federal statute or another regulation.” (Gov. Code section 11349(f).)
 - ▶ Essentially, if it is already regulated, the better option is to amend existing regulations rather than making new ones.
 - ▶ Similarly, if federal or state statutes already address the problem the proposed regulations seek to fix, a regulation is not needed.
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The California Public Records Act



California Public Records Act (PRA)

- ▶ Government Code section 6250 *et seq.* govern public records.
 - ▶ Provides a generalized right of access to state and local government records
 - ▶ Disclosure of public records is *required* unless an exemption to disclosure applies.
 - ▶ Documents must be made available during office hours or for copying.
 - ▶ Reasonable copying costs may be recovered.
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Who is subject to the Public Records Act?

- ▶ State Agencies
 - ▶ Local Agencies
 - ▶ Limited private entities
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What is a public record?

- ▶ Any writing that is:
 - Related to conduct of the public's business
 - Prepared, owned, used or retained
 - By a state or local agency
 - Regardless of physical form or characteristics

What is a public record? (“Writing”)

- ▶ “Any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record created, regardless of the manner in which the record has been stored.”

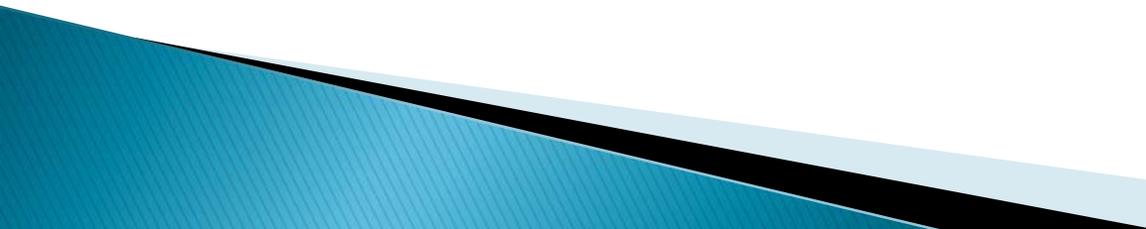
Government Code 6252(f).

- ▶ Includes electronic formats.
- ▶ Generally, email to outside third parties not otherwise privileged is a “public record.”

What is a public record?

- ▶ Custody of a writing by a public agency does not make it a “public record” under the PRA.
 - ▶ If a record is kept because it is necessary or convenient to the discharge of official duties, it is a “public record.”
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Requirements

- ▶ Does not apply to records that do not exist, or are not in the public agency's possession.
 - ▶ No duty to create records in response to a request.
 - Example: if the agency keeps a database of information, the agency is not required to produce a copy of the database filtered by certain information requested by the requestor, unless the agency ordinarily keeps such documents.
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Exemptions from the PRA

- ▶ Preliminary drafts, draft notes, or draft memoranda
 - ▶ Pending litigation
 - ▶ Personnel, medical and insurance records that would constitute an unwarranted invasion of privacy
 - ▶ Closed session minutes and legal memoranda and other materials distributed in a closed session
 - ▶ Records protected by the attorney–client privilege
 - ▶ Records of investigations by law enforcement
 - ▶ Trade secrets
 - ▶ Catch–all: If the “public interest served by not disclosing clearly outweighs public interest served by disclosure”, it is exempt.
 - ▶ Many more...
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Timing

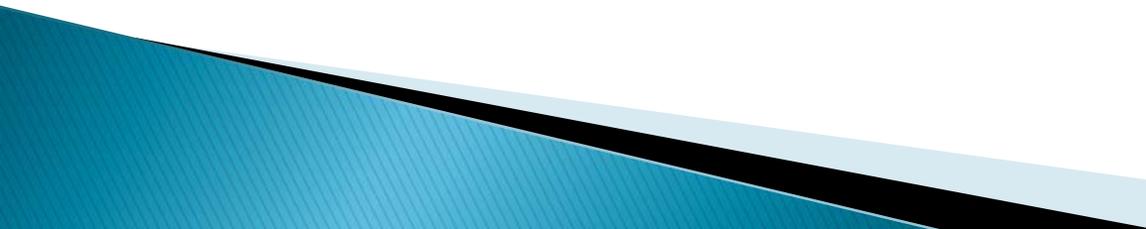
- ▶ Agencies have 10 days to initially respond to a PRA request. (Gov. Code section 6253(c).)
 - ▶ Records must be produced upon request, if practicable.
 - ▶ If not practicable, “prompt production.”
 - ▶ May implement a “rolling production” depending on the volume of records.
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Bagley-Keene Open Meetings Act

