

ECONOMIC ANALYSIS REQUIREMENTS FOR THE ADOPTION OF ADMINISTRATIVE REGULATIONS
DECEMBER 9, 1996
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THE FOLLOWING IS A MEMORANDUM ON ECONOMIC ANALYSIS REQUIREMENTS FOR THE ADOPTION OF ADMINISTRATIVE REGULATIONS

TO: Executive Officers and Directors
FROM: Peter M. Rooney
Undersecretary
DATE: December 9, 1996

Introduction

The purpose of this memorandum is to update the September 12, 1994, Management Memo entitled "Implementation of 1993 Regulatory Reform Legislation relating to Adoption of Administrative Regulations." The 1994 Management Memo described the legal provisions requiring Cal/EPA agencies to perform an economic analysis before adopting regulations. This memorandum contains material relating to economic analysis, organized into the sections described below. In our continuing effort to use the most current and applicable techniques in performing economic analysis, we will be holding a series of workshops to review these instructions. Therefore, this document may be updated based on input derived from the workshops.

(1) CAL/EPA POLICY REQUIRING ECONOMIC ANALYSIS FOR PROPOSED REGULATIONS: This section describes Cal/EPA policy regarding the economic analysis that must be performed by Cal/EPA agencies.

(2) SUMMARY OF THE APA LEGAL REQUIREMENTS FOR ECONOMIC ANALYSIS: This section summarizes the legal requirements relating to economic analyses that are contained in the California Administrative Procedure Act (APA). These APA requirements are essentially the same ones discussed in the 1994 Management Memo, except that this new summary reflects the reorganization of the APA that became effective on January 1, 1995.

(3) CAL/EPA GUIDELINES FOR EVALUATING ALTERNATIVES TO PROPOSED MAJOR REGULATIONS (SB 1082): This section discusses the Guidelines proposed by Cal/EPA to implement SB 1082.

(1) Cal/EPA Policy Requiring Economic Analysis for Proposed Regulations

Section 2 of this memorandum discusses the economic analysis requirements that are mandated by California law for regulatory actions subject to the Administrative Procedure Act (the "APA"; Government Code sections 11340 et seq). For such regulatory actions, the guidance provided by existing law and good public policy mandate that Cal/EPA agencies perform a thorough economic analysis. Following is Cal/EPA policy regarding the economic analysis that must be performed by Cal/EPA agencies.

--ANALYSIS THAT SHOULD OCCUR BEFORE THE 45-DAY NOTICE IS ISSUED.

Under the APA, the rulemaking process formally begins when an agency issues a notice of proposed adoption (often referred to as "the 45-day notice") and publishes it for a public comment period of at least 45 days. The APA says very little about what should happen before the formal rulemaking process begins (i.e., how an agency develops a proposed regulation, and what alternatives should be considered before the agency chooses a particular proposal). To address this, agencies should implement the following process for all major regulations. A "major regulation" is defined in the Guidelines as "any proposed regulation that will have a potential cost to California business enterprises in an amount exceeding ten million dollars (\$10,000,000) in any single year."

The process described below should be completed before the 45-day notice is issued, and should be followed except in emergency situations where immediate action is necessary.

HOLD ONE OR MORE PUBLIC WORKSHOPS. Before proposing a major regulation, each agency should conduct one or more public workshops to consult with affected parties. Stakeholders should be encouraged to provide input on how the regulation should be structured, supply information to the agency on potential economic impacts, and suggest regulatory alternatives. This requirement is consistent with recent legislative practice; in recent years it has become increasingly common for the Legislature to require holding one or more public workshops before certain regulatory actions are adopted (e.g., see Health and Safety Code sections 39668, 43013.2(c), 43018(d), and 44360(b))

CONDUCT AN INCREMENTAL COST-EFFECTIVENESS ANALYSIS. Conducting an incremental cost analysis will allow Cal/EPA agencies to compare the incremental costs needed to achieve various levels of environmental protection. Using the information obtained during the workshop process, the agency should identify a reasonable number of alternatives, or combinations of alternatives, that would fulfill the agency's statutory mandates and accomplish the purpose of the regulatory action. An incremental cost-effectiveness analysis should then be conducted to examine the cost differences in alternatives that have been identified. This analysis would be performed at the same time that the other APA economic analysis requirements are performed

(i.e, before the 45-day notice is issued, as described in section 2 of this memorandum.)

The incremental analysis should be conducted by analyzing each identified alternative using the cost-effectiveness procedures described in section (4)(c) of the SB 1082 Guidelines. The Initial Statement of Reasons (which is created for every proposed regulatory action) should explain what alternatives and combinations of alternatives were considered, the cost-effectiveness of these alternatives, and why the agency decided to choose the approach that was ultimately proposed. If insufficient economic data is available to conduct a detailed analysis of alternatives, the agency should utilize the best data that is reasonably available. This process should be followed except in emergency situations where immediate action is necessary.

Agencies should use their best technical judgement to both independently identify reasonable alternatives, and also to consider alternatives submitted by stakeholders during the workshop process. Of course, there are practical limits on how many different alternatives can be analyzed for each regulatory action. Agencies should therefore analyze a reasonable number of alternatives (or combination of alternatives) that meet all of the following criteria:

The alternatives must be within the authority of the agency to adopt, must be consistent with the statutory mandates that apply to the agency, and must accomplish the purpose of the regulatory action.

The alternatives must be enforceable and technically feasible. In making this determination, the agency may consider the cost to state and local government of implementing the alternative, and may reject alternatives that significantly increase these costs.

For alternatives submitted by affected persons, the alternatives must include a complete description of the alternative, including how it would be implemented and enforced, and at least a prima facie analysis demonstrating why the alternative would be more cost-effective for California business enterprises or individuals. The person submitting the alternative must also provide the agency with any data, references, analyses, or other materials that have been used to support the person's conclusion that the submitted alternative would be more cost-effective.

PERFORM A RISK ASSESSMENT. Most major regulations adopted by Cal/EPA agencies are intended to manage risks to human health, safety, or the environment. For major regulations that fall into this category, estimate the risk that the regulation would reduce when it is fully implemented. To estimate the risk reductions, use procedures and guidelines accepted or published by Cal/EPA or

U.S. EPA, or methodologies that have been peer-reviewed in consultation with the Office of Environmental Health Hazard Assessment (OEHHHA). In some cases it is not possible to accurately estimate the risk reductions due to a variety of reasons, such as lack of data. In such cases, use indicators that may help to indirectly take the risk reductions into consideration.

To help in the decision-making process, compare the estimated risk reduction of the proposed regulation with three similar risk reductions that the proposing agency has adopted in the past (if such information is available). Use scientific methods of comparison that allow for flexibility so that the differences in the regulatory purposes of the three risk reductions are taken into account. To further help in the decision-making process, compare the risk reductions of the proposed regulation with three risk reductions that are not directly controlled by your agency. These three risk reduction cases should be in the environmental risk management efforts undertaken within Cal/EPA, U.S. EPA, or other governmental agencies managing the environment.

