

HOW TO PARTICIPATE IN THE RULEMAKING PROCESS

**THE STATUTES, REGULATIONS AND CASE LAW YOU
NEED TO MAKE YOUR VOICE HEARD IN THE
CALIFORNIA RULEMAKING PROCESS**

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A CALIFORNIA STATE AGENCY MUST CONSIDER RECOMMENDATIONS AND OBJECTIONS FROM THE PUBLIC BEFORE IT ADOPTS OR CHANGES ANY REGULATION NOT EXPRESSLY EXEMPTED FROM THE CALIFORNIA ADMINISTRATIVE PROCEDURE ACT (APA). A “REGULATION” IS A POLICY OR PROCEDURE AFFECTING THE PUBLIC OR ANY SEGMENT OF THE PUBLIC THAT IMPLEMENTS, INTERPRETS, OR MAKES SPECIFIC A STATUTE THE STATE AGENCY ENFORCES OR ADMINISTERS.

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THE PROCEDURE FOR RULEMAKING Every department, division, office, officer, bureau, board or commission in the executive branch of California state government must follow the rulemaking procedures in the Administrative Procedure Act (Government Code § 11340 *et seq.*) The Government Code is available at <http://www.leginfo.ca.gov/calaw.htm>. Rulemaking must also comply with regulations adopted by the Office of Administrative Law (OAL) (California Code of Regulations, Title 1, §§ 1-120; <http://ccr.oal.ca.gov/>) unless expressly exempted by statute from some or all of these requirements. OAL's publication, *California Rulemaking Law Under the Administrative Procedure Act*, is an annotated compilation of the California statutes and regulations governing rulemaking and is available from OAL for a nominal fee. The checklists used by OAL in its review of regulation filings are available online at <http://www.oal.ca.gov/rulemaking.htm>.

THE CALIFORNIA CODE OF REGULATIONS Regulations are printed in the California Code of Regulations after they are adopted by the rulemaking agency, approved by OAL and filed with the Secretary of State. You may access regulations in the California Code of Regulations at <http://ccr.oal.ca.gov>.

PRE-NOTICE INVOLVEMENT An agency may involve the public in workshops or other preliminary activities well before the start of the formal rulemaking process. Government Code section 11346.46 requires an agency proposing to adopt complex proposals or a large number of proposals to involve the public. You can contact the agency and request to be added to their regulations mailing list to ensure you are notified of this opportunity. Also, agency websites often provide information on upcoming rulemaking actions. For websites, go to the State Agency Index under "Quick Hits" at: <http://www.ca.gov>.

COMMENTING ON THE INITIAL PROPOSAL A 45 day opportunity to submit written, faxed, or e-mail comments on all or any part of a proposed rulemaking action starts when the notice of proposed rulemaking is published in the California Regulatory Notice Register. The Notice Register may be accessed online at <http://www.oal.ca.gov/notice.htm>. The notice of proposed rulemaking is also mailed to those who have asked to be on the agency's notice mailing list, and is posted on the rulemaking agency's website. The notice tells you how to obtain access to the proposed regulation text and the initial statement of reasons and who to call if you have questions. The notice may also schedule a public hearing at which you may comment on the proposal orally and/or in writing.

COMMENTING ON MODIFICATIONS TO THE INITIAL PROPOSAL You will receive a notice of any 15 day opportunity to comment (1) on proposed modifications or (2) new material relied upon if you commented on the initial proposal or have requested such notice. The rulemaking agency also posts a copy of the notice of opportunity to comment on proposed modifications on its website.

MAKING AN EFFECTIVE COMMENT Effective comments are based on an understanding of the statutes and factual material the agency relies on in proposing the regulation, on an understanding of what the proposed regulation is intended to do, and on an understanding of the standards the regulation must satisfy. The Authority and Reference citations that follow the text of each regulation section identify the statutes on which the section is based. The initial statement of reasons describes the purpose and rationale of each regulation and identifies the factual material upon which the agency relies in proposing it. The response to comments in the final statement of reasons must demonstrate that each relevant, timely comment has been considered.

STANDARDS FOR REGULATIONS A regulation must be easily understandable, have a rationale, and be the least burdensome, effective alternative. A regulation cannot alter, amend, enlarge, or restrict a statute, or be inconsistent or in conflict with a statute.

