Part 11. Consideration of Public Input

Obligation to Consider Input. A rulemaking agency must consider all relevant matter it receives including comments received via FAX and e-mail before adopting, amending or repealing any regulation,. (Government Code Section 11346.8(a), Government Code Section 11340.8(a).)

In directing the agency to consider 'relevant matter,' the APA impliedly obliges it to exercise good faith, to avoid fixed preconceptions and to be responsive to new insights emanating from the parties' presentations. Possible adoption of a regulation differing from the original proposal is one objective of the hearing process. See, California Optometric Assn. v. Lackner (1976) 60 Cal.App.3d 500, 508, 131 Cal.Rptr. 744.

For each comment received during a public comment period and specifically directed at either the proposed action or the rulemaking procedures followed, the final statement of reasons shall contain *a summary of the comment*; and either of the following:

- *an explanation of how the proposed action has been changed to accommodate the comment; or*
- *an explanation of the reason for making no change.* (Government Code section 11346.9(a)(3).)

- When an agency decides to reject a comment, the response to the comment must be responsive to the comment and must rise to the level of being an "explanation of the reason for making no change."
- Late comments must be included in the record, (Government Code Section 11347.3 (b)(6)) but need not be summarized and responded to.
- No need to personally respond to a commentor.
- Ambiguous comments must be responded to in the alternative.
- Repetitive comments may be aggregated and addressed as a group. (Government Code Section 11346.9(a)(3).)
- When many comments are received an agency should carefully organize its summary and response to comments to ensure that all comments are considered and summarized and responded to.
- In interpreting the meaning of a regulation a court may consider what an agency says in the summary and response to comment . (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 186, 105 Cal.Rptr.2d 214.)

Answers to the following questions determine whether a rulemaking agency must summarize and respond to a comment on the record, and determine the nature of a proposed change.

1. Was the comment received during a public comment period? (If not, no response required. Agency may respond if it wishes to do so.)

2. Is the comment directed at the proposed action or the rulemaking procedures followed? (If not, no response required.)

3. How does the agency wish to respond?

(a) Reject the comment:
- summarize the comment, and
- explain the reason for making no change to accommodate the comment.

(b) Accept the comment and change the proposal:
- summarize the comment, and
- explain how the proposed action has been changed to accommodate the comment.

4. What is the nature of a proposed change?

- **Is the change nonsubstantial or substantial?**

> A change is nonsubstantial if it clarifies without materially altering the requirements, rights, responsibilities, conditions, or prescriptions contained in the original text.
> (California Code of Regulations, Title 1, Section 40.)

- **Is the change sufficiently related or not-sufficiently related?**

> A proposed change is sufficiently related to the original proposal if a reasonable member of the directly affected public could have determined from the notice that the proposed change could have resulted.
> (California Code of Regulations, Title 1, Section 42.)