#N-100 September 9, 1993

Memorandum 93-45

Subject: Study N-100 — Administrative Adjudication (Comments on Tentative Recommendation)

BACKGROUND

The Commission has circulated for comment its tentative recommendation relating to administrative adjudication by state agencies. The tentative recommendation was sent out in late May and early June, with a response date of August 31.

Attached to this memorandum as an Exhibit are the comments we have received to date on the tentative recommendation. We have been informed by a number of agencies that they are unable to meet the comment deadline due to delays in ordering and receiving copies of the tentative recommendation, and they will provide comments shortly. We will supplement this memorandum with any comments received later.

We have received comments from the following persons and organizations, whose letters appear at the following pages of the Exhibit to this memorandum:

State Water Resources Control Board	80-90
Pacific Gas and Electric Company	91-93
Department of Insurance	94-96
Ofc. Statewide Health Planning & Development	97-99
Office of Administrative Law	100-103
Alcoholic Beverage Control Appeals Board	104-105
Coastal Commission (Executive Director)	106-107
State Personnel Board	108-117
Energy Commission	118-126
Coastal Commission (Chief Counsel)	127-130
Department of Social Services	131-142
State Bar Committee on Administration of Justice	143-153

This memorandum summarizes comments concerning the following general aspects of the tentative recommendation:

General Approval
General Criticism
Fiscal Concerns
Variance by Regulation
Scope of Statute
Exemptions from Administrative Procedure Act
Central Panel

Subsequent memoranda will deal with comments addressed to specific provisions of the tentative recommendation.

GENERAL APPROVAL

Professor **Gregory L. Ogden**, author of *California Public Agency Practice*, strongly approves the tentative recommendation as written. Exhibit p. 4. "It is a substantial improvement over the existing administrative procedure act. I believe that adoption of the recommendation by the legislature will significantly advance procedural fairness in the administrative process in the State of California."

The **California School Employees Association** approves the tentative recommendation. Exhibit pp. 78-79. They actually would prefer to see it go much further:

> CSEA supports a comprehensive APA, including (1) mandatory application of the APA to local agencies, (2) a central panel of

> hearing officers for most formal hearings, (3) less opportunity for agencies to escape the APA by adopting regulations that alter default statutory provisions, and (4) an all-inclusive definition of "adjudication" with provisions for summary proceedings where appropriate. No formal hearing should be permitted without at least internal separation of functions.

However, they understand the limitations on what can be achieved, and think the tentative recommendation does an excellent job of balancing competing interests in a difficult area.

The **Pacific Gas and Electric Company** believes the tentative recommendation is a thorough job and supports the proposals for the most part, with some suggested areas for further revision. Exhibit p. 91.

The **Office of Statewide Health Planning and Development** in general supports the concepts embodied in the draft, but is concerned that the statute may formalize three of their programs where the hearings are intended to be informal. Exhibit p. 97.

The **State Bar Committee on Administration of Justice** generally supports the tentative recommendation, with some significant concerns. Exhibit pp. 144-153.

GENERAL CRITICISM

The **Department of Health Services** criticizes the approach of the draft to provide general default rules with the ability of the agency to vary or supplement by regulation. Exhibit p. 12. They point out that the effort to make one size fit all in many cases causes a loss of detail that makes the law less rather than more useful to the public. They also think the system is poorly conceived where everyone involved in an administrative proceeding must in every case first consult the statute and then look to see whether there are variant regulations. "Having so many provisions that are subject to variance by regulation (and to different variance by each affected program) would likely cause substantial confusion and uncertainty."

The **State Teachers Retirement System** legal office is of the opinion that the concept of a universal administrative procedure act is a seriously flawed one, "for the reasons discussed again and again at the Commission meetings. These reasons include the impossibility of applying one act to all state agencies, the

costs of changing the administrative practices of the various agencies, and the increased complexity of the proposed Act." Exhibit p. 69.

Robert Hughes of Long Beach states:

> In general, it appears to me that this proposed bill gives much more power and authority to administrative agencies; at the same time it diminishes the ability of a respondent to defend themselves. It certainly does not address some real problems with administrative adjudication by regulatory agencies. It certainly will not improve the business climate and encourage any new business which is subject to regulation to be established here and it will further deter business from locating here as opposed to some other state if they fully investigate and learn the facts. Exhibit p. 71.

His concern appears to be primarily with the whole regulatory system rather than the hearing process as such. However, he does propose that if a person is subjected to an administrative adjudication and prevails, the person should be awarded legal costs. He also believes the provisions for emergency decisions will allow overreaching state bureaucrats to destroy business.

The Chief Counsel of the **California Coastal Commission** is generally critical of the procrustean approach of the recommendation. Exhibit p. 130:

> Part of the wisdom embodied in the development of government decision-making in this century is reflected in the notion that no single process best suits the variety of needs of all administrative agencies which make determinations. Because different kinds of factual determinations need to be made from one agency to another, because different interests need to be identified and considered, including those without advocates, and because of a potential multiplicity of views among various parties, agency practice justifiably varies greatly within the overall confines of due process of law. To contend that only trial-type adjudications effectively resolve disputes is to cast aside much of this development of law in government. Even in the judicial context, alternative methods of dispute resolution are being explored, developed and utilized. Agencies should develop and refine their administrative procedures, borrowing liberally as necessary from our traditions, to properly implement the specifics of the laws which the Legislature has adopted, in the particular ways best suited to fulfill those various legislative mandates. The boundaries of this search for effective government should not be limited to one unitary procedure imposed without regard to substance or function, but rather be the tradition and law of due process as developed by the courts. Instead of reinventing government into a

> twenty-first century mode, this mandate would recast government into a nineteenth century model, exalting procedure over the proper implementation of substance. Only lawyers would benefit.

This criticism is reiterated in a letter from the Executive Director of the Coastal Commission. Exhibit p. 107:

> In conclusion, I fail to see what important public purpose or interest is going to be served by recommendations that state agency procedures be rendered more complicated, rigid and time-consuming. At a time of shrinking public sector budgets and when many vital public programs such as education, health care and public safety are desperately competing for limited public dollars, it seems to me ill advised to adopt recommendations that will be extremely costly to implement and that are devoid of any compelling public purpose. I realize the recommendations are well-intentioned and predicated on considerable study and discussion. I respectfully suggest, however, that, as they now stand, the proposals do not reflect good public policy and should be held for further review and possible future consideration.

The **Department of Social Services** disagrees with the concept of a single administrative procedure act to govern all state adjudications. Exhibit p. 131. "We believe that the efficiencies of tailoring due process procedures to specific needs of programs outweighs the advantages of a single act for all hearings. For example, the welfare hearings system processes almost 6,000 requests for hearing each month, and has its own state and federal rules which govern every aspect of the process. On the other hand procedures for uniform processing of cases that go before the central panel and similar cases makes good sense to us. As an agency we are willing to forego some of the special statutes in our programs for the sake of uniformity."

FISCAL CONCERNS

A number of agencies are concerned about the fiscal impact of the tentative recommendation, particularly the cost of adoption of regulations to make necessary variances from the statute. Some of the more extensive comments are summarized below.

The **Department of Health Services** states that:

> A further consideration is the potential expense of such a major change at a time when the state is particularly strapped financially.

> The contemplated changeover would have immense potential costs in the form of regulations development, notices to the public, staff training, and so forth, including as a not insignificant component the cost to agencies and the public of the inevitable errors the learning curve would cause. Exhibit p. 12.

The **State Board of Control** is concerned about the cost of adopting regulations necessary to vary the provisions of the administrative procedure act. Exhibit p. 46. They point out that the Board is experiencing significant funding problems and that formal rulemaking is a costly process. "Requiring state agencies to undertake massive and costly rulemaking is inappropriate."

The **Department of General Services** believes that the customizing provisions of the proposal are a useful and creative means of achieving flexibility. "It is of great concern, however, that at a time of budgetary limitation, a significant amount of time and money will be devoted to rulemaking." Exhibit p. 67.

The **California Coastal Commission** is concerned not only about the cost of adopting variant regulations, but about the cost of the proposed administrative process itself. Exhibit p. 128. They think the proposal would convert a streamlined public hearing type procedure into one with adversarial times and costs. "The LRC tentative recommendation would pose a severe financial strain on the Coastal Commission and on state government generally. In this regard the Commission, for example, over the last five years has acted on approximately ninety quasi-judicial actions that require public hearings per month. The Commission would have to hire a number of additional staff, including lawyers, hearing officers, and court reporters. It would need to schedule longer hearings, and would be forced to rent additional hearing rooms. The Commission does not have sufficient resources to absorb those expenses; thus significant supplemental appropriations would be required to implement this proposal."

VARIANCE BY REGULATION

The **State Board of Control** points out that although the draft allows a number of provisions to be varied by agency regulation, the draft is too restrictive in this respect. Exhibit p. 46. For example, the rule that mailed notice extends time is inconsistent with the Board's procedures and time limits "The enactment of this proposal would require the Board to either extend all of these timelines by five days, necessitating a costly reprogramming of its automated

system with resultant delays in processing and payment of victims' claims, or to seek legislation shortening its statutory timelines. This is but one example of how a seemingly insignificant requirement should not be imposed on all state agencies. We urge that state agencies be given the authority to deviate from any of the model requirements."

The **State Water Resources Control Board** appreciates the built-in flexibility that the tentative recommendation creates. Exhibit p. 80. However, in some instances they would suggest revising the default rule to eliminate the need to tailor the statute by regulation. "Adopting regulations is no picnic and, to the extent it can be avoided, everyone will be better served."

The **California Coastal Commission** objects to requiring that deviations from the mainline statute be done by regulation. Exhibit p. 129. "The rulemaking process is expensive, time consuming and cumbersome. Rulemaking is a labor intensive endeavor for state agencies. It could take a significant part of one or more attorney's time over the course of a year to prepare proposed regulations for adoption by the Commission and filing with the Office of Administrative Law. Additionally, the Commission as a whole would be required to have lengthy public hearings to consider the pros and cons of modifying the requirements."

The **California School Employees Association** also is unhappy with the variance process, but for the opposite reason. They think there should be "less opportunity for agencies to escape the APA by adopting regulations that alter default statutory provisions." Exhibit p. 79.

SCOPE OF STATUTE

The proposed administrative procedure act would apply only where a hearing "or other adjudicative proceeding" is required by the federal or state constitution or by statute. While the concept is straightforward, its application is not.

The **Department of Health Services** has serious concerns with the provision. Exhibit pp. 14-16. They point out that the reference to a "hearing" required by statute is overbroad in that it is not limited to adjudicative type hearings. They also note that many statutory hearings, and constitutional hearings, are not intended to be full blown administrative procedure act hearings. Yet this provision would convert all of these into regular APA hearings. Their suggestion is that the statute either state expressly which hearings are governed by the

administrative procedure act, or at least limit the administrative procedure act to hearings that are expressly adversarial. "We recognize that this would undo one of the basic purposes of the proposed reforms. Our recommendation in this regard is based on a belief that this purpose cannot be implemented without causing considerable confusion and uncertainty, and should therefore be abandoned."

The **Public Utilities Commission** likewise points out that the term "adjudicative proceeding" is undefined, leaving the meaning of the term in doubt. Exhibit p. 50.

The **Department of Social Services** is especially concerned with this provision, which they believe is too broad. Exhibit pp. 131-133. There are situations where the constitution would require a hearing, but the agency believes the judicial system rather than an administrative procedure act hearing is the place for relief. There are other situations in which a hearing is fashioned to meet the minimal precepts of the flexible concept of due process. "The agency gives the person a full description of their hearing rights at the time of the agency decision. Certainly the Skelly hearing for personnel matters is constitutionally required, but would become meaningless if it were to become a full APA hearing." They see some relief in the conference hearing concept, but this is insufficient. "We suggest that the section be simplified to cover only statutorily required adjudicative proceedings. The state and federal constitutions are just too broad to attempt to fit the varied due process rights into one act no matter how flexible. The cost of such an endeavor is prohibitive and wasteful."

On the other hand, the **California School Employees Association** would prefer an all-inclusive definition of adjudication, with provisions for summary proceedings where appropriate. Exhibit p. 79.

EXEMPTIONS FROM ADMINISTRATIVE PROCEDURE ACT

We requested each agency to indicate any adjudicative proceedings that the agency felt should be exempt from the administrative procedure act due to a special or unique character of the proceeding. In addition, the staff is doing a search and review of the statutes in an effort to determine whether there are any special proceedings or special rules that should be preserved. This is a major task, and may trail the basic administrative procedure act substantially.

We note here matters that have been called to our attention.

California Unemployment Insurance Appeals Board. The Unemployment Insurance Appeals Board seeks an exemption from the provisions of the proposed administrative procedure act. Exhibit pp. 34-36, 38. They point out that their procedures are much more informal and less prosecutorial than those proposed in the act, and are designed to conform to federal laws and rules, the failure of which will lead to loss of federal funding. They acknowledge that the proposed act is drafted so as to allow them to opt out of some provisions and tailor their own rules, but they question the utility of this procedure which will be time consuming and costly and whose net effect will be a set of regulations that looks nothing like the statute. They also don't relish the prospect of battling with the Office of Administrative Law over the content of the regulations. "The model act set forth in the tentative recommendation guarantees that this agency and others will opt out of all permissible provisions. Thus, this Board will have to re-promulgate its existing rules and adopt new rules 'interpreting' various provisions of the tentative recommendations."

They estimate that they alone hear in excess of 60 percent of all state administrative adjudications. Why not use their model as the standard, and allow agencies with more prosecutorial types of proceedings to craft their own regulations opting out?

> In CUIAB's view, the tentative recommendations will conflict or make it more difficult for the CUIAB to conform to federal mandates, cause the Board to spend time, energy and resources seeking to mold its processes to a hostile model and in general to create a more cumbersome and technical adjudication system. These negatives do not seem to be balanced by a corresponding positive. The laws governing the Board and the EDD are readily available in the Unemployment Insurance Code, the rules for both agencies are readily available. Many thousands of "customers" are satisfied with the process.

Department of Corrections and related entities: Board of Prison Terms; Youth Authority; Youthful Offender Parole Board; Narcotic Addict Evaluation Authority. The Department of Corrections requests an exemption from the administrative procedure act for itself and related entities that deal only with liberty interests of prisoners and parolees and not property interests, unlike other state administrative proceedings. Exhibit pp. 39-42. They point out that although their hearings are statutorily or constitutionally required, the law intends only minimal process and hearings; formal administrative procedure act type hearings

are inappropriate for the types of administrative determinations regarding persons in custody. Rights to representation differ, time limits differ, venues differ. "So few of the proposed provisions would be appropriate to our process that the cost of designing and adopting exempting regulations would far outweigh any overall benefit to the administrative adjudication process."

California Public Utilities Commission. The Public Utilities Commission believes it is inappropriate to include the PUC within the scope of the statute governing administrative adjudication by state agencies generally. Exhibit pp. 47-66. They argue that they have constitutional authority to establish their own procedures, and point out that the adjudicative proceedings conducted by them are different in character from those conducted by other state agencies and the procedure in the tentative recommendation simply will not work for them. PUC proceedings are designed to determine legislative rather than adjudicative facts, and policymaking by the agency head is all-important. They note that existing procedures recognize PUC's need for a broad range of flexibility in order to successfully regulate in a timely manner the safety and economics of major utility industries, which the procedures in the tentative recommendation do not. They detail specific problems with the proposed statute at Exhibit pp. 49-59, and at Exhibit pp. 60-66 detail special provisions peculiar to the PUC that would need to be preserved even if the new administrative procedure act were applied to PUC.

> Many of the mandatory provisions of the proposed new APA are inappropriate for the PUC. It makes little sense to try to accommodate the PUC's unique functions and situation by giving the PUC additional authority to issue regulations which would allow it to modify or opt out of even more provisions of the proposed new APA. Little of the proposed new APA would actually apply to the PUC and the PUC would have to go through considerable unnecessary effort to promulgate regulations simply restating current law. ... Rather than simplifying and clarifying the procedural rules applicable to PUC proceedings, subjecting the PUC to the proposed new APA would complicate, and make it more difficult to determine, the procedural rules applicable to PUC proceedings. Exhibit pp. 59, 66.

Occupational Safety and Health Appeals Board. The Occupational Safety and Health Appeals Board does not believe the proposed statute should be applied to it. Exhibit pp. 8-10. It points out that it is laboring under a substantially increased workload and does not have the resources to conduct a

complete review and overhaul of its administrative procedures. It cites as an example its specialized regulations governing pleading amendments, which are superior for its purposes to the general provision on the subject in the tentative recommendation. It notes that the draft would allow it to modify the general provision by regulation, but wonders why resources should be wasted to readopt what it's just recently adopted. It states that it has a specialized function as an appeals board, rather than as a prosecutorial agency, and the provisions of the proposed administrative procedure act are unsuited to its proceedings. As an alternative to exempting it, the Board suggests that the statute be recast to simply provide general outlines of due process requirements, allowing the agencies to provide appropriate details suited to their purposes.

Public Employment Relations Board. The Public Employment Relations Board seeks exemption from the administrative adjudication provisions of the administrative procedure act in their entirety. Exhibit pp. 6-7. They point out that they have a specialized function as an independent review board in the specialized area of public employment labor relations. Their procedures have been in place since 1976, work well, and all concerned are satisfied with them. The Board does not indicate in what respect the proposed procedures would be inadequate or inappropriate for their purposes.

California Coastal Commission. The California Coastal Commission requests an exemption from the proposed law. Exhibit pp. 127-130. They point out that its structure and function is more like that of a city council or board of supervisors than a state quasi-judicial prosecutorial body. "The LRC proposal is wholly inconsistent with the decision-making model chosen for the Coastal Commission by the Legislature because it would require a hearing process that would function more like a trial than that which is typically used for planning and land use decisions. Its implementation would undercut the spirit and purpose of the Coastal Act in a number of ways, including significantly lengthening the decision-making process, substantially increasing its cost and making public participation in the process more burdensome."

The Coastal Commission acknowledges the ability to deviate from the statute where necessary, but believes the regulatory process to accomplish this is too cumbersome. "It seems unnecessary to require that agencies that have statutory requirements that cannot be harmonized with the proposal expend valuable time and resources to conduct a rulemaking proceeding to make the APA statutory

provisions inapplicable. The better approach would be to include an express statutory exemption that would obviate the need for rulemaking."

"The proposed recommendations would not, in my view, serve any substantial or important public purpose if applied to the Coastal Commission and perhaps many other state agencies. On the contrary! They would, at the very time we are trying to find creative ways to cut costs, government red tape and to make government more effective, increase the size and cost of government." Exhibit p. 106.

Alcoholic Beverage Control Appeals Board. The Alcoholic Beverage Control Appeals Board assumes the proposed statute will apply to the Department of ABC but not to the Appeals Board. Exhibit p. 104. We have informed them that the statute would apply to the Appeals Board; they are giving this matter further review.

California Energy Commission. The California Energy Commission notes special aspects of its adjudicative proceedings that make them unique, but is not seeking an exemption from the administrative procedure at this time. Exhibit pp. 121-122. "We are continuing to study the proposal and reserve the right to decide ultimately that an exception is still the most appropriate course when your final version is released in bill form, but it currently appears that with a few additional changes to accommodate some of the more unique aspects of our process, an exception may not be necessary. We congratulate the Commission for the substantial progress that has been made toward its goal of a workable uniform APA."

Skelly Hearings. The Department of General Services notes that hearings are held throughout state government pursuant to Skelly v. State Personnel Board, 15 Cal. 3d 194 (1975), as part of the process leading up to adverse action appeal hearings before the State Personnel Board. Exhibit p. 67. The Department points out that these are supposed to be speedy and informal, and should be exempted from the statute. Otherwise they will become complex or time consuming, or many agencies will have to adopt regulations to opt out of the administrative procedure act.

Bid Protest Hearings and Other Simple Governmental Review Proceedings. The Department of General Services states that it is greatly concerned that "the availability of simple, swift, inexpensive, and flexible procedures for reviewing past or proposed governmental actions will be curtailed." Exhibit p. 67. Specifically, they are worried that current inexpensive and expeditious

governmental review proceedings, such as bid protest hearings, will be roped into the administrative procedure act and made complex and formal.

Department of Real Estate. The Department of Real Estate notes that the provisions of the Real Estate Recovery Program, Business and Professions Code § 10470 et seq., could be impacted by the administrative procedure act. Exhibit p. 5. Those provisions are a self-contained procedure for recovering from a state fund for an unsatisfied judgment against a broker, and sanctioning the broker. The provisions do not require a hearing, but they do involve an adjudicative proceeding in the sense that the Real Estate Commissioner must make determinations of recovery rights and sanctions.

Office of Statewide Health Planning and Development. The Office of Statewide Health Planning and Development notes three of its programs where the hearings are intended to be informal, providing due process for appellants while at the same time meeting their need for an accessible, expeditious, affordable, and understandable forum. Exhibit pp. 97-99. These are hearings under the Hospital Seismic Safety Program, the Cal-Mortgage Program, and the Health Data Collection Program. These hearings were not intended to be full administrative procedure act type hearings--"The Office or the panels were given authority to adopt simplified hearing procedures to create an accessible forum while protecting due process concerns. Our current structures are working very well, with high constituent satisfaction. The Office believes that the imposition of additional, unnecessary procedural requirements would have the effect, not of enhancing due process, but of reducing access to fair hearings."