EMERGENCY REGULATIONS An emergency regulation takes effect immediately, before the regular public opportunity for notice and comment. A state agency may adopt an emergency regulation if it can show that the regulation is necessary for the immediate preservation of public peace, health and safety, or general welfare, or if a statute deems the regulation to be an emergency for purposes of the APA. The public may comment directly to OAL on emergency regulations within 5 days after the regulation is submitted to OAL for review, if OAL has not taken action on the regulations before that time. The state agency may submit a rebuttal to any comments made on an emergency regulation up to eight days after the regulation is submitted to OAL. OAL has up to 10 calendar days to review an emergency regulation. You will find additional information about emergency regulations and how to comment on them at <http://www.oal.ca.gov/emergency.htm>. OAL reviews emergency regulations to determine whether an emergency has been demonstrated, or deemed by statute and whether the regulation satisfies the Authority, Reference, Consistency, Clarity, Nonduplication, and Necessity standards. Once approved, an emergency regulation remains in effect for 120 days, unless the state agency has a special statute allowing more or less time. During the time the emergency is effective, the rulemaking agency must conduct

the regular rulemaking process to permanently adopt the regulation. If, however, the agency is unable to complete the rulemaking process within that time, the agency may request permission from OAL to readopt the emergency regulation for another 120 days.

AN OVERVIEW OF THE RULEMAKING PROCESS Administrative Procedure Act requirements are designed to provide the public with a meaningful opportunity to participate in the adoption of regulations by California state agencies and to ensure the creation of an adequate record for the public and for OAL and judicial review. Every California state agency must satisfy the basic minimum procedural requirements established by the APA for the adoption, amendment or repeal of an administrative regulation unless the agency is expressly exempted by statute. (Graphic on pages 6 and 7 illustrates the rulemaking process.)

A DELEGATION OF RULEMAKING AUTHORITY How can a state agency in the executive branch adopt rules and regulations that have the force of law? The California Constitution separates the powers of the state government into legislative, executive, and judicial powers, and provides that persons charged with the exercise of one power may not exercise either of the others except as permitted by the Constitution. The Constitution also vests the legislative power of the State in the Legislature, but reserves to the people the powers of initiative and referendum.

California courts have long recognized that under the Constitution the Legislature may by statute delegate quasi-legislative powers to a state agency in the executive branch, so long as adequate standards are provided to guide the agency. The adequacy of such a delegation is virtually never an issue in a rulemaking because all state agencies, including OAL, must presume that any California statute, including one delegating rulemaking authority, is constitutional unless an appellate court has made a determination to the contrary. (California Constitution, Article 3, Section 3.5.) Thus every rulemaking action must be based upon a statutory delegation of rulemaking authority from the Legislature to a state agency.

PRELIMINARY ACTIVITIES What does a state agency do once it decides to conduct a rulemaking action? It makes the decisions and develops the documents required to conduct a formal APA rulemaking proceeding. Some agencies involve the public during this stage. Others do not. The APA in Government Code section 11346.45 provides that an agency must engage in pre-notice public discussions regarding complex proposals or large proposals. A decision to engage or not engage in such discussions, however, is not subject to review by OAL or the

courts. The agency develops four documents during the preliminary activity stage, which are needed to initiate the formal rulemaking process: the express terms of the proposed regulation (the proposed text), the initial statement of reasons, the STD 399 Fiscal Impact Statement, and the notice of proposed rulemaking.