In many cases the risk assessment discussion will be too long to feasibly include in the 45-day notice. The main body of the discussion should therefore be included in the Initial Statement of Reasons for the proposed regulation, and the notice should briefly state the conclusions of the analysis and identify where the more complete risk assessment analysis can be found. For some regulations it may not be possible to accurately quantify risks. In these situations agencies should quantify risks to the extent feasible, and qualitatively identify those risks that cannot be meaningfully quantified. Risk assessment analyses should be based on the available scientific evaluations of all significant and relevant information, including information provided by interested parties relating to risks and risk reduction.

It is not necessary to perform a risk assessment on the proposed regulation if the regulation deals with procedural or organizational matters instead of directly reducing risk to public health or the environment.

Estimate the benefits of the regulation. In the Initial Statement of Reasons, the agency should identify the expected benefits to be achieved by the regulation, and explain how the regulation will achieve them. A brief summary of the benefits should also be included in the 45-day notice. Quantify the benefits if it is possible to do so in a meaningful way. In certain situations it is not possible to accurately or meaningfully quantify the benefits of a regulation. In such situations, it will be sufficient to present a matrix of all reasonably foreseeable positive and negative impacts of the regulation. The matrix should also show all reasonable results of the economic evaluations and qualitative analysis that has been performed for the regulation. This matrix will allow a comparison of the costs and the benefits of the regulation.

It is not necessary to estimate the benefits of the regulation if the regulation is specifically mandated by state or federal law.

-Findings that should be made for Major Regulations

All of the economic analyses discussed above must be performed before the 45-day notice is issued. After the notice is issued and the public comments have been considered, an agency will then decide whether to adopt the regulation. Before formally adopting certain regulations, some of the statutes under which Cal/EPA agencies operate require an agency to make certain findings. Before adopting any major regulation subject to the APA, Cal/EPA agencies should also make the following findings:

- (1) That the regulation significantly reduces human health, safety, or environmental risks.
- (2) That the incremental cost-effectiveness of the regulation was considered, and the regulation as adopted is cost-effective.
- (3) That no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation. (This finding is legally required by Government Code section 11346.9(a)(4), and is discussed on page 12 of this memorandum.)
- (4) That the benefits to human health, public safety, public welfare, or the environment justify the costs of the regulation.

Each of the above findings should be supported by material in the administrative record (i.e., in the initial or final statement of reasons for the rulemaking action).

--Including the Secretary of Trade and Commerce in the Process

Government Code section 15363.6(e) authorizes the Secretary of Trade and Commerce at his or her discretion, to submit written comments into the rulemaking record of state agencies proposing to adopt regulations under the APA. The Secretary of Trade and Commerce may comment on the various findings and determinations that state agencies are required to make under the APA, including economic and cost impacts, reporting requirements, and alternative analyses. Comments are to be made:

" . . . in those instances when the secretary determines that the contents of the notice of the proposed action or the supporting analysis and initial statement of reasons do not sufficiently support the findings and determinations of the agency."

In addition, Government Code section 15363.6(e) states that

the Secretary of Trade and Commerce may also comment on other aspects of the proposed action that significantly impact the state's business, industry, economy, job base, etc.

It is important that Cal/EPA agencies provide sufficient information to the Secretary of Trade and Commerce to carry out his or her duties. Therefore, each Cal/EPA agency should forward to Trade and Commerce a copy of the Initial Statement of Reasons and 45-day notice for all proposed rulemaking actions under the APA. In addition, any comments made by Trade and Commerce on a proposed regulation should be carefully considered, and appropriate modifications should be made to the proposal. The Trade and Commerce comments should be summarized and fully responded to in the Final Statement of Reasons for the rulemaking, as specified in the APA. Finally, for proposed "major" regulations, the SB 1082 Guidelines require Cal/EPA agencies to forward to the Secretary of Trade and Commerce all SB 1082 cost evaluations prepared by the agency (see section (d) of the Guidelines).

(2) SUMMARY OF THE APA LEGAL REQUIREMENTS FOR ECONOMIC ANALYSIS

The 1994 Management Memo (attached as Appendix A) summarized the legal provisions requiring that economic analysis be conducted for proposed regulations. There have been no significant changes in these legal requirements since 1994. However, the location of these requirements in the Government Code was changed by AB 2531 (Stats. 1994, Chapter 1039), a bill which reorganized the Administrative Procedure Act (the "APA"; Government Code sections 11340 et seq.). Most of the economic analysis requirements are now located in Government Code sections 11346.3 and 11346.5 (attached as Appendix B).

Following is a brief summary of these requirements, with references to the new section numbers. Since all of the economic analysis requirements (except for SB 1082) are now integrated into the APA, this summary is organized by the APA section numbers instead of by the bills which originally contained the requirements. For reference, a discussion of the bills can be found in the 1994 Management Memo.

Government Code section 11346.3

This section contains the fundamental economic analysis requirements that state agencies must perform. The basic requirement is that:

"State agencies proposing to adopt or amend any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals." (Section 11346.3(a))

As part of this economic assessment, state agencies must:

"... consider the impact on business when initiating, processing, and adopting regulations with consideration of industries affected including the ability of California businesses to compete with businesses in other states."

(Section 11346.3(a)(2); the emphasized language was added by AB 969 (Stats. 1993, Chapter 1038))

Another critical component of the assessment is as follows:

"(b)(1) All state agencies proposing to adopt or amend any administrative regulations shall assess whether and to what extent it will affect the following:

(A) The creation or elimination of jobs within the State of California.

(B) The creation of new businesses or the elimination of existing businesses within the State of California.

The expansion of businesses currently doing business within the State of California.

(Section 11346.3(b)(1); these requirements were established by SB 513 (Stats. 1993, Chapter 1063))

The economic assessment required by section 11346.3 must be performed before the 45-day notice is issued. The assessment should be included in the Initial Statement of Reasons that is created for every proposed regulation (see section 11346.2).

Government Code section 11346.5

As mentioned previously, the APA the rulemaking process formally begins when an agency issues a notice of proposed adoption (often referred to as "the 45-day notice") and publishes it for a public comment period of at least 45 days. Section 11346.5 contains a long list of what information must be included in the 45-day notice. Some of this information relates to the economic analysis conducted by the agency. The section 11346.5 economic analysis provisions are discussed below:

Section 11346.5(a)(6). This subsection basically requires an agency to prepare and include in the notice an estimate of any cost or savings that a proposed regulation imposes on state agencies, local agencies, or school districts, and the cost or savings in federal funding to the state. Detailed information on how to comply with section 11346.5(a)(6) can be found in the State Administrative Manual, section 6050 et seq. (see also Government Code section 11357)

Sections 11346.5(a)(7) and (a)(8). These subsections expand on the provisions of section 11346.3(a), which, as discussed above, requires an agency to "... assess the potential for adverse economic impact on California business enterprises..." for all proposed regulations. Sections 11346.5(a)(7) and (a)(8) essentially require that the results of this assessment must be included in the 45-day notice.