Department of Health Services. Department of Health Services lists 37 different types of hearings under its jurisdiction that "have their own procedures for very good reason, such as ease of administration, need for speed, or lack of truly adversary nature." Exhibit pp. 29-33. They also make the caveat that the list may not be complete, both because of the multitude of types of proceedings that exist and because of the question whether a particular type of proceeding should be characterized as adjudicative. They are concerned that the proposed administrative procedure act might affect nonadjudicative and borderline proceedings as well as those that are intended to be adjudicative. Exhibit p. 12.

CENTRAL PANEL

The Commission's tentative recommendation would leave the basic personnel structure of administrative adjudication intact—those agencies

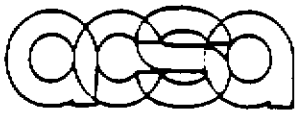
currently using their own hearing officers could continue to do so, and the Office of Administrative Hearings would continue to provide administrative law judges for the other agencies. The **State Bar Committee on Administration of Justice** disagrees with this proposal. Exhibit pp. 145-147. They dispute the Commission's assertion that there is no general concern about use of in-house hearing officers. "Our collective experience indicates that there is an appearance of unfairness, under the current structure, particularly to the average citizen who is the responding party. To the extent the public perceives that the administrative agency is acting as accuser, judge, jury and executioner, its faith in the process may be eroded."

They believe that exemptions form the central panel process should be sparingly created only in those situations where the agency regulates a specialized and sophisticated constituency or the subject matter is so new or complex that the use of an agency judge or hearing officer is the only realistic means of achieving justice. Where a requested exemption is purportedly based on the need for technical expertise, it should be granted only where there is a consensus among parties and attorneys regularly participating in such adjudications that central panel hearing officers cannot develop sufficient expertise on a case-by-case basis.

The **California School Employees Association** likewise believes there should be a central panel of hearing officers for most formal hearings. Exhibit p. 79.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary



ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND ADMINISTRATIVE LAW JUDGES

June 17, 1993

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Re: Administrative Procedure Act

Dear Mr. Sterling:

On behalf of our Administrative Law Judges who will be working under the new Administrative Procedure Act, which your Commission is now revising, ACSA proposes a very minor change that would both clear up existing confusion over the role of the Office of Administrative Hearings and enhance the perception of fairness to the public which is the sine qua non of any adjudicatory process. ACSA proposes that the name of the Office of Administrative Hearings be changed to the Administrative Law Court. While not a change in substance, it is necessary to accurately reflect the function and duties of the judges as well as provide to the public the sense of fair play in the administrative arena that is certainly created in the civil courts.

As you are undoubtedly aware, the entire purpose of having a central panel of Administrative Law Judges (ALJ) is to ensure that an impartial fact finder is available to preserve the due process rights of those brought before state agencies for disciplinary purposes. The ALJs do that job well; however, there is still the perception that the ALJs are not independent because they are but a small state agency subsumed within a larger one.

Over the years, the Office of Administrative Hearings has taken great pains to ensure all who come before it that the litigants will receive a fair hearing. One problem, of course, is that the general public has no conception what an administrative proceeding is. One major step in putting forth the notion that a fair hearing could be had in front of a state agency was in the creation of the Office of Administrative Hearings itself. Re-classifying the "hearing officers" as Administrative Law Judges was another major step in developing the appearance of impartiality. Another significant step was requiring the use of

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judicial robes. Additionally, dramatically increasing the attendance by the ALJs at the National Judicial College helped ensure that the ALJs were not only perceived as fair, competent and impartial, but were and are so in fact.

Support for the name change to "Administrative Law Court" can be found in case law as well. The Office of Administrative Hearings clearly acts as a court. In Imen v. Glassford (1988) 201 Cal.App.3d 898, the Court of Appeal for the Fourth Appellate District found that administrative proceedings to revoke an occupational license, held before the Office of Administrative Hearings, were judicial in character and thus contained all of the elements necessary for the application of the doctrine of collateral estoppel in a subsequent civil proceeding. The appellate court noted at page 907 that the administrative hearing "possessed a 'judicial character'" because, among other things, the proceeding conducted by the Administrative Law Judge was (1) conducted in a judicial like adversary setting; (2) the proceeding required witnesses to testify under oath; (3) the determination involved the adjudicatory application of rules to a single set of facts; (4) the proceedings were conducted before an impartial Administrative Law Judge; (5) the parties had the right to subpoena witnesses and present documentary evidence; (6) a verbatim record of the proceedings was maintained; and (7) the ALJ's decision was in writing with a statement of reasons. Clearly any "court", as the word is commonly understood, conducts its affairs in accordance with each of these elements.

The appellate courts themselves have begun using the terms "administrative law court" or "administrative court" in referring to proceedings held before the Office of Administrative Hearings. See, for example, the Second Appellate District case entitled Mullen v. Department of Real Estate, 204 Cal.App.3d 295, 297 (1988) where Justice Compton began his discussion of the facts of the case by noting that, "Following a hearing, an administrative law court rendered a proposed decision...". Additional references were made to the administrative court, as distinguished from the Superior Court "trial court".

Similarly, in an unpublished decision in the Second Appellate District entitled Ho v. California Board of Examiners in Veterinary Medicine (1990) B043471, the Appellate Court continuously referred to the findings of the "administrative court" as opposed to the findings of the Superior Court "trial court". Because this decision is unpublished, a copy is attached hereto for your reference.

The title "Administrative Law Court" is nothing more than an accurate description of what the Office of Administrative Hearings is. Similarly, the title of our executive officer should be changed from "Director" to Chief Administrative Law Judge. This title already exists in other state adjudicatory bodies, most notably the Public Employees Relations Board and the Department of Social Services.

Undoubtedly, the Commission will look to other states to see what names are applied to their respective administrative adjudicatory bodies. Most often, the name will be similar to that currently used by California. But that is because, as Professor Asimow noted in his reports to the Commission, when the Office of Administrative Hearings was created in 1946, California was a pioneer in administrative adjudication. Other states followed California's lead, including its choice of name for the independent adjudicator. Now, almost fifty years later when California is once again on the cutting edge of revitalizing the administrative process, there seems to be little reason to institutionalize a name which is clearly outdated.

Sincerely,

Robert F. Katz
President

attachment

PEPPERDINE UNIVERSITY

SCHOOL OF LAW

July 20, 1993

Mr. Nathaniel Sterling
Executive Director
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, Ca 94303-4739

Re: Tentative Recommendation on Administrative Adjudication By State Agencies

Dear Nat:

I have received and reviewed the tentative recommendation on administrative adjudication by state agencies. I strongly approve of the tentative recommendation as it is written. It is a substantial improvement over the existing administrative procedure act. I believe that adoption of the recommendation by the legislature will significantly advance procedural fairness in the administrative process in the State of California. You are to be commended for the Commission's careful work on this project.

Thank you also for sending me lots of information on the progress of this project. I appreciate that information. I would like to continue to be informed of commission work on other parts of the administrative law study, most notably the judicial review project.

Very Truly Yours,

Gregory L. Ogden
Professor of Law

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STATE OF CALIFORNIA - BUSINESS, TRANSPORTATION AND HOUSING AGENCY PETE WILSON, Governor

DEPARTMENT OF REAL ESTATE

3201 Broadway
P. O. Box 187000
Sacramento, CA 95818-7000
(916) 227-0789

July 29, 1993

NATHANIEL STERLING
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

This is in response to your recent request to be notified about agency statutes which may be affected by your proposed administrative adjudication project. The Department of Real Estate has three statutory provision which call for accelerated hearings: Business and Professions Code Sections 10086, 11018.3 and 11019. In addition, the provisions of law relating to the Real Estate Recovery Account (Business and Professions Code Sections 10470 through 10480) could be impacted by your project.

We hope this information will be of assistance to you and if you have any questions, please contact me at (916) 227-0789.

Sincerely,

Larry Alamao

LARRY A. ALAMAO
Attorney in Charge

LAA/lz

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Board Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 323-8012

August 23, 1993

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision
Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Subject: Comments on the Draft Administrative Procedure Act

Dear Mr. Sterling:

The Public Employment Relations Board appreciates the opportunity to comment on the recent draft of the Model Administrative Procedure Act.

While the draft represents a comprehensive approach to administrative adjudication, it represents a major departure from the original legislative intent and current practices of the Public Employment Relations Board (PERB). The quasi-judicial origin of PERB intended to relieve the courts of the workload anticipated in collective bargaining disputes in the public sector, while allowing the adjudicatory agency to rely on unique expertise in labor law. PERB is very dissimilar to those agencies who regularly use the services of the Office of Administrative Hearings in that it is neither a licensing nor a prosecutorial agency. It is a neutral board that helps resolve disputes by providing direction to contesting parties through the issuance of its decisions.

The established practices and procedures currently used have served parties successfully since 1976. There appears to be little support among the multitude of organizations, governmental entities, or the labor law section of the State Bar for change. PERB has developed regulations where needed, consistent with the unique needs of the clientele, while at the same time paralleled evolving practices in resolving disputes in other labor law venues.

After careful review of the proposal, PERB has resolved to seek an exemption from the proposal in its entirety. At this point in time, when employee/employer relations are challenged by difficult fiscal situations, a mature process developed in conjunction with the public sector clients well serves all the parties in resolving disputes. The citizens of California continue to benefit from PERB's ability to timely resolve disputes without interruption of public service functions.

Sincerely,

Sue Blair

SUE BLAIR
Chair

STATE OF CALIFORNIA PETE WILSON, Governor

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August 26, 1993

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Subject: Comments on Tentative Recommendation:
Administrative Adjudication by State Agencies

Dear Mr. Sterling:

We appreciate this renewed opportunity to comment upon the recommendation to create a uniform state administrative procedure act. Having followed the course of the Commission's deliberations and drafting efforts, the OSHA Appeals Board lauds this effort to seek improvement in state administrative processes. Clearly, the latest recommendation addressing such concerns as exclusivity of the record, ex parte communications, separation of functions, and command influence, is significantly superior to earlier drafts.

However, it is our feeling, and one which we have expressed on numerous occasions during the past three years, that the "model" APA is not necessarily an improvement over current regulations that are applicable to our hearings and review procedures. Indeed, OSHAB has recently completed a two-year effort to revise existing regulations culminating in the publication of our updated booklet "Appeal Information" which has been enclosed for your consideration. This guide is available to all parties that appear before us. While we view these regulation revisions as part of an evolutionary process, one in which OSHAB is continually seeking to streamline its procedures, so that the represented and nonrepresented alike may exercise their rights under the OSHA program, costs associated with these revisions cannot be understated.

We are a small agency, with one legal advisor and a statewide unit of eight ALJs. Our caseload has increased over 120% during the past twelve months, exceeding 3,000 appeals per year. We are simply not in a position to undergo another extensive regulation review merely because a more uniform administrative procedure act has been promulgated.

One example of this predicament should highlight our position: Following a great deal of internal discussion among legal staff, ALJs, and public input, the Board revised its regulations pertaining to prehearing and post submission amendments (Sections 371.2 and 386, Title 8, California Code of Regulations) which allow for amendments to correct clerical errors in pleadings, to conform to proof or statutory requirement, but only when timely filed, no prejudice has been shown, and all parties are given appropriate notice. These provisions have been adjusted to maintain the basic informality of our proceedings, yet assure efficiency in scheduling, and protect parties from late hour surprise. They reflect the nature of the issues litigated at our hearings, the extent to which parties may or may not be represented by counsel, as well as the diverse geographical locations covered by the program. While these changes may not be our last thoughts in this area, they would appear to be far superior to the Commission's tentative recommendation in Section 642.360, allowing a party to amend or supplement a pleading "[a]t any time before commencement of the hearing".

Under this provision, the Division, the enforcement arm of the OSHA program, could theoretically change the nature of the alleged violation one day before a hearing. The amendment would be akin to a prosecutor refiling a criminal complaint, and then alleging a different offense on the day before the trial has been set. An unprepared Employer under the OSHA program would arguably be entitled to a continuance to prepare its defense, and the case would have to be reset, at great cost to the state, since the ALJ, witnesses, and parties would, more likely than not, have had to travel significant distances to the hearing location.

While the tentative recommendation provides that agency modification would be permitted, this could only be accomplished by rulemaking, thus forcing OSHAB to return to OAL for review of the same regulation most recently approved. Apart from being a waste of resources, it is not clear whether OAL review would then require additional agency justification for any divergence from the "model code."

This example can be repeated in any number of areas, including discovery, prehearing conferences, decision making, declaratory relief, etc. The point is, agencies such as OSHAB which have been created expressly for adjudication, and are statutorily separated from their prosecutorial analogues, more likely than not have developed regulations better geared to the constituencies that appear before them, than the lowest common denominator obtainable from any uniform code.

We therefore respectfully urge that the tentative recommendation be limited to the APA-designated agencies presently listed in the Government Code, or that the Commission consider an alternative approach suggested in prior years, which would permit variations in procedural requirements, so long as fundamental due process concerns are assured.

Thank you again for this opportunity to share our views on the Commission's administrative adjudication project.

Yours very truly,

Elaine W. Donaldson,
Chairman California OSHA Appeals Board

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August 26, 1993

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Subject: Comments on Tentative Recommendation on Administrative Adjudication

Dear Mr. Sterling:

Attached for your consideration are comments on individual portions of the proposed new administrative adjudication procedures, which are made on behalf of the Department of Health Services.

As a matter of background to these comments, please allow me to give you a brief explanation of the experience which I am able to bring to the views expressed. I have been an attorney for the State of California for 19 years, 16 of them as a Deputy Attorney General and three as Chief Counsel to the Department of Health Services. I have personally handled and supervised dozens of administrative cases. Many of these cases (probably more than 50%) have been under the current California Administrative Procedure Act (APA). The remaining cases have been under special agency procedures, both state and federal, such as State Personnel Board, Unemployment Insurance Appeals Board, and U.S. Department of Health and Human Services grant appeal procedures.

In my current position, I supervise five (soon to be six) Administrative Law Judges who handle specialized cases, both under the APA and under program-specific statutes and regulations. (My supervision is procedural and administrative only. Since I do directly supervise the advocacy functions of my Department's legal staff, I sequester myself totally from the substance of the decision-making process.)

This background has given me both broad and deep insight into administrative adjudication procedures of various types, from the welfare "fair hearing" to the major license revocation proceeding involving a sophisticated corporate licensee represented by experienced trial counsel. In preparing these comments, I have relied both on my own background and on views expressed to me by our senior Administrative Law Judge.

In addition to the detailed comments attached, I would like to make a more general point. While I support and admire the efforts of the Law Revision Commission to unify California administrative adjudication procedure into a single system, the resulting product appears to me to have two serious shortcomings. First, the attempt to simplify all procedures by eliminating steps or distinctions which are not always applicable does not, in my opinion, always make the law more approachable for the non-expert. The opposite may well be true. In an area such as an appeal from a fiscal audit, for example, referring to the required pleadings as an "initial pleading" and "responsive pleading" would be singularly unhelpful, since it is the appellant, not the agency, which has the burden of defining the issues. Second, to have a multitude of statutes which apply unless the agency by regulation says otherwise seems to me to be potentially very confusing. For a non-expert, each such statute would have to be checked against any applicable regulatory scheme. Even if, as appears to be contemplated, all such regulations are published in a single volume of the California Code of Regulations, having so many provisions that are subject to variance by regulation (and to different variance by each affected program) would likely cause substantial confusion and uncertainty.

A further consideration is the potential expense of such a major change at a time when the state is particularly strapped financially. The contemplated changeover would have immense potential costs in the form of regulations development, notices to the public, staff training, and so forth, including as a not insignificant component the cost to agencies and the public of the inevitable errors the learning curve would cause.

You have asked that, as a part of our response, we identify those statutes under which we currently follow non-APA procedures which should be retained. Given the multitude of proceedings conducted by the Department of Health Services, this is a near-insurmountable task. We have attempted such a list, and it is appended after the comments on the proposed provisions. While we have attempted to insure its completeness, there may well be types of hearings which were missed because they are not viewed as adjudicative in nature. However, as the comments we are submitting point out, the proposed statutes may well affect such hearings along with those which are intended to be adjudicative.

Thank you for your consideration of our comments. Please feel free to contact this office for any additional assistance we might be able to provide.

Very truly yours,

Elisabeth C. Brandt
Deputy Director and
Chief Counsel

Attachments

COMMENTS TO PROPOSED SECTIONS

Section 613.220 Page 39

This proposed section would allow service by mail to be made by facsimile (fax) transmission or other electronic means, in the discretion of the sender. We suggest that the section also require, in the event a form of electronic service is chosen, that a "hard copy" of the matter served be mailed at the same time. The recipient should be entitled to have a copy that is of normal letter quality. Regular mail follow-up to faxes is a normal legal and business practice.

Section 613.230 Page 40

This proposed section would add five days to the time within which a notice is effective or within which an act must be done if service is done pursuant to any means described in proposed section 613.220. Since the addition of five days for service by mail assumes that mailing delays actual receipt, it appears to us to make little sense to give the same extension for fax notice. We suggest that service by fax or other means of immediate electronic transmittal be effective without the addition of five days to the period if the sender verifies by telephone that the transmission was received in legible and complete form.

Section 613.310 Page 40

There has been some confusion in administrative practice as to how corporations and other parties who are not natural persons may appear. Generally, administrative agency rules do not require (and may even discourage) appearance through counsel. However, the general rule in court is that a corporation may not appear in propria persona since there is no natural person who "is" the corporation. The proposed section leaves this problem unsolved and thus creates an area for potential disputes. The issue of who is competent to represent a corporation or other non-natural party should be addressed specifically.

Section 641.110 Page 43

Subsection (a) of this proposed section contains one of the most significant problems presented by the proposed legislation, the definition of when an APA adjudicatory hearing is required. For ease of reference, it provides:

> "An agency shall conduct a proceeding under this part as the process for formulating and issuing a decision for which a hearing or other adjudicative proceeding is required by the federal or state constitution or by statute."

This proposed provision is so incredibly overbroad and vague, the mischief its enactment would cause is difficult to overestimate. Taking the provision literally, for example, an APA adjudicative hearing would be required for every instance of rule making, because rule making involves a "hearing . . . required by statute." Similarly, and for the same reason, an APA adjudicative hearing would be required whenever a statute requires some other type of quasi-legislative, information-gathering or public-input hearing, since the proposed statute does not exempt such circumstances. An argument can (and will) be made that this provision automatically turns all such requirements into requirements for adjudicative hearings.

Of particular concern are the types of hearings required to be given by various agencies before a license is granted or amended. Usually, an APA adjudicative hearing is available in connection with the initial issuance of a license only where the application is denied, and only at the request of the affected applicant. However, there may be an opportunity for a public hearing at the request of any interested member of the public where granting a license or a license amendment will affect the public. Such a hearing is usually a "public input" type of hearing, since its purpose is to take public comment, not to adjudicate the rights of an individual. The proposed section would appear to remove this important distinction. The consequences of turning a "public input" hearing into an adjudicative hearing are extensive.

The reference to state and federal constitutional requirements presents even more serious concerns. Good public policy requires that constitutional requirements for hearings be implemented appropriately through statutes and regulations. While a constitutional right to a hearing may initially be identified in a judicial decision, that decision is normally not explicit enough to be implemented directly (nor is it generally available to the public as a guide). The proposed statute suggests that an agency would have the power, in implementing this provision, to find that a constitutional hearing requirement can be implemented directly, without the need for legislative consideration or delineation of the express procedures to be used.

Worse, this provision would automatically implement any constitutional hearing requirement as a full-blown APA hearing. For example, the case of Skelly v. State Personnel Board (1975) 15 Cal.3d 194, requires a "hearing" with minimal procedural components as a "pre-implementation" step in the employee disciplinary process. The employee then gets a full adjudicative hearing after implementation of the personnel action. The proposed statute would appear to turn the so-called "Skelly hearing" into a full-blown APA hearing because it is a constitutionally required hearing. Absent legislative change, the State Personnel Board hearing would then be a second full APA hearing.

We strongly recommend that this provision be rewritten so as to abandon the attempt to cast every conceivable type of hearing requirement into the APA adjudicative hearing mold automatically. At the very least, the provision should only "default" those hearings that are expressly required to be full adversarial adjudicative hearings into the APA requirements. However, it would be much preferable to have those hearings which are required to be APA hearings expressly identified. We recognize that this would undo one of the basic purposes of the proposed reforms. Our recommendation in this regard is based on a belief that this purpose cannot be implemented without causing considerable confusion and uncertainty, and should therefore be abandoned.

Section 641.120 Page 44

This proposed section greatly worsens the potential problems which could be caused by the preceding section, as discussed above. Because it gives one narrow exception to when an APA adjudicative hearing is required, it implies that there are no other exceptions. Again, the implication is left that henceforth, all hearings mentioned anywhere in any context (other than those which expressly refer to inapplicability of the APA or are not conducted by covered entities) must be adjudicative hearings conducted under the APA.

Section 641.340 Page 50

Although the proposed article beginning with this section applies only if adopted by regulation, its content is of concern, since this would presumably be the only procedure available short of enactment of a separate statutory scheme. This proposed section would specify how an "emergency decision" is to be issued. Presumably, this would be the provision under which this Department would issue what are now called "Temporary Suspension Orders" which suspend a license pending completion of a license revocation proceeding (see, e.g., Health and Safety Code section 1296).