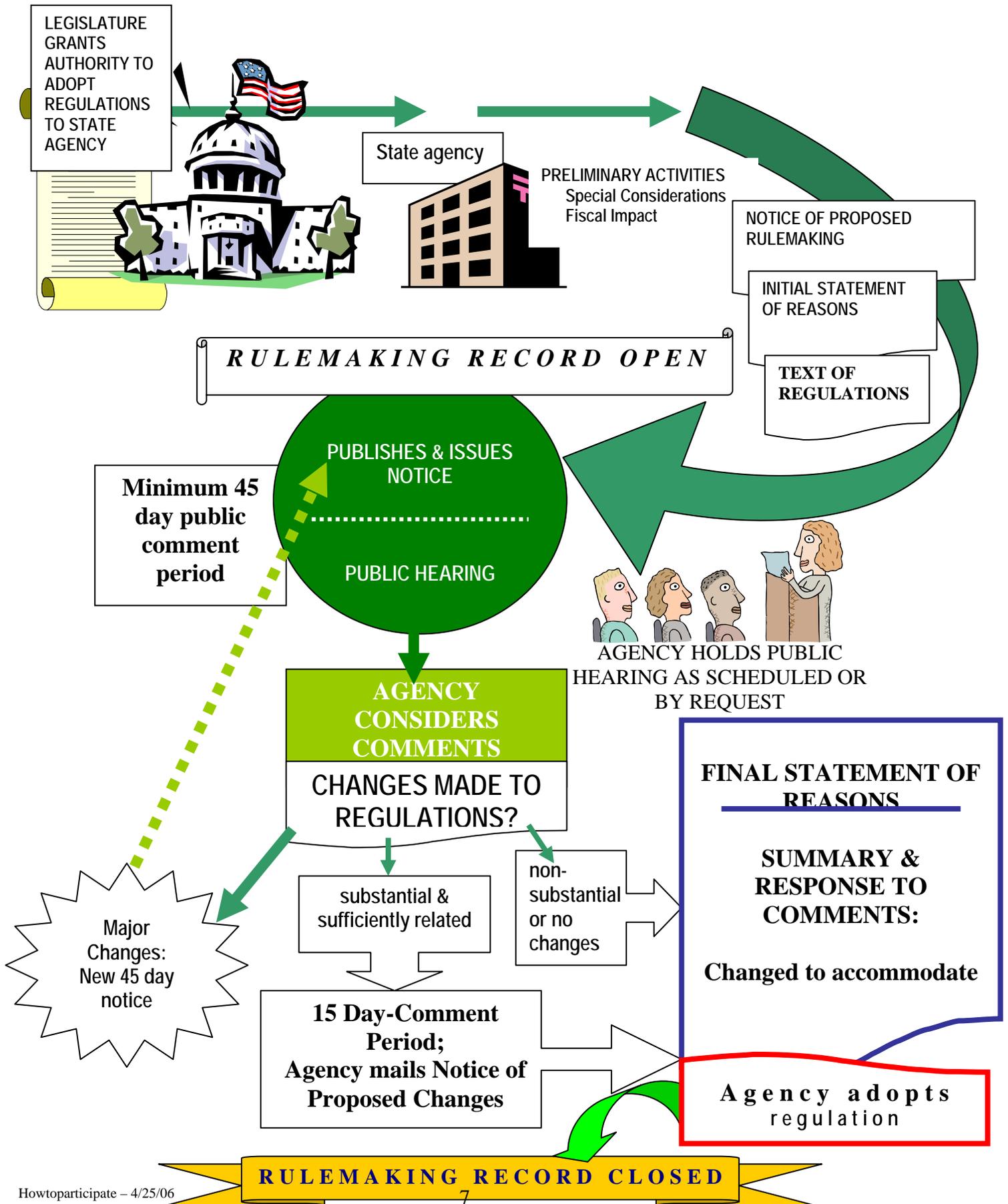
SPECIAL CONSIDERATIONS The APA requires a rulemaking agency to make specified determinations and findings with regard to a proposed action.

- An agency must find that no alternative would be more effective in carrying out the purpose for which a regulation is proposed or would be as effective as and less burdensome to affected private persons than the adopted regulation.
- A rulemaking agency must determine whether the regulation “may have,” or “will not have” a significant, statewide adverse impact directly affecting business. The agency must solicit alternatives if it “may have.”
- A rulemaking agency must describe the potential cost impact of a regulation on a representative private person or business, if known.
- A rulemaking agency must assess whether and to what extent the regulation will create or eliminate jobs and businesses. A rulemaking agency must find that any business reporting requirement is necessary for the public health, safety, or welfare.
- A rulemaking agency must consider the substitution of performance standards for prescriptive standards.
- A rulemaking agency must state whether a regulation affects small business.
- A rulemaking agency must state whether a regulation differs from a federal statute or regulation and avoid unnecessary duplication or conflict.
- If a rulemaking agency makes a determination regarding significant effect on housing costs it must include the determination in the notice.

