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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 80-716
	:	
of	:	<u>APRIL 15, 1981</u>
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GEORGE DEUKMEJIAN	:	
Attorney General	:	
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Robert D. Milam	:	
Deputy Attorney General	:	
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The California Air Resources Board has requested an opinion on a question which we have phrased as follows:

In a rule-making proceeding conducted pursuant to Government Code section 11340 *et seq.*, may a state agency establish and enforce a deadline that is prior to the rule-making hearing by which written comments must be submitted for them to be considered by the agency?

CONCLUSION

In a rule-making proceeding conducted pursuant to Government Code section 11340 *et seq.*, a state agency may not establish and enforce a deadline that is prior to the rule-making hearing by which written comments must be submitted for them to be considered by the agency.

ANALYSIS

The Administrative Procedure Act¹ (hereafter APA), in existence since 1947 in the State of California, has required state agencies to exercise most of their rule-making authority in accordance with the statutory procedures. Prior to 1980 section 11423 of the Government Code² provided:

“At least 30 days prior to the hearing on the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be:

“(a) Published in such newspaper of general circulation, trade or industry publication, as the state agency shall prescribe.

“(b) Mailed to every person who has filed a request for notice thereof with the state agency.

“.....”

Prior to 1980 section 11424 provided:

“(a) The notice of proposed adoption, amendment or repeal of a regulation shall include:

“(1) A statement of time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation.

“.....”

Prior to 1980 section 11425 provided:

“On the date and at the time and place designated in the notice the state agency shall afford any interested person or his duly authorized representative, or both, the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present the same orally. The state agency shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation.

¹ The Administrative Procedure Act historically was chapter 4, chapter 4.5 and chapter 5 of part I, division 3, of title 2 of the Government Code (commencing with § 11370).

² All reference to code sections in this opinion are to the Government Code.

“ ”

“In any hearing under this section the state agency or its duly authorized representative shall have authority to administer oaths or affirmations, and may continue or postpone such hearing from time to time to such time and at such place as it shall determine.

“ ”

These sections have been interpreted by the California courts in the case of *California Optometric Assn. v. Lackner* (1976) 60 Cal. App. 3d 500. At page 507, the *Lackner* court states:

“Section 11425 permits a purely documentary proceeding yet, in its last paragraph, refers to the proceeding as a ‘hearing.’ Thus, contrary to superficial assumptions, it does not necessarily demand a hearing characterized by oral testimony and oral argument In section 11425, the California Act permits a choice of oral advocacy, written presentations, or a combination of both.”

During the 1979–1980 session of the Legislature, the regulation-making provisions of the old APA were repealed and a separate chapter was enacted which revises procedures for promulgating regulations.³ The major change was accomplished by AB 1111 which became chapter 567 of the Statutes of 1979. The changes brought about by this bill were recently analyzed in 63 Ops. Cal. Atty. Gen. 326 (1980). Later, in the same legislative session, AB 939 was enacted as chapter 1203 of the Statutes of 1979. These bills left much of the language of the former statute unchanged and in many cases simply reenacted the old provisions under new section numbers. The change in section numbers are as follows:

<u>Former Section</u>	<u>New Section</u>
11423	11346.4
11424	11346.5

³ Chapter 567 of the Statutes of 1979 repealed chapter 4.5 of part I of division 3 of title 2 of the Government Code and added chapter 3.5 (commencing with § 11340) to this part of the Government Code. Section 11370 in defining the APA does not include chapter 3.5 within the definition, thus technically this new enactment is not a part of the APA.

Section 11346.4 provides:

“At least 45 days prior to the hearing on the adoption, amendment or repeal of a regulation, notice of the proposed action shall be:

“(a) Published in such newspaper of general circulation, trade or industry publication, as the state agency shall prescribe.

“(b) Mailed to every person who has filed a request for notice thereof with the state agency.

“.....”

Section 11346.5 provides:

“(a) The notice of proposed adoption, amendment, or repeal of a regulation shall include:

“(1) A statement of the time, place and nature of proceedings for adoption, amendment, or repeal of the regulation;

“.....”

“(7) The date by which comments submitted in writing must be received to present statements, arguments or contentions in writing relating to the proposed action in order for them to be considered by the state agency before it adopts, amends, or repeals a regulation.”

Section 11346.8 provides in pertinent part:

“On the date and at the time and place designated in the notice the state agency *shall* afford any interested person or his or her duly authorized representative the opportunity to present statements, arguments, or contentions in writing. If a public hearing is scheduled, an oral presentation shall also e permitted, if no later than 15 days prior to the hearing, an interested person or duly authorized representative submits in writing to the state agency a request to make an oral presentation. The state agency *shall* consider all relevant matter presented to it before adopting, amending, or repealing any regulation.” (Emphases added.)