The proposed provision which requires all emergency orders to be effective immediately would be very much unworkable for this agency, and we strongly recommend that an emergency order be permitted to have a delayed implementation date where this is necessary for the public health and welfare. For example, closure of a nursing facility may require deployment of extensive resources over several days or longer in order to avoid harm to the patients. It is not normally possible or desirable to serve the licensee with an order which terminates licensure immediately. (For example, termination of the license would mean immediate cessation of Medicaid funding. This in turn may mean all employees cease work immediately and no patient care staff remain. Also, since it is a misdemeanor for the licensee to continue to provide care after the license is suspended, the licensee can legitimately refuse to cooperate with transfer and "dump" the patients on state staff.) The agency should have the flexibility to delay the suspension of the license until after necessary pre-suspension steps have been

taken. Yet, unless the licensee is served with an executed suspension order, those steps will not be started. Thus, it is important that we be able to issue a suspension order with a delayed implementation date.

Section 641.350 Page 50

This proposed section is extremely vague and likely to be unworkable for this agency and many other licensing agencies.

The vagueness arises from the fact that it is unclear what the purpose of the adjudicative hearing is intended to be. The hearing, the proposed statute provides, is for the purpose of "resolv[ing] the underlying issues giving rise to the temporary, interim relief." This may make sense in the case of an emergency order unrelated to any other administrative action (e.g., under Health and Safety Code section 25846, an order to clean up an isolated case of radioactive materials contamination). In the case of a license revocation, however, where the license has been suspended pending a hearing on the grounds for revocation, does this mean that the hearing which must be started within 10 days of issuance of the emergency order is a hearing limited to the basis for the emergency order or all of the bases for license revocation?

An example will perhaps clarify the issue. Let us say a nursing facility's license should be revoked, in the view of the licensing agency, for the following reasons: several instances of inadequate record keeping concerning drug administration; several instances of operation without adequate staff; several instances of failure to follow dietary guidelines; patient trust fund violations of various kinds; several instances of fraud in the charges made to the Medicaid program; allowing a patient to choke to death because nursing staff failed to answer the call signal; and allowing three patients within the last week to develop severe bed sores due to lack of nursing care. In addition, the administrator has just resigned and no one is in charge of the facility.

In this example, the last three items might well constitute a basis for temporary license suspension. Under current California APA practice, the licensee would be served with an Accusation giving all the bases for revocation, and with a Temporary Suspension Order giving the last three items as the bases for the license suspension prior to hearing. The adjudicative hearing (which must commence within 30 days under Health and Safety Code section 1296) then adjudicates the entire Accusation, not just the bases of the temporary suspension.

Assuming that the proposed statute has the same intent, this should be clarified. In that event, the requirement that the adjudicative hearing commence within 10 days is very unrealistic. There are several reasons for this:

1. It is generally impossible to get an Administrative Law Judge and a hearing room with that little notice.

2. The agency would find it impossible to get a Deputy Attorney General assigned, educated to the case and freed for what could be a very time-consuming hearing in that short a time.

3. In a genuine health and safety emergency, the agency generally has to act very precipitously in putting together its initial papers supporting the suspension. Once the suspension is in effect, some time is needed to put an adequate case together on the full license revocation. The consequence of requiring a full license revocation hearing to start 10 days after service of the suspension would be that the suspension would be delayed (even where health and safety considerations argue to the contrary) until the agency had completed preparing its case on the full revocation action. The agency would have to balance the immediate threat to safety against the very real counter-threat that the revocation action would be unsuccessful because of lack of preparation.

It is possible that the phrase "commence an adjudicative proceeding" is not intended to mean that the hearing must begin, but only that the initial pleading must be issued. This reading is suggested by a comparison with proposed section 642.310. However, this is not clear (compare proposed sections 642.210 and 642.230; does the term "initiate" have a different meaning than "commence"?) If this is the intended meaning, it must be clarified, e.g., by specifying "commence an adjudicative proceeding by issuance of an initial pleading."

Section 641.370 Page 51

This proposed section gives the subject of the emergency order an appeal to the agency head, which must be heard and decided within 15 days of service of the petition for review. There are several serious problems with this provision:

1. How does this relate to the preceding requirement that the adjudicative hearing on the underlying issues start within 10 days? Is the agency head to be reviewing the initial emergency decision while the hearing on the underlying issues is going forward?

2. The procedure to be followed is to be the same as that used for review of a proposed Administrative Law Judge decision. However, since there is presumably no formal administrative record supporting the decision at this point (the hearing required by proposed section 641.350 would not have been completed in time), the

agency head cannot comply with the requirement that the record be reviewed.

3. The timing seems impossible. It is difficult even to get on the calendar of a busy director or board on 15 days' notice, much less have that person or body review what may be a complex record (assuming one can identify what it is) and consider oral or written argument.

Currently, the emergency orders with which I am familiar are subject only to judicial review (seeking injunctive or mandate relief). This is generally viewed as appropriate, since these types of orders are not issued lightly and generally would have been reviewed and approved at the executive level prior to issuance. Further internal agency review would not likely lead to a different result. We would urge you to remove this awkward and probably non-meaningful avenue of appeal from the general APA provisions. If it is of use in connection with some particular type of emergency order commonly issued at a relatively low level in an agency, it should be dealt with in a statute specific to that process.

Section 642.220 Page 54

This proposed provision would give every person a right to "make an application for an agency decision" and would provide that any such application "includes an application for the agency to initiate an appropriate adjudicative proceeding, whether or not the applicant expressly requests the proceeding."

With all due respect for the drafters of this provision, this is the kind of general language that has no real usefulness other than to create endless litigation.

What exactly does the right to apply for a decision encompass that is not expressed in some substantive statute? If nothing, then why say it? If there is a new right granted here, what is it? Does this give me the right to apply to any agency to make a decision on anything I care about? One would hope not, yet it is difficult to point to anything in the proposed language that says otherwise.

Moving to subdivision (b), what exactly is the consequence of the provision that deems every application for a decision to include an application for "an appropriate adjudicative proceeding"? Such a provision, in a complex administrative environment, raises more questions than it answers. For example, where there is a time constraint on the agency (e.g., it must schedule a hearing within 15 days of the request being made), does this time start running when the decision is requested rather than when the hearing is requested, since the former is deemed to include the latter? Does it require the agency to schedule a hearing even if the application is defective? If a particular request for a hearing is required to specify the issues on which a hearing is sought, is the agency

required to deem all issues to be included in the "automatic" hearing request? If it is not clear in law that any right to a hearing exists, must the agency still deem that one was asked for and respond as if it had been (e.g., by issuing an opinion on whether or not a hearing is required)?

These are just some of the problems and uncertainties raised by the proposed provision. It appears to us that far more certainty and understandability would be created through a law which requires that the agency, at the time it takes any action or receives any request which creates an entitlement to a hearing, give clear notice to the affected party or parties of how to request such a hearing and of the time period within which the request must be filed to be effective. We strongly urge that subparagraph (a) of the proposed provision be eliminated and that subparagraph (b) be changed to such a notice requirement.

Section 642.230 Page 55

Although the Comment concerning this proposed provision states that it "supersedes any implication [in the current APA] that a third party has a right to demand that an agency conduct a proceeding," this is by no means clear from the face of the proposed language. While there is a limitation that a hearing must be required for the provision to apply, this only limits the type of decision covered by the statute, and is silent as to the requisite interest in that decision the applicant must have.

This proposed statute is likely to generate extensive litigation because it expresses the right to a hearing not exclusively (i.e., by specifying when it applies) but inclusively (i.e., by granting that right in all cases which the limited exceptions stated do not cover). There will inevitably be circumstances where the statute arguably gives a right to a hearing, but it clearly shouldn't have. Those cases will lead to litigation and to rule making by court decision. Such a result should be avoided. The law should state clearly when a hearing is required, not state that a hearing is always required unless it is prohibited.

Section 642.240 Page 56

Although this is by no means clear, this provision appears to apply when an individual or entity applies for a license. It contains points of substantial uncertainty in such a context.

Is it the intent of this provision, as it appears to be, that all applications must be granted, denied, or brought to hearing within 90 days? If so, does it deprive the agency of jurisdiction to continue to work with a license applicant to complete its application once the 90 days is up? (Forcing the applicant to file a new application upon denial may have significant adverse consequences, such as the requirement that another fee be paid or failure to come under a "grandfather" exemption.) Does this

statute give the agency unlimited discretion to decide when to hold an adjudicative hearing prior to license granting or denial? (This appears to be its plain meaning.) Is the "brief statement of the agency's reasons" that must be served with a denial in addition to the subsequent "initial pleading" explaining the reasons for denial? If so, is it preclusive (i.e., does it preclude the agency from raising bases for denial in its initial pleading that were not mentioned in the notice of denial)?

This provision is quite foreign to current California administrative procedure, where there is no uniform procedure related to either the granting of a license or the process leading up to denial of a license. Both processes are custom-tailored by specific provisions if necessary (e.g., where a public hearing prior to the granting of a license application is provided for). The uniform APA process starts only once a license application is denied, the applicant has appealed the denial, and a hearing has been requested. We have seen no evidence that this format does not fully meet the needs of license applicants.

Section 642.320 Page 57

The requirements of this provision are unclear. Subparagraph (a)(1) requires the agency to specify the "issues to be determined, including any acts or omissions with which the respondent is charged" and any matters that "would justify a decision against the respondent." Subparagraph (a)(2) requires that the agency specify the "statutes and regulations that are at issue," including any which the respondent is alleged to have violated or with which the respondent must show compliance, but these "specifications shall not consist merely of issues or charges phrased in the language of the statutes and regulations."

But for the last provision, one would assume that subparagraph (a)(1) requires the agency to lay out the facts and subparagraph (a)(2) requires it to lay out the applicable law. (One would have expected the statute to require the agency to say which facts show violations of or failure to comply with which law.) However, what exactly does it mean that the statement of applicable laws may not just use the language of the laws?

This provision would be much clearer if it required (1) a specification of each statute or regulation that the respondent is alleged to have violated, with which it has failed to show compliance or an ability to comply, or which is otherwise a basis for the agency action at issue; (2) a statement of the facts which support the agency action at issue; and (3) an organization of the pleading or allegations sufficient to allow the respondent to determine which facts relate to which legal requirement.

Section 643.330 Page 67

This and other provisions use the term "nonprosecutorial in character." This term should be defined. While it may be clear to some people and in some contexts, it is by no means transparent. While a license revocation proceeding is fairly clearly "prosecutorial," is a proceeding to grant a license over objection from public advocates "nonprosecutorial"? What about a ratesetting proceeding? What about a proceeding to determine whether a non-punitive transfer of a state employee was lawful?

We also have the following suggestion concerning subsection (a)(5). This proposed subsection allows advice on a technical issue to be given to the presiding officer by certain persons in nonprosecutorial proceedings "provided the content of the advice is disclosed on the record and all parties have an opportunity to comment on the advice." Since a violation of this provision would have very serious consequences (possibly a total reversal and need to redo the entire proceeding), it should be much clearer. What does it mean to disclose the "content" of the advice? All of it? A summary? When does this have to be done? How are the parties notified? How long do they have to comment? Is an opportunity to comment orally on the record adequate?

Section 645.210 Page 72

Proposed subsection (a) sets the timing of discovery. It would be useful to specify when discovery is to be provided in connection with an appeal from an emergency decision, if the current requirement that the hearing go forward less than 30 days after service of the emergency order is retained.

Proposed subsection (b) would add a "continuing duty" on each party to provide the other party with supplemental items meeting the discovery request, "immediately on obtaining knowledge, possession, custody, or control of the matter."

So-called "continuing discovery" is uniformly disfavored and generally prohibited in civil matters (see for example Code of Civil Procedure section 2030(c)(7), which expressly provides that "[a]n interrogatory may not be made a continuing one so as to impose on the party responding to it a duty to supplement . . . "). Continuing discovery is a trap for even meticulous busy practitioners, since it requires constant inquiry about matters that may or may not exist; it is particularly difficult for the attorney for a large public agency, such as the Department of Health Services, where several components of the agency may take actions relating to a respondent, or may receive arguably relevant materials from others, without even having any awareness that a proceeding is ongoing, much less that a discovery request is pending.

We strongly urge you to delete this requirement. If it is considered important to allow a request to update discovery to be filed, this should be a one-time opportunity, perhaps at the time of a pre-hearing conference.

Article 3. Compelling discovery Page 73

This subpart does not specify whether judicial review of discovery rulings by the Administrative Law Judge is available or, if it is, what standard of review applies. It should so specify.

Section 645.440 Page 76

This provision should contain a cross-reference to Government Code sections 68097.1 and 68097.2 which, read together, require the payment to the state of the total cost of the compensation and traveling expenses of subpenaed state employees as a condition of validity of the subpena. A deposit of $150 has to be tendered with the subpena. Most public agencies have interpreted this provision to apply in administrative hearings. Indeed, it is difficult to read it otherwise. Some agencies apparently do not apply the requirement (although it appears to allow for no exceptions) in circumstances (such as personnel hearings) where state employees are necessary exculpatory witnesses. Perhaps this provision could seek to codify such exceptions for administrative hearings. We do not recommend a general exemption from the requirement, since the subpenaing of large numbers of state employees, especially upper level management, has been used as a technique for harassment of public agencies in the administrative adjudication context.

Section 646.210 Page 78

The term "occupational license" should be defined. Generally, it is used only to refer to individually held licenses to practice an occupation, with no ties to specific premises (e.g., a license to practice medicine). But even that definition is not clear or universal. Does it cover teachers? Health facilities administrators? Certified nurse assistants? Radiation technologists? Laboratory technologists? Realtors? Or is it limited to licensees under the jurisdiction of the Department of Consumer Affairs?

Section 647.210 Page 81

This proposed section is unclear. Does (a) mean that the article only applies to agency procedures which by statute require arbitration or mediation, or that its provisions are mandatory instead of permissive if a statute so requires? This should be clarified. As to subsection (b), does this mean that an agency which is required to have mediation or arbitration procedures can set up conflicting procedures by regulation, or only that an agency which is not required to offer mediation can, by regulation, avoid

the proposed APA procedures which allow it? This should also be clarified.

Section 648.150 Page 84

Please see discussion of proposed section 648.350. The suggestions made could also be accommodated in this proposed section.

Section 648.310 Page 89

Please see the discussion of proposed section 646.210 for the need to define "occupational license." In those instances where the "clear and convincing" standard applies as a matter of constitutional law, the agency would not be able to provide for a different standard by regulation, as proposed.

Section 648.320 Page 90

Subsection (b) allows a party to be called as an adverse witness at any time. Most Administrative Law Judges disfavor calling the respondent as an adverse witness during the agency's case-in-chief, in cases where the agency proceeds first. The concept is that the respondent should be allowed to tell a cohesive story on direct examination in the first instance, before being subjected to cross-examination. Some thought should be given to codifying this practice, which certainly gives an impression of "fair play." We suggest that the following language be added at the end of the existing text:

> "However, where the agency presents its case before the respondent's case, an individual respondent or the chief representative of an organizational respondent may elect, upon being called as a witness, to delay cross-examination until after the respondent or representative of the respondent has testified on direct examination as a part of the respondent's case. In the event of such an election, the agency may rest its case in chief subject to the testimony of the respondent or representative of the respondent being considered as additional evidence for the agency, and subject to a right to call the respondent or representative of the respondent on rebuttal if he or she does not voluntarily take the stand during the respondent's case."

Section 648.350 Page 91

This proposed section allows the presiding officer to protect child witnesses. It should be expanded to allow the presiding officer to protect other vulnerable witnesses, such as developmentally disabled or medically fragile adults, as well. A procedure I have used very successfully, which could be described either in this section or in proposed section 648.150 or 648.140, is the following:

Where a witness is extremely fearful, embarrassed or afraid of testifying in front of the respondent and/or the public, the public and the parties, if a party is the source of the fear, can be put in a separate room from the Administrative Law Judge, the witness, and counsel. A video camera is set up to broadcast the witness' testimony live to the room in which the public is watching. If the parties are excluded, an opportunity for counsel to confer with their clients as necessary would be made available. This procedure would be used only during the testimony of the witness who needs protection, not during the entire hearing.

Such a procedure is very beneficial in a situation such as a personnel action in a state facility (I have used it in connection with the discharge of a developmental center employee for raping a mentally disabled resident) or a license revocation involving a facility for young, disabled, and/or medically fragile residents. In such a situation, the right of the residents to be free from abuse is as deserving of protection as the right of the respondent to personal "confrontation" of the witness, and the criminal law cases on confrontation would not be appropriate models.

It would be helpful to have any such procedure spelled out in the statute so that the question of its appropriateness would not have to be argued de novo in each of the infrequent cases where it is necessary.

Section 648.450 Page 93

I would suggest that the term "administrative hearsay" be used instead of the term "residuum rule." In 19 years of practice before state and federal administrative agencies, I have never heard of a "residuum rule," and a survey of my staff found only one person who had heard of the term. The concept that hearsay can be used to supplement or explain direct evidence, but not to support a finding by itself, is commonly referred to as "administrative hearsay" instead.

Section 648.460 Page 93

This provision should be reexamined in light of the recent United States Supreme Court decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993) ___ U.S. ___, 113 S. Ct. 2786. While the case interprets federal law, it reverses the specific federal case on which California law on this issue has been based.

Section 648.510 Page 94

Please see comment to proposed section 643.330.

Section 648.520 Page 94

This proposed provision prohibits ex-parte communications. However, it is overbroad in its literal meaning. In the case of

Administrative Law Judges employed by a large agency, there may be a number of matters totally unrelated to the proceeding at issue concerning which an Administrative Law Judge and agency employees need to communicate. For example, I may be discussing with an Administrative Law Judge whether or not a proposed new regulation would present a problem in future cases, or ask the Administrative Law Judge to write a justification for new positions in the hearing office. Such conversations, while unobjectionable because they are unrelated to any pending adjudications, would arguably be prohibited by the proposed statute.

A suggested modification which would solve this problem is to amend the first sentence as follows:

> "(a) Except as provided in subdivision (b), while the proceeding is pending there shall be no communication, direct or indirect, on any matter concerning or affecting the proceeding, between the following persons. . . "

Please also see comment to proposed section 643.330 concerning use of the term "nonprosecutorial."

Section 649.140 Page 100

This proposed section specifies the actions an agency head may take on a proposed decision without reviewing the entire record. The Department of Health Services has used an additional method, which seems to have been of benefit to all concerned. When a proposed decision, in the opinion of the Director, contains erroneous reasoning or a misstatement of the law, or when the Director considers the decision wrong, but does not consider the monetary amount at issue worth further proceedings, the Director will adopt the decision, but state in the statement adopting the decision that he or she does not agree with all or some specified part of the reasoning.

We believe it is very much in the public interest to have an agency adopt routine proposed decisions which either reach the correct result for the wrong reason or which, though they reach a wrong result, should not be alternated or remanded because the cost of the effort would be excessive given the small monetary amount involved or the relative insignificance of the matter at issue. However, it is important in such cases to avoid the implied "adoption" of the erroneous reasoning by the Director. One reason for this is simply to avoid it becoming an issue in future litigation. No matter how much of an effort one makes to designate decisions as non-precedent-setting, they do get cited against the agency in spite of that effort. More important, however, from the public interest standpoint, is the desire to have the decision maker appear consistent. Adopting erroneous reasoning in one decision and rejecting it in another is confusing to the public unless the reason for this is explained.

We believe it would be helpful to codify this practice, and suggest the following additional subsection under subpart (a):

> "Adopt the proposed decision in its entirety as a final decision, with an explanation which expresses disagreement with all or part of the decision. The expression of disagreement is for the guidance of the parties and the public in future disputes and does not affect the validity of the decision itself."

Logically, such a provision should probably be inserted as subsection (2), with the remaining subsections to be renumbered appropriately.

Section 649.210 Page 103

This section seems very difficult to understand. If it applied only to proposed decisions, it would make sense, but when exactly is it appropriate for an agency head to review "final" decisions? Does this include decisions which have become final by the passage of time, or by adoption? This would seem to allow an agency to reopen its own final decisions or to allow a party to petition for endless cycles of re-review. This appears to be an attempt to cover some type of unusual procedure (where a "final" decision issued by a lower body or Administrative Law Judge is subject to discretionary review), but without more specificity as to when it does not apply, the language appears to us to cloud normal procedure considerably.

Section 649.230 Page 104

The requirement that "[a] copy of the record shall be made available to the parties" is ambiguous. It could be interpreted to require an affirmative tender of the record in all cases. Because of the cost of a copy of a record, most respondents or their counsel do not wish to purchase it at that time in the cases with which we have had experience. We suggest that this language be changed to read: "The parties shall be notified, at the time that the reviewing authority makes the determination to decide the case on the record, that a copy of the record will be available, when it will be available, and the schedule of charges, if any, which the agency imposes for copies of the record."

Section 649.240 Page 105

This proposed subsection deals with decisions made after review of the record by the reviewing authority.

Subsection (a)(3) provides that one of the options for the reviewing authority is to:

"(3) Reject the proposed or final decision, without remand. The reviewing authority shall dispose of the proceeding within a reasonable time after rejection."

This provision is extremely vague, and appears thoroughly confusing. Allowing an agency to reject a decision without substituting anything for it is very strange in the normal adjudicative context. Perhaps it has some function in what the document calls "nonprosecutorial" proceedings, but its inclusion as a general rule seems to us highly inappropriate and likely to lead to confusion and improper procedural calls by agencies.

Also please see the preceding comment on the subject of rejection of "final" decisions.

NON-APA PROCEEDINGS IN WHICH THE DEPARTMENT OF HEALTH SERVICES HAS INVOLVEMENT

The following is a list of discrete hearing procedures utilized by the Department of Health Services. It may not be complete because of the diversity of such proceedings. Many of these proceedings have their own procedures for very good reason, such as ease of administration, need for speed, or lack of truly adversary nature.