ISSUING THE NOTICE To initiate a rulemaking action, an agency issues a notice of a proposed rulemaking by having the notice published in the California Regulatory Notice Register, by mailing the notice to those persons who have filed a request for notice of regulatory actions, and by posting the notice, text, and statement of reasons on its website, if it has one. Once the notice is issued, the APA rulemaking process is officially under way.

AVAILABILITY OF THE PROPOSED TEXT AND THE INITIAL STATEMENT OF REASONS Agencies that have websites must make notice, the proposed text and the initial statement of reasons available there. The proposed text and the initial statement of reasons are also available on request to the agency contact person identified in the notice.

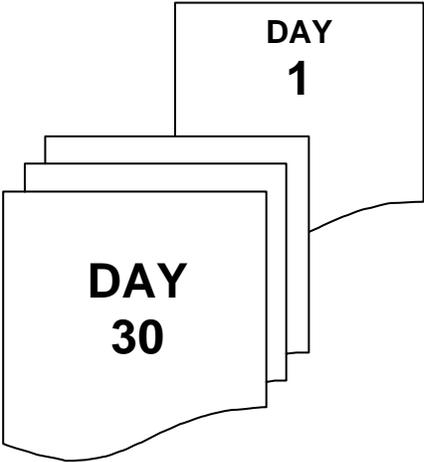
The Rulemaking Process



OAL REVIEW

State agency must submit rulemaking record within 1 year of notice publication

OAL has 30 WORKING days to review a regulation

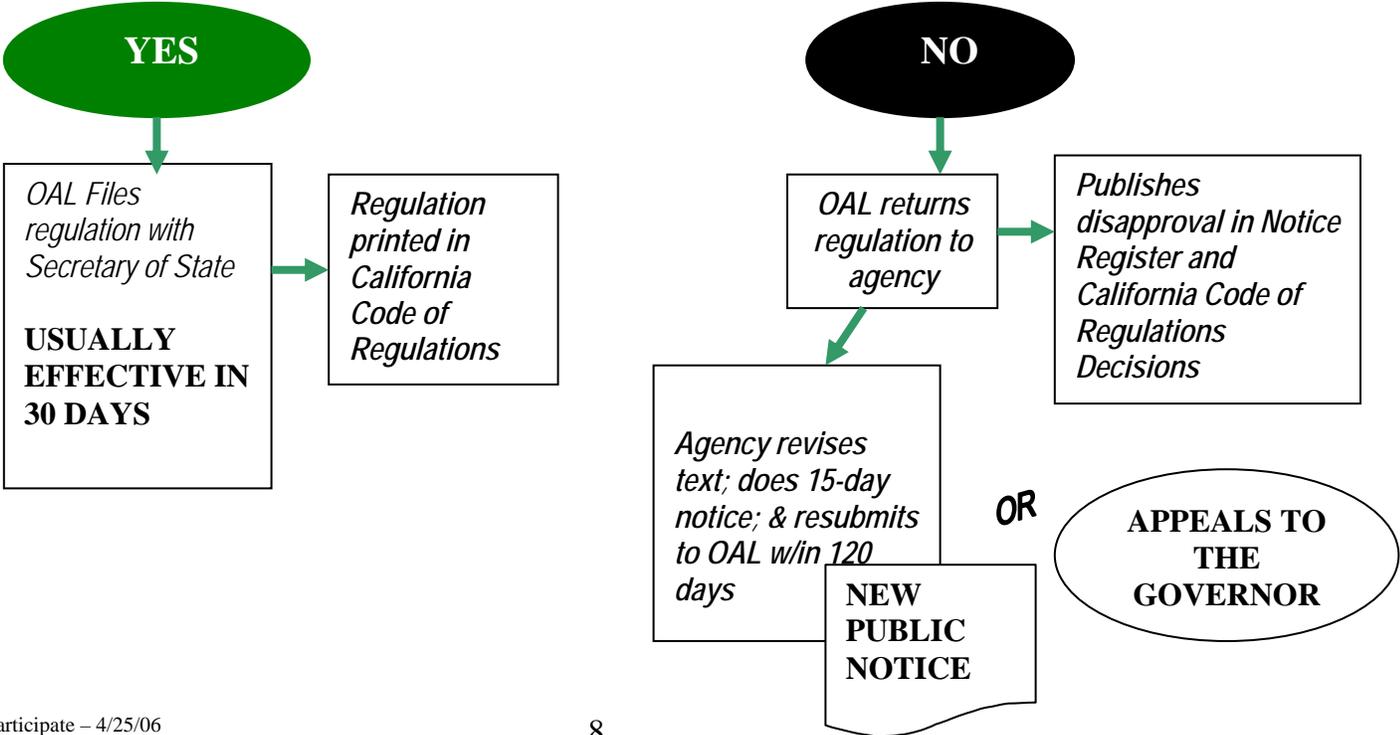


APA STANDARDS:

