

Memorandum 99-51

Administrative Rulemaking: Comments on Tentative Recommendation

In April, 1999, the Commission circulated a tentative recommendation relating to administrative rulemaking procedures. Attached to this memorandum are letters commenting on the tentative recommendation as well as some letters that comment on other aspects of the rulemaking study but are relevant to issues raised by the tentative recommendation. In addition, some comments were received by telephone. This memorandum discusses the issues raised by the public comments. After these issues have been resolved, the staff will prepare a final recommendation for the Commission's review.

The memorandum is organized as follows:

	<i>pp.</i>
GENERAL REACTION	2
DEFINITION OF REGULATION	3
TIDEWATER EXCEPTIONS GENERALLY	4
INDIVIDUAL ADVICE	4
Intra-Agency Advice	5
Limitation on Judicial Deference	6
Limitation on Unsolicited Advice	7
Conclusion	8
POLICY MANUAL EXCEPTION	9
Support for Prohibition on Use of "Policy Manuals"	10
Opposition to Prohibition on Use of "Policy Manuals"	11
Alternatives	13
Recommendation	15
EXCEPTION FOR ONLY LEGALLY TENABLE INTERPRETATION	15
EXCEPTION FOR AUDIT PROTOCOLS	16
INTERNAL MANAGEMENT EXCEPTION	18
Objections	19
Management of Staff	19
Confusion and Litigation	19
Conclusion	19
RULEMAKING PROCEDURES	20
Pre-Process Communication	20
Generalization of Plain English Requirements	21
Time Extensions	21
OAL REVIEW STANDARDS GENERALLY	21
NECESSITY STANDARD	22
Context for Evaluating Necessity	22
Scope of Standard's Application	22

Evidence Supporting Determination	23
Strictness of Standard	24
AUTHORITY STANDARD	26
REFERENCE STANDARD	27
EXTENSION OF TIME FOR REVIEW	28
JUDICIAL REVIEW	28
Effect on Standard of Review	30
Review of “Underground Regulations”	31
Drafting Concern	33
TECHNICAL ISSUES	33
Reorganization of Definitions	33
Name Changes	34
Application of Procedures to Repeals	34
Clarity Standard of Review	34
Availability of Rulemaking File Contents	35

Comment letters are reproduced in the Exhibit as follows:

	<i>Exhibit pp.</i>
1. Dick Ratliff, California Energy Commission, April 30, 1999	1
2. Christopher T. Ellison, Ellison & Schneider, June 9, 1999	4
3. Nancy Yamada, California State Employees Association, July 12, 1999	6
4. Donald C. Carroll, California Labor Federation, AFL-CIO, July 12, 1999	8
5. E. L. Sorensen, Jr., State Board of Equalization legal staff, July 16, 1999	11
6. E. L. Sorensen, Jr., State Board of Equalization legal staff, July 15, 1999	12
7. Timothy W. Boyer, State Board of Equalization legal staff, July 15, 1999	21
8. Debbie J. Baity, Department of Motor Vehicles, July 16, 1999	22
9. William Kenefick, Department of Corporations, July 16, 1999	23
10. Miles E. Locker, Division of Labor Standards Enforcement, July 23, 1999	24
11. Ralph Faust, California Coastal Commission, July 26, 1999	31

Unless otherwise indicated, all statutory references in this memorandum are to the Government Code.

GENERAL REACTION

The tentative recommendation does not propose a thorough overhaul of the rulemaking procedure. Instead it recommends piecemeal improvements in specific areas. It is therefore not surprising that the comments received relate to specific elements of the tentative recommendation, rather than expressing any opinion about the merit of the proposal as a whole. These specific concerns are discussed below.

DEFINITION OF REGULATION

The legal staff of the State Board of Equalization (SBE) believes that many of the changes proposed in the tentative recommendation reflect, but do not address, an underlying structural defect in the APA. Specifically, the definition of “regulation” has been interpreted too broadly (see Exhibit p. 13):

Historically, a regulation was regarded as an administrative writing, adopted pursuant to a formal set of procedures, giving meaning to some enactment of law, intended to be enforceable with the force and effect of law, and so enforceable, at least to the extent that the writing was consistent with the underlying enactment of law.

The language of section 11342(g) is consistent with this historical concept. The implication of the language is that there must be some “adoption ‘beyond mere’ issuance.” This language has been interpreted however, to cover any interpretive writing, without regard to whether the writing may be intended to be enforceable and without regard to whether any formal procedure may have been followed in the “adoption” of the writing.

SBE is concerned that this broad interpretation hinders agency efforts at public communication, education, and accessibility — goals that the Commission’s proposals are intended to advance (see Exhibit pp. 13-14):

All of the objectives of the Commission could be accomplished if section 11342(g) were amended to read as follows:

“Regulation” means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency pursuant to the rulemaking provisions of this Act to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency, and intended to have the force and effect of law.

SBE is correct in concluding that many of the proposed changes in this tentative recommendation are aimed at eliminating or reducing procedural obstacles to communication in specific areas where the procedures are unwarranted. However, the staff believes that the changes proposed by SBE would go too far.

Defining “regulation” to mean a rule that has been formally adopted would effectively make the rulemaking procedure optional — if an agency decides to issue or use a rule without formally adopting it, then it is not a regulation and is

therefore not subject to any of the APA provisions that apply to regulations. This is contrary to the prohibition on “underground regulations” provided in Section 11340.5, which broadly prohibits an agency from *issuing, utilizing, or enforcing* a regulation that has not been properly adopted. In fact, the proposed change would nullify Section 11340.5 by eliminating the class of regulations that have not been formally adopted — by definition, a rule that is not formally adopted would not be a regulation.

The staff recommends against the proposed amendment of Section 11342(g). The staff believes the better approach is to leave the broad definition in place and identify appropriate exceptions, as proposed in the tentative recommendation.

TIDEWATER EXCEPTIONS GENERALLY

In *Tidewater Marine Western, Inc. v. Bradshaw* the court identified two classes of agency statement that are not subject to the rulemaking requirements of the APA — “advice letters” to individuals and “policy manuals” that restate or summarize, without commentary, an agency’s prior advice letters and adjudicative decisions. See *Tidewater Marine Western, Inc. v. Bradshaw* , 14 Cal. 4th 557, 571 (1996) (hereinafter *Tidewater*).

Over the course of this study, the Commission has received sharply divergent input on what should be done about the *Tidewater* exceptions. Some note that the court’s statements are merely *dicta* and reflect bad policy in any case, and urge their express abrogation. Others believe that they reflect a common sense limitation on the otherwise strict application of the APA rulemaking procedure and advocate their codification. In the tentative recommendation, the Commission attempted to find a middle ground as a basis for public comment on these issues. The public reaction is discussed below.

INDIVIDUAL ADVICE

Existing law provides an exception to the rulemaking procedures for a regulation that is “directed to a specifically named person or to a group of persons and does not apply generally throughout the state.” See Sections 11343(a)(3), 11346.1(a). The tentative recommendation restates and elaborates this exception in proposed Section 11340.9(e):

11340.9. The requirements of this chapter do not apply to any of the following:

...

(e) An agency statement made to a specifically named person or group of specifically named persons, other than an employee or officer of the agency, to provide advice in response to a request for advice from that person or group of persons. Advice issued under this subdivision does not bind the person requesting the advice and is entitled to no judicial deference.

This effectively codifies the rule stated in *Tidewater* (by allowing the issuance of individual advice without adopting a regulation), but imposes the following limitations on the exception:

- The exception does not apply to advice to an officer or employee of the agency.
- Advice issued under the exception is not binding or entitled to judicial deference.
- The exception only applies to advice issued in response to a request for advice.

All three of these limitations were opposed by commentators. The basis for this opposition is discussed below.

Intra-Agency Advice

The SBE expresses serious concern about the limitation on advice to agency officers and employees (see Exhibit pp. 14-15):

The *Tidewater* decision recognizes that the government has to operate “within itself.” That is, people within the government must talk to each other and write to each other to do their jobs. The government must communicate “within itself” in writing. The government has to operate from the top down, i.e., management makes substantive internal decisions and gives written directions to employees, who act in accordance with management’s understanding of its duties and responsibilities in administering its laws.

...

We conduct thousands of tax audits a year. Our auditors and other personnel look at tens of thousands of transactions. It is not uncommon for persons performing field audits to ask for written advice from their supervisors, from management, or from the Board’s legal staff. It is not uncommon for senior management to ask for written advice. It is not uncommon for elected constitutional officers of this agency to ask for written advice with respect to substantive tax matters from management or from the legal staff. Indeed, the Board’s regulations provide for written briefing to be filed with the Board by the staff in tax disputes heard by the Board. In a sense, the whole

purpose of the staff is to advise the Board and most of that advice is in writing. Is it the intention of the Commission to prohibit all internal requests for advice in an agency's conduct of its business? Can an agency train its employees with respect to the duties and responsibilities of the agency?

The SBE makes a good point. An agency needs to be able train and advise its personnel and must be able to respond quickly in developing a position with respect to novel situations. These points argue in favor of allowing an agency to disseminate advice internally with little or no formal process.

On the other hand, an agency should not be allowed to use an individual advice exception to adopt de facto regulations. For example, if an agency develops a standard for evaluating compliance with a statute enforced by the agency, it is required to adopt the standard as a regulation under the APA. If the agency were allowed to provide "individual advice" to its employees without formal adoption of a regulation, it might distribute a memo to all of its employees instructing them to individually request "advice" on what standards to use in enforcing the statute. In this way, the agency could issue a rule governing its implementation of the statute, without any public notice or comment, OAL review, or publication — a classic underground regulation.

Limitation on Judicial Deference

The Division of Labor Standards Enforcement (DLSE) believes that individual advice issued under the proposed exception should not be precluded from receiving judicial deference. Instead, a court should be free to give an agency advice letter whatever deference is appropriate to the circumstances (see Exhibit pp. 24-25):

In *Yamaha Corp. of America v. State Bd. of Equalization*, (1998) 19 Cal. 4th 1, the California Supreme Court articulated the principle that agency pronouncements exempted from the APA are to be considered by the courts for the purpose of determining what measure of judicial deference such pronouncements should be accorded in ascertaining the correct interpretation of the law. In its opinion, the court emphasized the importance and value of agency expertise to the interpretive process, and at the same time made it clear that the measure of respect to be given such expertise will vary depending on the source, nature, and context of the pronouncement. With these considerations in mind, the court proceeded to delineate a carefully constructed and exacting standard for the courts to follow in assessing the degree of deference to be afforded a particular agency pronouncement.

Taken together, *Tidewater* and *Yamaha* elucidate the Supreme Court's view that in enacting the APA the Legislature contemplated appropriate judicial reliance on expressions of agency expertise which are exempt from the APA's rulemaking requirements. In *Yamaha*, the Supreme Court fashioned a standard to guide the accomplishment of that legislative objective.

The staff finds DLSE's argument persuasive. If an agency advice letter provides useful guidance to a court in interpreting the law, either because it represents a long-standing agency position, or because the agency speaks from a position of expertise on the subject, there does not seem to be any reason to limit the court in how it can use that guidance. Under the standards announced in *Yamaha*, a court might well accord little weight to a single advice letter, because of the lack of care and deliberation taken in its preparation. Of course, as a practical matter, our decision on the issue may have little effect — the courts will ultimately be responsible for deciding how persuasive an agency's interpretation is, and may well consider the contextual merit of the agency's expression even if the statute instructs otherwise.

If the Commission does not accept DLSE's view that agency advice letters should be entitled to some measure of deference from the courts, DLSE requests that language be added expressly providing that its advice letters are not precluded from receiving judicial deference. See Exhibit p. 25. This request is founded on the same policy considerations that led the Commission to approve amendment of the advisory interpretation provisions of AB 486 to allow judicial deference to a DLSE advisory interpretation: (1) DLSE implements regulations adopted by another agency and does not itself adopt interpretive regulations. (2) DLSE guidance is often relevant in private wage disputes to which DLSE is not a party (and therefore cannot advance its own view of the law). See generally Exhibit pp. 28-30.

Limitation on Unsolicited Advice

The California Coastal Commission (CCC) is concerned that an improper implication may be drawn from the enactment of the individual advice exception (see Exhibit p. 33):

“Under the familiar rule of construction, *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.” (Citations omitted.)...

Thus, if this proposed change were adopted, it could be interpreted to provide by implication that all other oral or written agency statements that are not made in response to a request for advice are subject to the Administrative Procedure Act.

Because of this rule of statutory construction, proposed § 11340.9(e) would create confusion because “agency statements” that do not meet the criteria set forth therein would be argued to be *de facto* regulations and thus would be considered invalid. The proposed statute would apparently provide that any statement made by any agency official or employee to anyone inside or outside the agency must be adopted as a regulation unless the statement is made in response to a request for advice.

It is true that an express exception for individual advice may imply that other exceptions are not to be implied or assumed. This is consistent with the APA provision stating the scope of the rulemaking chapter. See Section 11346 (“This chapter shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.”). However, the existence of an exception has nothing to do with whether a statement is a regulation or not. That question is governed by the definition of “regulation.” The CCC is mistaken when it asserts that the exception would cause “all agency statements ... to be treated as regulations except those which are issued in response to a request for advice.” See Exhibit p. 33. Instead, the exception would simply not prevent a statement *that is a regulation* from being treated as such, unless it is issued in response to a request for advice.

Of course, the fact that the individual advice exception does not apply to unsolicited advice may be a problem in itself. For example, an agency may wish to issue a warning to several people who it believes are violating a law that the agency enforces. If the warning letter states a generally applicable rule, then it may include a “regulation” that the agency would need to formally before the agency could issue the warning. This could be unduly burdensome in some circumstances. However, if the limitation on unsolicited advice were removed, there would be nothing to prevent an agency from promulgating a new rule by sending unsolicited advice letters expressing the rule to each “individual” that is subject to the new rule.

Conclusion

We have received objections to every limitation on the individual advice exception proposed in the tentative recommendation. We could remove these

restrictions, in which case we would be left with the unqualified rule from *Tidewater* — an agency can give advice to an individual without adopting a regulation. However, our experience in this area suggests that any attempt to codify *Tidewater* without some provisions limiting agency misuse would attract significant opposition from regulatees.

An alternative would be to make no substantive change to existing law on this issue and simply let *Tidewater* stand on its own merits. This would be consistent with the basic policy of the tentative recommendation — that agencies should be able to provide advice to individuals without first adopting a regulation — but would leave open the possibility of agency misuse. On the other hand, the Commission has not heard of any actual abuse of the exception in the three years since it was stated in *Tidewater*. As DLSE notes (see Exhibit p. 25):

With respect to the advice letter exemption, there is no indication that the exemption has served to undermine or is currently undermining the goals of the APA. Against this background, there does not appear to be a valid policy justification for tampering with the current state of the law....

This may be correct, and **the Commission should consider making no change to existing law**. If it turns out that agency misuse of the exception is a problem, the rule could be revisited by the Commission or by the courts.

POLICY MANUAL EXCEPTION

The tentative recommendation proposes amending Section 11340.5 as follows:

11340.5. (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (g) of Section 11342 unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter. For the purposes of this section, “manual” includes a policy manual that restates or summarizes the agency’s adjudicative decisions or statements made by the agency pursuant to subdivision (e) of Section 11340.9.