Subsection 11346.5(a)(7) provides that if the state agency "...determines that the action may have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states..." it must include in the 45-day notice a copy of the statement set forth in subsection 11346.5(a)(7). Subsection 11346.5(a)(8) provides that, if the agency instead determines that the action will not have a significant adverse economic impact on businesses (including the ability of California businesses to compete with businesses in other states), the agency must:

"... make a declaration to that effect in the notice of proposed action. In making this determination, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support that finding." (Government Code section 11346.5(a)(8))

Section 11346.5(a)(9). This subsection requires a state agency to assess and include in the notice:

"(9) A statement of the potential cost impact of the proposed action on private persons or businesses directly affected, as considered by the agency during the regulatory development process.

For purposes of this paragraph, "cost impact" means the reasonable range of costs, or a description of the type and extent of costs, direct or indirect, that a representative private person or business necessarily incurs in reasonable compliance with the proposed action."

(Government Code section 11346.5(a)(9))

Section 11346.5(a)(10). Finally, this subsection requires that the 45-day notice include a statement of the results of the assessment required by section 11346.3(b) (i.e., as discussed above, this assessment looks at the effect of the proposed regulation on the creation or elimination of jobs in California, and the effect on businesses in California).

Additional APA requirements relating to proposed regulations that are different from comparable federal regulations.

The economic analysis requirements discussed above apply to all proposed regulations adopted by Cal/EPA agencies. Additional APA requirements also apply for the special situation in which a proposed regulation is similar to a federal regulation. Most of these requirements were added by AB 1144 (Stats. 1993, Chapter 1046). The additional requirements are contained in sections 11346.2(b)(6), 11346.2(c), and 11346.5(a)(3)(A).

Section 11346.2(b)(6) requires a Cal/EPA agency to include in the Initial Statement of Reasons a description of the agency's efforts:

"... in connection with the proposed rulemaking action, to avoid unnecessary duplication or conflicts with federal regulations contained in the Code of Federal Regulations addressing the same issues."

Section 11346.5(a)(3)(A) also requires that certain information be included in the 45-day notice in cases where "... the proposed action differs substantially from an existing comparable federal regulation or statute." In such cases, the 45-day notice must include "... a brief description of the significant differences and full citation of the federal regulations or statutes."

The APA sections cited in the previous paragraph simply require certain information to be included in the Initial Statement of Reasons and the 45-day notice. However, the APA also imposes substantive requirements on Cal/EPA agencies that wish to adopt state regulations that are different from federal regulations. Section 11346.2(b)(6) states that Cal/EPA agencies:

"... may adopt regulations different from federal regulations contained in the Code of Federal Regulations addressing the same issues, upon a finding of one or more of the following justifications:

- (A) The differing state regulations are authorized by law,
- (B) The cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment."

Please note that section 11346.2(b)(6) requires agencies to make only one of these two possible findings. Any finding made by the agency should be supported by material in the administrative record. Finally, section 11346.2 provides for a shorter and easier way to comply with section 11346.6(b) if a proposed state regulation is mandated by federal law or regulations, and the provisions of the state regulation are identical to the federal regulation.

APA requirements relating to the consideration of alternatives

The APA requires state agencies to consider possible alternatives to proposed regulations, and in many cases this endeavor may involve considering the potential economic impact of alternatives. Specifically, the APA requires an agency to include in the Initial Statement of Reasons "... a description of the alternatives to the regulation considered by the agency and the agency's reasons for rejecting those alternatives" and a "... description of any alternatives the agency has identified that would lessen any adverse impact on small businesses." (Section 11346.2(b)(4)).

The APA also requires the agency to include in the Final Statement of Reasons:

"(4) A determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation." (Section 11346.9(a)(4))

and

"(5) An explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses" (Section 11346.9(a)(5))

(3) CAL/EPA GUIDELINES FOR EVALUATING ALTERNATIVES TO PROPOSED MAJOR REGULATIONS (SB 1082)

Senate Bill 1082 (Stats. 1993, Chapter 418) was signed into law in 1993. The bill requires each Cal/EPA agency, before adopting any "major" regulation, to perform a cost analysis of alternatives to the proposed regulation that may be submitted as comments during the public comment period, and to determine whether there is a less costly alternative that would be equally effective.

SB 1082 also requires the Secretary of Cal/EPA to adopt Guidelines for evaluating alternatives to proposed major regulations. Guidelines have recently been proposed by Cal/EPA after development and consultation with Cal/EPA agencies and other affected parties. A copy of the Guidelines is attached as Appendix C. The provisions of the Guidelines are generally self-explanatory, but a few points merit some clarification:

When do the Guidelines apply? The SB 1082 cost analysis is required for "major regulations" proposed by an agency. A "major regulation" is defined in the Guidelines as "any proposed regulation that will have a potential cost to California business enterprises in an amount exceeding ten million dollars (\$10,000,000) in any single year."

At what point in the regulatory process do the Guidelines apply? The first two sections of this memorandum discuss the economic analysis that must be performed before a regulation is proposed by a Cal/EPA agency. Senate Bill 1082 complements these provisions by requiring additional economic analysis after a major regulation has been proposed and, in response to the 45-day notice, comments are received which suggest that there is an equally effective alternative which would be less costly for California businesses. If the agency receives such a suggested alternative, the Guidelines require the agency to conduct a cost analysis of the proposed alternative to determine if it really would be less costly. The basic purpose of the Guidelines is to establish a process for making this cost determination.

Which submitted alternatives must be analyzed? The

Guidelines do not require that every submitted alternative be analyzed. A formal SB 1082 analysis must be conducted only of alternatives that are "equally as effective" as the proposed regulation. "Equally as effective" is defined as follows:

"Equally as effective" means that a submitted alternative or combination of alternatives would achieve the same purpose as the proposed regulation, and would achieve at least the equivalent level of environmental protection consistent with the purpose of the proposed regulation and applicable statutory mandates, within the same time frame as the proposed regulation. In determining whether a submitted alternative is equally as effective as a proposed regulation, the agency shall consider all relevant factors, including but not limited to the enforceability and technological feasibility of the regulation and the submitted alternative."

When should a combination of alternatives be analyzed? The Guidelines explicitly require an agency to determine whether any combination of submitted alternatives would be equally as effective as the proposed regulation. If so, the agency must conduct an SB 1082 cost analysis of the combination of alternatives. For example, suppose an agency receives several submitted alternatives, but none of these alternatives is equally as effective as the proposed major regulation. In this situation the agency must still independently consider whether some combination of these alternatives might be equally as effective, even if no individual has suggested such a combination. If the agency can identify some combination of alternatives that would be equally as effective, the agency must conduct a cost analysis of the combination.