Subdivision (a)(7) of section 11346.5 was added by chapter 1203, Statutes of 1979, but otherwise the language of the reenacted sections is identical to the former sections under the old APA. The description of these proceedings in *California Optometric Assn. v. Lackner*, *supra*, 60 Cal. App. 3d at page 507 applies to the new sections as well as the former sections because there was no substantial change in the language. A proceeding under section 11346.8 is the one at which interested parties are given the opportunity to present either written materials or oral testimony. The notice must state the “nature of the proceeding,” that is whether written materials only may be submitted or whether an oral presentation may be made.

Relying on section 11346.5, subdivision (a)(7), the Air Resources Board adopted the following provision in its regulations governing board hearings:

“60004(b)

“The State Board may specify the date by which comments submitted in writing must be received for them to be considered, provided that except for emergency hearings the deadline for filing written comments shall be at least 45 days from the date of publication of the staff report. Any deadline for receipt of written comments shall be contained in the hearing notice. The State Board shall accept for consideration written comments submitted after the deadline specified in the hearing notice but by the hearing date on a detailed factual showing that the comments could not have been provided to the State Board by the deadline by reasons of factors beyond the control of the person submitting the comments, and that the comments were submitted as expeditiously as reasonably practicable following the deadline.”

This regulation provides for a deadline prior to the meeting date and if comments are not received by that date they will not be considered by the Air Resources Board unless there was reasonable cause for the material not to have been submitted.

Section 11346.5 requires that the notice contain the date by which comments submitted in writing must be received to be considered by the state agency. There is no mention of whether the date can be before the hearing or not. Section 11346.8 requires that the state agency afford any interested party the right to present either written or oral statements at the hearing.

In construing the terms of these sections, we apply the controlling rule of statutory construction, that one is required to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (Select *Base Materials v. Board of Equalization* (1959) 51 Cal. 2d 640, 645.) In order to determine this intent, a statute must be construed with

reference to the whole system of law of which it is a part so that all may be harmonized and have effect. The various parts of a statutory enactment must be harmonized by considering the particular section in context of the statutory framework as a whole. (*Palos Verdes Faculty Association v. Palos Verdes Peninsula School District* (1978) 21 Cal. 2d 650, 659; *Moyer v. Workmen's Compensation Appeals Board* (1977) 10 Cal. 3d 222, 230; *Select Base Materials v. Board of Equalization*, *supra*, at p. 645; *Stafford v. Los Angeles etc. Retirement Board* (1954) 42 Cal. 2d 795, 799.) Where the provisions of a statute are susceptible to two or more reasonable interpretations, the interpretation that will harmonize rather than conflict with other provisions should be adopted. (*People v. Kuhn* (1963) 216 Cal. App. 2d 695, 698.) Amendment or repeal by implication is not favored and should not be presumed. (*First M.E. Church v. County of Los Angeles* (1928) 204 Cal. 201, 204; *People v. Welch* (1971) 20 Cal. App. 3d 997, 1002; *People v. Derby* (1960) 177 Cal. App. 2d 626, 629–630.)

In harmonizing section 11346.8 and section 11346.5, subdivision (a)(7), we must read the two sections in conjunction with each other. Since section 11346.8 requires the state agency to afford any interested person the opportunity to present materials for consideration by the agency prior to its final action, subdivision (a)(7) of section 11346.5 cannot be used to deter parties from filing written submissions at the time of the proceeding. Thus, the deadline fixed under subdivision (a)(7) of section 11346.5 cannot precede the time fixed for the proceeding under section 11346.8.

This brings us to the question of when an announced deadline may be enforced by not considering comments received after the established date. As concluded above, this date cannot be prior to the date of the public hearing. However, there is nothing in the law to preclude establishing such an enforceable deadline as of the date of the meeting or public hearing, at the earliest, or as of a date after the meeting or public hearing. Once an enforceable deadline has been established, any submissions received after that date need not be considered by the state agency in taking its final action. If the date established as a deadline under subdivision (a)(7) of section 11346.5 is the date of the meeting or public hearing, section 11346.8 requires that consideration be given to the submitted material before taking final action on the regulation. If the date established as the deadline under subdivision (a)(7) of section 11346.5 is a date after the meeting or public hearing, then final action may not be taken until the day announced as the deadline. This is because in harmonizing these sections, this is the only way for the state agency to consider all relevant material before taking its final action as required by section 11346.8.