1. Hearings under the Government Code

Section 11180-11181: Investigational hearings. These hearings, conducted infrequently, need to be tailored to the circumstances, and should not be forced into any particular format.

Section 19175: Rejections on Probation. These hearings are very limited, given the strong discretion of the agency in this area. They should not be made more formal.

Section 19233: Denial of Reasonable Accommodation. Pursuant to this section and 2 C.C.R. 547.32, informal hearings are held to review appeals from a denial of a reasonable accommodation request.

Section 19575: Notice of Adverse Action. Standard personnel matters are heard pursuant to this section and related regulations.

Section 19996.1: Setting Aside Resignation. This is another proceeding which is highly specialized and involves considerable discretion.

There are also informal hearing rights pursuant to Skelly v. SPB (1975) 15 Cal.3d 194 and Coleman v. DPA (1991) 52 Cal.3d 1102, which are granted in addition to formal hearing rights and should not be forced into a format which duplicates the formal hearing track.

2. Hearings Under the Public Contract Code

Section 10345: Bid Protests. This statute requires the agency to have written procedures, which may be specific to a particular bid process. This is appropriate given the vast variety of different processes covered.

3. Hearings under the Health and Safety Code

Section 255: California Children Services Program Disputes. These are "fair hearing" type procedures with special considerations. They should not be merged with other procedures.

Sections 311, 312: Beneficiary Appeals under the Women, Infants and Children Program (See also 22 C.C.R. §40703). These informal "fair hearings" are conducted by non-attorney hearing officials.

Section 319: Other Appeals under the Women, Infants and Children Program. This statute incorporates by reference the federal regulations applicable to such appeals and makes them applicable as a matter of state law. Note also 22 C.C.R. §40751 (food vendor appeals) and §40781 (local agency appeals).

Section 530: Environmental Health Specialist Registration. This statute provides for an investigation, an informal hearing, and a subsequent APA hearing. The informal level should not be elevated to a second APA proceeding.

Section 1428: Long Term Care Facility Citation Appeals. Care should be taken not to displace this procedure, which is carefully balanced to comply with federal law and with constitutional requirements related to civil money penalties. While the procedure provides for an APA hearing in some circumstances, it also involves several other types of review, including preliminary review at a Citation Review Conference, which is not and should not be an APA hearing.

Section 1704: Cancer Advisory Council Investigations. Subsection (e) of this provision authorizes the holding of hearings. They are investigational in nature and should not be forced into an adjudicative format.

Section 4027: Maximum Contaminant Level Exemption (Drinking Water). This statute requires a public hearing for the purpose of informing the public and allowing for public input. It should not be formalized.

Section 4027.6: Variances from Public Water Standards. Information gathering hearings under this statute are intended to determine community opposition and health risk. They should remain informal.

Section 25845: Radioactive Materials Licenses. This statute contains three different procedures, an information gathering type of hearing at which "any person whose interest may be affected" must be heard (for granting or amending a license), an APA hearing (for denying, suspending, or revoking a license), and a rulemaking hearing (for actions on regulations). These three types of hearings are appropriate to the different actions to be taken and should be preserved.

Section 25893: Tableware Civil Penalty Appeals. These special proceedings are to be conducted before a specially appointed hearing officer, and require time frames which the Office of Administrative Hearings may not be able to meet. They use APA procedures only until the Department of Health Services has promulgated specific regulatory procedures.

Section 26671: Whether a New Drug or Device Application is Approvable. This section contains a discrete procedure for

reevaluating a denial of an application for approval of a new drug or device. Since this is a quasi-investigative function, it should be retained in its current form.

Section 26672: Order Refusing to Approve New Drug or Device. While this hearing could conceivably be handled under the APA, it is still essentially a scientific investigatory function.

Section 26675: Withdrawal of New Drug or Device Approval. Similar to preceding sections.

Section 26691: Sherman Law Civil Penalty Appeals. See comment to section 25893, which is similar.

Section 28502: Closure of Waters to the Taking of Shellfish. This is an emergency procedure which is primarily of interest to members of the public, not to a particular individual. It requires public notice and the taking of public input in an appropriate manner. Since this is a public health matter on which the public has little expertise, the procedure should not be made more formal.

Section 28518.8: Violation of Shellfish Law. Since this procedure covers a variety of possible violations, affecting different kinds of individuals, entities or groups, the procedure should remain the very flexible one currently in the statute.

Section 28550: Civil Penalty Appeals - Various Entities. See comment to section 25893, which is similar.

Section 38060: Formal Direct Services Contract Appeals (See also 22 C.C.R. §20201 and §20204 for informal appeals). The statute specifically calls for flexible procedures to be used, to accommodate the particular needs of a given case.

4. Hearings under the Welfare and Institutions Code

Sections 10950-10967: Beneficiary "Fair Hearings". This is the basic welfare "fair hearing" process which is used by Medi-Cal. This procedure complies with constitutional requirements and program needs. It should not be changed just for the sake of achieving a single model.

Section 14087.27: Selective Provider Contract Disputes (See also 22 C.C.R. §66344). By contract, inpatient hospital rate contracts can provide for an administrative dispute resolution procedure. Obviously, this requires flexibility since it is a negotiated dispute resolution process.

Section 14105.38: Hearing on Deletion of Drug from List of Contract Drugs. This is a special hearing procedure which gathers information for a science-based decision. It should not be merged with standard adjudicative procedures.

Section 14105.98(s): Disproportionate Share Adjustment Appeals. This is a flexible provision applicable to any appealable issues which may arise. It should not be formalized.

Section 14123: Suspension of Medi-Cal Provider (See also W&IC §14124.5 and 22 C.C.R. § 51048.1 et seq. Federal rules at 42 C.F.R. § 431.153 et seq). While the hearing on the merits is an APA hearing, related procedures such as automatic suspension and temporary suspension must be retained to ensure conformity to federal law.

Section 14123.2: Medi-Cal Provider Penalties (See also 22 C.C.R. §51485.1). This is another civil penalty provision which should be retained because of its inherent dissimilarity to typical APA-covered adjudications.

Section 14126.50: Appeals from Long Term Care Facility Rate Setting Audits (no specific regulation, but procedure under 22 C.C.R. §51016 et seq. is appropriately used). See discussion of section 14171. The same comment applies to inpatient hospital rate appeals which occur pursuant to Welfare and Institutions Code sections 14105 and 14106, although those sections do not specifically refer to a hearing requirement, and to Mental Health (Short-Doyle) Fiscal Audit Appeals pursuant to Welfare and Institutions Code section 5712.4.

Section 14171: Medi-Cal Audit and Rate Appeals (See also 22 C.C.R. §§ 51016, 51536 and 51539). This procedure is well established and understood by the provider community. The APA is singularly inappropriate for these types of hearings because both the issues and the procedures are unique to the financial audit and ratesetting environment.

Section 14300: Intent to Contract with Prepaid Health Plan (PHP). This section provides for a public hearing, at the request of any person affected by the contract, when the Department of Health Services intends to enter into a PHP contract (new or renewal). The Director must find that the hearing request is reasonable and a public hearing is warranted. This is more in the nature of an information-gathering hearing than an adjudicative hearing.

Section 14450: PHP Contract Non-Renewal. Although this statute does not require a hearing upon non-renewal, since failure to renew must be for cause, the Department does provide a hearing upon request, using suitable procedures. PHP beneficiary fair hearings under subsection (a)(1) use the existing welfare fair hearing procedure.

5. Hearings Conducted Under Regulations

22 C.C.R. section 40245: Beneficiary grievance appeal to Director for Rural Health program.

6. Hearings Conducted By Agreement With Appealing Party

The Department of Health Services periodically provides hearing rights which are neither required by statute nor established through practice. Usually, the hearing procedures in 22 C.C.R. §51016 et seq. are utilized. It could be an unfortunate effect of the proposed new APA to have such hearings either cease to happen or be forced into an APA proceeding conducted by the Office of Administrative Hearings (since no statute provides an exemption). We would strongly urge specific statutory recognition of an agency's right to provide its own chosen hearing procedure in situations where a hearing is not clearly required, but may be in the public interest.

State of California - Health and Welfare Agency

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
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August 27, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Members of the California Law Revision Commission:

This is the California Unemployment Insurance Appeals Board (CUIAB or Appeals Board) comments with regard to the Law Revision Commission's tentative recommendation concerning administrative adjudication by State agencies. Because these comments focus on how the tentative recommendation would affect CUIAB operations, it is necessary to explain how the CUIAB currently operates.

The CUIAB is separate from the Employment Development Department. It adjudicates determinations made by the Employment Development Department regarding unemployment insurance, disability insurance and related tax matters. The issue of separation of function, a significant element in the tentative recommendation, has no application to the Appeals Board as EDD and the Appeals Board are functionally separate.

State unemployment insurance systems must be in conformity with federal laws and rules. States that fail to conform to federal law and rules are subject to severe penalties. Federal law, rules and court decisions set forth standards to assure that all administrative appeals affecting benefit rights are heard and decided with the greatest promptness that is administratively feasible. Failure to meet these standards can result in the Department of Labor stopping payment from the unemployment fund to the state (California paid out approximately 2 billion dollars in benefits last year) and can result in doubling the payroll tax paid by employers. Currently, the Board meets federal standards. The Board is concerned that the tentative recommendations, with its emphasis on an elaborate adjudicative process, would interfere with the CUIAB's ability to meet federal standards.

The CUIAB has approximately 180 administrative law judges, who last year, issued approximately 230,000 first level decisions. Additionally, the Board issued approximately 20,000 appellate or second level decisions. Hearings are informal and typically parties represent themselves, although in some cases they are represented by others. Only in rare

cases are parties represented by attorneys. The process begins with a determination issued by the Employment Development Department either granting or denying benefits. That determination may be appealed to the CUIAB. Although EDD is always a party to any such appeal, EDD only infrequently appears at the hearing. When it does appear it typically explains its reasons for deciding the way it did. It is the responsibility of the administrative law judge to draw out the facts from all parties present at the hearing. There is usual very little cross examination although parties often follow-up questions asked by the administrative law judge. While parties have the right to be represented and the right to cross examination the hearings are more in the nature of fact finding. There is no "accusation" and there is no prosecutorial flavor to the proceeding unlike the tentative recommendation.

The Unemployment Insurance Appeals Board and the unemployment insurance system were established as part of the Social Security Act in 1936. Thus, it predates the APA. It is the CUIAB's contention that the exclusion of the CUIAB from the APA was a considered decision on the part of the legislature and is as valid today as it was then. This is so because the nature of the hearing is different than that set out in the APA.

Although the CUIAB does not have precise statistics, an informal survey of other agencies leads us to believe that the CUIAB holds more than 60 percent of all State administrative hearings. The model set forth in the tentative recommendation is more suitable for a license revocation hearing than the hearing done by this agency. The APA model is not suitable for this agency. In fact, given the great number of cases done by this agency, it serves no real purpose to force the Board to adopt the APA.

It is helpful to be able to opt out of certain provisions of the proposed tentative recommendations. This is a partial but not complete solution. To opt out, the Appeals Board must promulgate regulations. In addition, the tentative recommendations will require new regulations. The CUIAB already has duly promulgated regulations governing its procedures. Because this agency's processes are so antipathetic to the model embodied in the tentative recommendations, in our view, this agency would be forced to opt out of all possible provisions and go through the process of re-instituting regulations.

Promulgating regulations poses difficulties to this and other agencies. Aside from the time and expense, the Office of Administrative Law will likely question any deviation from the model rules that the Office of Administrative Hearings is required to offer pursuant to this proposed legislation. This, in conjunction with whatever comments may be elicited from members of the public, will result in OAL evaluating the proposed regulations to determine whether the proffered regulations meet the "necessity" criteria. In effect, OAL,

which has no operational responsibility for the CUIAB, will be deciding issues that affect the Board's ability to operate.

In this vein, the proposed addition of Government Code section 11340.4 (page 110 of the tentative recommendation) significantly enhances the Office of Administrative Law's powers. OAL staff will be able to examine an agency's procedures and forms (which OAL regards as regulations) for the purpose of exposing "underground rules" which would then need to be adopted as regulations. The result will be a tremendous expansion of regulations in spite of the fact that one of the stated purposes of the Office of Administrative Law is to reduce the number of administrative regulations. (See Government Code section 11340.1.)

The model set forth in the tentative recommendation guarantees that this agency and others will opt out of all permissible provisions. Thus, this Board will have to re-promulgate its existing rules and adopt new rules "interpreting" various provisions of the tentative recommendations. If the reason for the tentative recommendation is convenience to the public, the Board's rules can easily be put together with similar procedural rules of other agencies in one place so that the public can easily find them.

Aside from the above, the Board has the following specific objections. These specific objections are not meant to be comprehensive. Tentative section 610.350, initial pleading, does not adequately describe the determinations made by EDD which are neither an accusation nor an institution of an investigation. Section 610.672 has no application to this agency because the CUIAB will set a hearing upon an appeal even if the appeal is not very specific. This section seems to require a greater degree of specificity than currently required by the Board and could be the kind of technicality that would put the Board out of conformity with federal rules.

Provisions concerning notice beginning with section 613.210 also raise potential problems in terms of compliance with federal standards. The difficulty is that this agency is required to hear and decide at least 60 percent of all first level benefit appeal decisions within 30 calendar days of the date of appeal and at least 80 percent of all first level benefit appeal decisions within 45 calendar days (20 CFR section 650.4). Appeals may be to the CUIAB field office or the EDD office. Most appeals are mailed or delivered to the EDD and it usually takes at least a few days for EDD to transmit the appeal to the CUIAB local office of appeals. That CUIAB office then mails a Notice of Hearing which requires the presence of parties. Under proposed section 613.230 the ten days Notice of Hearing would be extended by five days. Thus, the soonest a hearing could be held is about 17 or 18 calendar days after the appeal, leaving only 13 or 14 calendar days to hear the case and issue a decision.

Chapter 4, beginning with section 614.110 has no application to this agency. However, it is unclear whether the Board must follow these provisions, promulgate regulations saying they are not applicable, or simply ignore them.

With respect to Part 4, adjudicatory proceedings, Article 2, declaratory decisions, and Article 3, emergency decisions, it is difficult to see how these would apply to this agency. Again, there is some unclarity as to whether a provision that appears to have no application is nevertheless required to be implemented, whether regulations must be adopted indicating that such provision has no application, or whether the provision can be ignored because it is never applied.

As it now stands, the tentative recommendation does not permit agencies to opt out of Part 4, Chapter 9 which deals with issuance of decision, administrative review of decision and precedent decisions. The decision model set forth in this chapter differs drastically from the procedure employed by the CUIAB. The chapter assumes a proposed decision is issued by an administrative law judge from the Office of Administrative Hearings. That decision is then referred to the initiating agency for adoption or modification. That agency is required under section 649.110 to issue an final decision within 30 days.

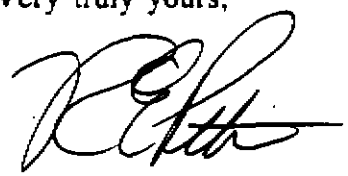
Appeals from the EDD decisions are set for hearing by the CUIAB. The decision of the administrative law judge is final unless it is appealed within 20 days. If it is appealed, the Appeals Board, acting as an appellate body, reviews the decision and a panel of Board Members affirms, reverses, remands or modifies the decision. By operation of Unemployment Insurance Code section 410, the Board's decision is final and the Board loses jurisdiction. Therefore, section 649.110 would appear to have no application to the Appeals Board and inclusion of this provision as part of the Board's operating procedure would simply create confusion. The same point can be made with respect to sections 649.130 and 649.140.

In section 649.150 the tentative language refers to Article 8 but we believe this is a typographical error and should refer instead to Article 2. Pursuant to 649.150(b), which in turns refers to 649.210, an agency such as ours arguably could articulate the procedure that we now use by regulation. This however is not clear. In any case, the provisions of Article 1 and Article 2 of Chapter 9 may not be able to be made to conform with the CUIAB's existing procedure or could be made to conform with existing procedure only with great difficulty and confusion. As always, the more difficult the process, the more likely the Board will be unable to meet federal standards.

Other problems raised by Chapter 9 deal with regulations that would probably have to be implemented in order to make clear the procedures which would implement the proposed statute. For example, 649.230(b) provides "the reviewing authority shall allow each party an opportunity to present a written brief or an oral argument as determined by the reviewing authority." As this provision is written, a regulation is required setting standards for granting oral argument or written brief requests. In addition, OAL regards "forms" as regulations and presumably all forms used by the Appeals Board would have to be submitted for OAL review. The tentative recommendation would thus spawn numerous new regulations. While putting everything in regulation may be a good idea, a balance needs to be struck between voluminous and complicated regulations required and any real improvement in the adjudication process.

The CUIAB hears more cases than other State agency in any given year. It hears more than 60 percent of all cases heard by State agencies. The model replicated in the tentative recommendations is not appropriate to this agency. Perhaps, the correct model the Commission should adopt is the CUIAB model. Other agencies that more closely conform to the existing APA can opt out of that model. In the CUIAB's view, the tentative recommendations will conflict or make it more difficult for the CUIAB to conform to federal mandates, cause the Board to spend time, energy and resources seeking to mold its processes to a hostile model and in general to create a more cumbersome and technical adjudication system. These negatives do not seem to be balanced by a corresponding positive. The laws governing the Board and the EDD are readily available in the Unemployment Insurance Code, the rules for both agencies are readily available. Many thousands of "customers" are satisfied with the process. If it is desirable to have all rules regarding adjudications in one place such a goal can be accomplished without the wholesale revision proposed by the tentative recommendations. Finally, and perhaps an unintended result of the tentative recommendations, is the broad expansion of the powers of the Office of Administrative Law and its conversion into an investigative agency. It is for all of these reasons that the CUIAB sees little value to subjecting itself to any of the tentative recommendations and it would seek to be exempted from them.

Very truly yours,



R. E. PETERSEN, Chief Counsel

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STATE OF CALIFORNIA-YOUTH AND ADULT CORRECTIONAL AGENCY PETE WILSON, Governor

DEPARTMENT OF CORRECTIONS

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August 30, 1993

Law Revision Commission
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Re: LAW REVISION COMMISSION ADMINISTRATIVE ADJUDICATION PROPOSALS

Dear Commissioners:

Thank you for the opportunity to comment on the California Law Revision Commission's "Tentative Recommendation" regarding legislative reform of Administrative Adjudication by State Agencies.

Currently, Government Code Section 11501 does not list the Department of Corrections among those agencies which are required to follow the Administrative Procedures Act in regards to administrative adjudication, e.g. determinations concerning inmate rights.

However, the "Tentative Recommendation," is so broadly written, that it could be construed to include the Department of Corrections' decisions regarding inmates as within those requiring elaborate hearings and procedures. For example, proposed Section 641.110 [entitled: When adjudication proceedings are required] states:

(a) An agency shall conduct a proceedings under this part as the process of formulating and issuing a decision for which a hearing or other adjudicative proceeding is required by the federal or state constitution or by statute.

Proposed Section 610.310 defines covered agency "decisions."

> *Decisions means an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person.*

While no California statute generally requires hearings for administrative actions affecting inmate, ward, civil addict or parolee rights, the *Due Process Clause* has often been interpreted to guarantee such person in "custody" minimal hearing rights in certain situations. See *Hewitt v. Helms* (1987) 482 U.S. 755, 107 S.Ct. 2672.

Let us use the example of parole revocation hearings to illustrate our argument -- that formal APA-type hearings are inappropriate for administrative determinations regarding those persons in custody.

Parole revocation hearings are mandated by Morrissey v. Brewer (1972) 408 U.S. 472 as explicated by subsequent United States Supreme Court and California appellate court decisions.

Under the provisions of Chapter 695, Statutes of 1992, effective September 15, 1992, the Parole Hearings Division (PHD) of the Department of Corrections succeeded to specified hearing functions of the Board of Prison Terms (BPT). The BPT now provides life parole consideration hearings in which it determines the suitability for parole of life prisoners, and if suitable, the term of imprisonment,[1] the status of any prisoner under the provisions of section 2962 (mentally disordered offenders) and the revocation of parole of these two classes of persons.[2] The Parole Hearings Division provides parole revocation hearings for all determinately sentenced prisoners, except those under the provisions of section 2962.[3]

The issues at these hearings is whether or not the parolee has violated a condition of parole, and if so, what the disposition should be. There is only one "respondent" at any revocation or revocation extension hearing, the parolee, and no other "party." There is no lawyer representing the state, and a lawyer for the parolee only is permitted by PHD for good cause.[4] Under our regulations a parolee is not entitled to representation unless needed, and in cases of indigency the state pays the attorney.[5]

Since the maximum time which the parolee may be returned to custody or extended is one year (usually less with credits)[6] the time frames set forth in the

proposal would probably violate the "reasonable" time periods in BPT regulations[7] and mandated by Morrissey. Trial Court decisions in Riverside and Solano counties have mandated hearings in 45 and 30 days from the date of the "parole hold," a term, like many others common to our proceedings, not contemplated by these proposals.

The pleading and hearing proposals are inconsistent with the reality of our hearing process. All hearings are held in the institution where the parolee is held unless his or her rights to witnesses would be jeopardized. This would violate proposed Government Code section 642.430.

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1. Penal Code section 3041
2. Penal Code section 3000
3. Penal Code section 3000
4. Gagnon v. Scarpelli (1973) 411 U.S. 778
5. 15 CCR § 2960 and following, In re Love (1974) 11 Cal.3d 179; see also People v. Ojeda (1986) 186 Cal.App.3d 302
6. Penal Code section 3057
7. 15 CCR § 2640

So few of the proposed provisions would be appropriate to our process that the cost of designing and adopting exempting regulations would far outweigh any overall benefit to the administrative adjudication process. The Parole Hearings Division alone projects it will conduct approximately 15,400 hearings, 34,300 screenings (charges settled without hearings), 115,200 central office calendar actions (for example determination of discharge from parole,[8] appeals of denials of attorneys at revocation hearings[9]) this year.

Accordingly, we believe that the Department of Corrections should be excluded from the proposal. We also note that similar arguments would be advanced by the Board of Prison Terms,[10] the Narcotic Addict Evaluation Authority,[11] and the Youthful Offender Parole Board.[12] All of these entities deal only with liberty interests of prisoners and parolees and not property interests unlike all other state agencies holding hearings applying generally to property interests.

Conclusion

Since the language of the Commission's "Tentative Recommendation" could be read so as to require APA-type hearings for inmates where case law intends only minimal process and hearings, the Department requests that the Department and related entities [the Board of Prison Terms, the Youth Authority, the Youthful Offender Parole Board, and the Narcotic Addict Evaluation Authority] be expressly exempted from the requirements of the Act.

Recommendation

Thus, the Department recommends that the Commission's proposed Section 612.110 [entitled: Application of division to state] be amended to add Subsection 612.110(d), as follows:

612.110(d)

All adjudications concerning the rights of inmates, wards, civil addicts, parolees and others conducted by the Department of Corrections, the Board of Prison Terms, the Youth Authority, the Youthful Offender Parole Board or the Narcotic Addiction Evaluation Authority.

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8. Penal Code section 3001
9. 15 CCR § 2055
10. Penal Code sections 3000, 3057, 5075 and following
11. Welfare and Institutions Code section 3152 and following
12. Welfare and Institutions Code section 1767.3

We appreciate your consideration of this request and ask that we be added to your mailing list as to this proposal.

Sincerely,

JEROLD A. PROD
Deputy Director, Legal Affairs Division

cc: Professor Michael R. Asimow, School of Law, UCLA
Judith A. McGillivray, Deputy Director, Parole Hearings Division
Michael Neal, Assistant Director, Legislative Liaison
John Monday, Deputy Secretary, Youth & Adult Correctional Agency
John W. Gillis, Chair, Board of Prison Terms
William M. Pruitt, Chair, Youthful Offender Parole Board
Nancy B. Dooley, Chair, Narcotic Addict Evaluation Authority

STATE OF CALIFORNIA PETE WILSON, Governor

STATE BOARD OF CONTROL
P.O. BOX 48
SACRAMENTO, CA 95812-0048

August 30, 1993

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Administrative Adjudication by State Agencies
Tentative Recommendation

Dear Mr. Sterling:

The functions of the State Board of Control are largely adjudicatory. Thus, the Tentative Recommendation of the California Law Revision Commission on Administrative Adjudication by State Agencies is of significant importance to the Board. We are concerned that adoption of the Tentative Recommendation would be very costly to the Board, and would interfere with the efficient conduct of its work. We have endeavored to review each draft of the study upon its release. The Tentative Recommendation, however, differs from earlier drafts we have reviewed in certain significant respects which increase the likelihood of its having a substantial, adverse and costly impact on the State Board of Control. These comments are offered in response to the possibility of that negative impact.

The State Board of Control is charged with a myriad of responsibilities within state government for resolving claims filed against the state. Among these are some that require the Board to conduct an adjudicative hearing. These include claims for compensation from victims of crime (Government Code §§13959 et seq.); claims of persons injured while benefiting the public (Government Code §§13970 et seq.); claims against the hazardous substance account (Health and Safety Code §§25370 et seq.); claims of persons erroneously convicted of felonies (Penal Code §§4900 et seq.); and the resolution of protests of certain procurement decisions (Public Contract Code §§10306 and 12102(f)). The State Board of Control is not an agency listed in Government Code §11501 and, but for the requirement in Health and Safety Code §25375.5 that those claims are subject to the requirements of Government Code §11513, the hearings of the Board are not subject to the requirements of the Administrative Procedures Act.

The different adjudicatory decisions made by the State Board of Control each require a slightly different degree of formality. The Board's largest workload is in the Victims of Crime Program. Eligible applicants are victims of crime with no source of reimbursement for the losses they suffer as a result of the crime. The Board schedules as many as 120 cases to hear on each of two days each month. Approximately one-half of these are either resolved prior to hearing or the applicant fails to appear for the hearing. The Board presently hears the cases itself although in the past it has successfully used a non-attorney hearing officer. Very few applicants are represented by attorneys, many are represented by victim advocates, and others appear without representation. Necessarily the hearings are very informal. These hearings would not qualify as "conference" hearings without the adoption of a regulation as facts are disputed and the amounts claimed are frequently greater than $1,000. Nor is it clear that the conference hearing is sufficiently flexible to allow the degree of informality required.

The most formal of the Board's hearings are those conducted to resolve a protest of a procurement decision. In these cases the Board is presently employing an attorney hearing officer. In the past the Board has referred some of these cases to the Office of Administrative Hearings. This proved to be extremely expensive and resulted in lengthy delays seriously interfering with the State's procurement needs. One case referred to OAH consumed approximately six months from referral to OAH to receipt of a proposed decision. In contrast, referral to the Board's own hearing officer of the most difficult cases requires approximately six weeks. The Board of Control's total cost per hour for a hearing conducted by its hearing officer is $50. This contrasts to a cost of $170 per hour for a hearing conducted by the Office of Administrative Hearings. The parties to the protests appear to feel that they have received a fair hearing as they have not sought writs challenging the conduct of these hearings.

Professor Asimov's study and early drafts of the new statute reflected a premise that the new Administrative Procedures Act would serve as the standard for adjudication by state agencies. However, the study and earlier drafts reflected the understanding that that standard was not appropriate for all adjudications conducted by state agencies. Thus, the drafts created a "default" procedure. The act would apply unless a state agency adopted rules adopting procedures which deviated from the act. These procedures were to be adopted as regulations which insured the opportunity for public review and comment as to the appropriateness of deviations from the standard APA. The Tentative Recommendation has now sharply deviated from this earlier approach and imposes all of the requirements of the act on many more state agencies and imposes many specific requirements on all state agencies.

This revised approach is reflected in §641.450. Unlike current law and unlike previous drafts, this section now requires that all hearings be conducted by an administrative law judge employed by the Office of Administrative Hearings unless an agency is specifically and statutorily exempted from this requirement. Under current law only those agencies listed in Government Code §11501 are subject to this requirement. Many other agencies having adjudicatory responsibilities are not listed in that statute, but may not have a statute specifically exempting the agency from this requirement as such a statute would be superfluous. We believe that enactment of §641.450 in its present form will have the unfortunate result of subjecting to the most rigid requirements of the new act those hearings for which the act is least amenable.

The State Board of Control has authority to have its cases heard by hearing examiners who are not administrative law judges employed by the Office of Administrative Hearings. This authority was enacted prior to the effective date of the current Administrative Procedures Act and does not specifically reference that act. Government Code §13908 states:

> The evidence in any investigation, inquiry, or hearing may be taken by the member to whom the investigation, inquiry, or hearing has been assigned or, in his or their behalf, by an examiner designated for that purpose. Every finding, opinion, and order made by a member so designated, pursuant to investigation, inquiry, or hearing, when approved or confirmed by the board and ordered filed in its office at the State Capitol, Sacramento, is the finding, opinion, and order of the board.

We believe that this section would exempt the Board from the requirement of proposed §641.450. However, we are concerned that a challenge to this exemption might be brought as the Board's exemption does not specifically reference the Administrative Procedures Act or the Office of Administrative Hearings. Therefore, we believe §641.450 should be proposed as set forth in earlier drafts. An administrative law judge employed by the Office of Administrative Hearings should be required for only those proceedings for which a statute specifically requires they be conducted by an administrative law judge employed by the office.

We are also concerned with the limited ability of state agencies not required to utilize the Office of Administrative Hearings to modify the requirements of the proposed act to meet their unique needs. The Tentative Recommendation appears to allow these agencies to modify only those requirements set forth in Chapter 2 of Part 4 relating to commencement of proceedings, Chapter 5 of Part 4 relating to discovery, and Chapter 8 of Part 4 relating to the conduct of the hearing. Yet many of the other provisions of the proposed act would have a costly and detrimental effect on the State Board of Control.

For example, proposed section 613.230 would impose the rule that when service is made by mail any response period is extended by five days. The Victims of Crime Program (Government Code §13959 et seq.) imposes various statutory notice periods. These have been found to be workable for applicants and for the Board of Control. They were adopted and implemented with the understanding that service by mail did not extend the time. Had service by mail been intended to extend these times, each time period might have been five days shorter. The enactment of this proposal would require the Board to either extend all of these timelines by five days, necessitating a costly reprogramming of its automated system with resultant delays in processing and payment of victims' claims, or to seek legislation shortening its statutory timelines. This is but one example of how a seemingly insignificant requirement should not be imposed on all state agencies.

We urge that state agencies be given the authority to deviate from any of the model requirements.

Further, while requiring that any such deviation be accomplished by means of a rulemaking action following the opportunity for public review and comment would insure that the interests of those coming before the agency are protected, this, too, is unnecessary and costly. Persons entitled to an adjudicatory decision are entitled to due process. Agency reliance on rules or procedures not available to those subject to those rules is a violation of due process. However, formal rulemaking is a costly process. The State Board of Control is experiencing significant funding problems. The Board's general fund programs have experienced a 40% loss of revenue in the last three years. Authorized expenditures in the Victims of Crime Program currently exceed revenue by approximately 100%. Requiring state agencies to undertake massive and costly rulemaking is inappropriate.

Thank you for the opportunity to comment on the Tentative Recommendation. We will await the Commissions Recommendation to the Legislature.

Sincerely yours,

Catherine Close

Catherine Close
General Counsel
(916) 327-1998

STATE OF CALIFORNIA PETE WILSON, Governor

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

August 30, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Attn: Nathaniel Sterling, Executive Secretary

Comments of the Legal Division of the Public Utilities Commission on the Tentative Recommendation on Administrative Adjudication

Dear Commissioners and Mr. Sterling:

The following are the comments of the Legal Division of the California Public Utilities Commission (PUC or Commission) on the California Law Revision Commission's tentative recommendation on administrative adjudication (proposed new APA).

The work of the PUC is quite different from that of most other state agencies. Because of its unique responsibilities, the PUC's specialized procedures are established by comprehensive legislation contained in the Public Utilities Code, and pursuant to the PUC's constitutional authority to establish its own procedures (subject to due process and statute). (See Cal. Constitution, art. XII, §2.) It therefore is not appropriate to include the PUC within the scope of a single statute to govern administrative adjudication by state agencies generally.[1]

Throughout the course of the Law Revision Commission's study of administrative adjudication, we have pointed out that the PUC's work is so different from that of most other agencies that the PUC's "adjudications" should not be governed by rules written for other agencies. We acknowledge that some flexibility has been built into the proposed new APA, and that some proposals that we objected to earlier have been modified or not incorporated into the proposed new APA. Still, as explained in greater detail below, we continue to be of the view that procedures that can be incorporated into a single Administrative Procedure Act which may be appropriate for the kind of cases typically handled by other state agencies simply will not work at the PUC.

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1 Accordingly, we agree that the work of the PUC's Administrative Law Judges (ALJs) should not be shifted to a central panel. The use of central panel judges would deprive the PUC of necessary expertise and control over its own workload.

The treatment of individualized ratemaking[2] and initial licensing cases under the proposed new Administrative Procedure Act (APA) most readily demonstrates the inappropriateness of subjecting the PUC's "adjudications" to the proposed new APA. (Individualized ratemaking and initial licensing cases comprise a large portion of the PUC proceedings that would be covered by the proposed new APA.) The proposed new APA would treat these cases as "adjudications" (see Comment to §610.310), and generally subject them to the same procedural requirements as would apply, for example, to unemployment and workers compensation benefit cases.[3] Such benefit cases look primarily at what happened sometime in the past (adjudicative facts). On the other hand, individualized ratemaking and initial licensing cases rely in large part on legislative facts, the kind of facts that are useful for predicting future events and establishing the rules and rates that a utility should observe in the future, or deciding whether it is desirable for a utility to build additional facilities or for an additional utility to be granted a license.[4]

The California Supreme Court has repeatedly recognized the legislative character of PUC ratemaking cases. "In adopting rules governing service and in fixing rates, [the PUC] exercises legislative functions delegated to it and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions . . ." (Consumers Lobby Against Monopolies v. Public Utilities Commission (1979) 25 Cal. 3d 891, 909 quoting Wood v. Public Utilities Commission (1971) 4 Cal. 3d 288, 292.) "The commission's primary task is to assimilate [the views of the various parties] into a composite 'public interest'". (25 Cal.3d at 909.) Thus policymaking assumes a predominant role in such cases, as it does in a broad range of PUC proceedings. We submit that it is inappropriate to subject such cases, where legislative

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2 "Individualized ratemaking" refers to the setting of rates for a specifically named utility.

3 The federal APA, on the other hand, defines ratemaking as "rulemaking" (see Comment to § 610.310).

4 Such an initial licensing case is not like a case concerning whether an individual should be granted a professional license. In a professional license case primarily adjudicative facts are at issue: does the applicant meet the minimum training and competency standards, or has the applicant committed some act that disqualifies him from receiving a license, etc.

facts are most prominent, to procedures designed for cases that look mostly at adjudicative facts, such as benefit determination cases.

In several instances, the proposed new APA seeks to shift authority from the agency head to the administrative law judge (ALJ). See, for example, §649.150, allowing an ALJ's proposed decision to become a final decision without affirmative action by the agency head. See also §§649.230(c), 649.240(a)(2), requiring that a remand generally be to the ALJ who originally heard the case. While it can be argued that such procedures are appropriate where a decision primarily determines adjudicative facts, they are clearly inappropriate in cases where legislative facts and policymaking functions are predominant. The Public Utilities Commission (and not its ALJs) has been given policymaking authority by the State Constitution and the Legislature. Thus, for example, if the Commission wishes to remand a case for further proceedings, and it believes that the case should not go back to the original ALJ because of policy disagreements between that ALJ and the Commission, the Commission should be free to reassign it to a different ALJ.

The constitutional and statutory provisions governing the PUC further demonstrate that it is different than most other state agencies. Thus, the PUC is a constitutionally created agency. (See Cal. Constitution, art. XII.) In addition to the specific powers granted the PUC by the Constitution and statute the PUC "may supervise and regulate every public utility in the State and may do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." (Public Utilities (P.U.) Code §701.) In order not to unduly restrict the PUC in its exercise of these powers, the Legislature has generally exempted the PUC from the rulemaking provisions of the existing APA (see Government Code §11351) and has provided for direct review of PUC decisions by the California Supreme Court (see, e.g., P.U. Code §1759). These provisions all recognize the PUC's need for a broad range of flexibility in order to succcessfully regulate in a timely manner the safety and economics of major utility industries. As further demonstrated in the specific comments below, subjecting the PUC to the proposed new APA would unnecessarily and unduly interfere with the PUC's ability to perform its duties.

Comments on Specific Sections of the Proposed New APA

Sections 610.190 & 610.460: The definitions of "agency" and "party" are highly confusing as they might apply to the PUC. The PUC is clearly an agency under 610.190 and appears to be "the agency that is taking action" under 610.460. However, the PUC is not a party to proceedings before the Commission. (Cf. §610.460 "party . . . includes the agency that is taking action".)

Typically, one of the PUC's staff Divisions (e.g. the Division of Ratepayer Advocates (DRA) or the Transportation Division) appears as a party in Commission proceedings.[5] Moreover, it is not clear whether the DRA is an "agency". An administrative unit within an agency can itself be an agency "[t]o the extent it purports to exercise authority pursuant to any provision of this division". Because the DRA has no authority to issue decisions or take other similar action it does not appear to fit within the definition of agency. Because these key definitions are unclear and do not comport with the reality of practice at the PUC, it is sometimes unclear how operative sections of the proposed new APA are supposed to apply to the work of the PUC.[6]

Section 610.310: As discussed above, this section is overbroad. Furthermore, the Comment suggests that PUC ratemaking and licensing actions of general application addressed to all members of a class are subject to the APA's rulemaking provisions. Such PUC actions are not currently subject to the APA, nor would the current recommendation make them subject to the APA's rulemaking provisions.

Section 641.110(a): states that an "agency shall conduct a proceeding under this part . . . [before] issuing a decision for which a hearing or other adjudicative proceeding is required . . ." However, the term "adjudicative proceeding" is not defined, leaving the meaning of this provision in some doubt.

Sections 641.310 - 641.380: The word "section" in §641.310(c) should be replaced by the word "article". When there is other express statutory authority for an emergency decision, that other section should govern the proceedings. Compare §612.150 (contrary express statute controls).

The PUC is directed by existing statutes to summarily suspend or revoke the operating authority of motor carriers: (1) upon receipt of written recommendation from the California Highway Patrol (CHP) that the motor carrier has consistently failed to abide by certain safety regulations or that the carrier's operations present an imminent danger to public safety (see, e.g., Public Utilities (P.U.) Code §1070.5); and (2) when the motor carrier has failed to pay a final judgment to an employee pursuant to §3716.2 of the Labor Code (see, e.g., P.U. Code

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5 However, in many complaint proceedings only the utility and the private complainant are parties and staff does not participate.

6 See, e.g., proposed §648.520(a)(1), (b)(1) referring to "an employee of an agency that is a party".

§1070.6). (See the discussion below as to why these P.U. Code sections should be retained.) It is unclear how these statutes would interact with these sections of the proposed new APA if the change in §641.310(c) suggested in the preceding paragraph is not made. The proposed new APA should make it clear that an agency granted emergency-type powers by another statute can follow the procedures required by that statute, without having to comply with additional restrictions that might be required if it were acting under these provisions of the APA.

In addition, §641.380 of the proposed new APA appears inconsistent with current law which vests exclusive power to review the PUC's decisions with the Supreme Court. (See P.U. Code §1759.)[7]

Section 642.240: The Comment to this section indicates that an agency not required to use Office of Administrative Hearings ALJs may make the section inapplicable by issuing a regulation. However, the text of subsection (a) is less clear. A requirement to issue regulations establishing timelines for processing applications may make sense for agencies that handle a specific number of routine kinds of applications. However, the PUC handles a nearly infinite variety of applications. Even just in the area of ratemaking, applications can run the gamut from: (a) a relatively simple application by a small water company to increase its rates to reflect increased costs for the water it buys; to (z) a very complex application by a large gas and electric utility to restructure the way the PUC sets its rates to incorporate more incentives. Thus in this area, as well as many others, the PUC has a unique need for flexibility.

Section 643.130: This section would apparently authorize the Governor to appoint a substitute PUC Commissioner if the PUC was unable to take action in a proceeding because of the disqualification or unavailability of a Commissioner or Commissioners. To the extent that this section would authorize such a substitute PUC Commissioner, it would appear to violate Section 1 of Article XII of the California Constitution. That section of the Constitution requires Senate confirmation of a PUC Commissioner, establishes a 6 year term for Commissioners, provides that a vacancy is filled for the remainder of the term, and establishes the procedures and circumstances under which the Legislature may remove a Commissioner.

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7 The tentative recommendation currently before the Law Revision Commission does not propose to change this statute.

Section 643.330(a)(4), (5): These subsections allow a person who has served, or is now serving, as an investigator or advocate in a nonprosecutorial proceeding to provide advice to the presiding officer or a reviewing authority "provided the content of any advice is disclosed on the record and all parties have an opportunity to comment on the advice." The quoted provision will interfere with the PUC's ability to issue rate case decisions. Typically, major rate case decisions are issued just before the end of the year, so that new rates can go into effect on the first of the year. In the course of compiling the final numbers for the decision, it is often necessary to consult with technical personnel in order to calculate the impact of particular policy decisions on rates. The PUC normally relies on its separate advisory staff (Commission Advisory and Compliance Division or CACD) to provide such advice. However, due to staff rotation and the long-running nature of some rate case proceedings, personnel currently working in CACD may have previously worked on the same case while serving in the advocacy staff (Division of Ratepayer Advocates or DRA).[8] In addition, some technical expertise may reside only with the staff currently working on the case for DRA. While these subsections would authorize the ALJ or the Commission to obtain the advice they need, they could only do so if the content of the advice is disclosed on the record with an opportunity for all parties to comment. The delay this would create would make it impossible for the Commission to issue rate case decisions in a timely manner.

Furthermore, the requirement that the advice be disclosed on the record would have the effect of making public the Commission's internal deliberative processes. For example, consider the situation where the Commission asks an advisor who would be covered by these provisions what the impact of a particular policy decision would be on the various calculations that appear in the appendices to a Commission rate decision. Presumably, in order to comply with the quoted requirements of these subsections the advisor would have to disclose both the question she was asked and the various numbers that she advised the Commission should be included in particular places in the

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8 In some areas, for example certain licensing issues handled by the PUC's Transportation Division, there is not a complete separation of functions at the PUC. This reflects the need for administrative efficiency (consider the difficulties of having two staff members familiar with all matters), which sometimes conflicts with the perfection the proposed new APA seeks.

various tables.[9] This would have the effect of revealing to the parties the policy decision that the Commission was contemplating making. We submit that it is inappropriate to require an ALJ or the Commission to reveal its internal deliberations about what policy decisions ought to be made.

There are likely to be several other untoward impacts of the above-quoted requirements. First, a disclosure like that described in the preceding paragraph is likely to engender comments not so much on the accuracy of the calculations made by the advisor, but more about the wisdom of making the policy decision the Commission was contemplating. This intervention is simply unnecessary and will engender delay. Second, besides the highly technical advice provided by CACD, that Division also provides the ALJ and the Commissioners with policy advice. As explained above, the requirement that the advice given by the advisor be disclosed on the record will have the effect of revealing the Commission's internal thought processes. Accordingly, the Commission will likely never want to get policy advice from a CACD employee who is subject to these disclosure provisions. Rate cases can continue for seven years or longer and are often consolidated with other proceedings involving the same utility or other utilities in the same industry, and can come to involve multiple issues besides the ones on which a particular staff member once worked for DRA. Nevertheless, if such an employee moved from DRA to CACD, the employee would not be able to provide advice in that proceeding (including any "adjudicative" proceedings consolidated with it), unless that employee's advice is disclosed on the record. That employee, because she is familiar with the industry involved, may be the most expert person to advise the ALJ or Commissioner. Nevertheless, because requesting advice from that person will wind up revealing the policy direction being considered by the ALJ or Commissioner, the advice may well not be requested. In short, these provisions will encourage the Commission to make inefficient use of its staff expertise and discourage the Commission from providing for staff rotations that help to develop expertise. These provisions will add nothing to the fairness of the PUC's existing procedures, which are already controlled by an ex parte rule.

Section 643.340: The language of this section is unclear. This section should not apply to nonprosecutorial proceedings where ex parte contacts are permitted. Nor should it prohibit CACD personnel who may have received an ex parte contact from

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9 The need to make such disclosures would be cumbersome and time consuming and would tend to delay the Commission's decisionmaking process.

providing advice on the request of a Commissioner. Such provisions would prevent the PUC from taking advantage of the in-house staff advice needed to decide cases accurately and in a timely fashion. The PUC's existing ex parte rule provides sufficient fairness protections.

Section 644.110: This provision could unduly limit public participation in Commission proceedings. Rule 54 of the Commission's Rules of Practice and Procedure currently provides:

> Participation Without Intervention.
>
> In an investigation or application proceeding, or in such a proceeding when heard on a consolidated record with a complaint proceeding, an appearance may be entered at the hearing without filing a pleading, if no affirmative relief is sought, if there is full disclosure of the persons or entities in whose behalf the appearance is to be entered, if the interest of such persons or entities in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed.
>
> A person or entity in whose behalf an appearance is entered in this manner becomes a party to and may participate in the proceeding to the degree indicated by the presiding officer.
>
> (Cal. Code Regs., tit. 20, §54.)

Thus, in order to become a party to an application or investigation proceeding,[10] a person or entity only needs to show up at the hearing or prehearing conference and make a few simple disclosures. The proposed section would impose additional procedural hurdles (require the person or entity that wants to become a party to file a motion) and appears to allow the ALJ to deny party status where the current rule requires the ALJ to grant party status. (Compare Rule 54 with subsection (d) of

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10 Most ratemaking and initial licensing hearings occur in application and investigation proceedings. These proceedings may also include other kinds of hearings.

§644.110.) Such additional impediments are not appropriate for proceedings such as ratemaking proceedings where the Commission's "primary task is to assimilate [a wide variety of public positions] into a composite 'public interest'". (Consumers Lobby, 25 Cal.3d at 909.)

Section 647.210(b): The language of this subsection should not prohibit agencies from adopting Alternative Dispute Resolution (ADR) techniques different than those authorized by §647.210, where agencies have the power to do so. This subsection authorizes an agency to make Article 2 "inapplicable" by issuing a regulation, but does not authorize an agency to modify the article by regulation. The subsection therefore might be read as not allowing an agency to adopt different ADR techniques, even though the agency has other authority to do so. Such a result is not appropriate for the PUC which "[s]ubject to statute and due process . . . may establish its own procedures." (California Constitution, art. XII, §2.)

Section 648.510: This section would authorize the PUC to adopt a different ex parte rule for "nonprosecutorial" proceedings. However, in light of the language of some other sections, e.g., §648.520(b)(2), it is unclear how much discretion the proposed new APA would actually give the PUC in drafting such a rule. In fact, the PUC has already adopted its own ex parte rule. See Cal. Code Regs., tit. 20, Art. 1.5. We submit that the PUC's own rule is better adapted to the unique functions of the PUC. Given the problems that might arise from attempting to comply with the more specific provisions of the proposed new APA, discussed below, we believe that the PUC should retain discretion to adopt its own ex parte rule.

Section 648.520: This section appears to prohibit, or at least require disclosure of, ex parte contacts whether or not they relate to a particular adjudicative proceeding. The same parties regularly appear in numerous PUC proceedings, both proceedings that would be treated as "adjudications" under the proposed new APA and those that would be defined as rulemakings. Moreover, the Commissioners regularly have contacts with utility and ratepayer representatives about numerous issues -- many of which may not be involved in any pending proceeding. There is no reason for a proposed statute dealing with "adjudications" to prohibit or require disclosure of contacts concerning issues that are not involved in a pending "adjudicative" proceeding. Compare the PUC's ex parte contact rule defining an "ex parte communication" as "a written or oral communication on any substantive issue in a covered proceeding, between a party and a decisionmaker, off the record and without opportunity for all parties to participate in the communication." (Cal. Code Regs., tit. 20, §1.1(g) (emphasis added).)

In subsection (a)(2), the reference to "an interested person outside an agency that is a party" is unclear. Communications between the presiding officer and a party are already covered by (a)(1).

At the PUC, the General Counsel is both the Commission's attorney and a supervisor of the attorneys who represent DRA and other staff advocates in Commission proceedings. The proposed new APA should not prohibit or require disclosure of communications between the General Counsel and the Commissioners or their advisors when the General Counsel is acting as the Commission's attorney. Compare the PUC's ex parte rule which exempts such communications from disclosure. (See Cal. Code Regs., tit. 20, §1.1(b)(2), (g), (h).)

When the Commission is concluding its work on a major rate case decision, it is sometimes necessary to contact utility personnel in order to ensure the accuracy of the final numbers for the decision. Under the proposed new APA, although the provisions are not entirely clear, it appears that such a communication might be required to be reported and an opportunity for comment provided. We submit that such notice and an opportunity to comment should not be required. As explained earlier, major rate cases are typically on a very tight time schedule and any such requirement could delay the case considerably, especially if other parties must be given 10 days in which just to "request" an opportunity to comment. (Compare §648.540(c).) Furthermore, any justification for notice and opportunity to comment is attenuated here. First, the contact is initiated by the Commission's staff to obtain specific advice that the Commission needs. In addition, there is no direct contact between the utility and the presiding officer or reviewing authority. Any advice that the utility gives is filtered through the expert CACD staff, who can detect and stop any improper lobbying.

Section 648.540: Subsection (a) apparently requires disclosure of the response of a presiding officer, or reviewing authority, to an ex parte contact. Subsection (b) further contemplates that the presiding officer or reviewing authority will review the disclosure for accuracy, when the disclosure is made by the party making the ex parte communication. In contrast, the PUC's ex parte rule specifically excludes from disclosure a description of the decisionmaker's communication. The PUC's rule also requires the party making the ex parte communication to make the disclosure, and does not require any review by the decisionmaker. (See Cal. Code Regs., tit. 20, §1.4(a).) The PUC rule excludes reporting of what the decisionmaker said, in large part, because of the likelihood that parties may mischaracterize the decisionmaker's statements, perhaps in self-serving ways. If PUC Commissioners have to review the disclosure, in order to avoid this problem, that will burden Commissioners and interfere with their ability to fulfill their numerous responsibilities. A side effect of this burden,

might well be to discourage the Commissioners from receiving permissible communications in ratemaking and similar proceedings. Given the legislative nature of such proceedings, we submit that the statute should not impose such a burden on communications with Commissioners. As stated above, we believe that the PUC should be authorized to craft its own ex parte rules.

Section 649.130 apparently would require issuance of a proposed decision even in cases in which the Legislature has determined that no proposed decision need be issued. See P.U. Code §311 and the implementing regulation, Cal. Code Regs., tit. 20, §77.1.

Section 649.150: This section would allow an ALJ's proposed decision to become a final decision without affirmative action by the Commission. As pointed out in the introduction to these comments, that is inappropriate because the Commission (and not its ALJs) has been given policymaking authority by the State Constitution and the Legislature. The Commission could prevent any ALJ decisions from becoming final by issuing a regulation requiring administrative review of every proposed ALJ Decision. Such an option, however, would introduce unnecessary procedures, at least in some cases. Consider the situation where an ALJ proposes to grant a motion for a summary judgment. Because no hearing has been held, no proposed decision is currently required. (See Cal. Code Regs., tit 20, §77.1.) Under current law the Commission is free to revise the ALJ's draft decision without providing for any additional argument. Nor would it appear that any additional argument is necessary, because the parties have already briefed the motion for summary judgment. In addition, any party who believes that the Commission's decision is legally erroneous can file for rehearing. (P.U. Code §§1731(b), 1732.) Nevertheless, under the proposed new APA, in order for the Commission to reserve the right to modify the ALJ's proposal, it apparently would have to afford the parties an opportunity for additional argument before issuing a final decision. (See §649.230(b).) This is another example of how existing statutes are more appropriate for the PUC than the proposed new APA, and is yet another reason why the PUC should be left out of the proposal.

Section 649.160: would extend the time for judicial review under certain circumstances. This could undermine the current statutory program for review of PUC decisions, which is designed to secure prompt review and finality for PUC decisions. Under current law, a party cannot apply for judicial review of a PUC decision unless it applies to the PUC for rehearing within 30 days after the PUC mails the decision. (See P.U. Code §1731(b).) A party must apply to the California Supreme Court for review within 30 days after the PUC acts on the application for rehearing. (See P.U. Code §1756; see also P.U. Code §1733 (situations under which a party can deem an application for

rehearing to have been denied).) Since a party must apply to the PUC for rehearing before seeking judicial review, it is unclear just how the PUC would comply with subsection (a), which apparently contemplates a right to seek judicial review without applying for rehearing. It is likewise unclear, how much additional time the party would have to apply for rehearing or judicial review if the PUC inadvertently failed to provide a required notice. In any event, however, it seems that this provision could introduce undesirable uncertainty into when a PUC decision has become final and is no longer subject to judicial review. It can be argued that allowing additional time for judicial review is desirable when the rights of a single individual and primarily private interests are being adjudicated. Such a provision seems inappropriate for PUC proceedings which often have multiple parties, and for decisions that can impact the rates paid by millions of consumers.

Section 649.170: The PUC often makes its decisions effective immediately. Nevertheless, a party is free to file a petition for modification requesting correction of a mistake or clerical error at any time thereafter, even if a party has filed an application for rehearing claiming legal error. In contrast, an application under proposed §649.170 cannot be made after the effective date of a decision, or after administrative review has been initiated. It does not appear that such restrictions should apply to the PUC.

Sections 649.230 & 649.240: As explained in the introductory portion of these comments, the PUC should remain free to determine to what ALJ it should assign a remand.

Sections 649.310 - 649.330: All current PUC decisions are available through the Lexis electronic service. (See P.U. Code §323.) Furthermore, the PUC has never limited the ability of parties to citing only specifically listed "precedent" decisions.[11] A provision requiring the designation of "precedent " decisions may make sense for agencies that issue hundreds of nearly identical decisions (composed from stock paragraphs) that are not readily available. Such a provision makes no sense for the PUC where most decisions are individually crafted and potentially useful as precedent in future proceedings, and where all current decisions are available through an electronic research service to which many lawyers subscribe. The PUC does publish some selected decisions in hard

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11 Public Utilities Code §1705 does provide that PUC decisions under the expedited complaint procedure (P.U. Code §1702.1) are not precedential.

copy. Those selected decisions are indexed by subject matter at the back of each volume. However, in order to allow parties the right to cite all potentially relevant cases as precedent, the proposed new APA would require that, starting in 1996, the Commission index all of its decisions. Given that the Commission's decisions are available on the Lexis service, there is no reason to require the PUC to incur this unnecessary expense.

Section 650.120: As mentioned above, the Commission often makes its decisions effective immediately. (See P.U. Code §1731(a) authorizing this practice.) The proposed section would appear to restrict the Commission's ability to grant a stay of a decision after the decision has become effective. In light of the PUC's continuing and general jurisdiction over utilities, and the fact that a party cannot apply for judicial review without first applying for rehearing (P.U. Code §1731(b), it makes no sense to prohibit the Commission from issuing a stay after a decision has become effective. Indeed, P.U. Code §1733(b) authorizes such a practice under certain circumstances (when an application for rehearing has been filed, the decision has become effective, and the PUC has not completed action on the application for rehearing within 60 days).

Concluding Comments: As shown above, many of the mandatory provisions of the proposed new APA are inappropriate for the PUC. It makes little sense to try to accommodate the PUC's unique functions and situation by giving the PUC additional authority to issue regulations which would allow it to modify or opt out of even more provisions of the proposed new APA. Little of the proposed new APA would actually apply to the PUC and the PUC would have to go through considerable unnecessary effort to promulgate regulations simply restating current law. The PUC's Legal Division submits that the wiser course of action is simply to recognize the uniqueness of the PUC by leaving it out of the proposed new APA.

Further considerations support this conclusion. In addition to those situations where the proposed new APA requires "adjudicative proceedings", the PUC also uses hearing-type procedures to set rates for (or otherwise regulate) a class of utilities. These proceedings are not subject to the proposed new APA, and the procedures contained in the proposed new APA are certainly not appropriate for such proceedings. Furthermore, the PUC conducts rulemakings without conducting evidentiary hearings. (See Cal. Code Regs., tit. 20, Art. 3.5.) Thus, subjecting the PUC to the proposed new APA would apparently require the PUC to have three different sets of procedural rules (i.e. one for "adjudicative proceedings", one for hearing-type procedures used in other situations, and one for rulemakings.) Furthermore, proceedings that the proposed new APA treats as "adjudications" are often consolidated with proceedings that would not be subject to the proposed new APA. Thus, there could

easily be confusion as to whether or how the proposed new APA would apply to a particular PUC hearing or PUC decision.[12] All of these factors argue for leaving the PUC out of the proposed new APA.

Specific Public Utilities Code Sections that Should Not Be Repealed

The PUC Legal Division submits that no provisions of the Public Utilities (P.U.) Code should be repealed, because the proposed new APA should not apply to the PUC. Even if the proposed new APA were to apply to the PUC, most of the existing statutory provisions would have to be retained (although they might have to be rewritten for clarity). As explained above, the PUC often conducts evidentiary-type hearings in proceedings that are not covered by the proposed new APA. For example, the PUC often conducts evidentiary hearings in cases that set rates for a whole class of utilities. Accordingly, the PUC would need to retain the current statutory provisions governing its hearing procedures to apply to hearings that would not be subject to the new APA.

In addition to these general reasons why P.U. Code sections should not be repealed, there are more specific reasons why individual P.U. Code sections should not be repealed. The following paragraphs list many of these sections and briefly explain the specific need for their retention.

P.U. Code §310: The PUC's longstanding practice is to assign one (or more) Commissioner(s) and an ALJ to each proceeding. This practice is authorized by P.U. Code §§310 & 311(b). The assigned ALJ typically acts as the presiding officer and is always present during the hearings. However, the assigned Commissioner may act as the presiding officer on occasion, and most importantly, may issue an assigned Commissioner's ruling. Such rulings typically dispose of important procedural points in a proceeding. Given the central role of policymaking in PUC "adjudications" (as discussed above), it is imperative that the

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12 The definition of "decision" contained in the proposed new APA does not encompass all of the opinions and orders that the Commission issues. Nevertheless, in common parlance they are all decisions. If the PUC will have to restrict its use of the term to those opinions and orders that are "decisions" within the meaning of the APA (even if just in order to avoid confusion), then it will likely have to create new terminology and amend its existing statutes and regulations that cover matters that do not fall within the proposed new APA.

assigned Commissioner or Commissioners be able to determine the course of a proceeding by deciding matters such as which issues should be considered during the various phases of a proceeding. It is important that the assigned Commissioner have this authority, even though the assigned Commissioner typically is not present for most of the proceeding. Accordingly, section 310 should be retained, inter alia, so that the Commission can continue to assign a Commissioner to each proceeding, without any doubt as to the propriety of this practice pursuant to proposed §643.110.[13]

P.U. Code §311: In addition to the reasons discussed above, there are a number of other reasons why this statute should be retained. Subsection (d) makes it clear that only the Commission, and not an ALJ, can issue a final decision. (See the last two sentences of subsection (d).) Subsection (d) also establishes the framework under which the Commission receives comments on an ALJ's proposed decision. That subsection generally requires a 30 day period after the filing and service of a proposed decision before the Commission can issue its decision. Article 19 of the PUC's Rules of Practice and Procedure then establishes the comment procedure that occurs during that period. (Cal. Code Regs., tit. 20, art. 19.) Section 311 also implements the PUC's constitutional authority to issue subpoenas. (See Cal. Constitution, art. XII, §6; P.U. Code §311(a) & (b).)

P.U. Code §312: This section implements the PUC's constitutional authority to punish for contempt. (See Cal. Constitution, art. XII, §6.) In contrast, the proposed new APA would only authorize superior courts to punish a person for contempt before the agency. (See proposed §648.620.) Given the PUC's constitutional authority to punish for contempt, it should not be limited to the procedures provided by the proposed new APA.

P.U. Code §325: This section provides the Commission with some detailed guidelines for establishing expedited procedures to be followed when the President of the United States declares an emergency. This section deals with a more limited set of circumstances than is covered by §§641.310 - 641.380 of the proposed new APA (Emergency Decision). However, it is also not subject to all of the restrictions of those sections. It should

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13 In addition, proposed §643.110 should be drafted so as not to prohibit the assigned Commissioner from functioning as described above.

be retained to allow the PUC to deal with the specific situations it covers as the Legislature thought appropriate.

P.U.Code §454(c): This subsection requires the PUC to permit utility customers, and organizations formed to represent their interests, to testify at certain hearings (subject to certain restrictions). Their right to testify should not be disturbed.

P.U. Code §705: This section provides the method for initiating particular proceedings before the PUC.

P.U.Code §728.5: This section further implements the PUC's constitutional authority to issue subpoenas and punish for contempt. (See Cal. Constitution, art. XII, §6.)

P.U. Code §§1006, 1034, 5379.5, & 7726: These sections provide cease and desist powers that extend to situations not covered by §§641.310 - 641.380 of the proposed new APA (Emergency Decision). The PUC should not be deprived of these powers. Indeed, the proposed new APA should make clear that powers granted by such other statutes are not subject to any additional restrictions contained in those APA sections. Furthermore, §7726(e) specifically authorizes delegation of the PUC's cease and desist power, a matter not specifically addressed by the emergency decision sections of the proposed new APA.

P.U. Code §§ 1033.7, 1070.5, 3774.5, 4022, 5285.6, 5378.5, & 5378.6: These statutes direct the PUC to summarily suspend or revoke the operating authority of motor carriers upon receipt of a written recommendation from the California Highway Patrol (CHP) where: (i) the carrier has consistently failed to abide by certain safety regulations; (ii) the carrier's operations present an imminent danger to public safety: or (iii) the carrier has failed to enroll all drivers in the pull notice system. (See, e.g., P.U. Code §1033.7(a).) While the situation described in (ii) would be covered by the emergency decision sections of the proposed new APA, the other two situations would appear not to be. (Compare proposed §641.320(b).) There is no reason to disturb the Legislature's decision that these other two situations also justify summary suspension.

Another reason for retaining these P.U. Code sections is that the emergency decision sections of the proposed new APA are designed to deal with the situation where a single agency both determines that emergency action should be taken and then takes action. Under these P.U. Code sections the CHP determines that there should be a summary suspension and the PUC then suspends the carrier's operating authority. (See, e.g., P.U. Code §1033.7(a).) The PUC does not exercise any discretion in

initially suspending the carrier's operating authority.[14] Therefore, it is the CHP which provides the motor carrier with notice and an informal opportunity to be heard before the PUC can act. (See, e.g., P.U. Code §1033.7(c)(3).) In contrast, §641.330(a) of the proposed new APA apparently would require the PUC to give the respondent notice and an opportunity to be heard before the PUC could take action. Similarly, under §641.340 of the proposed new APA, the agency is to issue an emergency decision explaining the basis for its action. However, given the respective roles of the PUC and the CHP, the P.U. Code sections direct the CHP to provide the motor carrier with the basis for the CHP's recommendation that the carrier's operating authority be suspended. (See, e.g., P.U. Code §1033.7(c).)

These P.U. Code sections provide different time periods and methods for obtaining further consideration of the underlying issues than would be provided under the emergency decision sections of the proposed new APA. (See, e.g., P.U. Code §§1033.7(b) & (d).) These provisions are tailored to the specific situations that these P.U. Code sections deal with. There is no reason to require additional procedures under §§641.350 and 641.370 of the proposed new APA. Indeed, it would be difficult for the PUC to meet the time period required by §641.370, since the Commission generally meets only once every two weeks.

P.U. Code §§1033.8(b) & (c); 1070.6(b) & (c); 3774.6(b) & (c); 5285.5(b) & (c); 5378.7(b) & (c): These statutes direct the PUC to summarily suspend or revoke the operating authority of a motor carrier when a carrier has failed to pay a final judgment to an employee pursuant to §3716.2 of the Labor Code. As with the CHP statutes discussed immediately above, there is no reason to disturb the Legislature's determination that summary action is justified in this situation, or that the procedures specifically tailored to this kind of suspension or revocation are adequate. Indeed, given the limited factual issues presented (see, e.g., the last sentence of §1033.8(c)), there seems little need here for the more complex emergency decision procedures contained in the proposed new APA.

P.U. Code §§1207 - 1213: These sections provide the particular procedures to be followed when the PUC establishes the just compensation to be paid when property is taken or damaged in a railroad grade separation project. Many of these procedures are unique to such proceedings. Indeed, P.U. Code §1210 provides

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14 Accordingly, the authority to order these suspensions has been delegated to the Commission's staff. It is not clear that the authority to issue emergency decisions could be delegated under the proposed new APA.

for substitute service by means of publication, a method of service not authorized by the proposed new APA.

P.U. Code §§1403 - 1412: These sections provide the particular procedures to be followed when the PUC establishes the just compensation to be paid for utility property being acquired by a political subdivision. In many respects, these provisions are similar to those contained in P.U. Code §§1207 - 1213. Section 1407, like §1210, provides for substitute service by means of publication.

P.U. Code §1701: This section implements the PUC's constitutional authority to establish its own rules of practice and procedure. (See Cal. Constitution, art. XII, §2.) It also provides that "[n]o informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, [or] decision . . . made, approved, or confirmed by the commission."

P.U. Code §1702: This section specifies what complaints may be filed with the PUC. It further requires 25 signatures on certain kinds of complaints.

P.U. Code §1702.1: This section establishes an expedited complaint procedure, similar to small claims procedure, for certain complaints against utilities. A party may not be represented by an attorney, and the proceedings are not reported. The proposed new APA contains no analogous procedure.

P.U. Code §1703: This section specifies that no motion shall be entertained, and no court shall reverse a PUC decision, for misjoinder of causes of action or misjoinder or nonjoinder of parties. It also provides that the PUC shall not be required to dismiss a complaint because there is no direct damage to the complainant. The proposed new APA does not contain any such provisions.

P.U. Code §§1704, 1705, & 1706: These sections (as well as many others) apply both to proceedings that would be covered by the proposed new APA and to proceedings that would not. In addition, §1705 provides that decisions issued under the expedited complaint procedure are not precedential. Section 1706 also specifies the record on court review, a subject not covered by the current tentative recommendation.

P.U. Code §1707: This section specifies that a public utility may file a complaint on any grounds upon which complaints may be filed by other parties, and that such a complaint may be heard ex parte by the PUC.

P.U. Code §1708: This section permits the PUC to rescind, alter, or amend any order or decision made by it (so long as

notice and opportunity to be heard is provided as required in the case of complaints). This is an important provision that defines the extent of the PUC's authority. The proposed new APA contains no comparable provision.

P.U. Code §1731: Subsection (b) grants rights to certain non-parties to file for review (rehearing) of PUC decisions. It also contains provisions requiring exhaustion of administrative remedies within a specified time period as condition of a court challenge. The proposed new APA does not contain any similar provisions. In addition, subsection (a) clarifies that the PUC can make a decision effective before it mails the decision to the parties.

P.U. Code §1732: This section requires specificity in the application for rehearing and bars a court challenge based on any grounds not specifically set forth in the application for rehearing. The proposed new APA does not contain similar provisions. The requirement that a party apply for rehearing before petitioning for judicial review is most important in light of the fact that only the California Supreme Court has jurisdiction to review the PUC's decisions. (See P.U. Code §1759.) This exhaustion of remedies requirement ensures that the PUC has an opportunity to correct any legal errors in its decisions before judicial review, and thus helps to conserve limited judicial resources.

P.U. Code §§1733, 1734, & 1735: Section 1733 provides for certain automatic stays of PUC decisions. There is no similar provision in the proposed new APA. Both sections 1733 and 1735 authorize the PUC to issue stays. The PUC's authority to issue stays under these sections is not limited to the period before the decision becomes effective. Compare proposed §650.120. Sections 1733 and 1734 also permit a party to file a petition for review with the Supreme Court if the PUC does not act on its application for rehearing, or a rehearing, within specified time periods. The proposed new APA does not contain provisions on that subject.

P.U. Code §1736: This section specifies the powers the PUC may exercise when it issues a decision after rehearing. The proposed new APA contains no similar provision.

P.U. Code §1794: This section authorizes the taking of depositions. Unlike proposed §645.130(b)(4), it does not require a showing that the witness "will be unable or can not be compelled to attend the hearing."

P.U. Code §§ 1795, 3741, & 5258: Under these sections the PUC can order a person to give incriminating testimony, and in return the person receives immunity from prosecution. The proposed new APA contains no similar provisions.

P.U. Code §§ 1801 - 1812: These sections authorize compensation for advocate's fees and other costs incurred by public utility customers when participating or intervening in PUC proceedings. The proposed new APA contains no similar provisions.

P.U. Code §§1821 - 1824: These sections deal with the verification of computer models used as the basis for testimony in PUC proceedings. The proposed new APA does not cover this subject.

P.U. Code §§2707, 3731, 3739, 5251, & 5256: These sections apply procedures applicable under the Public Utilities Act (P.U. Code §§201 - 2119) to various other PUC proceedings. As explained above, the Public Utilities Act sections need to be retained; therefore these sections should be retained as well.

P.U. Code §3557(d): This section provides a procedure for summarily suspending the PUC operating authority of an "owner-operator" whose driver's license has been suspended or revoked. The owner-operator has an opportunity, before the PUC takes action, to show cause why his operating authority should not be suspended. Furthermore, the factual issues involved are likely to be simple. Accordingly, the more elaborate procedures required for emergency decisions under the proposed new APA (§§641.310 - 641.380) do not seem necessary here.

P.U. Code §5285(b): This section permits the PUC to suspend the permit of a household goods carrier without a hearing under circumstances not covered by §§641.310 - 641.380 of the proposed new APA (Emergency Decision).

As demonstrated above, numerous procedural provisions of the Public Utilities Code would have to be retained even if the PUC were made subject to the proposed new APA. Thus, rather than simplifying and clarifying the procedural rules applicable to PUC proceedings, subjecting the PUC to the proposed new APA would complicate, and make it more difficult to determine, the procedural rules applicable to PUC proceedings. The Legal Division of the PUC submits that that is one more reason why the PUC should be exempted from the proposed new APA.

Very truly yours,

Peter Arth, Jr.
General Counsel

PAJ:jtp:lk:ltq

STATE OF CALIFORNIA - STATE AND CONSUMER SERVICES AGENCY PETE WILSON, Governor

DEPARTMENT OF GENERAL SERVICES
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August 30, 1993

California Law Revision Commission
4000 Middlefield Road
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Palo Alto, CA 94303-4739

RE: COMMISSION'S MAY 1993 TENTATIVE RECOMMENDATION;
ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

Dear Commission Members:

On behalf of the Department of General Services, Office of Legal Services, I wish to commend the thought and effort evidenced by the above-referenced recommendation. I hope the following comments made on behalf of the Office of Legal Services will be helpful as the process of refining your recommendation continues.

First, this Office believes that access is at least as important as procedural uniformity with respect to the public's dealings with State government. Broad application of the proposed adjudicative procedures will likely aid attorneys practicing administrative law. It is of great concern, however, that the availability of simple, swift, inexpensive and flexible procedures for reviewing past or proposed governmental actions will be curtailed.

Second, we believe the "customizing provisions" are very useful and are a creative means of addressing the need for flexibility. It is a significant concern, however, that at a time of budgetary limitation, a significant amount of time and money will be devoted to rulemaking.

Third, we wish to draw your attention to a particular type of proceeding: hearings held pursuant to Skelly v. State Personnel Board (1975) 15 Cal.3d 194. These hearings are held throughout State government as part of the process that leads up to State Personnel Board ("S.P.B.") adverse action appeal hearings. If it is determined that Skelly hearings are governed by the adjudicative procedures in your proposal, one of two results will occur: either Skelly hearings (which are supposed to be speedy and informal) will become as complex and time-consuming as the S.P.B. hearings they precede or numerous State agencies will undertake duplicative rulemaking in order to modify the adjudicative procedures with respect to Skelly hearings. These undesirable and no doubt unintended results would be avoided if your proposal specifically excluded Skelly hearings from the scope of the proposed adjudicative procedures.

Please feel free to contact me regarding these comments as well as any other matters pertaining to your proposal.

Very truly yours,

JEFF MARSCHNER
Chief Counsel

JM:DB:mh
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STATE OF CALIFORNIA PETE WILSON, Governor

STRS

P.O. BOX 15275-C
SACRAMENTO, CA 95851

John H. Demoully August 31, 1993
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, Ca. 94303-4739

Re: Administrative Adjudication by State Agencies:
Tentative Recommendation

Dear Mr. DeMoully:

This is to express the comments of this office on the above referanced tentative recommendation of the Law Revision Commission. The opinion of the Teachers' Retirement Board has not yet been requested, so any opinions expressed herein are those of the legal office of the State Teachers' Retirement System (STRS). A representative of our office has attended most of the Commission meetings at which the revision of the California Administrative Procedure Act (APA) has been discussed and has reviewed the various rewrites of the Act. We appreciate the opportunity to comment on this tentative recommendation.

It is the opinion of this office that the concept of a universal APA is a seriously flawed one, for the reasons discussed again and again at the Commission meetings. These reasons include the impossibility of applying one act to all state agencies, the costs of changing the administrative practices of the various agencies, and the increased complexity of the proposed Act.

However, recognizing the possibility that the Commission will proceed with this project, we would like to point out two specific provisions to which we object. First, when acting as a reviewing authority, the State Teachers' Retirement Board (Board) would be limited to a review of the record. No additional evidence could be heard, except for newly-discovered evidence or evidence that was otherwise unavailable at the time of the hearing. Under present law, if STRS does not adopt a proposed decision, it may "decide the case upon the record, including the transcript, with or without taking additional evidence...." (Govt. Code, § 11517 (c).) The Act does not permit the option of taking additional evidence, requiring that the Board make its decision based on the record. (649.210.)

Second, credibility determinations of the presiding officer (ALJ) based on observation of demeanor and the like would be entitled to great weight upon judicial review of the administrative decision. Proposed section 649.120 would require an ALJ to include in a proposed decision a statement of the factual and legal basis for the decision as to each of the principal controverted issues. It goes on to state that "If the factual basis for the proposed or

final decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination." This determination would then be entitled to great weight upon judicial review, regardless of the final decision by the Board.

We hope the foregoing comments are helpful to the Commission in its study of the Administrative Procedure Act. Again, we thank you for the opportunity to provide input.

Sincerely,

Lawrence P. Boulger
Chief Counsel

August 30, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Public comment on staff's TENTATIVE RECOMMENDATION of proposed bill on Administrative Adjudication by State Agencies

There are many things about this Tentative Recommendation that are objectionable to me. Further, a lay person such as myself lacks the ability to properly address and articulate these concerns. I do not address all of my concerns because of time constraints; those recommendations not addressed should not be considered endorsed.

Following are some general observations, objections and some recommendations. In general, it appears to me that this proposed bill gives much more power and authority to administrative agencies; at the same time it diminishes the ability of a respondent to defend themselves. It certainly does not address some real problems with administrative adjudication by regulatory agencies. It certainly will not improve the business climate and encourage any new business which is subject to regulation to be established here and it will further deter businesses from locating here as opposed to some other state if they fully investigate and learn the facts. I would not personally recommend to a friend to locate a new business here because of the regulatory climate.

ISSUE: OFFICE OF ADMINISTRATIVE LAW (OAL) FUNDING IS INADEQUATE TO PROVIDE FOR PROPER STAFFING.

This should not be construed to be critical of OAL. All things considered, OAL does a commendable job.

The recommended new statute, which focuses primarily on Administrative Hearings, builds on the existing Administrative Procedure Act which is in significant part failing due to lack of adequate funding for the OAL.

At the present time there is a serious question as to whether OAL has sufficient staff to properly review proposed administrative regulations and to properly review public comments. Regulations have been allowed to become adopted which are clearly unconstitutional.

Additionally, OAL has a large backlog of "Regulatory Determination Decisions" pending, and there is a very significant

number of "Requests for Determination" that have been "Accepted, but which are not under active consideration." I estimate that now OAL has a three (3) year backlog of Regulatory Determination Decisions.

Some consideration needs to be given here to amendments that will guarantee adequate and appropriate funding for the Office of Administrative Law such as provided for under § 641.470 for the Office of Administrative Hearings.

Perhaps some provision could be made for special fund agencies including in their cost of doing business the work being done by the Office of Administrative Law; with a provisions for those funds going directly to OAL.

ISSUE: OAL'S DETERMINATIONS ARE ONLY ADVISORY.

A significant factor to remember is that OAL Regulatory Determination Decisions are advisory only; these decisions are not binding on state regulatory agencies; only a court can force state regulatory agencies to comply with such a Regulatory Determination Decision.

If true regulatory reform is being sought, there should be a provision that Regulatory Determination Decisions of the OAL are binding upon each agency which is not exempt from the Administrative Procedure Act subject only to appeal by the agency in a Court of Competent Jurisdiction.

ISSUE: INCREASED COSTS TO BUSINESS - MORE BURDENS UNFAIR TO REGULATED BUSINESSES

The authors of these proposed statutes seem to have taken the attitude that those who administer the various agencies boards and commissions are impartial and unbiased; these authors seems to forget that an adversarial relationship exists between government and those businesses that are regulated.

Often those serving on these agencies, boards, and commissions are like the foxes guarding the chickenhouse; not to be trusted! Some professional governmental employees are no better, some seem to have "sold out" to self interest groups and are just as suspect.

Currently, some agencies, boards and commissions have adopted regulations that allow them to impose monetary penalties and mandates to cease and desist from alleged improper conduct, subject only to hearing upon request.

State law allows agencies, boards and commissions to access charges to respondents whose prosecution was successful for all investigation and prosecution cost.

Conversely those respondents who are successful in defense of such charges are not given the same consideration, that is, there is no provision for compensation for legal costs for the preparation and defense against such charges. There should be a provision that allows successful respondents to be compensated for their costs for their preparation and defense.

Otherwise this places respondents in very hostile and unfair business environment; some consideration should be given to fundamental fairness. Hostile business climates force potentially higher costs and therefore higher prices for consumers with no increase in benefits. Hostile business climates also reduce revenue for government.

Another serious problem exists in that some agency officials adopt and implement underground regulations and the only recourse available to those adversely affected is civil action. Many sadly lament about the burgeoning litigation; litigation can be expected to continue to increase in intensity and frequency unless some fundamental fairness is introduced in state regulatory policy. It would not surprise me to see some attorneys start to specialize in such civil cases against the state much as many specialize today in personal injury litigation. The citizens of the state are being unfairly subjected to significant potential civil liability by arrogant state agency officials.

ISSUE: PETITIONS ROUTINELY IGNORED BY REGULATORY AGENCIES

Another problem is that governmental agencies seem to routinely ignore petitions under GC 11347. We enjoy a constitutional right to petition our government, but if government agencies routinely simply ignore the petitions, what is the remedy? Certainly civil action, and another remedy supposedly is a Request for Regulatory Determination from the Office of Administrative Law. If its true that OAL is three years behind in issuing Regulatory Determinations; and if it is also true that the Attorney General is going to continue to assert in Demurrer to the courts that administrative remedy has not been exhausted since a Regulatory Determination has not been issued by OAL to prevent trial; and its also true that when the Determination finally is issued it is not binding upon a regulatory agency; if this is the real world situation presently; where is the effective remedy? There needs to be some consideration to enactment of some provision to "make" government agencies respond to petitions guaranteed under the constitution. Presently the code clearly specifies the agencies responsibility to respond. What is the answer, civil damages from the courts?

Another problem here is that these government entities are represented by the Office of the Attorney General which has developed significant expertise in thwarting attempts to obtain effective remedy in the courts, actually preventing trial through repeated demurrers. The issues of standing, ripeness, exhaustion of administrative remedy, and all type of misleading, misdirec-

tion and conniving by the Office of the Attorney General can be expected in their attempts to keep an aggrieved citizen out of court and/or to delay trial.

These proposed statutes enables agencies, boards and commissions to adopt regulations to further their authority and discretion without compliance with the Administrative Procedure Act. See § 610.940. Adoption of regulations - There is no need for this! There already exists provisions for emergency regulations; under the APA which are subject to review by OAL prior to them becoming permanent.

Imagine the significant expense and damages that can be incurred by a business which is adversely effected by such underground regulations, and the very real possibility that the "state will put them out of business before they have the opportunity for their day in court." Also imagine the significant potential civil liability the citizens of the state are being exposed to as a result of this sham of "fairness" by the state in the regulatory process.

There is particular concern with your proposed Article 6.

Article 6. Enforcement of Orders and Sanctions
§ 648.610. Misconduct in proceeding
648.610. A person is subject to the contempt sanction for any of the following in a proceeding before an agency under this part:
(a) Disobedience of or resistance to a lawful order.
(b) Refusal to take the oath or affirmation as a witness or thereafter refusal to be examined.
(c) Obstruction or interruption of the due course of the proceeding during a hearing or near the place of the hearing by any of the following:
(1) Disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the proceeding.
(2) Breach of the peace, boisterous conduct, or violent disturbance.
(3) Other unlawful interference with the process or proceedings of the agency.
(d) Violation of the prohibition of ex parte communications under Section 648.520.
(e) Failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer under Chapter 4 (commencing with Section 645.110), or moving, without substantial justification, to compel discovery.
Comment. Section 648.610 restates the substance of a portion of former Section 11525. Subdivision (c) is a clarifying provision drawn from Code of Civil Procedure Section 1209 (contempt of court). Subdivision (d) is new. Subdivision (e) supersedes former Section 11507.7(i).

§ 648.620. Contempt
648.620. (a) The presiding officer or reviewing authority may certify the facts that justify the contempt sanction against a

person to the superior court in and for the county where the proceeding is conducted. The court shall thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there to show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court has jurisdiction of the matter.
(b) The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.
Comment. Section 648.620 restates a portion of former Section 11525 of the Government Code, but vests certification authority in the presiding officer or reviewing authority. For monetary sanctions for bad faith tactics, see Section 648.630. For enforcement of discovery orders, see Sections 645.310-645.360.

§ 648.630. Monetary sanctions for bad faith actions or tactics
648.630. (a) The presiding officer or agency may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.
(b) The order, or denial of an order, is subject to administrative and judicial review in the same manner as a decision in the proceeding, and is enforceable by writ of execution, by the contempt sanction, or by other proper process.
Comment. Section 648.630 is new. It permits monetary sanctions against a party (including the agency) for bad faith actions or tactics. Bad faith actions or tactics could include failure or refusal to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer in discovery, or moving to compel discovery, frivolously or solely intended to cause delay. An order imposing sanctions (or denial of such an order) is reviewable in the same manner as administrative decisions generally.
For authority to seek the contempt sanction, see Section 648.620. For enforcement of discovery orders, see Sections 645.310-645.360.

In my opinion there is danger here that individuals/businesses who are belligerently asserting and demanding their rights will be cited for contempt; or otherwise discouraged from exercise of their constitutional rights. This is objectionable.

Comment:

The individual rights guaranteed by our constitution can be compromised or ignored by our government. For example, in U.S. vs. JOHNSON (76 Fed, Supp. 538), Federal District Court Judge James Alger Fee ruled that,

The privilege against self-incrimination is neither accorded to the passive resistant, not to the person who

is ignorant of his rights, nor to one who is indifferent thereto. It is a FIGHTING clause. It's benefits can be retained only by sustained COMBAT. It cannot be claimed by attorney or solicitor. It is valid only when insisted upon by a BELLIGERENT claimant in person. McAlister vs. Henkle, 201 U.S. 90, 26 S.Ct. 385, 50 L. Ed. 671; Commonwealth vs. Shaw, 4 Cush. 594, 50 Am. Dec. 813; Orum vs. State, 38 Ohio App. 171, 175 N.E. 876.

Note the verdicts confrontational language: "FIGHTING", "COMBAT", and most surprising, "BELLIGERENT".

The court ruled that the constitutional right against self incrimination (Article V of the Bill of Rights) is not automatically guaranteed to any citizen by any government branch or official. Moreover, despite the government's usual propaganda, this right is not made available to all persons: It is not available to the "passive", the "ignorant" or the "indifferent". Nor can this right be claimed by an attorney on behalf of his client. The right against self-incrimination is available only to the knowledgeable, "belligerent claimant", to the individual willing to engage in "sustained combat" to FIGHT for his rights.

Here we see that Government claims it is obligated to recognize your Constitutional right against self incrimination only IF YOU FIGHT for that right. The above ruling claims that our courts are free to ignore this right for any citizen who is 1) ignorant of his right and/or 2) lacks the courage to fight for his right. Therefore, anyone who trusts the courts (or even his own lawyer) to protect his Constitutional right against self-incrimination is a fool.

This also applies to other constitutional rights. They must be asserted or they will be lost. Any statute that usurps or discourages this assertion will not stand.

Relative to § 648.450. Hearsay evidence and the residuum rule. I don't understand this proposal. If it allows the state to use hearsay evidence I am opposed and it seems to me that it is unconstitutional. How can a respondent cross examine hearsay evidence. If the state has to resort to hearsay evidence it doesn't have a strong enough case to proceed. Hearsay evidence should not be allowed under the statutes.

Additionally, it enables an agency to adopt by regulation a different rule, presumably broader, for admission of hearsay evidence. If find this very objectionable and unwise.

Relative to Burden of Proof
This enables an agency to change the Burden of Proof through regulatory action. This is very objectionable to me.

Relative to 11528. In any proceedings under this chapter any agency, agency member, secretary of an agency, hearing reporter, or administrative law judge has power to administer oaths and affirmations and to certify to official acts.