Does the APA require any consideration of alternatives that are not equally as effective as the proposed regulation? Even if a particular alternative is not required to be fully analyzed under SB 1082, the APA still requires state agencies to engage in a more limited consideration of alternatives. The alternatives analysis required by the APA is discussed above, in the last bullet in section (2) of this memorandum.

Who should I contact if I have any questions or comments on the Guidelines? For legal questions, please contact Mr. Robert C. Jenne, Senior Staff Counsel, Air Resources Board Office of Legal Affairs, at (916) 322-3762. For questions on economics or the procedures set forth in the Guidelines, please contact Reza Mahdavi, Air Resources Board Research Division, Economic Studies Section, at (916) 323-8704.

APPENDICES

Appendix A. September 12, 1994 Management Memo: "Implementation of 1993 Regulatory Reform Legislation relating to Adoption of Administrative Regulations"

APPENDIX A:

THE FOLLOWING IS A MEMORANDUM ON MANAGEMENT MEMO: IMPLEMENTATION
OF 1993 REGULATORY REFORM LEGISLATION RELATING TO ADOPTION OF
ADMINISTRATIVE REGULATIONS AUTHORED BY SECRETARY JAMES ME. STROCK.
RELEASED: SEPTEMBER 12, 1994

MEMORANDUM

TO: Executive Officers and Directors

FROM: James M. Strock
Secretary for Environmental Protection

DATE: September 12, 1994

SUBJECT: MANAGEMENT MEMO: IMPLEMENTATION OF 1993 REGULATORY
REFORM LEGISLATION RELATING TO ADOPTION OF
ADMINISTRATIVE REGULATIONS

Legislation enacted in 1993 imposed a number of new requirements relating to the adoption of regulations by state agencies. This memorandum describes how Cal/EPA agencies should implement these new requirements, which are contained in six 1993 bills: AB 969, AB 1144, SB 513, SB 919, SB 1082, and SB 726.

These bills make a number of important amendments to the regulatory adoption process specified in the Administrative Procedure Act (the APA; Government Code section 11340 et seq.) Some of the new requirements will necessitate that Cal/EPA agencies perform significantly more analysis for certain regulations. It will be the responsibility of each Cal/EPA agency to modify their current procedures to conform with this new legislation. Following is a detailed discussion of what Cal/EPA agencies will need to do to comply with the 1993 legislation cited above. Attached to this memorandum is a copy of a typical hearing notice from the Air Resources Board which has been modified to illustrate the type of changes that will be necessary to comply with the new requirements.

The new requirements represent an important part of the Governor's regulatory reform initiative. It is critical that your staff understands how they may affect your agency and that you implement them fully in each rulemaking.

AB1144 (Stats. 1993, Chapter 1046):

AB 1144 amends the APA by adding two new requirements:

(1) AB 1144 imposes a new APA procedural requirement that must be followed. The APA currently requires that, in cases where a "... proposed action differs substantially from an existing comparable federal regulation or statute, the informative digest shall also include a brief description of the significant differences and the full citation of the federal regulations or statutes . . ." (Government Code section 11346.5(a)(3)). AB 1144 amends section 11346.5(a)(3) by adding that in such cases, the informative digest must also include a summary of agency efforts to avoid unnecessary duplication and conflicts between the proposed state regulations and any other federal regulations (br any regulations of other California state agencies; see Government Code section 11340(f)).

This new requirement means essentially that several new paragraphs must be included in each agency's 45-day APA notice (see attached notice). The new paragraphs would set forth the agency's rationale regarding why it is necessary to enact new regulations in an area that is already addressed by other regulations, and would summarize the agencies efforts to minimize duplication and conflicts with the other regulations.

(2) A second requirement of AB 1144 is contained in new Government Code section 11346.6. Section 11346.6 states that departments, boards, and commissions within Cal/EPA may adopt regulations which are different from federal regulations addressing the same issues, upon a finding of one or both of the following justifications:

(1) The differing regulations are authorized by state law.

(2) The cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment.

To comply with the requirements of section 11346.6, agencies should include one or both of these findings in the agency resolution or order adopting the regulation. Please note that section 11346.6 requires Cal/EPA agencies to make only one of these two possible findings. Any finding made by the agency should be supported by material in the administrative record. With regard to finding (1), it should be noted that the APA currently requires that every 45-day notice contain a reference to the authority under which a regulation is being proposed (see Government Code section 11346.5(a) (2)).

AB 969 AND SB 513

Prior to the adoption of the 1993 legislation described in this memorandum, the APA required state agencies to assess the adverse economic impact of proposed regulations. AB 969 and SB 513 add significant new economic analysis requirements to the provisions that already existed in the APA. This memorandum will

first describe the prior legal requirements, and then explain how 1993 legislation has enlarged these requirements.

PRIOR LEGAL REQUIREMENTS TO REFORM ECONOMIC ANALYSIS

Government Code section 1134.6.53(a) (1), which is part of the APA, currently requires state agencies to assess the potential for adverse economic impact on California business enterprises and individuals . . .". As part of performing this economic assessment, a state agency is required to determine whether or not a proposed regulation "... may have a significant adverse impact on business ..." (section 11346.53(a)(2)). If the agency determines that the proposed regulation may have a significant adverse impact on businesses, the agency is required to include in the 45-day notice a copy of the statement set forth in section 1134 6.53(a) (2) (C).

However, if the agency instead determines that the proposed regulation "... will not have a significant adverse economic impact on business ...", the agency is required to make a declaration to that effect in the hearing notice, and to include in the administrative record "...facts, evidence, documents or testimony, or other evidence upon which the agency relies to support that finding..." (Government Code section 1134 6.53(c)).

Finally an agency is also required to assess and include in the hearing notice a statement of the "... potential cost impact of the proposed action on private persons and businesses directly affected..." (section 11346.53(e)). "Cost impact" is defined as:

"..." cost impact" means the reasonable range of costs, or a description of the type and extent of costs, direct or indirect, that a representative private person or business necessarily incurs in reasonable compliance with the proposed action."

All of the prior APA requirements, as described above, continue to be applicable to state agencies. AB 96.9 and SB 513 add new requirements to the ones that already existed.

AB969 (STATS. 1993, CHAPTER 1038)

This bill adds new language to Government Code section 11346.53. The new language requires state agencies, in assessing a proposed regulation is potential for an adverse economic impact on business, to also consider whether the proposed action "... may have a significant adverse economic impact on business, including the ability of California business to compete with businesses in other states ..." (section 11346.53(a)(2); new language added by AB 969 is underlined.)

AB 969 also adds a new subsection A (g) to section 11346. The new subsection (g) provides:

"(g) For purposes of evaluating the impact on the ability of California businesses to compete with businesses in other states, an agency shall consider, but shall not be limited to, information supplied by interested parties."

These new provisions basically require that for those proposed regulations which may have a significant adverse act on business, state agencies must evaluate how the proposed regulatory action may impact the ability of California business to compete with businesses in other states. Furthermore, in conducting this evaluation, state agencies must also consider any information on this issue which has been supplied by interested parties.

SB 513 (STATS. 1993, CHAPTER 1063):

Of all the new legislation discussed in this memorandum::, this bill imposes the most extensive new requirements for additional economic analysis. SB 513 adds a new section (Government Code section 11346.54) to the APA which provides that:

- (a) All state agencies proposing to adopt or amend any administrative regulation shall assess whether and to what extent it will affect; the following:

Ci) The creation or elimination of jobs within the State of California.

(2) The creation of new businesses or the elimination of existing businesses within the State of California.

(3) The expansion of businesses currently doing business within the State of California.

SB 513 does not prescribe a specific methodology to analyze these three factors. However, section 1134.54(d) states that;

"(d) Information required from state agencies for the purpose of completing this assessment may come from existing state publications."

The language of subsection ~d) allows state agencies to comply with SB 513 by compiling and analyzing the economic information that already exists, rather than to undertaking the extremely difficult task of generating new economic data.

Finally, SB 513 also requires agencies to "... include a statement of the results of this assessment in the notice of proposed action ..." (Government Code section 11346.54(c)). This means that another paragraph must be added to each agency's 45-day notice (see the attached notice).

How should Cal/EPA agencies comply with the provisions of AB 969 and SB 513.

For many regulations, these two bills will require that considerably more analysis must be performed than has been performed in the past. Owing to the wide variability in the specific facts for each proposed regulations each Cal/EPA agency must perform a case-by-case assessment to determine what type of analysis to perform. The first step in this assessment would be to review a proposed regulation to determine if any impacts are likely. Some regulations make only minor technical or administrative changes that would not cause any economic impacts. For such regulations, only minimal analysis would be needed to comply with AB 969 and SB 513.

However certain regulations clearly may result in significant economic impacts. For these regulations an analysis must be performed by either in-house agency staff or Outside consultants. Because there is wide variability in the specific facts for each regulation, each Cal/EPA agency will have to carefully assess each individual regulation to determine the best way to conduct the analysis required by SB 513. To provide assistance in this process, the Air Resources Board has contracted with an economics professor at the University of California, Berkeley. He will be helping Cal/EPA economists develop an approach and methodology that can be Utilized by Cal/EPA agencies. This information will be forwarded to each Cal/EPA agency as soon as it becomes available, later this year.

SB 1082 (Stats. 1993, Chapter 418)

SB 1082 is a complex bill that makes a number of important changes to existing law. Two of these changes are particularly relevant to the adoption of regulations by Cal/EPA agencies; these two changes will be discussed below.

(1) New Requirements to Evaluate Alternatives

One important change made by SB 1082 is the addition of a new section 57005 to the Health and Safety Code. (This new section is not part of the APA; but has been located in a new Division 37 of the Health and Safety Code). Commencing January 1, 1994, section 57005 requires Cal/EPA agencies, before adopting any "major" regulation, to:

--evaluate any alternatives to the proposed regulatory requirements that are submitted to the agency in response to the 45-day notice, and

-- consider whether there is a less costly alternative or combination of alternatives which would be equally effective in achieving increments of environmental protection in a manner that ensures full compliance with statutory mandates within the same amount of time as the

proposed regulatory requirements ..." (new Health and Safety Code section 57005(a)).

A "major regulation" is defined as:

"...any regulation that will have an economic impact on the state 's business enterprises in an amount exceeding ten million dollars ..." (new Health and Safety Code section 57005(b)).

Basically, SB 1082 requires that Cal/EPA agencies perform an appropriate cost analysis of regulatory alternatives submitted as comments during the public comment period, and determine whether there is a less costly alternative that would be equally effective active. To clarify the provisions of SB 1082, Health and Safety Code section 57005 requires the Secretary of Cal/EPA to adopt, on or before December 31, 1994, guidelines that Cal/EPA agencies will be required to follow in conducting the SB 1082 cost analysis. Cal/EPA is in the process of developing draft guidelines, which we expect to finalize before the end of 1994. Comments will be solicited from the public and Cal/EPA agencies before the guidelines are approved by Cal/EPA. Subsequent memorandums will keep you informed of developments in this process.

Until such time as final guidelines are approved, Cal/EPA agencies will have to determine how to implement SB 1082 in the context of each proposed regulation. In making these decisions, the following factors should be carefully considered by each agency:

--The SB 1082 analysis is required only of "major" regulations. Some proposed regulations will have an impact of less than \$10,000,000, and such regulations are not subject to SB 1082 requirements.

--Cal/EPA agencies are required to analyze all alternatives submitted as formal comments during the public comment periods under the APA. However, SB 1082 does not require agencies to consider alternatives submitted during any informal regulatory development that may have occurred prior to issuing of a formal 45-day notice under the APA.

--Only certain proposed alternatives can receive consideration under SB 1082. The alternatives that must be analyzed are those that "... achieve full compliance with statutory mandates within the same amount of time as the proposed regulatory requirements ...". Until the exact meaning of these criteria are clarified in the upcoming guidelines, Cal/EPA agencies should carefully evaluate on a case-by-case basis whether each proposed alternative meets these criteria, and must therefore be analyzed under SB 1082. In cases where it is not entirely clear if the criteria have been met, the agency should err on the side of caution and perform an appropriate analysis.

--If a particular SB 1082 analysis is not extensive, it may be included as a response to comments in the Final Statement of Reasons required by the APA (see Government Code section 11346.7(b)). However, an extensive, detailed analysis might be necessary to effectively respond to a complex alternative suggested during the public comment period. In such a case it might be necessary to make the analysis publicly available for a 15-day comment period, in order to conform to the requirement of Government Code section 11436.8(d) that no new material shall be added to the administrative record after the close of the public hearing, unless adequate provision is made for public comment on the material. A very detailed analysis might utilize new data or other material that could be construed as "new material" within the meaning of Government Code section 11346.8(d).

--Even if a particular alternative is not required to be fully analyzed under SB 1082, the APA still requires state agencies to engage in a more limited consideration of proposed alternatives. Specifically, the APA requires state agencies to include in the final statement of reasons:

"A determination, with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation." (Government Code section 11346.7(b) (4).)

Government Code section 11346.7(b) (5) also requires that the final statement of reasons include:

"An explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses."

These APA provisions must be followed whether or not a proposed alternative is subject to a more detailed analysis under SB 1082.

(2 Comments by the Secretary of Trade and Commerce

In addition to the provisions described above, SB 1082 also amended Government Code section 15363.6(e) to specify new responsibilities for the Secretary of Trade and Commerce (the "Secretary"). Section 15363.6(e) states that the Secretary may, at his or her discretion, submit written comments into the rulemaking record of state agencies proposing to adopt regulations under the APA. Comments may be made regarding the various findings and determinations that state agencies are required to make under the APA, including economic and cost impacts, reporting requirements, and alternatives analyses. Comments are to be made:

"... in those instances when the secretary determines that the contents of the notice of the proposed action or the supporting analysis and initial statement of reasons do not sufficiently support the findings and determinations of the agency."

In addition, Government Code section 15363.6(e) further states that the Secretary may, at his or her discretion, comment on other aspects of the proposed action that significantly impact the state's business, industry economy, job base, etc., including the cumulative effects of the proposed action.

Given the critical state of California's economy it is important that Cal/EPA agencies provide sufficient information to the Secretary of Trade and Commerce to carry out his or her duties under SB .1082. Therefore, each Cal/EPA agency should forward to the Secretary a copy of the initial statement of reasons and 45-day notices for future proposed rulemaking actions under the APA. In addition, any comments made by the Secretary on a proposed regulation should be carefully considered, and appropriate modifications should be made to the proposal. Finally the Secretary's Comments should be summarized and fully responded to in the final statement of reasons for the rulemaking, as specified in Government Code section 11346.7(b)(3).

SB 919 (Stats, 1993, Chapter 1131)

Existing provisions of the California Environmental Quality Act ("CEQA") require governmental agencies to consider the potential adverse environmental impacts of proposed "projects" (e.g., the adoption of regulations). Certain Cal/EPA agencies currently implement CEQA by preparing a negative declaration ("ND") or environmental impact report ("EIR"), as appropriate, for proposed regulations. Other Cal/EPA agencies use a different CEQA process for some or all of the agency's regulatory programs, because the agency's regulatory adoption procedures have been certified by the Secretary of Resources as equivalent to the ND/EIR process ("certified regulatory programs").

SB 919 requires most Cal/EPA agencies to perform an environmental analysis of the "reasonably foreseeable methods of compliance" prior to adopting certain regulations. However, only certain Cal/EPA agencies are subject to the requirements of SB 919. These agencies are the Air Resources Board, the Water Resources Control Board, the Department of Toxic Substances Control, and the Integrated Waste Management Board. In addition, only certain types of regulatory actions are covered by SB 919. SB 919 covers only those rules or regulations "... requiring the installation of pollution control equipment, or a performance standard or treatment requirement"

The environmental analysis required by SB~919 must include, at a minimum, all of the following:

(1) An analysis of the reasonably foreseeable methods of compliance.

(2) An analysis of the reasonably foreseeable feasible mitigation measures.

(3) An analysis of reasonably foreseeable feasible alternative means of compliance with the rule or regulation.

Existing CEQA requirements are not affected by AB 919 and must also be met by Cal/EPA agencies. Cal/EPA agencies should implement SB 919 in the same way that they currently implement the existing CEQA requirements. These agencies should be able to implement SB 919 as part of their existing CEQA process, by more explicitly addressing the issues identified in SB 919.

The Cal/EPA agencies should implement SB 919 by including an explicit discussion of SB 919 issues as part of the EIR or, for agencies with certified regulatory programs, in the document that serves as their functional equivalent of an EIR. Agencies with certified regulatory programs are the Air Resources Board, - the Water Resources Control Board, and the Department of Pesticide Regulation.

The effect of SB 919 - is that the three issues listed above must be specifically addressed as part of the environmental assessment that is performed for a proposed regulation. It is difficult to generalize about how to actually perform this analysis, because each regulation will have different "reasonably foreseeable" methods of compliance, with different types of possible impacts that are quite specific to the particular regulation. - Each agency will have to make a case-by-case decision regarding these issues, based on the individual facts of each regulation.

SB 726 (Stats. 1993, Chapter 870)

Existing provisions of the APA require that regulations be written so that the meaning will be easily understood by those persons directly affected by them. (Government Code sections 11349(c) and 11349.1(a)(3).) SB 726 adds an additional requirement for regulations affecting small businesses, which do not have the resources to hire experts to assist them in understanding regulatory requirements. SB 726 add new Government Code section 11343.2 requiring state agencies, when proposing to adopt or amend a regulation that affects small business, to do all of the following:

(a) Adopt a plain English policy statement overview regarding each proposed regulation that would explain

all of the following:

- (1) The broad objectives of the proposed regulation.
 - (2) The specific objectives of the proposed regulation, if appropriate.
- (b) Draft the regulations in plain English, and if it is not feasible to do so due to the technical nature of the regulation, make available to the public a noncontrolling plain English summary of the regulation.

"Plain English" is defined in SB 726 as "... language that can be interpreted by a person who has no more than an eighth grade level of proficiency in English .

On June 22, 1994, the Office of Administrative Law formally adopted detailed regulations to implement and internet SB 726 (1 CCR 4). Among other things, the regulations require that the 45-day notice for a proposed regulation affecting small business include a concise plain English policy statement, and a statement that the plain English regulatory text or plain English summary of the regulatory text as appropriate, is available from the agency contact person. These statements have been included in the sample notice attached to this memorandum. Cal/EPA agencies should obtain a copy of the regulations from OAL and follow them for each rulemaking.

Appendix B. California Government Code Sections 11346.3 and 11346.5

Section 11346.3. Assessing Potential for Significant Adverse Economic Impact on Business or individuals; Ability of California businesses to compete; Assessing creation or elimination of jobs and businesses; Exemption from reporting

(a) State agencies proposing to adopt or amend any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, record keeping, or compliance requirements. For purposes of this subdivision assessing the potential for adverse economic impact shall require agencies, when adopting new regulations or reviewing or amending existing regulations, to adhere to the following requirements, to the extent that these requirements do not conflict with other state or federal laws:

- (1) The regulations shall be based on adequate information concerning the need for, and consequences of, proposed governmental action.
- (2) The state agency, prior to submitting regulations to the office, shall consider the impact on business when initiating, processing, and adopting regulations with consideration of

industries affected including the ability of California businesses to compete with businesses in other states. For purposes of evaluating the impact on the ability of California businesses to compete with businesses in other states, an agency shall consider, but not be limited to, information supplied by interested parties.

It is not the intent of this section to impose additional criteria on agencies, above that which exists in current law, in assessing adverse economic impact on California business enterprises, but only to assure that the assessment is made early in the process of initiation and development of proposed regulations or amendments to regulations.

(b)(1) All state agencies proposing to adopt or amend any administrative regulations shall assess whether and to what extent it will affect the following:

(A) The creation or elimination of jobs within the State of California.

(B) The creation of new businesses or the elimination of existing businesses within the State of California.

The expansion of businesses currently doing business within the State of California.

(2) For purposes of this subdivision, "state agency" shall include every state office, officer, department, division, bureau, board, and commission, whether created by the Constitution, statute, or initiative, but shall not include the courts, an agency in the judicial or legislative branch of state government, the University of California, the Hastings College of the Law, or the Fair Political Practices Commission.

(3) Information required from state agencies for the purpose of completing the assessment may come from existing state publications.

No administrative regulation adopted on or after January 1, 1993, that requires a report shall apply to businesses, unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses.

GOVERNMENT CODE SECTION 11346.5.

Section 11346.5 Notice of Proposed Adoption, Amendment or Repeal; Contents; Plain English Policy Statement Overview; Availability to Public

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

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

(2) Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

(3) An informative digest containing a concise and clear

summary of existing laws and regulations, if any, related directly to the proposed action and the effect of the proposed action. The informative digest shall be drafted in a format similar to the Legislative Counsel's digest on legislative bills.

(A) If the proposed action differs substantially from an existing comparable federal regulation or statute, the informative digest shall also include a brief description of the significant differences and the full citation of the federal regulations or statutes.

(B) If the proposed action affects small business, the informative digest shall also include a plain English policy statement overview explaining the broad objectives of the regulation and, if appropriate, the specific objectives.

(4) Any other matters as are prescribed by statute applicable to the specific state agency or to any specific regulation or class of regulations.

(5) A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4.

(6) An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state.

For purposes of this paragraph, "cost or savings" means additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.

(7) If a state agency, in proposing to adopt or amend any administrative regulation, determines that the action may have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall include the following information in the notice of proposed action:

(A) Identification of the types of businesses that would be affected.

(B) A description of the projected reporting, record keeping, and other compliance requirements that would result from the proposed action.

The following statement: "The (name of agency) finds that the (adoption/amendment) of this regulation may have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states. The (name of agency) (has/has not) considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:

(I) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.

(ii) Consolidation or simplification of compliance and

reporting requirements for businesses.

(iii) The use of performance standards rather than prescriptive standards.

(iv) Exemption or partial exemption from the regulatory requirements for businesses."

(8) If a state agency, in adopting or amending any administrative regulation, determines that the action will not have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action. In making this determination, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support that finding.

An agency's determination and declaration that a proposed regulation may have or will not have a significant, adverse impact on businesses, including the ability of California businesses to compete with businesses in other states, shall not be grounds for the office to refuse to publish the notice of proposed action.

(9) A statement of the potential cost impact of the proposed action on private persons or businesses directly affected, as considered by the agency during the regulatory development process.

For purposes of this paragraph, "cost impact" means the reasonable range of costs, or a description of the type and extent of costs, direct or indirect, that a representative private person or business necessarily incurs in reasonable compliance with the proposed action."

(10) A statement of the results of the assessment required by subdivision (b) of Section 11346.3.

(11) A statement that the action would have a significant effect on housing costs, if a state agency, in adopting, amending, or repealing any administrative regulation, determines that the action would have an effect. In addition, the agency officer designated in paragraph (13), shall make available to the public, upon request, the agency's evaluation, if any, of the effect of the proposed regulatory action on housing costs.

(12) A statement that the adopting agency must determine that no alternative considered by the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

(13) The name and telephone number of the agency officer to whom inquiries concerning the proposed administrative action may be directed.

(14) 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.

(15) Reference to the fact that the agency proposing the action has prepared a statement of the reasons for the proposed action, has available all the information upon which its proposal is based, and has available the express terms of the proposed

action, pursuant to subdivision (b).

(16) A statement that if a public hearing is not scheduled, any interested person or his or her duly authorized representative may request, no later than 15 days prior to the close of the written comment period, a public hearing pursuant to Section 11346.8.

(17) A statement indicating that the full text of a regulation changed pursuant to Section 11346.8 will be available for at least 15 days prior to the date on which the agency adopts, amends, or repeals the resulting regulation.

(b) The agency officer designated in paragraph (13) of subdivision (a) shall make available to the public upon request the express terms of the proposed action. The officer shall also make available to the public upon request the location of public records, including reports, documentation, and other materials, related to the proposed action.

This section shall not be construed in any manner that results in the invalidation of a regulation because of the alleged inadequacy of the notice content or the summary or cost estimates, or the alleged inadequacy or inaccuracy of the housing cost estimates, if there has been substantial compliance with those requirements.

APPENDIX C. CAL/EPA GUIDELINES FOR EVALUATING ALTERNATIVES TO PROPOSED MAJOR REGULATIONS (SB 1082 GUIDELINES)

1. Purpose

Health and Safety Code section 57005 requires the Secretary for Environmental Protection to adopt guidelines for evaluating alternatives to proposed major regulations, which are to be followed by the boards, departments, and offices within the California Environmental Protection Agency ("Cal/EPA"). The purpose of this document is to set forth these guidelines.

2. Applicability

These guidelines shall apply to each board, department, office, or agency within the Cal/EPA that is proposing to adopt a regulation. For the purposes of this section, "proposing to adopt" means that an agency has issued a notice of proposed action pursuant to Government Code section 11346.4, regarding the proposed adoption or amendment of a regulation.

3. Definitions

For purposes of these guidelines, the following definitions shall apply:

(a) "Agency" means any board, department, office, or agency within the Cal/EPA that proposes to amend or adopt a major regulation.

(b) "Capital recovery factor" or "CRF" means a ratio that converts an amount of nonrecurring expenditure to a recurring expense over a project horizon at a discount rate, according to the following formula:

$$CRF = [r(1 + r)^m] / [(1 + r)^m - 1]$$

Where: CRF is the capital recovery factor

r is the discount rate per time period

m is the project horizon

For ease of reference, tables showing the capital recovery factor over various time periods can be found in a number of standard textbooks (e.g., Donald G. Newman, Engineering Economic Analysis, 3rd ed.,

San Jose, California: Engineering Press, Inc., 1988).

Cost" means the total of the nonrecurring expenditures and the recurring expenses incurred by California business enterprises to comply with a regulation.

(d) "Cost-effectiveness analysis" means a method that selects the lowest cost alternative among alternatives that are equally effective for achieving a specific purpose.

(e) "Discounting method" means a method that converts the value of money from future time periods to the present time period according to the following formula:

$$PV = \sum_{t=0}^m Fvt / (1+r)^t$$

Where: PV is the present value of the money received or paid in future time periods

\sum is the summation operator that adds the future money values over the project horizon (m periods).

Fvt is the future value of the money received or paid in the period t during the project horizon.

r is the discount rate per time period

t is any time period from 0, ..., m

(f) "Discount rate" means the interest rate on United States Treasury Securities with a maturity that most closely approximates

the project horizon, plus 2 percent.

(g) "Equally as effective" means that a submitted alternative or combination of alternatives would achieve the same purpose as the proposed regulation, and would achieve at least the equivalent level of environmental protection consistent with the purpose of the proposed regulation and applicable statutory mandates, within the same time frame as the proposed regulation. In determining whether a submitted alternative is equally as effective as a proposed regulation, the agency shall consider all relevant factors, including but not limited to the enforceability and technological feasibility of the regulation and the submitted alternative.

(h) "Future value" means the value of money at a future date that is paid or received in time periods prior to the future date.

(I) "Major regulation" means any proposed regulation that will have a potential cost to California business enterprises in an amount exceeding ten million dollars (\$10,000,000.00) in any single year, as estimated by the agency pursuant to Government Code section 11346.3.

(j) "Nonrecurring expenditures" means all outlays, such as expenditures for plants and equipment, incurred by California business enterprises for items that provide benefits over multiple 12-month periods.

(k) "Present Value" means the value of money at a present date that will be paid or received in future time periods.

(l) "Project horizon" means the time period over which the cost of a proposed regulation or a submitted alternative is estimated. For situations in which capital investment is necessary to comply with a proposed regulation or a submitted alternative, this time period should correspond to the useful life of the capital investment.

(m) "Proposed regulation" means any adoption or amendment of a regulation for which a notice of proposed action has been issued by the agency pursuant to Government Code section 11346.4.

(n) "Purpose of the regulation" means the purpose of the proposed regulation as set forth by the agency in the initial statement of reasons prepared pursuant to Government Code section 11346.2(b)(2).

(o) "Recurring expenses" means all expenses incurred by California business enterprises each year or periodically, such as operating, maintenance, and reporting expenses.

(p) "Submitted alternative" means an alternative or combination of alternatives submitted to the agency during the public comment period for the proposed regulation required by

Government Code section 11346.4(a). The submitted alternative shall at a minimum include a complete description of the alternative being proposed by the commenter, including how it would be implemented and enforced, and a description of why the submitted alternative will be less costly for California business enterprises or individuals. The person submitting the alternative shall provide the agency with all data, references, analyses, or other material that have been used to support the person's conclusion that the submitted alternative would be at least as effective as the proposed regulation and would result in less cost for California business enterprises or individuals. Any material claimed to be confidential by the person submitting the alternative shall be treated in accordance with the California Public Records Act (Government Code section 6250 et seq.) and applicable agency regulations.

4. Guidelines for Cal/EPA Agencies

(a) Prior to adopting any proposed regulation, the agency shall determine whether the proposed regulation is a major regulation, as defined in these guidelines.

(b) If the proposed regulation is a major regulation, the agency shall determine if any submitted alternative is equally as effective as the proposed regulation. The agency shall also determine whether any combination of submitted alternatives is equally as effective as the proposed regulation.

For each submitted alternative or combination of alternatives that the agency determines to be equally as effective as the proposed regulation, the agency shall conduct an evaluation as follows:

(1) The agency shall estimate the cost of the proposed regulation and each submitted alternative over the project horizon and compare the cost of the proposed regulation with the cost of the submitted alternative. The agency shall utilize the same economic, accounting, and financial assumptions, methodologies, and procedures to compare the proposed regulation and each submitted alternative. The comparison specified in this paragraph shall be conducted using cost-effectiveness analysis.

(2) The agency shall conduct the cost-effectiveness analysis over the project horizon by performing the following procedure for both the proposed regulation and each submitted alternative:

A. Estimate the recurring expenses per 12-month period over the project horizon that California business enterprises will incur to comply with the regulation.

For situations in which the recurring expenses are not equal over the project horizon, convert unequal recurring expenses to equalized recurring expenses as follows:

1. Calculate the present value of the recurring expenses for each year of the project horizon using the formula specified in section (3.)(e).

2. Convert the sum of the present values calculated in the previous paragraph using the following formula:

$$\text{Equalized recurring expenses} = \text{PV} \times \text{CRF}$$

Where: PV is the sum of the present value of all the recurring expenses over the project horizon

CRF is the capital recovery factor

B. Estimate the nonrecurring expenditures over the project horizon on equipment, goods and services that California business enterprises will incur to comply with the regulation.

C. Convert the nonrecurring expenditures to a recurring expense over the project horizon, using the capital recovery factor, as specified by the following formula:

$$\text{Converted Recurring Expense} = \text{E} \times \text{CRF}$$

Where: E is the nonrecurring expenditures over the project horizon

D. Calculate the annual costs for each year of the project horizon by adding the converted recurring expenses calculated in paragraph C and the recurring expenses or equalized recurring expenses estimated in paragraph A.

E. Describe and estimate the annual change in the units of pollutant reduced, or other appropriate change, for each year of the project horizon, as measured in an appropriate unit such as pounds, acre-feet, or cubic meters.

F. Calculate cost-effectiveness ratios expressed in terms of the cost per unit of pollutant reduced (e.g., dollars per pound or dollars per acre-foot) by dividing the annual costs (as calculated in paragraph D) by the annual change in the units of pollutant reduced.

G. Use the following procedure to compare equitably the costs over the project horizon for the proposed regulation and each submitted alternative, and account for inflation and the time value of money:

Adjust the cost-effectiveness ratios calculated in paragraph F by assuring that the dollar amounts for

each alternative are adjusted to the same year. The dollar amounts shall be adjusted to the same year by using the discounting method specified in section 3(e). For example, if one alternative requires expenditures in two years from the present for environmental improvements to be realized ten years from the present, and another alternative achieves the same improvement but requires expenditures 5 years from the present, the expenditures must be adjusted for inflation and time value of money to the same year, such as the present year, before comparing the cost-effectiveness ratios of the alternatives.

H. Using the adjusted cost-effectiveness ratios determined in paragraph G, identify the alternative with the lowest cost per unit of pollutant reduced (i.e., the most cost-effective alternative).

I. To the extent feasible, identify those assumptions that suggest significant uncertainty in the levels of expenditures and expenses proposed in the alternative. Modify these assumptions and calculate a range of cost-effectiveness ratios by changing the expenditures and expenses to reasonable levels above and/or below those proposed in the alternative.

(3) Where appropriate the agency may vary the procedures and methodology set forth in subsection (c)(2) (e.g., where adequate information does not exist to follow all of the steps specified in the procedures). The agency may also use other types of cost evaluation analysis in addition to the analysis specified in subsection (c)(2).

(d) The agency shall forward all evaluations prepared pursuant to subsection to the California Trade and Commerce Agency Regulation Review Unit and the Secretary of Trade and Commerce.

(e) The final statement of reasons required by Government Code section 11346.9(a) shall include a summary of each submitted alternative, and the evaluation of the alternative as required by subsection (c).

(f) If the agency adopts or amends the regulation as proposed, the final statement of reasons shall include a statement with supporting information that no alternative considered by the agency would be equally as effective as the proposed regulation and result in less costs.