AUTHORITY
REFERENCE
CONSISTENCY
CLARITY
NON-DUPLICATION
NECESSITY

& PROCEDURAL REQUIREMENTS

DOES THE RULEMAKING SATISFY THE APA?



THE 45 DAY COMMENT PERIOD The APA requires, at minimum, a 45 day opportunity to comment in writing, by fax, or e-mail on the regulation changes as initially proposed by the agency. The notice of proposed rulemaking specifies where the comments must be directed and when this opportunity to comment in writing on the initial proposal closes.

THE PUBLIC HEARING Under the APA, an agency has an option as to whether it wishes to hold a public hearing on a proposed rulemaking action. (An agency's enabling statutes may eliminate this option by requiring a public hearing.) However, if an agency doesn't schedule a public hearing, and any interested person submits a written request for one within 15 days prior to the close of the written comment period, the agency must give notice of, and hold a public hearing. Because of this requirement, a rulemaking agency usually schedules a public hearing unless it is confident that one will not be requested.

CONSIDERATION OF PUBLIC INPUT ON THE INITIAL PROPOSAL The APA requires a rulemaking agency to consider all relevant matter presented to it during a comment period before adopting, amending, or repealing any regulation.

ASSESSING THE NATURE OF MODIFICATIONS TO THE INITIAL PROPOSAL After the initial public comment period, a rulemaking agency will often decide to change its initial proposal either in response to public comments or on its own. The agency must then decide whether a change is: (1) nonsubstantial, (2) substantial and sufficiently related, or (3) substantial and *not* sufficiently related.

MAKING CHANGES AVAILABLE FOR PUBLIC COMMENT The APA provides that a rulemaking agency must make each substantial, sufficiently related change to its initial proposal available for public comment for at least 15 days before adopting such a change. Thus, before a rulemaking agency adopts such a change, it must mail a notice of opportunity to comment on proposed changes along with a copy of the text of the proposed changes to each person who has submitted written comments on the proposal, testified at the public hearing, or asked to receive a notice of proposed modification. The agency must also post the notice on its website. No public hearing is required. The public may comment *on the proposed modifications* in writing. The agency must then consider comments received during the comment period, which are directed at the proposed changes. An agency may conduct more than one 15 day opportunity to comment on a large, complicated, or sensitive rulemaking action before the final version is adopted.

OPPORTUNITY FOR PUBLIC COMMENT BASED UPON NEW MATERIAL RELIED UPON A rulemaking agency must specifically identify in the initial statement of reasons and include in the rulemaking record the material it relies upon in proposing a rulemaking action. If during a rulemaking proceeding an agency decides to rely on material that it did not identify in the initial statement of reasons or otherwise identify or make available for public review prior to the close of the public comment period, the agency must make the document available for comment for 15 days.

SUMMARY AND RESPONSE TO COMMENTS A rulemaking agency must summarize and respond on the record to timely comments that are directed at the rulemaking proposal or at the procedures followed. The summary and response to comment demonstrates that the agency has understood and considered all relevant material presented to it before adopting, amending, or repealing a regulation. An agency may respond to a comment in one of two ways. The agency must either (1) explain how it has amended the proposal to accommodate the comment, or (2) explain the reasons for making no change to the proposal. An agency's summary and response to comments is included as part of the final statement of reasons.

SUBMISSION OF A RULEMAKING ACTION TO OAL FOR REVIEW A rulemaking agency must transmit a rulemaking action to OAL for review within a year from the date that the notice of proposed rulemaking action was published in the California Regulatory Notice Register. OAL then has 30 working days in which to review the rulemaking record to determine whether it demonstrates that the rulemaking agency satisfied the procedural requirements of the APA, and to review regulations for compliance with the six standards: Authority, Reference, Consistency, Clarity, Nonduplication, and Necessity. OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulations.