

Second Supplement to Memorandum 99-17

Legislative Program: Issues on AB 486 (Administrative Rulemaking)

We received another letter from the Office of Administrative Law (OAL) offering more suggestions regarding AB 486. That letter is attached. Most of the suggestions made are technical and should not require discussion at the meeting. The staff will work with OAL to develop amendments where appropriate.

We have also received a letter from the California State Employees Association that makes one suggestion with regard to AB 486 — the Commission should consider amending AB 486 to supersede the “policy manual” exception language in the *Tidewater* case. This issue will be discussed in conjunction with the same suggestion from OAL. As the letter is primarily concerned with Memorandum 99-20 (Administrative Rulemaking: Draft Tentative Recommendation), it is attached to the First Supplement to Memorandum 99-20.

Respectfully submitted,

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April 6, 1999



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

Re: **SECOND PART OF OAL COMMENTS CONCERNING****Administrative Rulemaking: Advisory Interpretations & Consent Regulations--Final Recommendation dated September 1998**

Commission Meeting of Thursday, April 8, 1999, 10:00 a.m.- 5:00 p.m.,
State Capitol Room 317, Sacramento--Agenda Item 3 on final agenda dated
3-26-99:

1999 Legislative Program

AB 486 (Wayne; 4-5-99)--Advisory Interpretations & Consent Regulations (approved April 6, 1999 by Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development)

Dear Chairperson Marshall:

The Office of Administrative Law ("OAL") sent a letter to the Commission dated April 2, 1999 on the advisory interpretation part of the above topic. As mentioned to Brian Hebert of your staff, due to a word processing error, OAL was unable to include several points in the letter of April 2. As noted on page 2 of that letter:

"There are five issues we wish to call to your attention at this time: (1) policy manuals, (2) addition of an authority requirement, (3) relationship of article 10 to Government Code section 11340.5, (4) need to clarify the judicial review provision (section 11360.100), and (5) amendments to existing APA rulemaking petition provisions. *Additional points (generally*

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concerning more technical matters, such as whether the 45-day notice period begins with the mailing of notice or with publication of the notice in the Notice Register) will be made in a second letter.” (Emphasis added.)

We will begin where we left off, with the “rulemaking petition” issue. There are ten additional issues we wish to call to your attention at this time. Page references are to the April 5 version of the bill. However, this letter does not address the topic of consent regulations or other substantive amendments first appearing in the April 5 version of the AB 486.

**Issue 5-- amendments to existing APA rulemaking petition provisions
(Government Code section 11340.6 & 11340.7); AB 486, pp. 2-4**

This comment adds to the earlier comment on Issue 5, in the letter of April 2 (p. 11), *and also bears upon Issue 2--Addition of an Authority Requirement (p. 9 of April 2 letter).*

It is a basic precept of administrative law and a basic assumption of the California Administrative Procedure Act (“APA”) that each agency is limited to adopting regulations that are within the scope of the agency’s authority. Government Code sections 11342.1 & 11342.2 (adopted regulations not effective unless “within the scope the authority conferred” by statute, which may be either “express or implied”). The authority requirement applies not only to duly adopted regulations (those adopted pursuant to the APA for printing in the California Code of Regulations), but also to uncodified agency directives. *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391, 211 Cal.Rptr. 758, 761 (administrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void). No showing has been made thus far that would justify deviating from this norm in the case of agency issuance of advisory interpretations. From another perspective: what purpose is served by empowering an agency to officially issue an interpretation concerning a topic *not* within the scope of authority conferred on the agency by statute?

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The proposed amendments to section 11340.6 and 11340.7 presuppose (and explicitly state) that the authority requirement applies to advisory interpretations, though OAL review of these interpretations is limited in AB 486 to consistency.

Government Code section 11340.6, if amended as proposed, would require that any petition to adopt an advisory interpretation:

“state the following clearly and concisely:

- (a) The substance or nature of the regulation, amendment, or repeal requested.
- (b) The reasons for the request.
- (c) *Reference to the authority of the state agency to take the action requested.* (Emphasis added.)

Government Code section 11340.7, if amended as proposed, would similarly require that the response of the rulemaking agency to the petition includes “reference to *authority* to take action requested.” (Emphasis added.)

As previously indicated (page 9 of April 2 letter), we recommend that OAL review cover not only consistency, but also authority. Thus, we recommend resolving the apparent conflict between the OAL review provision (proposed section 11360.090(d) (AB 486, p. 22, line 27) and the petition provisions by adding authority to the OAL review provision.

Issue 6--When the 45-day notice period begins

Proposed section 11360.050(c) mandates a 45-day public comment period. It is not clear whether this 45-day period begins (1) with the mailing of notice to interested persons (11360(a)) or (2) with publication of the notice in the California Regulatory Notice Register (11360.80(a)).

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Issue 7--Definitions

Proposed section 11360.010(b) (p. 18, line 26) states:

“Except as expressly provided in this chapter, an advisory interpretation adopted pursuant to this article is not subject to the requirements of the other provisions of this chapter.”

We agree that it is necessary to make clear that the regular APA rulemaking requirements, such as Government Code section 11346.8 (c) (posthearing change requirements), do not apply to advisory interpretations. However, some APA provisions should still apply to some degree, such as the definitions of agency and office (“office” means OAL) in section 11342, the definitions of authority and consistency in section 11349 (and sections 11342.1 and 11342.2), and provisions discussing the California Code of Regulations (e.g., section 11344) and the California Regulatory Notice Register.

We recommend amending section 11360.010(b) to provide that the above-noted general provisions of the APA apply in the advisory interpretation context.

Issue 8---Use of “contradictory”

Proposed section 11360.030(b) (p. 19, line 19) (the safe harbor provision) states that an agency may not assert or rely upon an interpretation of law “contradicting” an advisory interpretation. The word “contradicting” also appears in the comment to that section, and in section 11360.040(b)(2)(p. 19, line 38). Note that section 11360.030(e) uses the term “inconsistent.” (p. 19, line 26.)

We suggest replacing “contradictory”(especially on page 19, line 19) with “that is inconsistent with.” The APA and the cases most often use the term “consistent” or “inconsistent,” and we are concerned that use of the term “contradictory” may be read as having created a higher standard.

Issue 9--Department of Education examples

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The comment to proposed section 11360.020 contains an example of an agency statement that would fall within the definition of advisory interpretation, followed by an example of a second agency statement that would *not* qualify as an advisory interpretation.

We suggest, however, that better examples be developed, perhaps ones involving a different agency, or ones not naming a particular agency. It may be that the Department of Education does not conduct enforcement actions or adjudicatory proceedings, and that these examples makes it more difficult to appreciate how the safe harbor provision (section 11360.030(b); p. 5, line 5)) would apply in practice in the context of such an action or proceeding.

Issue 10—Explain when advisory interpretations *are* binding

Proposed section 11360.010 (p. 18, line 18) states that the purpose of article 10 is to create a procedure for communication of “nonbinding” agency interpretations. We suggest that the comment be revised to explain the circumstances under which these “nonbinding” interpretations are binding on the agency, by citing and very briefly discussing the safe harbor provision (section 11360.030(b); p. 5, line 5).

Issue 11—Published opinions

Proposed section 11360.030(c) (p. 19, line 24) (and other sections and comments) refers to “a published opinion of the California Supreme Court or a California court of appeal.” We suggest changing this to “an opinion of the California Supreme Court or a published opinion of a California court of Appeal.” So far as we know, all opinions of the California Supreme Court are published. Thus, the reference to “published” opinions should be limited to lower court appellate opinions, some of which are published in whole or in part.

Issue 12—Comment re “effect of advisory interpretations”

The final sentence of the comment to proposed section 113060.030 (p. 19, line 10) states: “Subdivision (c) only affects the safe harbor provision provided under subdivision (b) and is not intended to raise any implication regarding the proper

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interpretation of the provision of law that is the subject of the advisory interpretation.”

We recommend revising this sentence. We are not sure what it means.

Issue 13---Additional “authority” suggestions (see April 2 letter, p. 9 & pp. 2-3 of this letter)

Proposed section 1360.050(a) (p. 20, line 11) requires an agency adopting an advisory interpretation to clearly identify the provision of law the agency is interpreting.

We suggest that the agency also be required to identify the provision of law which gives the agency *the authority to interpret* the provision that is the subject of the advisory interpretation. It might also be a good idea to revise proposed section 11360.110(a) (p. 18, line 18) to state that the procedure is limited to provisions of law within the scope of the agency’s authority.

Issue 14---Retaining and Providing Administrative Record

OAL is required to disapprove an advisory interpretation “if it does not satisfy the requirements of this article.” Proposed section 11360.090(d) (p. 22, line 31-2). However, AB 486 neither requires adopting agencies to retain a record verifying that the required procedural steps have been taken, nor does it require that such a record be provided to OAL as part of request to review an advisory interpretation. OAL cannot perform a review without a record.

We suggest these amendments:

- (1) a provision requiring the adopting agency to create an administrative record as the advisory interpretation is being adopted, and then to retain a copy of that record (cf. Government Code section 11347.3(e-f). The record should be available to the public and to the courts (see Government Code section 11347.3(d).

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(2) the person requesting OAL review should be required to provide a copy of the record as part of the request. Given the brief 15-day review period, there is not time for OAL to obtain the record from the agency.

Issue 15—"Notice" or "Decision" if OAL disapproves?

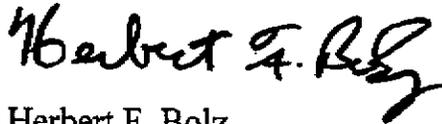
Proposed section 11360.090(d) (p.27, line 27):

OAL must mail a "notice" explaining its decision. Is that notice a summary of the decision or the decision itself? We recommend simply requiring mailing of the decision. This should not be two-step process.

If an advisory interpretation is approved or disapproved, OAL is required to publish a "notice explaining its decision." We recommend simply requiring publication of the decision. Cf. 11360.090(c)(3) (OAL must file "decision" with Secretary of State).

If you have questions or thoughts about these improvement suggestions, please contact me at (916) 323-6814 (voice); (916) 323-6826 (FAX); e-mail... hbolz@oal.ca.gov.

Sincerely,



Herbert F. Bolz