...

Comment. Section 11340.5(a) is amended to clarify that the prohibition on issuance or use of a regulation unless it has been adopted pursuant to this chapter applies to an agency “manual” that contains a restatement or summary of the agency’s adjudicative

decisions or statements made pursuant to Section 11340.9(e). This contradicts a recent *dictum* of the Supreme Court suggesting that there is a categorical exemption to the requirements of this chapter for “a policy manual that is no more than a restatement or summary, without commentary, of the agency’s prior decisions in specific cases and its prior advice letters”. See *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571, 59 Cal. Rptr. 2d 186, 194-95 (1996). Subdivision (a) does not preclude an agency from compiling or indexing its adjudicative decisions and statements made pursuant to Section 11340.9(e) to improve their accessibility as public records. Neither does it affect the designation, compilation, indexing, or citation of precedent decisions pursuant to Section 11425.60. See Section 11425.60(b) (designation of precedent decision not rulemaking).

The decision to propose a provision contradicting *Tidewater* in the tentative recommendation was based on the concern that an agency may use a restatement or summary to express a general rule that it infers from a pattern of advice letters or decisions. Such an inference may be correct, but stating it in terms of a generally applicable standard could constitute the expression of a regulation.

The Comment is careful to distinguish between restatement and summary (which may involve quasi-legislative expressions) and compilation and indexing (which enhance public access to the original documents without elaborating on their contents). This is similar to the distinction drawn by the *Tidewater* court when it stated that restatement or summary, *without commentary*, is not a regulation — implying that mere presentation of the material is not quasi-legislative, but elaboration through commentary can be. The Commission’s more restrictive formulation of this distinction is based on a concern that restatement and summary necessarily involve elaboration.

Support for Prohibition on Use of “Policy Manuals”

The California State Employees Association (CSEA) writes in support of the proposed language (at Exhibit p.6):

CSEA supports the Commission’s decision not to allow, and expressly prohibit, an exception for policy manuals that would restate or summarize an agency’s prior decisions or individual advice letters Individuals would rely on such manuals as the agency’s position or interpretation of law, and thus these manuals would become standards of general application and improperly promulgated regulations. CSEA agrees that such restatements and summaries are

quasi-legislative and therefore should be subject to the rulemaking process.

Opposition to Prohibition on Use of “Policy Manuals”

Most of those who commented believe that an agency should be able to maintain a policy manual restating or summarizing its prior advice and adjudicative decisions without adopting it as a regulation.

The California Energy Commission (CEC), wrote in response to an earlier OAL proposal that the *Tidewater* policy manual language be expressly abrogated in a pending Commission bill on rulemaking (AB 486 (Wayne)). CEC opposed that suggestion, which was not accepted by the Commission. CEC’s comments on that issue are relevant to the question of whether there should be a policy manual exception to the rulemaking requirements (see Exhibit p. 2):

When an applicant for a 300 million dollar energy facility comes to the Energy Commission with questions about the licensing of a project, it has a concentrated desire to know as much as it can about agency practice, earlier positions of the investigative Staff on complex environmental issues, and how it might reasonably expect the agency’s statutes and regulations to be applied to the particular circumstances of its application. It is not acceptable to dismiss such an applicant’s requests for information with the absurd contention that any information other than the “black letter” regulation is an “underground regulation.”

...

It is important to recall that the very concept of prohibited “underground regulations” was conceived from the perception that agencies did or could “hide the ball” from regulatees by having rules that they never disclosed but which the public was somehow expected to follow. It is ironic that OAL has attempted to use the rule against such practices in a way that would make it harder for the public to know what an agency’s practice has been under its statutes and regulations.

...

The *Tidewater* decision provided agencies — and the regulated public — with practical breathing room from OAL’s more extreme edicts. The decision clarifies that it is permissible agency practice to provide summaries of prior agency decisions or advice letters — information that is extremely helpful to the regulated public.

Such restatements or summaries could ordinarily be compiled by members of the regulated public themselves using the Public Records Act, but such work would be extraordinarily burdensome, and the result uncertain, for most members of the regulated public. These

compilations of information are useful indicators of agency function. They are useful to permit applicants, persons subject to enforcement actions, to the Legislature, and to OAL itself.

The views expressed in CEC's letter were expressly endorsed by Robert Jenny of the Air Resources Board in a telephone conversation with the staff.

Similar views were expressed by Christopher T. Ellison, who writes (see Exhibit pp. 4-5):

My primary concern relates to the proposed abolition of the use of compilations or summaries of advice letters. As a partner of a law firm which works almost entirely with clients subject to the rulemaking process of state agencies, the use of such compilations or restatements is beneficial both to the attorneys of our firm and our clients. By reviewing past decisions of an agency, the attorneys of our firm can give sound advice to clients about imminent decisions or fact situations which often require immediate attention and cannot wait for an agency rulemaking. ...

We realize that restatements of agency decisions and advice letters are subject to change through future rulemaking or under different facts, just as the law today could change if the legislature amended a statute or if a court interpreted a statute under facts not previously considered. However, the compilations are useful to our firm and clients as an informational resource which allows us to better advise our clients regarding their rights and obligations. As *Tidewater* recognized, the compilation of such information by the private sector is plainly permissible and is not in any manner "regulation." The compilation of this *same* information by the agency involved provides a valuable service which is no more "regulation" than if the summary were compiled privately. The *Tidewater* court recognized this common-sense principle and its decision should not be legislatively overturned in a misguided effort to "protect" the public. Speaking for that portion of the public we represent, such "protection" is unnecessary and unwelcome.

The California Coastal Commission also opposes the proposed change (see Exhibit p. 35):

Read carefully, the Law Revision Commission's proposal urges that because an agency restatement or summary of its adjudicatory decisions or advice letters "may" have a quasi-legislative purpose, all policy manuals that include restatements or summaries should be subject to APA rulemaking requirements, regardless of their purpose or effect. Such a conclusion is logically and factually unsupported. It would be wasteful of limited governmental resources to require that,

because some summaries of agency precedent may be undertaken with a quasi-legislative intent, no summaries of agency precedent may be issued unless they have been adopted as regulations. Clearly, many agency statements regarding past adjudicatory decisions and advice letters are merely intended to be informative. The primary effect of the proposed change would be to prevent members of the public from being informed about the past actions of the agencies that make quasi-judicial decisions. We agree with the California Supreme Court that such “policy manuals” are not regulations.

Although the SBE does not directly comment on the policy manual exception, the points it makes with respect to the individual advice exception are relevant to this discussion. SBE points out the difficulty of training its employees if it cannot provide them with individual advice. See Exhibit pp. 14-15. The inability to provide employees with a manual summarizing or restating its prior adjudicative decisions and advice letters presents a similar problem. SBE also expresses concern about its ability to carry out its statutory duties to educate the public about tax law if it is precluded from providing individual advice. See Exhibit pp. 15-16. These educational duties might also be impeded by a prohibition on restatement or summary of prior decisions and advice.

Finally, the Department of Motor Vehicles raises a technical objection. It asserts that an agency could not adopt a policy manual restating or summarizing its prior decisions and advice as a regulation, even if it wished to, because such a “regulation” would not meet the standards of necessity or nonduplication applied by OAL in its review of proposed regulations. See Section 11349 (review standards). It isn’t clear that this is so. A restatement or summary of prior advice and adjudications may be necessary to state a generally applicable rule that has evolved from the agency’s prior decisions. Such a rule would not necessarily be duplicative of an existing statute or regulation. Regardless of whether a policy manual could legally be adopted as a regulation, it is probably impractical to do so. Policy manuals may be quite lengthy. Review and publication of such a document would significantly tax OAL’s resources.

Alternatives

In considering the issues raised by opponents of the proposed language, it is important to recall that policy manuals and formally adopted regulations are not the only methods by which an agency can communicate information about its prior decisions and advice. There are three important alternatives:

(1) *Compilation.* As noted in the Comment to Section 11340.5(a), the proposed amendment does not preclude an agency compiling and indexing its prior adjudicative decisions and advice letters so that they will be more accessible to the public as public records. A well-indexed compilation of this type can be very useful. For example, OAL provides a subject index of its prior “regulatory determinations” that substantially improves the usefulness of those documents as a guide to OAL’s interpretation of the law.

(2) *Precedent Decisions.* In order to rely on an earlier adjudicative decision as a precedent, an agency must designate that decision as a “precedent decision.” An index of an agency’s designated precedent decisions must be updated annually and made available to the public. See Gov’t Code § 11425.60. This provides another method for making an agency’s prior decisions publicly accessible in a usefully indexed form.

The CEC finds this alternative to the use of policy manuals inadequate because (see Exhibit p. 2):

... many agencies are reluctant to use this device. The Energy Commission, for instance, has adopted none of its power plant siting decisions as precedent decisions. This is in part because of reluctance to create binding precedents for cases with complex and varied factual situations, and in part because of a rapidly fluctuating regulatory landscape that may quickly make any precedent decision obsolete.

This is a good point. Marginal or obsolete decisions will probably not be designated as precedent decisions, despite their possible utility to someone researching the history of an agency’s position on a particular issue. Nonetheless, the index of precedent decision should be a useful tool for researching the highlights of an agency’s prior decisions.

(3) *Advisory interpretations.* The Commission has recommended the creation of a procedure for the adoption of “advisory interpretations.” This recommendation would be implemented by AB 486 (Wayne) which is currently before the Legislature. The advisory interpretation procedure would allow an agency to use a simple notice and comment procedure to adopt a nonbinding statement of the agency’s interpretation of law. If an agency has issued a number of advice letters on a subject and wishes to “restate” their substance as a general interpretive rule, it can do so by issuance of an advisory interpretation.

Recommendation

Despite the alternatives discussed above, the staff is persuaded that a blanket prohibition on restatements and summaries could create significant problems for agencies and the regulated public. On the other hand, the staff recognizes that a blanket authorization of restatement and summary of prior decisions and advice creates the potential for an agency to express general rules without following the rulemaking procedure. In light of this inherent conflict, **the staff recommends that we neither ratify nor abrogate the policy manual exception.** *Tidewater* approves the practice of preparing a restatement or summary of an agency's prior decisions and advice, so long as it is unadorned by commentary. If an interested person believes that an agency policy manual crosses that line and has issued a new regulation through its commentary, the person may challenge the offensive language by means of the existing procedures for challenging an underground regulation. This may present difficult line drawing questions for OAL and the courts but will focus the restriction on the actual problem, without foreclosing a broad range of useful agency communications.

An alternative would be to codify the policy manual exception, taking great care to point out that a policy manual cannot include commentary that states a regulation. However, the staff believes that any attempt to do so would be controversial and probably unfruitful.

EXCEPTION FOR ONLY LEGALLY TENABLE INTERPRETATION

The tentative recommendation provides that the rulemaking requirements do not apply to an agency interpretation of law that is the only legally tenable interpretation of that law. See Section 11340.9(g). SBE criticizes this provision (see Exhibit p. 16):

This provision is illustrative of one of the main problems the Board has with the Commission's proposal in general. As a jurisprudential matter, what is the origin of the concept "only legally tenable interpretation?" The concept is an academic construct at best, and has no connection with reality. It completely ignores the fact that the entire world operates in an advocacy mode. From the point of view of an advocate, there is no such thing as "the only legally tenable interpretation." No matter how apparently correct some statement of the law may be — especially a tax law — there is always some person whose situation will be financially affected by that interpretation, and his or her advocate will argue strenuously and continuously that the interpretation is not only *not* "the only legally tenable interpretation"

but is *clearly wrong*. Proposals such as this, which deal with hypothetical situations, cannot be expected to pass the test of experience.

The origin of the provision was not academic, but practical. OAL requested it to authorize their existing practice when reviewing purported underground regulations. SBE is correct that the exception would be of little use in an advocacy situation where the parties sharply dispute the correctness of an agency's interpretation. Nonetheless, it would clarify the scope of the APA's applicability in a way that OAL finds useful.

The Coastal Commission also objects to the proposed language, raising the same "*expressio est unius exclusio alterius*" argument it raised in the context of the individual advice exception (see Exhibit p. 34):

This provision could be argued to make every statement by a member of an agency's staff subject to rulemaking requirements, as long as the statement concerns an issue about which there may be more than one legal interpretation.

This ignores the fact that a statement must be a regulation in order to be subject to the rulemaking chapter. Whether or not an agency statement interpreting law is a regulation is determined by the definition of "regulation." The proposed exception would simply provide that an interpretive statement that *is* a regulation is not subject to the requirements of the APA if it states the only legally tenable interpretation of a provision of law.

The staff recommends that the provision be preserved as drafted. Despite SBE's misgivings about the provision having any practical utility, OAL currently applies the distinction in its analysis of whether a rule is an underground regulation and has asked that language be added to the statute to approve its practice.

EXCEPTION FOR AUDIT PROTOCOLS

The tentative recommendation provides an exception to the rulemaking requirements for an agency rule that should properly remain secret:

11340.9. The requirements of this chapter do not apply to any of the following:

...

(f) An agency rule that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or

inspections, settling commercial disputes, negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if disclosure of the criteria or guidelines would do any of the following:

- (1) Enable law violators to avoid detection.
- (2) Facilitate disregard of requirements imposed by law.
- (3) Give a clearly improper advantage to persons who are in an adverse position to the state.

The Commission instructed the staff to solicit input on this provision from the Department of Corporations (DOC), the Franchise Tax Board, and the State Board of Equalization (SBE). To date, we have received replies from the DOC and SBE. The DOC writes in favor of the provision, but would like the catalog of subjects of the rule to apply to “examinations” as well as “audits, investigations, or inspections.” Several laws administered by DOC involve examinations. See Exhibit p. 23. This makes sense. An agency should not be required to disclose the “answers” to an examination before it is administered.

The SBE also supports the proposal. See Exhibit p. 21.

CSEA approves of the policy behind the provision, but objects to its drafting. It believes that the standards expressed in the provision are too subjective and are therefore prone to manipulation and abuse. CSEA proposes that we develop objective criteria similar to those defining the exceptions to the Public Records Act. See Exhibit p. 7. This suggestion would be difficult to apply, because the Public Records Act does not have an objective exception for the types of material that the provision would cover. In fact, in one case where the Public Records Act was found not to apply to an agency audit protocol, the court based its decision on the catch-all public interest exception to the Public Records Act, which requires an entirely subjective balancing of the competing public interests in disclosure and nondisclosure. See *Eskaton Monterey Hospital v. Meyers*, 134 Cal. App. 3d 788, 793, 184 Cal. Rptr. 840 (1982); Section 6255 (agency may withhold record where public interest served by nondisclosure outweighs public interest served by disclosure). What’s more, it would be very difficult to develop an exhaustive list of the types of standards and criteria that should properly be kept confidential. It is much more comprehensive (and efficient) to draft the statute in language that focuses on the type of harms that would be caused if the regulation were disclosed (avoidance of the law, improper advantage).

The staff recommends extending the provision to apply to “examinations,” as suggested by DOC, but otherwise leaving it unchanged.

INTERNAL MANAGEMENT EXCEPTION

Under existing law, “regulation” does not include a rule “that relates only to the internal management of the state agency.” See Section 11342(g). This has been construed narrowly by the courts, to the effect that a rule does not relate only to internal management if it affects “persons subject to regulation by the agency.” See *Grier v. Kizer*, 219 Cal. App. 3d 422, 435-38 (1990). Furthermore, even if the rule only affects the employees of the rulemaking agency, it is not an internal management rule if it affects “a matter of serious consequence involving an important public interest.” See *Poschman v. Dumke*, 31 Cal. App. 3d 932, 943 (1973). This latter limitation has been construed strictly by OAL, which in one instance concluded that a rule requiring medical verification of an employee’s illness in order to use sick leave was not an internal management rule because it affected the public’s important interest in having fair standards for hiring and firing of state employees and in protecting the privacy of medical records. See 1998 OAL Determination No. 36, at 15. In combination, these limitations on the internal management exception almost eclipse the rule — it is difficult to think of an agency practice that will not have some effect on the public or on an abstract public interest such as the fairness of agency personnel policies.

The tentative recommendation would broaden the exception slightly by providing that an internal management rule is one that does not significantly affect the legal rights or obligations of any person. See proposed Section 11340.9(d). This means that the internal management exception applies to rules with trivial effects or with effects that do not involve legal rights or obligations. For example, under the existing construction of the exception, it might not apply to an agency rule specifying the types of information an agency puts on its website — such a rule would have some effect on regulatees. Under the rule proposed in the tentative recommendation, the website policy would be an internal management rule because it would not significantly affect any person’s legal rights or obligations.

The tentative recommendation also erases the distinction between rules that affect persons subject to regulation by the agency and rules that affect the agency’s employees. This was meant to address concerns we heard that state agencies should not be able to make new rules affecting the legal rights or obligations of their employees without following the APA.

Objections

The California Coastal Commission (CCC) opposes the proposed changes to the internal management rule exception, for two reasons: (1) It would interfere with an agency's ability to manage its staff. (2) It would invite confusion and litigation over what constitutes a significant effect on legal rights or obligations. These objections are discussed below.

Management of Staff

The proposed law would change the way that the internal management exception applies to rules affecting agency employees. Under existing law, a rule governing employee conduct is an internal management rule unless it involves "a matter of serious consequence involving an important public interest." Under the proposed reformulation, the internal management exception would only apply to a personnel issue if it significantly affects the legal rights and obligations of the employee. The CCC points out examples of rules that probably do not involve an important public interest, but could arguably affect the legal rights or obligations of employees: e.g. rules governing the use of state property (such as state vehicles or internet access). See Exhibit p. 32. Rules on these subjects would be internal management rules under existing law, but might not be under the proposed law. This does seem to be a problem.

Confusion and Litigation

The proposed law does not employ a bright line rule, relying instead on a standard of "significant effect on legal rights or obligations." The CCC believes that this will lead to wasteful litigation as parties dispute whether the effect of a particular rule meets the standard. See Exhibit p. 32. This may be correct. However, the staff does not see why the proposed law would be any worse than existing law in this regard. Existing law turns on whether a rule has an effect on persons regulated by the agency, or if it does not, whether it involves "a matter of serious consequence involving an important public interest." These standards would also seem to provide fertile ground for dispute. Of course, introducing a *new* standard, could generate more confusion and litigation initially, as interested parties test its boundaries.

Conclusion

The purpose of the proposed change was to loosen the internal management exception, to make it easier for agencies to make rules for the administration of

their internal affairs. At the same time, we attempted to ensure that the loosened standard would not adversely affect the interests of state employees, who want to have a say in the formulation of rules that affect them. It seems that the attempt could create new problems, without necessarily resolving the old. **The staff recommends that it be deleted from the recommendation.** Existing law appears to be problematic on its face but may be workable as applied.

RULEMAKING PROCEDURES

Pre-Process Communication

Proposed Section 11346(b) provides as follows:

11346. ...

(b) An agency that is considering adopting, amending, or repealing a regulation may consult with interested persons before initiating regulatory action pursuant to this article.

Comment. Section 11346(b) expressly authorizes the existing practice of informal consultation with interested persons in developing a proposed regulation. For example, an agency that is considering adoption of a regulation may hold a workshop in which interested persons can share their views on the proposal. Informal communication of this type provides useful information to the agency and may reduce opposition to the proposed regulation from the interests that participated.

This provision is the last vestige of the staff's attempt at incorporating the federal practice of negotiated rulemaking into California's rulemaking scheme.

The DMV believes that the provision is unnecessary (because agencies already have the authority "granted" in the provision) and might imply that agencies do not have that authority absent the provision. See Exhibit p. 22. DMV is correct that the statute simply restates existing law (which is silent on whether an agency can discuss a regulation with interested persons before beginning the formal adoption process and therefore does not preclude such discussion). However, this was proposed in an effort to clarify the law — the Commission has been informed that some agencies doubt their authority to conduct such pre-adoption discussions. **The staff recommends leaving the provision as drafted, but recognizes that it serves a primarily educational purpose that could perhaps be served by means other than a statute.**

Generalization of Plain English Requirements

Existing law requires that a regulation that will affect small business must be drafted in plain English or a plain English summary of the regulation must be provided, and the informative digest prepared by the agency concerning the regulation must include a plain English policy statement overview explaining its objectives. See Sections 11346.2(a)(1), 11346.5(a)(3)(B). The tentative recommendation extends these requirements to all regulations, not just those affecting small business. CSEA supports this change. See Exhibit p. 6.

The DMV is concerned that it may not be possible to draft a regulation in 8th grade English where the subject of the regulation is highly technical. See Exhibit p. 22. This concern has been addressed in proposed Section 11342.570, which now defines “plain English” by reference to the clarity standard for review of regulations, rather than by 8th grade English proficiency. See proposed Section 11349(c) (“A regulation satisfies the clarity standard if it is drafted so that it can be easily understood by those who will be directly affected by it.”) **The staff recommends leaving the provisions as currently drafted.**

Time Extensions

Existing law provides that a notice of proposed rulemaking is effective for one year. If a proposed regulation is not adopted within that period, the adopting agency must issue a new notice. The tentative recommendation authorizes the director of OAL to extend the one year period of a notice by 90 days for good cause. See proposed amendment to Section 11346.5(b). This is intended to provide some slack in cases where a proposed regulation is so complex or controversial that an agency cannot adopt it within one year. CSEA opposes this change. See Exhibit p. 7. It feels that one year is ample time to adopt most regulations and that agencies will procrastinate in adopting a regulation if they know that additional time is easily available. The Commission should consider whether to delete the language providing for an extension to the time limit.

OAL REVIEW STANDARDS GENERALLY

The tentative recommendation proposes some minor substantive changes to the standards employed by OAL in reviewing a proposed regulation. It also redrafts the other standards, in order to make technical improvements to those provisions without affecting their substance.

These efforts are opposed by SBE as “a solution in search of a problem” (see Exhibit p. 16):

the terms of the present statute are well understood by affected parties, are working well and do not need amendment. Amendments add new language that will lead to definitional disputes and litigation. There is no need to add this additional level of dispute to the process.

SBE and others have criticisms and suggestions with respect to specific language, which are discussed below.

NECESSITY STANDARD

Existing law requires that OAL review a regulation for its necessity, which is defined in Section 11349(a), as follows:

“Necessity” means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

Comments regarding proposed changes to the standard are discussed below:

Context for Evaluating Necessity

The tentative recommendation places the abstract notion of “necessity” in a practical context by relating it to “the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific.” This is consistent with the OAL regulation implementing review of necessity. See 1 Cal. Code Reg. § 10. It is also consistent with the other provisions of the APA that apply a necessity standard in determining the validity of a regulation. See Sections 11342.2, 11350.

SBE believes that this limited change to the necessity standard would be beneficial. See Exhibit p. 17. **The staff recommends that this change be preserved.**

Scope of Standard’s Application

Under an OAL regulation, an agency must demonstrate the necessity of “each provision” of a proposed regulation. See 1 Cal. Code Regs. § 10(b). Read literally, this requires review of the necessity of each discrete element of a proposed regulation. The tentative recommendation attempts to narrow the scope of

necessity review by providing that an agency need only demonstrate the necessity of the “major provisions of the regulation and any specific provisions of the regulation that have been challenged by public comment.” This approach relies on the judgment of the agency to determine which provisions are “major” and should be justified, in addition to those provisions that are of public concern.

The approach taken in the tentative recommendation is opposed by Donald C. Carroll, writing on behalf of the California Labor Federation, AFL-CIO (Federation), and by SBE. The Federation wonders whether OAL will be required to apply the necessity standard to “virtually every discrete part of a regulation?” See Exhibit p. 9. To the contrary, the staff believes that it is the existing OAL regulation that can be read to require review of every discrete provision. The proposed language is expressly limited to two classes of provisions — major provisions and challenged provisions. Nonetheless it is obvious that the purpose of the proposed language is not sufficiently clear. This conclusion is reinforced by SBE’s comments (see Exhibit p. 17):

The Commission would create new classes of “major provisions” and “challenged” provisions. Such terms will create new disputes and controversies where none exist. We find it hard to understand what a “major” provision would be. Does that mean the basic or fundamental purpose as opposed to specific language?

The staff is skeptical about whether the language could ever be made clear enough to avoid disputes and misunderstandings. The policy of requiring that necessity be demonstrated for all provisions that are “major” does not lend itself to expression by a bright line rule. As we have heard in prior testimony on this issue, what is really required is a rule of reason. The proposed law attempts to codify such a rule, but ultimately it would depend on reasonableness in its application in order to function properly. Perhaps, the best approach would be to preserve the status quo. The staff believes that OAL’s regulation is technically flawed, but if it is being applied “reasonably” rather than literally, then there may not be a problem at present — in which case, our attempt at reform may cause more harm than good. **The staff recommends deleting the language relating to “major” and “challenged” provisions.**

Evidence Supporting Determination

The proposed law authorizes an agency to provide its rationale for the necessity of a regulation in lieu of facts or expert opinion showing the need for the

regulation. To do so, the agency must explain why, as a practical matter, factual evidence or expert opinion cannot be provided. This rule recognizes that some policy decisions depend on the expert judgment of the agency and cannot be justified with factual evidence. For example, where an agency anticipates a problem that has not yet occurred, it may be difficult or impossible to find data relating to that problem. In such a case, the agency must act on its informed assessment of the situation.

SBE questions the need for this provision (see Exhibit p. 17):

The Commission would also elaborately define “evidence” and provide for “substantial evidence” to include a statement of the adopting agency’s rationale for the necessity of adopting the regulation. We believe this is already included within the requirement to provide a statement of reasons, and OAL has found sufficient evidence in the record without such a requirement.

The staff does not agree that existing law already allows OAL to find sufficient evidence based only on an agency’s statement of its rationale in the statement of reasons. Existing Section 11349 requires evidence, not explanations. This is confirmed in OAL’s regulation (1 Cal. Code Reg. § 10(b)(2)), which provides in relevant part:

When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information.

Our intention is to relieve an agency from the existing requirement to provide supporting facts to support its policy rationale where such facts cannot, as a practical matter, be provided. It would be helpful to hear further commentary on this point, but **the staff believes that the language proposed in the tentative recommendation serves a useful purpose and should be retained.**

Strictness of Standard

The Federation has specific concerns about a change in the phrasing of the necessity standard. Existing law provides that: “‘Necessity’ means the record ... demonstrates ... the need for a regulation.” See Section 11349(a). In the tentative recommendation, this is rephrased to read: “A regulation satisfies the necessity standard if [it is] shown ... to be necessary”

The Federation's initial criticism of this change is technical. It believes that the new language is circular in that it defines necessity in terms of a regulation being "necessary," and that the existing language is not circular. See Exhibit p. 8. The staff agrees that using the term "necessary" by itself to define "necessity" would indeed be circular. However, the proposed language does not do so. It defines "necessity" in terms of a regulation being "necessary to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific...." As discussed above, this is consistent with the language used in the other provisions of the APA that address "necessity" in terms of a regulation being "necessary." In contrast, the staff believes that the existing language is in fact circular, as it defines "necessity" only in terms of a regulation being "needed." The staff believes that the concern about the circularity of the proposed language is misplaced.

However, the Federation has another criticism of this language that is more persuasive. It maintains that the change in language will create an implication that the meaning of "necessity" has changed (see Exhibit pp. 8-9):

"Necessary" can be given a very strict meaning as in the sense of absolute necessity or it can be given a more relaxed meaning in the sense of needed, useful, desirable. Which is it here? Applying the usual canons of construction, one could argue that if the Legislature adopts this proposed change it has intended a substantive change beyond a showing of "need" and has intended a ratcheting up of that showing towards a stricter meaning of necessity.

This is a good point. However, the Comment states that Section 11349(a) was amended to make three changes, which are then described (placing necessity in the context of the purpose of the regulation, clarifying the scope of the standard's application, and allowing an agency's statement of rationale as evidence of necessity where factual evidence cannot be provided). The implication of this Comment is that no other changes were intended. This could be stated expressly by amending the Comment language to read:

Subdivision (a) is amended to make The substance of subdivision (a) is continued without change, except for the following three changes: ...

Alternatively, the section could be redrafted to restore the original phrasing. In relevant part, it would read as follows:

A regulation satisfies the necessity standard if the rulemaking file demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record.

Such a change would address the concern about circularity as well as the possible implication that the change in phrasing was intended as a change in the strictness of the standard.

Another option that the Commission should consider is phrasing the section in terms of “reasonable necessity.” That would make it clear that the standard does not require absolute necessity and would be consistent with both OAL’s practice and Sections 11342.2 and 11350 (which both require that a regulation be “reasonably necessary”). A change along these lines was originally suggested by OAL and was rejected by the Commission as too lax.

AUTHORITY STANDARD

The tentative recommendation amends the authority standard in Section 11349(b) as follows:

(b) “Authority” means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation. A regulation satisfies the authority standard if the regulation is authorized or required by statute.

As is noted in the Comment to this provision, the amendment is intended to improve the provision’s clarity without changing its substance .

SBE opposes the amendment on the grounds that it does in fact affect the substance of the standard (see Exhibit p. 17):

The meaning of the subdivision is changed substantially. It is one thing to say that a provision of law permits the agency to adopt, amend or repeal a regulation. It is quite another thing to say “the regulation is authorized or required by statute.” The former addresses the authority of the agency to adopt regulations; the latter addresses the authority for the specific regulation.

If the existing law is read literally, SBE is correct. Section 11349(b) requires only that an agency have authority to adopt a regulation, rather than requiring authority to adopt *the* regulation under review by OAL. However, this is surely not the rule intended by the Legislature. Most rulemaking agencies have limited rulemaking

authority that extends to the implementation of specific delegated powers. The fact that an agency has authority to adopt regulations on one subject is irrelevant to whether it has authority to adopt regulations on a subject outside the scope of the granted authority. The tentative recommendation expresses the rule as it must have been intended — requiring that an agency have authority to adopt the regulation that it is adopting. This interpretation is consistent with the OAL regulation on the subject (1 Cal. Code Reg. § 14(a)), which requires a demonstration of the agency’s authority to adopt *the* regulation. Insofar as the proposed law is different from a literal reading of existing law, this should probably be reflected in the Comment, as follows:

Section (b) is amended to provide that the authority standard requires a statement of the agency’s authority to adopt the regulation being proposed, and not just a statement of the agency’s general rulemaking authority.

The staff recommends that the proposed statutory language be preserved as drafted but that the Comment be revised to read as set out above.

REFERENCE STANDARD

The tentative recommendation amends the “reference” standard in Section 11349(e) as follows:

~~(e) “Reference” means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation. A regulation satisfies the reference standard if the adopting agency has provided the office with a complete and accurate list of the provisions of law that the regulation implements, interprets, or makes specific.~~

The purpose of the amendment is to recast the provision so that it states a standard for reviewing the adequacy of an agency’s reference to the law implemented by a regulation, rather than simply defining a “reference.” No other change to the provision was intended.

SBE opposes the amendment, on two grounds. First, it is phrased in terms of requiring a “list” of the specified references. SBE points out that the existing practice is to state references in the form of a “note.” SBE seems to believe that preparing a list would be more burdensome than preparing a note that lists the references sections. See Exhibit p. 18. **The staff sees no harm in using the language**

proposed by SBE (an agency must provide OAL with “a statement, in such form as the office may require”).

SBE’s second objection is that the proposed language requires that the reference list be “complete and accurate.” They maintain that there is “certainly no need” for such a requirement. See Exhibit p. 18. Presumably, SBE’s comment is based on a belief that the requirement for complete and accurate reference is implicit in the requirement for reference and is therefore unnecessary. However, this language was added in response to an OAL concern that the statute should not imply that simple submission of a reference note satisfies the standard. OAL wanted to be sure that they had authority to review the content of the reference note to ensure that it was adequate. As the staff understands it, such review by OAL is the existing practice. It may be that OAL’s concern is misplaced and there is no need for the language opposed by SBE. On the other hand, the staff doesn’t see what harm is done by expressly requiring that the reference be complete and accurate. Surely the standard should not be met by an incomplete or inaccurate reference note. **The staff recommends that the “complete and accurate” language be retained.**

EXTENSION OF TIME FOR REVIEW

The tentative recommendation provides that the period for review of a proposed regulation by OAL may be extended from 30 to 45 working days, if the director of OAL certifies that additional time is needed due to the size or complexity of the proposed regulation. SBE states that it is neutral on the provision, but generally opposed to anything that lengthens the rulemaking process. See Exhibit p. 18. **This issue should be raised at the meeting to see if there is any other concern about the provision.**

JUDICIAL REVIEW

Section 11350 provides that any interested person can seek a judicial declaration of the validity or invalidity of a regulation. One ground for declaring a regulation invalid is a “substantial failure to comply” with the requirements of the rulemaking chapter.

Section 11350(b)(2) limits the record of review to the contents of the rulemaking file maintained pursuant to Section 11347.3. This is inadequate, for two reasons:

(1) Section 11350 provides for review of whether the facts recited in a statement justifying adoption of an emergency regulation actually demonstrates an

emergency. The statement of facts is not included in the rulemaking file and would therefore not be part of the record before the court.

(2) An agency may have failed to comply with the rulemaking procedure in ways that are not evident from the contents of the rulemaking file. For example, an agency may have improperly omitted a comment letter from the rulemaking file, or omitted a written request for a hearing (which triggers a statutory requirement that a hearing be held). In either case, the procedural failure would not be evident from the record.

The tentative recommendation addresses these inadequacies by deleting the existing record limitation language and adding a new subdivision to Section 11350, as follows:

11350. ...

~~For purposes of this section, the record shall be deemed to consist of all material maintained in the file of the rulemaking proceeding as defined in Section 11347.3.~~

...

(d) The record of review in a proceeding under this section shall be limited to the following material:

(1) The rulemaking file prepared under Section 11347.3.

(2) The written statement prepared under paragraph (b) of Section 11346.1.

(3) Evidence of a procedural defect in the adoption, amendment, or repeal of the regulation.

Comment. ...

Subdivision (d) is added to clarify the record of review in a proceeding under this section. Subdivision (d)(1) restates part of the substance of the former second paragraph of Section 11350(b)(2), limiting the record of review to the rulemaking file prepared under Section 11347.3. Subdivision (d)(2) permits consideration of an agency statement prepared under Section 11346.1(b) (justifying emergency regulation). Such a statement is not part of a rulemaking file prepared under Section 11347.3. See Section 11346.1(a). Subdivision (d)(3) permits consideration of evidence of procedural noncompliance. This is necessary where proof of procedural noncompliance depends on material that is not included in the rulemaking file. E.g., proof that an agency failed to include written public comments in a rulemaking file requires consideration of the excluded comments. Also, where it is asserted that an agency statement is an invalid “underground regulation” (i.e., it should have been adopted under this chapter but was not), the court will need to consider the text of the purported underground regulation in order to determine whether it is, in fact, a regulation subject to this chapter.

SBE opposes the proposed change. Their concerns are discussed below.

Effect on Standard of Review

SBE's main concern is that the proposed language would result in de novo review of a challenged regulation (see Exhibit pp. 18-19):

... the Commission seems to be advocating some form of “trial de novo” in place of a substantial evidence review of the rulemaking record. Note that the comment states: “For example, proof that an agency failed to include written public comments in a rulemaking file *requires review of the excluded comments ...*” The implication is that the court would review the *content* of those comments in addition to determining whether they were or were not included in the rulemaking file [emphasis in original].

This misstates the Comment language, which reads:

Subdivision (d)(3) permits consideration of evidence of procedural noncompliance. This is necessary where proof of procedural noncompliance depends on material that is not included in the rulemaking file. E.g., proof that an agency failed to include written public comments in a rulemaking files requires *consideration* of the excluded comments [emphasis added].

The staff does not see how the statement that a court may “consider” excluded comments implies that the court would review the content of the excluded comments.

However, there could be a related problem with the language as drafted. Because “procedural defect” isn't defined, a person could argue that a substantive error in an agency's procedurally required analysis is a “procedural defect.” For example, a person who believes that the agency's analysis of the economic effects of the regulation is incomplete or inaccurate could assert that this is a procedural defect. As a consequence, a person may try to introduce new economic data demonstrating the substantive inadequacy of the analysis as “evidence of a procedural defect.” This could lead to de novo review of an agency's substantive conclusions, which is not the intent of the proposed language. This could be avoided by revising the proposed language to read as follows :

(d) The record of review in a proceeding under this section shall be limited to the following material:

...

(3) An item that is required to be included in the rulemaking file but is not included in the rulemaking file, for the sole purpose of proving its omission.

Comment. ...

Subdivision (d)(3) permits consideration of a document that should have been included in the rulemaking file but was not, in order to prove its omission. Such evidence may be necessary to prove a substantial failure to follow required procedures. For example, where an agency has failed to include in the rulemaking file written public comments, this may constitute a substantial failure to follow required procedures. See Section 11347.3(b)(6) (written public comments must be included in rulemaking file). Proof of this omission requires consideration of the omitted comments.

This focuses directly on the issue of concern, the need to admit items omitted from the file to prove their omission. **The staff recommends that this change be made.**

Review of “Underground Regulations”

The Comment in the tentative recommendation notes that the proposed language permits consideration of evidence necessary to show that a regulation is invalid for a complete failure to follow the APA procedure, i.e., because it is an “underground regulation”:

Also, where it is asserted that an agency statement is an invalid “underground regulation” (i.e., it should have been adopted under this chapter but was not), the court will need to consider the text of the purported underground regulation in order to determine whether it is, in fact, a regulation subject to this chapter.

SBE maintains that this comment is misplaced because Section 11350 is limited to review of “adopted regulations.” See Exhibit p. 18.

The Commission previously considered this issue and concluded that there is nothing in the APA limiting Section 11350 to the review of duly adopted regulations. To the contrary, the section provides for the review of “any regulation,” and the definition of “regulation” includes rules that are not properly adopted. The staff could not find any case law expressly discussing whether Section 11350 can be used to review an underground regulation, but there are *dicta* suggesting as much. See, e.g., *Kings Rehabilitation Center, Inc. v. Premo*, 69 Cal. App. 4th 215, 217 (1999):

The APA is partly designed to eliminate the use of "underground" regulations; rules which only the government knows about. If a policy

or procedure falls within the definition of a "regulation" within the meaning of the APA, the promulgating agency must comply with the procedures for formalizing such regulation, which include public notice and approval by the Office of Administrative Law (OAL). *Failure to comply with the APA nullifies the rule. (Gov't Code, § 11350)....* [emphasis added]

Because there is no clear authority limiting Section 11350 to review of duly-adopted regulations, nor any apparent policy reason to limit Section 11350 in that way, the Commission decided not to propose such a limit. Instead, the proposed language was drafted in such a way as to allow consideration of the text of a purported underground regulation, despite the fact that it would not be part of any rulemaking file.

The Commission's decision would be complicated slightly by revision of subdivision (d)(3) along the lines discussed above (to provide that material omitted from the record can only be introduced to prove its omission). Technically, one could introduce the text of an underground regulation under that provision, since the rulemaking file is supposed to contain the text of the regulation. See Section 11347.3(b)(10). However, that would seem a contrived way to justify introduction of the text of the regulation. A much more direct approach would be to add an additional paragraph, along the following lines:

(d) The record of review in a proceeding under this section shall be limited to the following material:

...

(4) The text of the regulation.

Comment. ...

Subdivision (d)(4) permits introduction of the text of the challenged regulation. This is necessary where an agency is using a regulation without satisfying any of the requirements of this chapter (i.e., the regulation is an "underground regulation").

Alternatively, the Commission could delete the references in the Comment to underground regulations. A court that is reviewing an underground regulation under Section 11350 could presumably infer a substantial failure to follow the requirements of the chapter from the complete absence of any rulemaking file. This approach has the benefit of avoiding any controversy over the proper scope of Section 11350.

Drafting Concern

SBE also perceives a flaw in the drafting of the proposed language (see Exhibit p. 19):

The Commission's proposed subdivision (d) provides that the "Record of review..." is to include evidence of a procedural defect. Based on the Commission's comments, the record of review is intended to mean evidence not in the rulemaking file, which is the "record." How can a "record" include items not in the record? It would be a serious mistake to define "record" to include material that is not, in fact, in the officially designated record.

SBE's concern is apparently based on language in Section 11347.3(a) stating that the rulemaking file "shall be deemed to be the record for that rulemaking proceeding." Thus, it might be confusing to speak of the "record of review" including material that is not part of the "record."

The staff sees no problem in revising the language to eliminate any confusion that might result from use of the term "record of review." This could be done by revising the introduction to subdivision (d) to read as follows:

(d) In a proceeding under this section, only the following evidence shall be admissible:

TECHNICAL ISSUES

A number of minor technical issues were raised and are discussed below. The staff does not intend to discuss these items at the meeting. **Unless the Commission objects, the actions indicated below will be taken in preparing the recommendation.**

Reorganization of Definitions

The tentative recommendation would repeal Section 11342 (definitions applicable to chapter) and continue its substance in a number of individual definition sections, organized as an article. In addition, some provisions of the definition of "regulation" that are actually substantive limitations on the operation of the chapter are recast as exceptions in proposed Section 11340.9. This change is consistent with the Commission's practice of breaking up unduly long sections where practical to do so. See also Senate and Assembly Joint Rule 8 (preference for short sections to facilitate future amendments).

SBE opposes this change (see Exhibit p. 14):

We think this change is unnecessary, and there is no substantive reason to reorganize the definitional provisions — change leads only to confusion and uncertainty. What changes were made? Why were the changes made?

The staff disagrees. Most of the reorganized definitions are continued without any change to their wording. The corresponding Comments clearly state that these definitions are continued without change. See Sections 11342.540 (“office”), 11342.550 (“order of repeal”), 11342.560 (“performance standard”), 11342.580 (“prescriptive standard”). In some cases, the wording has been changed slightly, without affecting the definition’s substance — as clearly indicated in the relevant Comment. See proposed Sections 11342.590 (“regulation”), 11342.600 (“small business”). The only substantive changes made are to the internal management exception and the definition of “plain English.” See proposed Sections 11340.9(d) (internal management exception), 11342.570 (“plain English”). SBE does not object to the substance of these changes. **The staff does not intend to revise these provisions in the recommendation.**

Name Changes

The tentative recommendation would rename the “California Regulatory Code Supplement” as the “California Code of Regulations Supplement.” DMV points out parallel changes that were inadvertently not made. See Exhibit p. 22. Similarly, the tentative recommendation changes a reference to the “State Building Standards Commission” to reflect its new name: the “California Building Standards Commission.” The DMV points out a similar change that should have been made in one other place in the APA. **These changes will be made in the recommendation.**

Application of Procedures to Repeals

The tentative recommendation makes a number of minor changes to the rulemaking procedures to make clear that they apply to the repeal of a regulation as well as the adoption or amendment of a regulation. CSEA supports this policy. See Exhibit p. 6. The DMV points out an error in the application of this policy (in Section 11347.3(b)(9)). See Exhibit p. 22. **It will be corrected in the recommendation.**

Clarity Standard of Review

The existing “clarity” standard for review of regulations requires that a regulation be “written or displayed” so as to be understandable. See Section

11349(c). The tentative recommendation rephrases this provision so that it requires that the regulation be “drafted” so as to be understandable. The DMV correctly points out that the new language could be construed as narrowing the standard, such that the clarity of non-text elements of a regulation would not be subject to review. See Exhibit p. 22. **The original phrasing will be restored in the recommendation.**

Availability of Rulemaking File Contents

Dorothy Dickie, of the California Coastal Commission, commented by telephone to point out a perceived technical flaw in the proposed amendments to Section 11347.3 (rulemaking file). Proposed new language in subdivision (a) would provide:

Commencing no later than the date that the notice of the proposed action is published in the California Regulatory Notice Register, and during all subsequent periods of time that the file is in the agency’s possession, the agency shall make the file available to the public for inspection and copying during regular business hours.

Subdivision (b) then specifies what material “shall” be in the rulemaking file.

Ms. Dickie is concerned that these provisions will combine to require an agency to make available material that must be included in the rulemaking file at a time before it has actually been produced. For example, the final statement of reasons is not produced until after public comment. If a person asks to see the rulemaking file before public comment the final statement of reasons will not be in the file, despite subdivision (b)’s requirement that it “shall” be in the file.

The staff thinks that this would not be a problem in practice. The intent of the language is clear enough and the drafting is not incompatible with that intent. **The staff intends to leave the language as it is currently drafted.**

Respectfully submitted,

Brian Hebert
Staff Counsel

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512

April 30, 1999

Law Revision Commission
RECEIVED

MAY - 3 1999

Arthur K. Marshall, Chairperson
California Law Revision Commission
Attention: Brian Hebert, Staff Counsel
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

File: _____

Re: **Administrative Rulemaking: Policy Manuals
and the Tidewater Decision**

Dear Chairman Marshall:

My agency has followed and been involved in the Law Revision Commission's efforts to reform the Administrative Procedure Act (APA) for at least the past three years. We have followed with interest the various proposals you have made regarding the APA rulemaking provisions. Your efforts, and those of your staff, have been greatly appreciated.

I recently became aware of a very late proposal by the Office of Administrative Law (OAL) to use AB 486 (Wayne) as a vehicle to reverse the Supreme Court's holdings in the Tidewater decision. OAL's proposal has, as I understand it, not been added to the bill, so my agency has no formal position on the proposal. Nevertheless, I am concerned that most state agencies that engage in rulemaking are entirely unaware of this untimely and misguided proposal.

The Tidewater decision provided sensible clarification regarding what publicly available agency information is (and is not) an "underground regulation." Specifically, Tidewater held that policy manuals that contain restatements or summaries of prior agency decisions, without commentary, or that consist of prior advice letters, are not "regulations" requiring adoption and approval by OAL. (Tidewater Marine Western, Inc., v. Bradshaw (1996) 14 Cal.4th 557, 571.) State agencies with rulemaking, permitting, and enforcement responsibilities in broad and complex areas benefit from this holding, as does the regulated public.

In my view, OAL has an inveterate "blind spot" about the need—in some cases the demand—of the regulated public for information concerning the enforcement practices of regulating agencies. Although OAL has somewhat tempered its tone in recent years, its representatives have in the past advised agencies that they could not 1) answer telephonic requests for information concerning an enforcing agency's view or practice regarding any enforcement matter other than by parroting the exact wording of an adopted regulation; 2) respond to written inquiries with "advice letters" on a specific enforcement issue; 3) provide summaries of prior agency decisions or policy manuals describing prior practice by an agency or its staff.

Such views disserve the regulated public, and are entirely divorced from the reality of agency practice.

When an applicant for a 300 million dollar energy facility comes to the Energy Commission with questions about the licensing of a project, it has a concentrated desire to know as much as it can about agency practice, earlier positions of the investigative Staff on complex environmental issues, and how it might reasonably expect the agency's statutes and regulations to be applied to the particular circumstances of its application. It is not acceptable to dismiss such an applicant's requests for information with the absurd contention that any information other than the "black letter" regulation is an "underground regulation."

I submit that no agency with serious regulatory responsibilities actually behaves in this manner. I know for a fact that OAL does not (fortunately for its regulatees) conduct itself in this manner. Responsible governmental agencies consider it their duty to assist the regulated public by providing information.

It is important to recall that the very concept of prohibited "underground regulations" was conceived from the perception that agencies did or could "hide the ball" from regulatees by having rules that they never disclosed but which the public was somehow expected to follow. It is ironic that OAL has attempted to use the rule against such practices in a way that would make it harder for the public to know what an agency's practice has been under its statutes and regulations.

The Tidewater decision provided agencies—and the regulated public—with practical breathing room from OAL's more extreme edicts. The decision clarifies that it is permissible agency practice to provide summaries of prior agency decisions or advice letters—information that is extremely helpful to the regulated public.

Such restatements or summaries could ordinarily be compiled by members of the regulated public themselves using the Public Records Act, but such work would be extraordinarily burdensome, and the result uncertain, for most members of the regulated public. These compilations of information are useful indicators of agency function. They are useful to permit applicants, persons subject to enforcement actions, to the Legislature, and to OAL itself.

OAL argues that there is no need for such restatements because prior decisions can be adopted as "precedent decisions" in whole or in part. However, many agencies are reluctant to use this device. The Energy Commission, for instance, has adopted none of its power plant siting decisions as precedent decisions. This is in part because of reluctance to create binding precedents for cases with complex and varied factual situations, and in part because of a rapidly fluctuating regulatory landscape that may quickly make any precedent decision obsolete.

The points that OAL urges in favor of undoing the Tidewater decision are unpersuasive. First, OAL argues that the decision is inconsistent with Government Code Section 11340.5, which prohibits the enforcement of "regulations" not adopted in accordance with the APA.

However, as the decision itself explains, prior decisions in specific cases and prior advice letters are by their very nature not standards of general application, and therefore not regulations. (Tidewater, supra, at p. 571.) OAL's actual concern would appear to be that agencies will go beyond mere restatements of decision or collations of advice letters. However, such unadopted agency interpretations were held to be void in Tidewater, and in the subsequent case of Morillon v. Royal Packing Company (1998) 77 Cal.Rptr.2d 616, 621,¹ as OAL's letter acknowledges.

Second, OAL contends that it will "be difficult in practice to administer this complex, conditional exemption." Here OAL has it precisely backward. It is impossible to limit agency communication to the regulated public such that an agency cannot discuss prior decisions or advice letters with potentially affected regulatees, whose fortunes and freedom may be at stake. Tidewater merely condones necessary agency practice that is largely beneficial to both agencies and the regulated public.

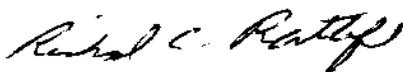
Third, OAL contends that "it will take years of litigation to resolve uncertainties created by the [Tidewater] language." In fact, Tidewater is the case which largely resolves the uncertainty concerning the degree to which agencies may communicate with the regulated public. Erasing the Tidewater clarifications would result in more uncertainty and litigation, not less.

Fourth, OAL speculates that leaving the Tidewater clarifications alone may "encourage lower courts to create even more new judge-made APA exemptions" Such speculation is clearly unwarranted; as stated above, Tidewater did much to clarify an area previously uncertain for regulatory agencies.

Finally, I wish to raise the issue of process. OAL filed this proposal for the legislative reversal of Tidewater only this month. The Law Revision Commission has been considering various amendments to the rulemaking provisions of the APA for nearly two years, and has already introduced its legislation. OAL's very late proposal is virtually unknown to the agencies affected, and to the Attorney General, who frequently represents such agencies. If such a proposal is to be seriously considered, there should be a strong effort to solicit comment from agencies that will be affected.

Thank you for considering these comments.

Yours truly,



RICHARD C. RATLIFF
Senior Staff Counsel

¹ The Supreme Court granted review of the Morillon decision on December 2, 1998.

ELLISON & SCHNEIDER

ATTORNEYS AT LAW

2015 H STREET

SACRAMENTO, CALIFORNIA 95814-3109

TELEPHONE (916) 447-2166 FAX (916) 447-3512

CHRISTOPHER T. ELLISON
ANNE J. SCHNEIDER
DOUGLAS K. KERNER, OF COUNSEL
MARGARET C. FLAVITT, OF COUNSEL
JEFFREY D. GARRIS, OF COUNSEL

LYNN M. HAUG
WENDY M. FISHER
BARBARA A. BRENNER
ROBERT L. DONLAN
ANDREW B. BROWN
CHRISTOPHER M. SANDERS
TARA E. LYNCH

June 9, 1999

Law Revision Commission
RECEIVED

JUN 10 1999

File: AB 486

Arthur K. Marshall, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Attention: Brian Hebert, Staff Counsel

Re: Opposition to Reversal of the *Tidewater* Decision

Dear Chairman Marshall:

Recently it was brought to my attention that the Office of Administrative Law (OAL) has proposed to amend AB 486 (Wayne) with the intent of reversing the *Tidewater* decision. Such an action would reinstate confusion and lack of direction for state agencies and the regulated public, and ensure that litigation is the primary method of rulemaking.

My primary concern relates to the proposed abolition of the use of compilations or summaries or advice letters. As a partner of a law firm which works almost entirely with clients subject to the rulemaking processes of state agencies, the use of such compilations or restatements is beneficial both to the attorneys of our firm and our clients. By reviewing past decisions of an agency, the attorneys of our firm can give sound advice to clients about imminent decisions or fact situations which often require immediate attention and cannot wait for an agency rulemaking. In permitting agencies to provide letters of advice, *Tidewater* encouraged the regulated public to confer with the agency and make every effort to comply with the law and agency regulations, rather than making an unadvised decision which invites litigation.

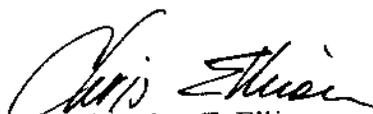
We realize that restatements of agency decisions and advice letters are subject to change through future rulemaking or under different facts, just as the law today could change if the legislature amended a statute or if a court interpreted a statute under facts not previously considered. However, the compilations are useful to our firm and clients as an informational resource which allows us to better advise our clients regarding their rights and obligations. As *Tidewater* recognized, the compilation of such information by the private sector is plainly permissible and is not in any manner "regulation." The compilation of this same information by

Arthur K. Marshall, Chairperson
June 9, 1999
Page 2

the agency involved provides a valuable service which is no more "regulation" than if the summary were compiled privately. The *Tidewater* court recognized this common-sense principle and its decision should not be legislatively overturned in a misguided effort to "protect" the public. Speaking for that portion of the public we represent, such "protection" is unnecessary and unwelcome.

The *Tidewater* decision has promoted a more educated regulated public and deterred litigation. I strongly oppose any regression from this decision. Thank you in advance for considering my comments.

Very truly yours,


Christopher T. Ellison

CTE:rko



California State Employees Association

Local 1000, SEIU, AFL-CIO, CLC

Tel.: (916) 326-4208

Fax: (916) 326-4276

July 12, 1999

Law Revision Commission:
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JUL 13 1999

California Law Revision Commission
Attn: Brian Hebert
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

File: _____

Re: Administrative Rulemaking (Study N-300)
Tentative Recommendation

Dear Commission Members:

The California State Employees Association (CSEA) has reviewed the Tentative Recommendation on Administrative Rulemaking and submits the following comments to the Law Revision Commission's recommended changes to the Administrative Procedure Act (APA). For the reasons stated in the Tentative Recommendation, CSEA supports the Commission's proposals to 1) change the plain English requirement to the clarity standard (proposed Gov't Code § 11349(c)); 2) extend the plain English requirement to all regulations (proposed Gov't Code §§ 11346.2(a)(1), 11346.9(a)(5)); and 3) equally apply rulemaking protections to the repeals of regulations (proposed Gov't Code §§ 11346.3, 11346.5(a), 11346.9(a), 11350(a), 11350.3). However, CSEA has concerns regarding the 1) policy manual exception, 2) rules that will be exempt from public disclosure, and 3) extended notice periods, which are discussed below.

Policy Manual Exception

CSEA supports the Commission's decision not to allow, and expressly prohibit, an exception for policy manuals that would restate or summarize an agency's prior decisions or individual advice letters (proposed Gov't Code § 11340.5(a)). Individuals would rely on such manuals as the agency's position or interpretation of law, and thus these manuals would become standards of general application and improperly promulgated regulations. CSEA agrees that such restatements and summaries are quasi-legislative and therefore should be subject to the rulemaking process.

Rules that Should Not Be Disclosed Publicly

CSEA is not opposed to the concept that certain rules should be kept secret when disclosure would facilitate evasion of the law. Rather, CSEA continues to be concerned that what "should properly be kept secret" is defined too broadly (proposed Gov't Code § 11340.9(f)(1), (2), and (3)). The proposed statutory addition would exempt rules from disclosure if disclosure would:

- (1) Enable Law violators to avoid detection.
- (2) Facilitate disregard of requirements imposed by law.
- (3) Give a clearly improper advantage to persons who are in an adverse position to the state.

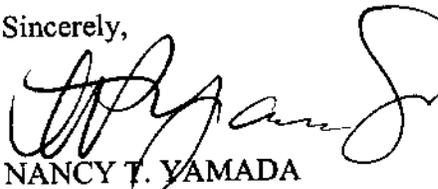
The listed criteria may often times be a more subjective than objective standard and is therefore subject to abuse. In contrast, the Public Records Act specifically enumerates exceptions to disclosure. (See, Gov't Code §§ 6254 - 6254.21.) In the rare event that the withholding of records outweighs the public interest in disclosure of such records for reasons not enumerated, the Public Records Act provides that an agency can withhold records if it demonstrates nondisclosure is in the public interest. The Commission should consider mirroring the Public Records Act for parallel rulemaking exceptions.

Extended Notice Periods

In regard to rulemaking procedure, CSEA opposes and questions the wisdom of extending the effective period of notice to over one year (proposed Gov't Code § 11346.4(b)). CSEA recognizes that some regulations are more complicated and/or controversial than others and would therefore generate more comments for agency response. However, one year is an adequate amount of time for the proposed action to be completed. If a regulation is indeed necessary, then it should be enacted within one year. Practical experience demonstrates that agencies regularly take as long as time will allow (or longer) to complete projects. Knowing that notice periods could be extended will only facilitate delay. For any special circumstances beyond the agency's control, if any proposed action will take beyond one year, then the agency can issue a new notice.

Thank you for your consideration. Please contact me if you have any questions or would like to discuss this matter further.

Sincerely,



NANCY T. YAMADA
Attorney

LAW OFFICES
OF
CARROLL & SCULLY, INC.
300 MONTGOMERY STREET
SUITE 735
SAN FRANCISCO, CALIFORNIA 94104-1909

CHARLES P. SCULLY (1915-1985)
DONALD C. CARROLL
CHARLES P. SCULLY, II

TELEPHONE
362-0241
AREA CODE 415

July 12, 1999

Law Revision Commission
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JUL 13 1999

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303

File: _____

RE: Tentative Recommendation ~ Administrative Rulemaking

Dear Commission:

The undersigned firm is General Counsel to the California Labor Federation, AFL-CIO, and we wish to comment on the Tentative Recommendation pertaining to Administrative Rulemaking, April, 1999. Specifically, we want to comment with respect to the proposed change in Government Code Section 11349(a).

The proposed law, proposed Govt. Code § 11349(a), is said to clarify the necessity standard by which OAL will review a proposed regulation for necessity. (p. 10 of Tentative Recommendation).

The Federation does not believe that the proposed law really "clarifies" anything, and the Federation is concerned that the proposed law may instead make regulation more difficult than it should be.

The proposed law really does not clarify because it would define "necessity" by the word "necessary", an unhelpful exercise in circularity. The Federation readily admits that other laws exist which define a term by the same term. The most famous example is probably "gross income means all income from whatever source derived...." I. R. C. § 61. This type of precedent should not be encouraged because defining a term by the same term really clarifies nothing. It invites litigation.

The existing law in Govt. Code § 11349(a) does not suffer from this difficulty: "Necessity" means...the need for a regulation taking into account the totality of the record."

By changing this language to define "necessity" to mean "necessary" to effectuate the purpose of the statute, court decision, etc., this proposed change also arguably makes the regulatory process more difficult. "Necessary" can be given a very strict meaning as in the sense of absolute necessity or it can be given a more relaxed

meaning in the sense of needed, useful, desirable.¹ Which is it here? Applying the usual canons of construction, one could argue that if the Legislature adopts this proposed change it has intended a substantive change beyond a showing of “need” and has intended a racheting up of that showing towards a stricter meaning of necessity. The Federation does not believe that such a change is desirable for policy reasons; but if the Commission does, it should at least acknowledge that is what it is doing so that the policy issues can be debated at least in the Legislature.

The Federation’s concern is heightened by the fact that the proposed law would also require a demonstration of this “necessity” as to “the major provisions of the regulation and any specific provisions of the regulation that have been challenged....” Is the OAL now to apply a new strict standard of absolute necessity to virtually every discrete part of a regulation? Does the OAL want, or indeed does it have the ability, to exercise this role?

The OAL does not now exercise such a heightened review of “necessity”. 1 CCR § 10. Subsection (a) of § 10 says that the OAL shall not dispute a decision by an agency to adopt a regulation just because the record may support alternative conclusions. For the OAL “necessity” is satisfied if there is an explanation of the problem and how each provision carries out the purpose of the regulation. § 10(b).

The Federation is concerned, therefore, that the role of the OAL is not just being clarified but changed quite significantly so that § 10 of Title 1 of the CCR would no longer be consistent with the proposed new law and would have to be changed to reflect the OAL’s new role to determine necessity afresh from any agency determination by a heightened, albeit undefined, standard.

The commentary also says that this change in the proposed law “is consistent with the other provisions of the APA that relate to the necessity of a regulation” with a footnote 63 referring to Government Code sections such as § 11350 which pertains to judicial review (court may find a regulation invalid if the agency determination of necessity for regulation is not supported by substantial evidence). The judicial function has not in fact been definitively defined to make a court responsible to

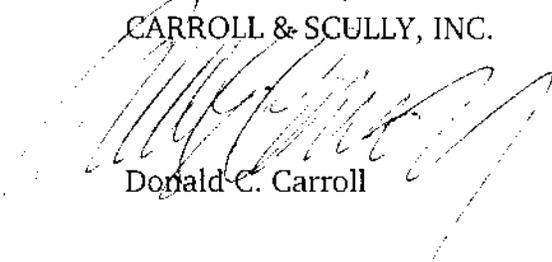
¹An example is ERISA § 408(b)(2), 29 USC 1108(b)(2), which exempts from the prohibited transaction provisions of ERISA § 406 “[c]ontracting or making reasonable arrangements with a party in interest for... other services necessary for the establishment or operation of the plan....” The Secretary of Labor’s regulations say a service is necessary “if the service is appropriate or helpful to the plan obtaining the service in carrying out the purposes for which the plan is established....” 29 CFR § 2550.408b-2(b).

determine strict necessity of a regulation and each provision in it. It is difficult to imagine the wisdom of imposing that role on every superior court judge in the State. The issue is currently one (of many) in a pending case in the Third Appellate District involving the ergonomics standard, and it may (or may not) be addressed by that court. Pulaski et al. v. California Occupational Safety and Health Standards Board, Case No. CO285525.

Thank you.

Very truly yours,

LAW OFFICES OF
CARROLL & SCULLY, INC.



Donald C. Carroll

DCC:ef
ope-3-afl-cio

CC: Mr. Art Pulaski
Mr. Tom Rankin



**STATE BOARD OF EQUALIZATION
OFFICE OF THE EXECUTIVE DIRECTOR**

450 N STREET, SACRAMENTO, CALIFORNIA 95814
(P. O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0073)
TELEPHONE (916) 327-4975
FAX (916) 324-2586

Law Revision Commission
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JUL 20 1999

File: _____

JOHAN KLEHS
First District, Hayward

DEAN F. ANDAL
Second District, Stockton

CLAUDE PARRISH
Third District, Torrance

JOHN CHIANG
Fourth District, Los Angeles

KATHLEEN CONNELL
Controller, Sacramento

E. L. SORENSEN, JR.
Executive Director

July 16, 1999

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

By letter dated July 15, 1999, we provided you with comments with respect to your Tentative Recommendation in regard to administrative rulemaking dated April 1999.

This analysis was prepared by and reflects the views of our legal staff. We have forwarded copies to our Board members. If the members have further comments, we will forward that information to the Commission forthwith.

Sincerely,

E. L. Sorensen, Jr.
E. L. Sorensen, Jr.
Executive Director

ELS:sr

- cc: Honorable Johan Klehs
- Honorable Dean F. Andal
- Honorable Claude Parrish
- Honorable John Chiang
- Honorable Kathleen Connell



**STATE BOARD OF EQUALIZATION
OFFICE OF THE EXECUTIVE DIRECTOR**
450 N STREET (MIC:73), SACRAMENTO, CALIFORNIA 95814
(P. O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0073)
TELEPHONE (916) 327-4975
FAX (916) 324-2586

Law Revision Commission
RECEIVED

JUL 16 1999

File: _____

July 15, 1999

JOHAN KLEHS
First District, Hayward

DEAN F. ANDAL
Second District, Stockton

CLAUDE PARRISH
Third District, Torrance

JOHN CHIANG
Fourth District, Los Angeles

KATHLEEN CONNELL
Controller, Sacramento

E. L. SORENSEN, JR.
Executive Director

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

This is in response to your request for comments with respect to the Tentative Recommendation in regard to administrative rulemaking, dated April 1999.

The State Board of Equalization is a constitutional agency charged with responsibilities with respect to the California property tax system, income tax laws, and more than 20 excise tax laws, including the Sales and Use Tax Law. The Board presently has in effect more than 565 regulations, adopted in accordance with the rulemaking provisions of the Administrative Procedure Act. The Board maintains an active rulemaking program, adopting, amending, or repealing as many as 81 regulations on an annual basis.

The Commission is proposing a major restructuring of the laws governing the rulemaking process. Generally, it is the experience of the Board that present rulemaking procedures, as interpreted by the courts and as implemented in practice, strike an appropriate balance between the needs of the governmental agencies charged with the duty of carrying out the mandates of the California Constitution and the California Legislature, and the interests of those persons who may be subject to administrative action by those agencies. However, it is our view that the problems that do exist in practice flow from an inherent defect in the architecture of the rulemaking provisions and that the perceived problems can be remedied most effectively by addressing this defect directly.

Our comments, with respect to specific components of the Commission's recommendation, are as follows:

EXCEPTIONS TO RULEMAKING REQUIREMENTS

Government Code section 11342(g) defines the term "regulation" to mean "every rule, regulation, order, or standard of general application or [their] amendment, supplement, or revision. . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to conform its procedure, except one that relates only to the internal management of the state agency."

Historically, a regulation was regarded as an administrative writing, adopted pursuant to a formal set of procedures, giving meaning to some enactment of law, intended to be enforceable with the force and effect of law, and so enforceable, at least to the extent that the writing was consistent with the underlying enactment of law.

The language of section 11342(g) is consistent with this historical concept. The implication of the language is that there must be some "adoption 'beyond mere' issuance." The language has been interpreted, however, to cover any interpretive writing, without regard to whether the writing may be intended to be enforceable and without regard to whether any formal procedure may have been followed in the "adoption" of the writing.

It is the view of the Board that now is the time for California to align its rulemaking procedures with their jurisdictional antecedents. It seems pointless to us to ask the Office of Administrative Law to identify formally, as unenforceable, writings which administrative agencies do not formally adopt as regulations, and which the agency agrees from the beginning are not enforceable and were not intended to be enforced.

The Board is concerned that the present all inclusive concept of the regulation is antithetical to the fundamental concepts of communication, education, and accessibility, and to the actions of the Commission itself.

The Commission recognizes that there is a need for some kind of informal communication between government agencies and persons affected by its actions. The Commission is the sponsor of AB 486, which would provide for an informal guideline exception to the present strict rules of prohibition. Likewise, in the proposal under review the Commission recognizes some need for exceptions for individual advice, restatement or summary of prior adjudicative decisions, internal management rules, rules that should remain confidential, and rules described as "only legally tenable interpretations."

The practical problems that the Commission is grappling with are structural in nature. All of the objectives of the Commission could be accomplished if section 11342(g) were amended to read as follows:

“Regulation” means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency pursuant to the rulemaking provisions of this Act to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency, and intended to have the force and effect of law.

Beyond our general comment, we have specific comments with respect to proposed exceptions to rulemaking requirements.

We oppose the repeal of California Code section 11342 and the adoption of proposed sections 11340.9 and 11342.590. We think this change is unnecessary, and there is no substantive reason to reorganize the definitional provisions--change leads only to confusion and uncertainty. What changes were made? Why were the changes made?

In regard to proposed section 11340.9, subdivisions (d) and (e), we have specific comments. Basically, the Commission is quarreling with the decision of the Supreme Court in *Tidewater Marine Western, Inc. v. Bradshaw* 14 Cal.4th 557. The Commission notes that in *Tidewater* the Court noted exception to the rulemaking procedures where agency advice is issued to an individual, and the Court concluded that an agency is not adopting regulations if an agency prepares a policy manual restating the agency's prior decisions and specific cases, and its prior advice letters.

The *Tidewater* decision recognizes that the government has to operate “within itself.” That is, people within the government must talk to each other and write to each other to do their jobs. The government must communicate “within itself” in writing. The government has to operate from the top down, i.e., management makes substantive internal decisions and gives written directions to employees, who act in accordance with management's understanding of its duties and responsibilities in administering its laws.

We are not sure of the intention of the Commission. It would appear that the proposed language would prohibit (1) any written communication within an agency between employees with respect to substantive matters, and (2) any educational communication from an agency to the public.

Our concern is that we will not be able to train our employees in writing (advice can only be given to a person who has requested the advice). A request for advice may not be made by employees or officers of the agency issuing the advice.

We conduct thousands of tax audits a year. Our auditors and other personnel look at tens of thousands of transactions. It is not uncommon for persons conducting field audits to ask for written advice from their supervisors, from management, or from the Board's legal staff. It is not uncommon for senior management to ask for written advice. It is not uncommon for elected

constitutional officers of this agency to ask for written advice with respect to substantive tax matters from management or from the legal staff. Indeed, the Board's regulations provide for written briefing to be filed with the Board by the staff in tax disputes heard by the Board. In a sense, the whole purpose of the staff is to advise the Board and most of that advice is in writing. Is it the intention of the Commission to prohibit all internal requests for advice in an agency's conduct of its business?. Can an agency train its employees with respect to the duties and responsibilities of the agency?

We are concerned about the potential negative impact of the Commission proposal on the Board's customer services program. Are agencies prohibited from engaging in educational activities with respect to the public? Both the Legislature and our elected Board members have been strong advocates of our taxpayer education and information programs. This agency has a number of positive statutory duties in this regard. For example, Revenue and Taxation Code section 7084 provides in relevant part, as follows:

7084. Education and information program. (a) The board shall develop and implement a taxpayer education and information program directed at, but not limited to, all of the following groups:

- (1) Taxpayers newly registered with the board.
- (2) Taxpayer or industry groups identified in the annual report described in Section 7085.
- (3) Board audit and compliance staff.

(b) The education and information program shall include all of the following:

- (1) Mailings to, or appropriate and effective contact with, the taxpayer groups specified in subdivision (a) which explain in simplified terms the most common areas of noncompliance the taxpayers or industry groups are likely to encounter.
- (2) A program of written communication with newly registered taxpayers explaining in simplified terms their duties and responsibilities as a holder of a seller's permit or use tax registrant and the most common areas of noncompliance encountered by participants in their business or industry.
- (3) Participation in small business seminars and similar programs organized by federal, state, and local agencies.
- (4) Revision of taxpayer educational materials currently produced by the board which explain the most common areas of taxpayer nonconformance in simplified terms.

(5) Implementation of a continuing education program for audit and compliance personnel to include the application of new legislation to taxpayer activities and areas of recurrent taxpayer noncompliance or inconsistency of administration. . . .
[Emphasis added.]

Likewise, the proposal would appear to conflict with the following:

- Government Code section 15606, subdivision (e), which authorizes the Board to prepare and issue instructions to assessors designed to promote uniformity throughout the state. (Note: we already have a conflict with OAL as to the scope of this authority, and don't need to add another layer to this conflict)
- Government Code section 15608, authorizing the Board to instruct, advise and direct assessors as to their duties under the laws.
- The duties of the Property Taxpayers' Advocate set forth in Revenue and Taxation Code sections 5905 and 5906.

Section 11340.9(g) provides an exception for "an agency interpretation of law that is the only legally tenable interpretation of that law." This provision is illustrative of one of the main problems the Board has with the Commission's proposal in general. As a jurisprudential matter, what is the origin of the concept "only legally tenable interpretation"? The concept is an academic construct at best, and has no connection with reality. It completely ignores the fact that the entire world operates in an advocacy mode. From the point of view of an advocate, there is no such thing as "the only legally tenable interpretation." No matter how apparently correct some statement of the law may be—especially a tax law—there is always some person whose situation will be financially affected by that interpretation, and his or her advocate will argue strenuously and continuously that the interpretation is not only not "the only legally tenable interpretation" but is clearly wrong. Proposals such as this, which deal with hypothetical situations, cannot be expected to pass the test of experience. What this proposal illustrates is that the Commission thinks that there is a persuasive need to adjust the rulemaking structure to the real world—and we agree with that.

ADMINISTRATIVE REVIEW OF REGULATIONS

With respect to subdivision (d) internal management rules the Commission proposes to rewrite Government section 11349 which sets forth the basic definitions and standards for OAL review of regulations. We think the Commission's proposal is a solution in search of a problem, and should not be adopted.

The Board opposes the amendments to section 11349 on the grounds that the terms of the present statute are well understood by affected parties, are working well and do not need amendment. Amendments add new language that will lead to definitional disputes and litigation.

There is no need to add this additional level of dispute to the process. However, we also have alternative language for some of the proposals.

We have these specific concerns:

Amendments to subdivision (a). The present standard for review in subdivision (a) of section 11349 is that the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation taking into account the totality of the record. The Commission correctly points out that this standard is not precisely the same as the standards set forth in sections 11342.2 and 11350, namely that the regulation must be “reasonably necessary” to effectuate the purpose of the statute, court decision or other provision of law that is being implemented, interpreted or made specific by the regulation. To the extent the law is amended to conform these divergent tests, it would be beneficial. However, by adding new definitions and standards, the Commission proposal goes too far.

For example, the Commission would create new classes of “major provisions” and “challenged” provisions. Such terms will create new disputes and controversies where none exist. We find it hard to understand what a “major” provision would be. Does that mean the basic or fundamental purpose as opposed to specific language?

The Commission would also elaborately define “evidence” and provide for “substantial evidence” to include a statement of the adopting agency’s rationale for the necessity of adopting the regulation. We believe this is already included within the requirement to provide a statement of reasons, and OAL has found sufficient evidence in the record without such a requirement.

If the Legislature wants to take action in this area, we believe the following revision would be sufficient. It incorporates the tests of sections 11342.2 and 11350, but leaves out the additional criteria of “major provisions” and “challenged provisions” and the new definition of evidence:

“(a) ‘Necessity’ means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation is necessary to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

Amendments to subdivision (b). We oppose the proposed amendment. While the Commission’s comments allege that the substance of the section is continued without change, we respectfully disagree. The meaning of the subdivision is changed substantially. It is one thing to say that a provision of law permits the agency to adopt, amend or repeal a regulation. It is quite another thing to say “the regulation is authorized or required by statute.” The former addresses the authority of the agency to adopt regulations; the latter addresses the authority for the specific regulation.

We believe the subdivision should remain unchanged. If the Legislature believes an amendment is appropriate, we suggest the following language:

“A regulation satisfies the authority standard if the agency is authorized or required by statute to adopt, amend or repeal a regulation.”

Amendments to Subdivision (c). We believe the Commission’s proposed amendments demonstrate a lack of understanding of how the OAL uses this requirement in practice. The OAL merely requires that we state the references in a footnote to the draft of the regulation. There is no need for a “list.” And there certainly is no need to include a “complete and accurate” requirement. We oppose this change.

The present statute is worded adequately and properly. The proposed amendments show that statutes can become somewhat convoluted when you change the language for no other purpose than consistency. If the Legislature believes an amendment is appropriate, it should state:

“A regulation satisfies the reference standard if the adopting agency provides the office a statement, in such form as the office may require, of the statute, court decision, or other provision of law that the agency implements, interprets or makes specific by adopting, amending or repealing the regulation.”

Review Periods – Section 11349.3. The Commission suggests that, for cause, the director of OAL may extend the period for OAL action on a regulation from 30 days to 45 days where the regulation is lengthy or complex.

We are neutral on this proposed change; however, as a matter of principle we generally oppose any lengthening of the rulemaking process.

JUDICIAL REVIEW OF REGULATIONS

We have a significant problem with the Commission’s proposal with respect to judicial review. Further, we believe the Commission’s analysis is inaccurate and confused, and that the text of the comment does not reflect what the amendments provide. Finally, we believe the amendments are not properly drafted. For all these reasons the Board opposes the proposed revisions to the law on judicial review.

First, the comment refers to determinations regarding invalid underground regulations. The provisions of section 11350 apply to adopted regulations, and simply do not apply to underground regulations. The Commission’s comment is misplaced.

Second, and this is our main concern, the Commission seems to be advocating some form of “trial de novo” in place of a substantial evidence review of the rulemaking record. Note that

the comment states: "For example, proof that an agency failed to include written public comments in a rulemaking file *requires review of the excluded comments* (emphasis added)." The implication is that the court would review the *content* of those comments in addition to determining whether they were or were not included in the rulemaking file.

Section 11347.3 requires every agency to maintain a file of each rulemaking that shall be deemed to be the record for that rulemaking proceeding. The section specifies in detail what is to be included in the rulemaking file. Subdivision (a)(6) requires the inclusion of "All . . . written comments submitted to the agency in connection with the adoption, amendment or repeal of the regulation." Thus, a rulemaking file that didn't include all written comments would not be a complete file. A person challenging the rulemaking need only allege that the written comments were made but not included in the file. A reviewing court may make such a finding without considering the content of the statements.

Permitting extrinsic evidence to be considered by a reviewing court would be a very undesirable path to take, and would be a major deviation from existing law and policy.

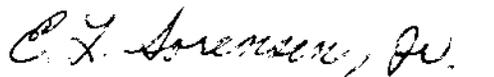
We find fault with the drafting of the amendments, even assuming the policy is acceptable. The Commission's proposed subdivision (d) provides that the "Record of review . . ." is to include evidence of a procedural defect. Based on the Commission's comments, the record of review is intended to mean evidence not in the rulemaking file, which is the "record." How can a "record" include items not in the record? It would be a serious mistake to define "record" to include material that is not, in fact, in the officially designated record.

If the policy is acceptable to the Legislature, we recommend that the Commission redraft the proposal to reflect more accurately their intent and not create a conflict with the definition of the term "record" or provide any kind of independent consideration of evidence not in the official rulemaking file, as follows:

"(d) The agency's failure to include in the rulemaking file any written comments submitted to the agency in connection with the adoption, amendment or repeal of the regulation shall constitute a substantial failure to comply with this chapter within the meaning of subdivision (a)."

The Board opposes any provision that would permit a reviewing court to consider evidence outside the official rulemaking file.

Sincerely,



E. L. Sorensen, Jr.
Executive Director

ELS:sr

Mr. Nathaniel Sterling

-9-

July 15, 1999

cc: Honorable Johan Klehs
Honorable Dean F. Andal
Honorable Claude Parrish
Honorable John Chiang
Honorable Kathleen Connell



STATE OF CALIFORNIA

**STATE BOARD OF EQUALIZATION
OFFICE OF THE CHIEF COUNSEL**

450 N STREET, SACRAMENTO, CALIFORNIA 95814
(P. O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0083)
TELEPHONE (916) 445-4380
FAX (916) 323-3367

JOHAN KLEBS
First District, Hayward

DEAN F. ANCAL
Second District, Stockton

CLAUDE PARRISH
Third District, Torrance

JOHN CHANG
Fourth District, Los Angeles

KATHLEEN CONNELL
Controller, Sacramento

E. L. SORENSEN, JR.
Executive Director

July 15, 1999

Mr. Brian Hebert
Staff Counsel
California Law Revision Commission
3200 5th Avenue
Sacramento, CA 95817

Dear Mr. Hebert:

This is in reply to your letter of June 3, 1999.

It is the position of the State Board of Equalization that criteria or guidelines used by an agency in performing audits, investigations, or in the defense, prosecution, or settlement of cases, are appropriately to be excluded from administrative rulemaking requirements, for sound public policy reasons which are readily apparent.

The Board would support any clarification in support of this principle.

Sincerely,

Timothy W. Boyer
Chief Counsel

TWB:sr

cc: Mr. E. L. Sorensen, Jr.
Executive Director

LEGAL AFFAIRS DIVISION
REGULATIONS BRANCH E244

DEPARTMENT OF MOTOR VEHICLES

P.O. BOX 932382
SACRAMENTO, CA 94232-3820
(916) 657-6469

July 16, 1999

Law Revision Commission
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JUL 20 1999

File: _____

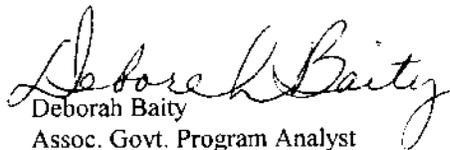
Brian Hebert
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739RE: Comments on the tentative recommendation relating to administrative rulemaking of the California Law Revision Commission, dated April 1999

Many of the recommendations have been proposed before, and some of the recommendations are very good—they will clarify rulemaking law and ease agency compliance. However, the following concerns should be addressed before the provisions are included in legislation the CLRC plans to recommend to the Legislature:

1. OAL's belief that restatements or summaries of law in policy manuals or other instruments, without commentary, should be adopted as regulations is problematic, because such proposed regulations would not meet the nonduplication and necessity standards. See the discussion on page 4, and CLRC's comments following proposed Section 11340.5 (page 19) that the proposed law contradicts a recent dictum of the Supreme Court regarding policy manuals.
2. Express authority in statute to do something that agencies are already able to do is unnecessary, and it gives the impression that the activity would otherwise not be permitted. Specifically, the Pre-Adoption Public Input provisions are unnecessary. See the discussion on page 6, and proposed Section 11346(b) (page 34).
3. The amendment of Section 11344(b) (page 31) to read "California Code of Regulations Supplement" (see discussion on page 12, item 3) should also be made for consistency in Section 11343.5 (page 30), and in Sections 11344.2, 11344.4, 11344.6, and 11344.7 (pages 32-33). Also, on page 29, line 1, "state" is changed to "California" Building Standards Commission. The same change should be made on page 35, line 4.
4. The amendment imposing a plain English only requirement in proposed Section 11346.2(a)(1) (page 36), as defined in proposed Section 11342.570 (page 26), appears to be unworkable in certain instances. There are proposed regulations that are highly technical and can't be written in 8th grade English. Examples include smog check equipment calibration rules and tax laws.
5. The reference in Section 11346.5(a)(12) to paragraph (13) (see page 42, line 29) should be changed to paragraph (14), as the paragraphs in Section 11346.5 have been renumbered.
6. The amendment proposed in Section 11349(c) (page 49) omitting "written or displayed" changes the substantive meaning of the clarity requirement, removing the requirement for clarity (or consistency) of format. It should also be noted that the CLRC comment following proposed Section 11342.570 refers to the existing clarity standard in Section 11349(c), including the phrase "written or displayed so that their meaning will be easily understood...".
7. The amendment proposed in Section 11347.3(b)(9) (page 48), removing the phrase "adoption, amendment or repeal," is inconsistent with the discussion beginning on page 9 regarding application of these requirements to repeals.

If you have questions related to the comments outlined above, please contact me by e-mail at mvdjm2@dmv.ca.gov or call me at (916) 657-5690.

Sincerely,



Deborah Baity
Assoc. Govt. Program Analyst

22

DEPARTMENT OF CORPORATIONS
SACRAMENTO, CALIFORNIAIN REPLY REFER TO:
FILE NO:

July 16, 1999

Brian Herbert, Staff Counsel
California Law Revision Commission
3200 5th Avenue
Sacramento, CA 95817Re: Proposed Recommendation to the Rulemaking Requirements of the
Administrative Procedure Act ("APA")

Dear Mr. Herbert:

This letter is in response to your June 3, 1999 letter addressed to A. Peter Kezirian, General Counsel, Department of Corporations ("Department"). Mr. Kezirian no longer is employed by the Department.

The Department has reviewed the California Law Revision Commission's ("CRLC") proposed recommendation and suggests that the exception also apply to examinations.

Several laws administered the Commissioner of Corporations use the word "examination" rather than "audit" or "inspect." For example, see Sections 17405, 17408, 22701, and 50314 of the Financial Code; Sections 25134, and 25248-50 of the Corporations Code. Including "examination" in the exception would clarify that any guidelines or criteria for the Commissioner's financial examination of the business records of licensees would be excepted from the rulemaking requirements of the APA.

We appreciate the opportunity to review CRLC's proposed exception and provide technical assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read "W. Kenefick", written over a horizontal line.

WILLIAM KENEFICK
Acting Commissioner
(916) 322-3553

WK:gtc

23

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
1655 Mesa Verde Avenue, Suite #125
Ventura, CA 93003-6518
TELEPHONE (805) 654-4647
FAX NO. (805) 654-4739



July 23, 1999

Law Revision Commission
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JUL 26 1999

File: _____

Brian Herbert, Staff Counsel
California Law Revision Commission
3455 Fifth Avenue, Room I-214
Sacramento, California 95817

RE: Tentative Recommendation Proposing Changes To Rulemaking Provisions Of
Administrative Procedure Act

Dear Mr. Herbert:

I am writing this letter on behalf of the Division of Labor Standards Enforcement of the Department of Industrial Relations (DLSE) to express our views concerning certain aspects of the Commission's April, 1999 Tentative Recommendation which proposes amending the rulemaking provisions of the Administrative Procedure Act (APA). In particular, we have concerns about the following two proposed APA revisions: (1) Government Code section 11340.9(e)'s language prohibiting the courts from according judicial deference to agency advice letters that are exempt from the APA, and (2) Government Code section 11340.5(a)'s language banning manuals which restate or summarize prior agency advice letters and adjudicatory decisions. As explained below, in our view neither of these proposed changes to the APA is justified.

Prohibition On Judicial Deference For Advice Letters

In Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, 571, the California Supreme Court recognized that advice letters issued by agencies to private individuals are exempt from the APA. The court went on to observe that although such advice letters are addressed to specific individuals and are not designed to apply generally, they can serve the useful function of identifying the agency's views on the correct interpretation of the law and thereby provide "some guidance to the public, as well as agency staff". (Id. at 576)

In Yamaha Corp. v. State Bd. Of Equalization (1998) 19 Cal.4th 1, the California Supreme Court articulated the principle that agency pronouncements exempted from the APA are to be considered by the courts for the purpose of determining what measure of judicial deference such pronouncements should be accorded in ascertaining the correct interpretation of the law. In its opinion, the court emphasized the importance and value of agency expertise to the interpretive process, and at the same time made it clear that the measure of respect to be given such expertise will vary depending on the source, nature, and context of the pronouncement. With these considerations in mind, the court proceeded to delineate a carefully constructed and exacting standard for the courts to follow in assessing the degree of deference to be afforded a particular agency pronouncement.

Taken together, Tidewater and Yamaha elucidate the Supreme Court's view that in enacting the APA the legislature contemplated appropriate judicial reliance on expressions of agency expertise which are exempt from the APA's rulemaking requirements. In Yamaha, the Supreme Court fashioned a standard to guide the accomplishment of that legislative objective.

At this point in time, as the Supreme Court has made clear, the exemptions from rulemaking under the APA are functioning in precisely the manner intended. With respect to the advice letter exemption, there is no indication that the exemption has served to undermine or is currently undermining the other goals of the APA. Against this background, there does not appear to be a valid policy justification for tampering with the current state of the law or for nullifying the approach of the Supreme Court as expressed in the Yamaha decision.

In sum, it is the view of the DLSE that the advice letter exemption should be permitted to function as it has historically and as the Supreme Court has construed it, in other words without being subject to a prohibition on judicial deference.

In addition, it is the view of the DLSE that if the Commission should decide to impose a general prohibition on judicial deference, any such prohibition should not apply to the DLSE. On April 8, 1999, DLSE's chief counsel, Miles E. Locker, sent Assemblyman Howard Wayne a letter detailing why, with respect to the proposed new APA provisions pertaining to advisory interpretations, DLSE should not be subject to the prohibition on judicial deference for such advisory interpretations; a copy of that letter is enclosed herewith. At about that time, it was also pointed out to the Commission that the DLSE performs its enforcement function in the context of a unique statutory scheme which allows private parties to litigate their rights without direct DLSE involvement; in such an arena, it is particularly important, indeed vital, that DLSE advice letters be given their proper due so as to insure effective and consistent enforcement of the protections embodied in the state's labor laws. Subsequently, the legislation (AB 486) containing the new APA provisions was modified to exempt the DLSE from the prohibition on judicial deference. The considerations and reasoning set out in the April 8, 1999 letter, as well as the additional point discussed above, apply with equal force to the issue of judicial deference in the context of advice letters, and warrant the conclusion that DLSE should be exempt from any prohibition on judicial deference for advice letters.

Ban On Manual Which Summarizes Advice Letters And Adjudicatory Decisions

In Tidewater, having noted that "interpretations . . . in the course of case-specific adjudication are not regulations" and that "advice letters . . . are not subject to the rulemaking provisions of the APA," the California Supreme Court commented as follows:

“Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency’s prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes.” (Tidewater, *supra*, 14 Cal.4th at p. 571.)

In this connection, the court went on to make the following additional observation:

“By publicizing a summary of its decisions and advice letters, the agency can provide some guidance to the public, as well as agency staff, without the necessity of following APA rulemaking procedures.” (Tidewater, *supra*, 14 Cal.4th at p.576.)

The Supreme Court’s position on the proper interpretation of the APA could not be clearer: manuals which merely restate or summarize prior agency pronouncements that are exempt from or not subject to the APA do not constitute regulations; moreover, they fulfill the salutary function of apprising the public and agency staff of the agency’s likely enforcement position in areas where the promulgation of regulations is neither feasible nor workable.

The conclusion of the Supreme Court is sound and should be accorded the respect it deserves. We do not see any merit in the view that, because an agency might wish that ultimately its interpretations will be accepted by the courts, the mere act of collecting and summarizing agency pronouncements not subject to the APA in a manual converts the pronouncements into regulations. Consequently, it is DLSE’s position that the proposed ban on manuals which merely summarize or restate prior advice letters and adjudicatory decisions is neither warranted nor justifiable.

Again, for the reasons stated above in connection with the judicial deference issue, we would request that if in fact a ban on manuals is adopted by the Commission that ban not apply to the DLSE.

In conclusion, based on the foregoing, we would request the following changes in the language of the tentative recommendation:

- (1) Delete the following words from Gov’t Code §11340.9(e): “and is entitled to no judicial deference”.
- (2) Delete the last sentence of Gov’t Code §11340.5 in its entirety.

Page 4
July 23, 1999

Brian Herbert, Staff Counsel

Thank you for affording us the opportunity to present our views on the pending proposal to amend the APA.

Sincerely,

A handwritten signature in black ink, appearing to read 'William A. Reich', with a long horizontal flourish extending to the right.

WILLIAM A. REICH, Staff Counsel
State Labor Commissioner
WAR/bcs

STATE OF CALIFORNIA

GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
(415) 703-4863

MILES E. LOCKER, Chief Counsel

April 8, 1999

The Honorable Howard Wayne, Assemblyman
California Assembly
State Capitol
Sacramento, California 95814

Re: **Assembly Bill 486**

Dear Assemblyman Wayne:

The Division of Labor Standards Enforcement of the Department of Industrial Relations, an agency that is headed by the State Labor Commissioner, thanks you for the opportunity to express our concerns regarding the above-referenced Assembly Bill. As a whole, we view AB 486 as a laudable method of enabling state agencies to provide the public with advisory interpretations of the various laws, regulations, and court decisions which the agencies enforce. However, there is one aspect of the bill that we find troubling.

Section 3, Article 10 of the bill would, among other things, add section 11360.030 to the Government Code. In its current form, section 11360.030(a) provides: "Except as provided in subsection (b), an advisory interpretation has no legal effect and is entitled to no judicial deference. . . ." For the reasons discussed below, we believe that it would be a grave error to preclude courts from giving any judicial deference to an advisory interpretation adopted by the Division of Labor Standards Enforcement. We therefore propose that section 11360.030(a) be amended to provide: "Except as provided in subsections (b) and (d), an advisory interpretation has no legal effect and is entitled to no judicial deference. . . .", and that subsection (d) be added to provide: "Courts shall not be precluded from giving judicial deference to the advisory interpretations adopted by the Division of Labor Standards Enforcement of the Department of Industrial Relations."

Assemblyman Howard Wayne
April 8, 1999
Page 2

We believe that this amendment is necessitated by the unique relationship between our agency and the Industrial Welfare Commission ("IWC"), the body that is empowered to adopt regulations governing wages, hours, and working conditions. (See Labor Code sections 1171, et seq.) Our agency is responsible for the enforcement of the various IWC wage orders. Although we must necessarily interpret the IWC's regulations in order to enforce them, we cannot adopt regulations that would enlarge or narrow the provisions of the IWC's regulations, as to do so would invade an area that the legislature intended to be exclusively occupied by the IWC. In recognition of our Division's need to interpret the wage and hour provisions that we enforce (and the public's need for guidance), in 1980 the Legislature enacted Labor Code section 1198.4, which authorizes the Division to "make available to the public any enforcement policy statements or interpretations of orders of the Industrial Welfare Commission."

The courts, no less than the public at large, have benefitted and should continue to benefit from the Division's interpretations of wage and hour requirements. The Labor Commissioner's special expertise in this complex area of law is founded upon more than seventy years of experience in interpreting and enforcing the IWC's wage orders. The existing "no deference" provision flatly denies the courts the opportunity to consider the Division's advisory interpretations, thereby depriving the courts of the opportunity to rely on our agency's special expertise. By carving out a limited exception for our Division from this "no deference" provision, the courts will be permitted to consider these interpretations, and to assign whatever weight to them the courts may deem appropriate. This approach is consistent with the Supreme Court's holding in *Yamaha Corporation v. State Board of Equalization* (1998) 19 Cal.4th 1, wherein the Court ruled that courts may give deference to an agency's advisory letters which interpret statutes or regulations that are enforced by that agency, and that the degree of deference is to be determined by the court based on factors that may vary on a case by case basis.

The limited amendment that we propose would not make our agency's advisory interpretations binding on the public - - it would merely permit courts to consider those interpretations. Courts would be permitted to follow or not follow our interpretation, based on the courts' independent assessment of the meaning of the law. We are therefore confident that those organizations that have expressed their support for a general "no deference" provision in this legislation would agree to a limited

Assemblyman Howard Wayne
April 8, 1999
Page 3

exception for our Division.

Thank you for your consideration of our concerns. Feel free to contact me with any questions.

Sincerely,



Miles E. Locker
Chief Counsel

cc: Stephen J. Smith, Director-Industrial Relations
Marcy V. Saunders, State Labor Commissioner
Tom Grogan, Assistant Labor Commissioner
Herbert Bolz, Office of Administrative Law
Brian Hebert, Law Revision Commission

CALIFORNIA COASTAL COMMISSION

45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94108-3219
VOICE AND TDD (415) 904-5200



July 26, 1999

VIA FACSIMILE & REGULAR MAIL

Arthur K. Marshall, Chairperson
California Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

**RE: Law Revision Commission's Tentative Recommendation
on Administrative Rulemaking**

Dear Chairperson Marshall:

I am writing on behalf of the Coastal Commission staff to express our views on the Law Revision Commission's Tentative Recommendation on Administrative Rulemaking. We appreciate the efforts of your Commission to take a fresh look at the procedures required for state agencies to adopt and revise regulations. Nevertheless, we have major concerns about four of the changes included in the proposal.

1. Internal Management

Our first concern relates to proposed Government Code § 11340.9(d). It provides that the Administrative Procedure Act (Government Code § 11340 *et seq.*) (hereafter "APA") does not apply to:

[a]n agency rule concerning only the internal management of the agency that does not significantly affect the legal rights or obligations of any person.

The Tentative Recommendation indicates that this provision is intended to replace existing § 11342(g). That statutory section (which would be repealed) in relevant part exempts from the APA a "rule, regulation, order, or standard of general application ... that relates only to the internal management of the state agency" The Tentative Recommendation proposes to revise the existing "internal management" exception by adding a requirement that the internal rule must "not significantly affect the legal rights or obligations of any person"

The Recommendation does not explain the basis for this proposal. It notes that "the internal management exception has been construed narrowly by the courts ..." and goes on to suggest that under that precedent "a rule is not eligible for the exception if it has any effect on a

Arthur K. Marshall
 July 26, 1999
 Page -2-

person outside the agency or "involves a matter of serious public interest." (Citations omitted.) The Recommendation states that the Commission's proposal would modify the exception but argues that the change would be "slight." The Tentative Recommendation fails to explain why the Law Revision Commission proposes to revise this standard in a manner that differs from the current requirement as courts have interpreted it.

We believe that it would be a serious mistake to modify the current "internal management" exception. Numerous judicial opinions have construed the existing APA standard as well as applicable labor law provisions. Under those labor laws, to the extent that the Legislature has determined that it is appropriate to place limits on public agencies' ability to manage its decisions (e.g., those that define the scope or method of work practice or behavior), it has imposed collective bargaining requirements on those decisions. State agencies are thus guided in their interpretation of the statutory provision for internal management rules in light of that judicial precedent. If the standard is revised, state agencies will be unable to rely on those years of precedent to guide them.

Furthermore, the proposed revision will invite litigation in order to interpret when an internal management rule does "not significantly affect the rights or obligations of any person . . ." It can be argued that every memo or document produced by any governmental agency somehow affects the rights or obligations of some person. State agencies will undoubtedly be required to devote limited resources to the task of litigating whether or not internal guidelines that would currently be exempt from the APA would have an effect on someone that would be "significant."

The purpose of having an "internal management" exception is to allow governmental agencies to adopt guidelines that would have an effect on their employees. Agencies cannot operate effectively if they must conduct all internal business by regulation; nor can they operate effectively without the ability to provide informal guidance to their employees. To require either result would paralyze the management of state government. Examples of matters that are exempt now but would almost certainly be litigated include agency guidance about such things as preparation of required time sheets and appropriate uses of state property such as state vehicles and state provided electronic mail. We believe that the proposed change would needlessly foster litigation about matters that are now addressed under the current internal management exception. The Commission staff's proposal to eviscerate the "internal management" exception by requiring that agencies conduct their internal business through rulemaking would add regulatory burdens and costs to state government with no corresponding benefit.

2. "Agency Statement[s]"

We are next concerned with proposed Government Code section 11340.9(e). The amendment would provide that the APA does not apply to:

"[a]n agency statement made to a specifically named person or group of specifically named persons, other than an employee or officer of the

Arthur K. Marshall
 July 26, 1999
 Page -3-

agency, to provide advice in response to a request for advice from that person or group of persons"

The explanatory materials included in the Tentative Recommendation suggest that this proposal was intended to narrow an exception to rulemaking requirements that was discussed by the California Supreme Court in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th, 557, 571. (The Tentative Recommendation describes the exception set forth in the California Supreme Court's *Tidewater* decision as "too broad".)

The California Supreme Court addressed agency "advice letters" in the *Tidewater* decision (*Tidewater Marine Western, Inc. v. Bradshaw, supra, at p. 571.*) whereas the legislative proposal would exempt "agency statement[s] made ... in response to a request for advice" The proposed statute would exempt only a narrow and specific category of agency statements from the APA. Under the maxim of statutory construction "*expressio unius est exclusio alterius*", this proposed legislative change would arguably cause all other agency statements to become subject to the APA. The California Supreme Court has held that:

"Under the familiar rule of construction, *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed." (Citations omitted.) (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195. See also *Sierra Club v. Board of Forestry* (1994) 7 Cal.4th 1215, 1230.)

Thus, if this proposed change were adopted, it could be interpreted to provide by implication that all other oral or written agency statements that are not made in response to a request for advice are subject to the Administrative Procedure Act.

Because of this rule of statutory construction, proposed § 11340.9(e) would create confusion because "agency statements" that do not meet the criteria set forth therein would be argued to be *de facto* regulations and thus would be considered to be invalid. The proposed statute would apparently provide that any statement made by any agency official or employee to anyone inside or outside the agency must be adopted as a regulation unless the statement is made in response to a request for advice. Although such a result may be unintended, it would significantly impair the efficient functioning of state government. For example, agency staff would be prohibited from affirmatively contacting applicants to discuss the status of their applications. Unless specifically requested, they would also be unable to provide information to the public about upcoming regulatory decisions, legal requirements, or other matters necessary to the functioning of government. Similarly, state agency employees and officials would be prohibited from making any statements related to official business to other state and local government employees or officials. These results are absurd. We oppose this change because of the potential confusion and paralysis that would be caused if all agency statements were to be treated as regulations except those which are issued in response to a request for advice.

Arthur K. Marshall
 July 26, 1999
 Page -4-

The Law Revision Commission staff's proposal that agency official and staff "speak only when spoken to" would present state agencies from communicating effectively with their staff, the public, members of the regulated community, and other governmental agencies. This change is antithetical to the proper function of government.

3. "Agency Interpretation[s] of Law"

Proposed Government Code § 11340.9 reflects a similar problem to that described above with respect to "agency statements". It would exempt from the Administrative Procedure Act:

"[a]n agency interpretation of law that is the only legally tenable interpretation of that law"

As drafted, this section would exempt a narrow category of agency legal interpretations. Under the maxim of statutory construction, "*expressio unius est exclusio alterius*", which is discussed above, the proposed statute would provide that all other agency interpretations of law would be prohibited unless adopted through a rulemaking proceeding. Thus, an agency interpretation of law that is not the only possible legal interpretation of law would not be exempt from the APA and would therefore be prohibited unless it were adopted by regulation. The phrase "agency interpretation" is undefined. Therefore, this provision could be argued to make every statement by a member of an agency's staff subject to rulemaking requirements, as long as the statement concerns an issue about which there may be more than one legal interpretation. Furthermore, the proposed statute is not limited on its face to written statements of legal interpretation, therefore oral statements would also appear to be subject to rulemaking requirements.

Such a result is nonsensical. State officials and employees would be unable to fulfill their required functions because they would be unable to assert an oral or written position on any matter on which there may be more than one possible legal interpretation unless an APA rulemaking had occurred. Under the proposed statute, this letter would be prohibited unless it were adopted as a regulation because it articulates a legal position about which there is more than one legal interpretation. The proposed law also appears to prohibit state agencies from adopting findings in quasi-adjudicatory proceedings. Such findings articulate legal positions about matters on which multiple legal interpretations are generally expressed. State officials and employees would also be prohibited from taking positions in judicial and administrative proceedings and in any public forum concerning legal positions that are in dispute. This would effectively prevent state agencies from communicating about anything that is in dispute unless the communication is first adopted as a regulation. Again we oppose this change because it is wholly inconsistent with the proper functioning of government.

4. Policy Manuals

Our fourth area of concern relates to proposed Government Code § 11340.5(a). The existing statutory provision provides that a state agency shall not:

Arthur K. Marshall
 July 26, 1999
 Page -5-

"... issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in ... [the APA] unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter ..."

The proposed revision would add the following:

"For the purposes of this section, "manual" includes a policy manual that restates or summarizes the agency's adjudicative decisions or statements made by the agency pursuant to subdivision (e) of Section 11340.9."

The Tentative Recommendation indicates that this change is proposed in response to the California Supreme Court's decision in the *Tidewater* case. (*Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal.4th 557.) The California Supreme Court held in *Tidewater* that "a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases, and its prior advice letters ..." is not a regulation under the APA. (*Tidewater, supra*, at p. 571.) The Tentative Recommendation takes issue with that Supreme Court holding and describes it as "problematic". The Law Revision Commission's proposal argues that:

"an agency restatement or summary of its adjudicative decisions may state a rule that the agency intends to be generally applicable. Such a restatement or summary is itself quasi-legislative and should be adopted as a regulation. Similarly, the exception for individual advice is based on the fact that the advice is directed to a specific person. If an agency restates or summarizes such advice in a policy manual intended to provide guidance to the public, the advice serves a quasi-legislative function."

Read carefully, the Law Revision Commission's proposal urges that because an agency restatement or summary of its adjudicatory decisions or advice letters "may" have a quasi-legislative purpose, all policy manuals that include restatements or summaries should be subject to APA rulemaking requirements, regardless of their purpose or effect. Such a conclusion is logically and factually unsupported. It would be wasteful of limited governmental resources to require that, because some summaries of agency precedent may be undertaken with a quasi-legislative intent, no summaries of agency precedent may be issued unless they have been adopted as regulations. Clearly, many agency statements regarding past adjudicatory decisions and advice letters are merely intended to be informative. The primary effect of the proposed change would be to prevent members of the public from being informed about the past actions of the agencies that make quasi-judicial decisions. We agree with the California Supreme Court that such "policy manuals" are not regulations. (*Tidewater Marine Western, Inc. Bradshaw, supra*, at p. 571.) We therefore oppose this proposed change.

Arthur K. Marshall
July 26, 1999
Page -6-

CONCLUSION

We appreciate the opportunity to comment about the Law Revision Commission's Tentative Recommendation on Administrative Rulemaking. If you have any questions about the concerns that we have outlined above, please do not hesitate to call me at (415) 904-5220 or Dorothy Dickey, the Commission's Deputy Chief Counsel at (415) 904-5224.

Very truly yours,

Ralph Faust by DFD

RALPH FAUST
Chief Counsel