Overview

- ▶ Policy: adequate notice of meetings, conduct meetings in open, provide an opportunity for public comment at meetings.
- ▶ Application
 - State body created by law (California Water Commission)
- ▶ “Meeting”: any gathering of a majority to hear, discuss or deliberate. (Gov. Code section 11122.5(a).)
 - Includes serial communications by phone, email or otherwise

What is NOT a meeting?

- ▶ Conference open to the public (Gov. Code section 11122.5(c)(2)).
 - ▶ An open and publicized meeting organized to address a topic of state concern (Gov. Code section 11122.5(c)(3)).
 - ▶ Open and noticed meeting of another state or local agency (Gov. Code section 11122.5(c)(4)).
 - ▶ Purely social or ceremonial occasion (11122.5(c)(5)).
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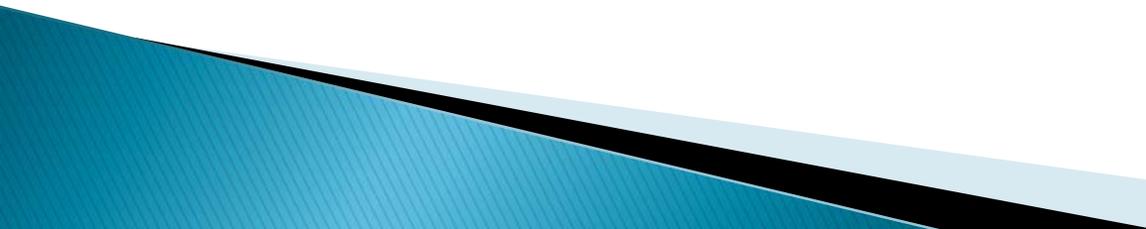
Closed sessions (Gov. Code § 11126.1 *et seq.*)

- ▶ Purposes (not an exhaustive list)
 - Personnel matters (appointment, employment, performance evaluation)
 - Examination matter (preparation, approval, grading of examinations)
 - Issues affecting individual privacy
 - Pending litigation
 - Threat of criminal or terrorist activity
- ▶ Must be noticed
- ▶ Must report action taken to “appoint, employ, or dismiss a public employee arising out of any closed session...” (Gov. Code section 11126.3.)

Closed sessions (cont'd)

- ▶ Information received by members during closed session is considered confidential and can not be disclosed to outside parties.
 - ▶ Minutes of closed sessions are only available to members of the agency or a court (if a violation of law is alleged).
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Notice and Agenda (Gov. Code §11125)

- ▶ 10 calendar days written notice posted on agency website/Internet.
 - ▶ Agenda must have brief description of the items to be heard with sufficient details to inform the public of the subject to be discussed.
 - ▶ Agency *cannot* take action on items not on the agenda.
 - ▶ Agency *cannot* discuss items that are not on the agenda.
 - ▶ Agency *must* accept comments on items on the agenda.
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Teleconference (Gov. Code § 11123)

- ▶ Comply with all requirements for an in-person meeting
 - ▶ Location of each member must be identified in the notice and must be open to the public.
 - ▶ *Votes must be* roll call.
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Deliberation and Voting

- ▶ No calls or emails to discuss, deliberate or take action before the meeting. (Gov. Code 11122.5)
 - ▶ No use of electronic devices during the meeting to communicate with each other. (Gov. Code 11122.5)
 - ▶ No proxy voting. (68 Ops. Cal. Atty. Gen. 65, 70)
 - ▶ Public comment before or during discussion or consideration.
 - ▶ May impose time limits on public comment.
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Document Disclosure (Gov. Code §11125.1)

- ▶ Documents given to all or a majority of the members must be made available at the meeting.
 - ▶ No requirement to post in advance.
 - ▶ Does not apply to records that are exempt from disclosure under the Public Records Act.
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Penalties (Gov. Code §11130.5)

- ▶ Intentional violation is a misdemeanor
- ▶ Actions taken in violation of Bagley–Keene may be void if court finds violation.