This gives wide authority to too many people to administer oaths and certify acts; to people who may not be "sworn" and even perhaps newly hired clerical staff and is therefore objectionable.

Sincerely,

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cc
Governor
California Business Roundtable

CSEA California School Employees Association

August 30, 1993

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

Re: **Administrative Adjudication, Tentative Recommendation**

Dear Judge Marshall and Members of the Commission:

California School Employees Association (CSEA) represents over 170,000 public workers in California, most of whom are classified workers employed in public schools or community college districts. While CSEA[1] occasionally represents workers before state agencies such as the Public Employment Relations Board, the Department of Motor Vehicles, the Unemployment Insurance Appeals Board and the Public Employees Retirement System, most of CSEA's representation is before local agencies.

Early in its deliberations, the Commission decided not to extend coverage under the Administrative Procedure Act (APA) to local agencies, except where existing statutes made it applicable or the agency voluntarily adopted the provisions of the APA. I am unaware of any school or community college district that has voluntarily adopted the provisions of the APA, nor do existing statutes make the APA applicable to these districts except for a few limited situations, none of which involve students, curriculum, or classified workers.

Footnote 21 of the Tentative Recommendation is misleading. While school districts are listed in Government Code section 11501, the application of the APA is "determined by the statues relating to the agency." (Gov. Code § 11501, subd. (a).) School districts were added to Government Code section 11501 in 1961 but, until the statute was repealed and reenacted in 1977 (Stats. 1977, Ch. 122, § 2, p. 558), the statute read: "School districts under section 13443 of the Education Code." (See, e.g., Stats. 1976, Ch. 1185, § 925, p. 5321.) When the Education Code was reorganized in 1977, section 13443 became sections 44949 and 87740, two of the statutes governing the dismissal of certificated workers. No other school district or community college district adjudications are governed by the APA. (See,

[1] This acronym should not be confused with the same acronym for California State Employees Association, a separate and smaller association representing state workers.

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e.g., Ed. Code §§ 48918, 49070, 45113, 45261, 88013 and 88081.) Footnote 21 should be eliminated or revised and the comment to section 612.120 of the new APA should be corrected since Education Code sections 44944 and 44948.5 apply only to school certificated workers.

CSEA supports a comprehensive APA, including (1) mandatory application of the APA to local agencies, (2) a central panel of hearing officers for most formal hearings, (3) less opportunity for agencies to escape the APA by adopting regulations that alter default statutory provisions, and (4) an all-inclusive definition of "adjudication" with provisions for summary proceedings where appropriate. No formal hearing should be permitted without at least internal separation of functions. (Contra, new APA § 643.320 subd. (b).)

While CSEA would be delighted if the Tentative Recommendation were revised to include these provisions, "politics is the art of the possible"[2] and the Commission is not writing on a blank slate. Under these circumstances, CSEA approves the Tentative Recommendation at this time.

The Commission has undertaken a difficult task and done an excellent job of balancing competing interests. Thank you for your efforts.

Sincerely,

WILLIAM C. HEATH
Deputy Chief Counsel

cc: Bud Dougherty, ED
Margie Valdez, CC
Barbara Howard, DGR

[2] Attributed to Otto von Bismarck, (Bartlett's Familiar Quotations (15th ed. 1980) p. 553, note 3.)

State of California

Memorandum

To : California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Date: AUG 31 1993

William R. Attwater
Chief Counsel
OFFICE OF THE CHIEF COUNSEL
From : STATE WATER RESOURCES CONTROL BOARD
901 P Street, Sacramento, CA 95814
Mail Code: G-8

Subject: COMMENTS ON ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

Thank you for this opportunity to comment on the Tentative Recommendation on Administrative Adjudication by State Agencies. The State Water Resources Control Board, while sharing many of the problems common to all administrative agencies, is very different in some ways. Unique to all state agencies is our system of planning and adjudication by our nine Regional Water Quality Control Boards. With review of Regional Water Board matters as well as all rulemaking vested in the State Water Board, this internal, administrative, appellate system occurs nowhere else in state government. Furthermore, the magnitude of our adjudications is unusual. It is rare in the state administrative system to have as many affected and interested parties (sometimes many dozen) as commonly appear in both our water quality and water rights disputes.

Because of the unique nature of our water quality administrative system and the somewhat unusual character of our water rights hearings, most of my comments are focused on ways to blend our needs with the obvious desirability of enhancing statewide consistency in administrative adjudication. While I do not wish to overly burden your task of streamlining the system, we have certain problems which ought to be addressed. I especially appreciate the built-in flexibility which the proposal creates. For the most part, my concerns can be addressed through use of those rules which allow us to establish our own.

In some instances, even though I recognize that the proposal permits agencies to implement regulations modifying the procedures, I would suggest changes for the benefit of all.

Adopting regulations is no picnic and, to the extent it can be avoided, everyone will be better served.

PART 1. GENERAL PROVISIONS.

Chapter 1. Preliminary Provisions.

*Section 610.940. Adoption of Regulations.

The State Water Board supports the inclusion of transitional provisions in the bill. In particular, I support an exemption from Office of Administrative Law (OAL) review of interim regulations. At best, OAL review will only delay the process. At worst, OAL will seek to use its review authority over procedural rulemaking to exercise control over adjudicatory decisions. In fact, OAL has sought to exert control over State Water Board adjudicatory decisions on the pretext that because they are given precedential effect, they are quasi-legislative. I recommend that the proposed APA go farther and exempt all rulemaking pursuant to the adjudicatory provisions of the APA from OAL review.

Even without OAL review, administrative rulemaking procedures are sufficiently cumbersome that agencies are reluctant to engage in rulemaking unless absolutely necessary. Agencies are not likely to adopt rules modifying APA adjudicatory procedures unless they have good reason to do so.

Finally, this provision fails to address the entirely possible situation in which an agency has approved permanent regulations before June 30, 1997 but OAL has rejected them. In such a case, the interim regulations should remain valid until such time as permanent regulations are approved by OAL.

Chapter 2. Application of Division.

*Section 612.150. Contrary Express Statute Controls.

This provision which allows conflicting statutes to prevail over this division is entirely appropriate. The note at the top of page 109 which indicates that an effort will be made to ferret out all conflicting statutes and have them repealed is not. Extra emphasis should be given to allowing agencies to identify special and unique statutes which need to remain on the books. Otherwise, more rulemaking will be necessary to reenact a provision which has been voided by statute.

At this point in time, I would recommend that no provisions of the Porter-Cologne Water Quality Control Act (Water Code, Division 7) be repealed. I would also recommend that all provisions relating to the adjudication of water rights (Water Code, Division 2) be left undisturbed. To the extent that there

are conflicts between those statutes and the proposed APA, I feel that the specific rules in the Water Code better suit our needs.

If your staff concludes that certain sections should be repealed, I would appreciate an opportunity to discuss the matter before legislation is proposed.

*Section 612.160. Suspension of Statute.

This would allow the Governor to suspend the APA if necessary to avoid a denial of funds or services from the federal government. It is unclear whether this section would apply if the operation of the APA merely would delay the receipt of funds or services.

Chapter 3. Procedural Provisions.

*Section 613.110. Voting by Agency Member.

This section differs from the State Water Board's existing requirement that Board members vote in person at a meeting. (Water Code Section 183.) The proposed section would allow voting by mail or otherwise. It appears there is no provision for agency regulations to modify this provision. The State Water Board would prefer the option of keeping its present requirement.

*Section 613.230. Extension of Time.

This adds a five-day period to any service of notice by mail, fax, or electronic delivery. This changes the existing notice requirements which require mailing a minimum number of days before a hearing or a deadline for submitting materials. In expedited proceedings such as temporary urgency changes or permits, or actions to respond to emergency conditions during a drought, this could cause critical delays in taking action. The existing statutory notice requirements should not be disturbed without examining all the effects. The State Water Board would prefer the option of keeping its present requirements.

*Section 613.320. Representation by Attorney.

An agency should be allowed to adopt regulations that impose qualification and disciplinary standards for attorneys, not just for lay representation (§ 613.330). The authority to seek contempt is not sufficient. The agency should have authority to preclude an attorney from practice before the agency in appropriate cases (such as intentional misrepresentations to the agency).

Chapter 4. Conversion of Proceedings.

*Section 614.120. Presiding Officer.

This provides that the hearing officer responsible for a proceeding that is converted to another type of proceeding shall secure the appointment of a successor, for the converted proceeding. This provision leaves out the possibility that it may be more appropriate for the agency head to make this appointment, not the hearing officer. This section should be amended so that the agency head can appoint a successor.

PART 4. ADJUDICATIVE PROCEEDINGS.

Chapter 1. General Provisions.

*Section 641.140. Compilation of Regulations.

Having all agency procedural requirements compiled in one volume of the California Code of Regulations is neither necessary nor desirable. Many procedural requirements relate to exemptions or variances from substantive requirements, and separating the procedural requirements may have the effect of taking them out of context. Moreover, any attorney who looks only at an agency's procedural regulations, and fails to look at the substantive requirements, courts disaster. Separating out the procedural regulations is a trap for the unwary. Finally, it means that many regulations will have to be printed twice, once in the consolidated procedural regulations and once in the agency's own regulations, increasing the cost to subscribers to the Code of Regulations.

*Section 641.210 et seq. Declaratory Decision.

The procedures for declaratory decisions assume that declaratory decisions will be limited to cases where the facts are not disputed, and the agency will decide the applicable law. In water law, this procedure will not often be workable, as decisions will hinge on mixed questions of fact and law. There are, however, cases where it would be very useful for a water right holder to obtain a declaratory decision, and it is feasible to make the necessary factual decisions. The declaratory decisions procedures should allow sufficient flexibility to make factual determinations in appropriate cases.

*Section 641.310. Emergency Decision.

The provisions for emergency decisions are too narrow. Allowance should be also be made for interim relief to prevent irreparable harm pending the outcome of administrative proceedings, especially where those proceedings may take a long

time. Of course, for non-emergency interim relief, the procedures should allow more "process" than in an emergency. The interim relief proceedings should be similar to the proceedings available for a preliminary injunction in court.

It should also be made clear that a statutory emergency triggers this article without resort to regulations.

*Section 641.320. When Emergency Decision Available.

This section allows emergency action based only on public health, safety or welfare reasons. It should include potentially irreparable adverse effects on the environment, particularly to fish and wildlife.

*Section 641.370. Agency Review.

This requires an agency that issues an emergency decision to review it within 15 days and confirm, revoke, or modify it. This is too short a period for notice to other interested parties. Ten days' notice is required for a public meeting and, if five days are added because of Section 613.230, there is no time for preparing a notice after the respondent serves the agency. If a weekend occurs at the end of the 15 days, this period would be even shorter.

Chapter 2. Commencement of Proceeding.

*Section 642.220 et seq. Application for Decision.

It should be recognized that many agencies may have backlogged applications or complaints, simply because of limited resources. The "application for decision" is likely to be used by persons who already have applications or complaints on file and want to jump to the head of the line. The agency apparently would be forced to either initiate an adjudicatory proceeding promptly or make a final decision not to act on the application or complaint. (§ 642.230.) The agency may not have the resources or the legal authority to do either. The statute should expressly allow the agency to decline to act one way or another, while retaining the application or complaint on file, when an application for decision is filed but limited resources prevent immediate attention to the application for decision. The time limits (§ 642.240) are completely unrealistic in view of the limited resources available. The agency needs to be able to set priorities for its work, instead of having its schedule determined by applications for decision. At a minimum, the limit should be changed to 120 days.

*Section 642.310 et seq. Pleadings.

There should be no requirement for a complaint-like initial pleading in cases where the hearing notice provides adequate

notice of the issues to be considered. This is a good example of where the proposed APA is based on the model of occupational licensing, and may not be appropriate for multi-party proceedings such as water right proceedings before the State Water Board. Filing an initial pleading in effect forces an agency into an adversarial role, where it may be more appropriate to act as a kind of referee. In many cases, it is better to reserve judgment until after the parties present their evidence.

*Section 642.430. Venue.

It should always be appropriate for the agency to hold a hearing in its headquarters office.

Chapter 3. Presiding Officer.

*Section 643.110. Designation of Presiding Officer.

The proposed APA would allow hearings to be conducted by the Board, one or more Board members, or an administrative law judge. The Board may hire its own administrative law judges (ALJs), instead of relying on ALJs from the Office of Administrative Hearings. The State Water Board supports these recommendations.

In the State Water Board's experience, it is important to have adjudicatory hearings conducted by the Board itself. Because the outcome often hinges on mixed issues of law and fact (such as what constitutes waste and unreasonable use), reliance on an administrative law judge would be difficult. Reliance on a central panel of administrative law judges, who may not have expertise in water law and many not be in tune with the policy direction of the Board, would be unworkable.

*Section 643.120. OAH Administrative Law Judge as Presiding Officer.

This section says that, absent a statutory exemption, every agency must use an OAH hearing officer. This is contrary to the Commission's general conclusion, stated in the Introduction, "that there should not be a general removal of state agency hearing personnel and functions to a central panel." This statement would lead one to the assumption that most agencies are exempt by statute, yet it is not clear how one determines which agencies are exempt. Does the mere mention of an alternative hearing procedure in the Water Code exempt the State and Regional Water Boards or must we go to the Legislature for more specific language? The basis we have always used, that we were not listed in Government Code § 11501, will cease to exist when it is repealed.

*Section 643.310 et seq. Separation of Functions.

Administrative Agencies should have flexibility, as they do in most other areas, to modify the provisions governing separation of functions. Four areas, in particular, call for greater flexibility.

First there should be greater allowance for flexibility in non-prosecutorial proceedings, such as review of initial applications (as opposed to permit or license revocations). In such cases, staff does not have the initial burden of coming forward. Like the decision-maker, the staff is primarily responsible for reviewing the application. Nevertheless, the separation of functions mandate would require one set of staff to review the application and make its recommendation at the hearing, and a second set of staff to review the application again and review the first set of staff's recommendations in order to make a recommendation to the Board after the hearing. This separation of functions apparently would be required even in cases where there are no closed sessions, and all discussions between Board and staff are made in public. This involves tremendous duplication of effort. Moreover, as noted in California Radioactive Materials v. DHS, 19 Cal.Rptr.2d 357, 369-70 (1993), the APA ordinarily doesn't apply to such proceedings in the first place. Requiring separation of functions in these kinds of proceedings may backfire. Agencies will have the choice of seeking additional money to do the same work they are now doing, or requesting a statutory exemption from the requirement to hold a hearing in the first place. In view of the State's current budget limitations, the more likely result is that the Legislature will repeal existing hearing requirements.

Second, separation of functions should not be required where, because of the participation of other parties, a third party plays an active role in initiating administrative proceedings and putting on proof. In such case, the role of agency staff may be more like that of an adjudicator than that of a prosecutor. In these circumstances, prohibiting staff from advising the decision-maker is neither necessary nor desirable. It's a bit like prohibiting a Superior Court judge from making a ruling because the judge is required to evaluate the parties' criticism of the judge's own tentative decision. What is needed in such multi-party cases are rules making sure that agency staff participating in the proceeding don't lose their impartiality, not a duplicative staff to advise the decision-maker.

Third, separation of functions should not be required in conference hearings. Again, the additional due process provided by separation of functions isn't worth the additional delay and confrontation.

Finally, the rules on ex parte communication with agency staff (§ 643.340) are too restrictive. Often, allowing parties to discuss their contentions with agency staff helps to expedite proceedings before the Board, particularly where lay representation is involved. Allowing agency staff to discuss the issues with the parties, and let them know about applicable statutes or precedents, allows parties to determine which of their arguments are meritorious and avoid discussion of other arguments. What is important is that staff provide equal access to all parties, make clear that arguments or information provided in connection with discussions with one party are available to all parties, and ensure that staff does not become a conduit for ex parte communication with the Board.

Chapter 4. Intervention.

*Section 644.110 et seq. Intervention.

The proposed rules on third-party intervention are more restrictive than those currently applicable to proceedings before the State Water Board. Many parties who now may intervene as a matter of right would instead have to file motions to intervene. At best the procedures are cumbersome; at worst the statute would create confusion as to the status of parties, such as persons who file protests to water right applications, who currently have the rights of intervenors. Curiously, the section on intervention is not one of those which provides flexibility for modification of procedures through administrative rulemaking. The State Water Board would prefer the option of keeping its present procedure.

Chapter 6. Prehearing and Settlement Conferences.

*Section 646.120. Prehearing Conference.

This section should be amended to provide that agency employees other than the presiding officer may conduct prehearing conferences. This is our practice.

*Section 646.210 et seq. Settlement Conference.

The provisions on settlement should authorize modification by administrative rulemaking.

The statement that the parties may settle "on any terms the parties determine are appropriate" is ambiguous, and may be subject to abuse. Some administrative agencies contend that they may take action as part of a settlement which would otherwise be ultra vires. For example, some agencies contend that they may approve a project in violation of the substantive

provisions of applicable statutes if the approval is part of a settlement.

The proposed APA should expressly address the issue of when the agency may deliberate on settlement proposals in closed session. See Funeral Security Plans, Inc. v. State Board of Funeral Directors (3d Dist. Ct. App. 1993) (allowing closed sessions only if litigation is pending or a hearing has been held and no new evidence is considered.) Because settlement may be proposed before a hearing and evaluation of the settlement may require candid assessment of the strengths and weaknesses of the agency's proposed action, the law should make allowance for deliberation in closed session.

Chapter 8. Conduct of Hearing.

*Section 648.510 et seq. Ex Parte Communications.

The provisions on ex parte communications are both too narrow and too inflexible.

There is no reason to treat non-prosecutorial hearings differently from prosecutorial hearings. Some of the worst abuses occur in the context of the hearings on applications, where the applicant develops an insider relationship with decision-makers.

The proposed APA apparently contemplates that ex parte communications will be prohibited only after an "initial pleading" has been filed. This invites abuse. Apparently ex parte communications would be allowed even after an application or third-party complaint has been filed and even though the agency knows a hearing will be required. Allowing ex parte communications on a pending application or impending prosecutorial proceeding, simply because the initial pleading or hearing notice has not yet been filed, makes a sham of the ex parte communications restriction.

On the other hand, the ex parte communications restriction is insufficiently flexible in some respects. Agencies should be allowed to modify applicable requirements through agency rulemaking. The need for flexibility is particularly important for site visits, contacts concerning related projects or proposals for legislation, and briefings by agency staff.

Chapter 9. Decision.

*Section 649.110. Proposed and Final Decisions.

This requires that an agency issue a final decision within 100 days after the case is submitted, unless the agency sets a different time by regulation. The State Water Board clearly

would have to adopt a longer time limit by regulation. Major water right decisions often require at least 180 days before a draft final decision is issued.

*Section 649.120. Form and Contents of Decision.

This requires that a proposed decision state both the factual and legal basis as to each principal controverted issue. While it is generally advisable to include a discussion of the legal bases for a decision, such a discussion is not currently required and may be inadvisable because of the threat of litigation in some instances, or it may be undesirable to the agency because of the space required adequately to explain a legal position.

More importantly, this section could require the State Water Board to explain why it did not take a particular action on an issue. Our current practice is to write findings only to support the specific terms and conditions the Board imposes in a decision, not to explain why the Board did not adopt other terms and conditions or variations on the terms and conditions. With many parties in each hearing, an explanation of each issue that was not addressed in a complex case could result in an extremely long decision with a substantial amount of useless discussion. Water quality orders and water right decisions may exceed 40 pages without adding unnecessary material. With this change the length of decisions could double.

*Section 649.150. Time Proposed Decision Becomes Final.

This would make a proposed decision final without formal State Water Board action at a specific time after it was issued, unless it was adopted earlier. If the Board is exempt from having water right hearings conducted by the Office of Administrative Hearings, it will be able to adopt a regulation specifying the time period. While this section could aid in administrative processing, it removes some agency control over decisions by removing the requirement that decisions be specifically adopted by an affirmative agency action.

*Section 649.210 et seq. Availability and Scope of Review.

It is not clear from this section whether a Regional Water Board, whose decisions now are reviewable by the State Water Board, may review its own decisions.

These procedures partly conflict with the Water Code and State Water Board practice. With respect to a final decision, these procedures would approximately duplicate the Water Code procedures to petition for reconsideration of a water right decision and the Board's informal review of draft decisions. By circulating a draft decision, listening to comments, and

occasionally reopening a hearing to receive additional evidence or argument before adopting a decision, the Board in practice provides for review of proposed decisions.

The procedures in Article 2 of Chapter 9 are more appropriate when the OAH hears a case than when the agency itself hears the case. Section 649.210(b) allows an agency to preclude or limit administrative review, but does not allow the agency to make Article 2 inapplicable. To resolve statutory conflicts, the Board will have to rely on Section 612.150 which provides that a statute expressly applicable to an agency prevails over a contrary provision in the APA.

*Section 649.310 et seq. Precedent Decisions.

The provisions concerning precedent decisions should allow flexibility for revision through agency rulemaking. The State Water Board should be allowed to continue its practice of giving precedential effect to all its decisions, to the same extent a court would (some decisions recognize that they are based on unique circumstances, but still have precedential effect if those circumstances are repeated).

Indexing should not be required (§ 649.330) if decisions are available on a data base which can be searched for key words. The State Water Board maintained an index of key water right decisions, but it was of limited usefulness in finding appropriate water quality orders. The State Water Board discontinued indexing after the orders were added to the Lexis and Westlaw databases. Use of these databases is a much more effective way of searching for appropriate precedent than use of an index system.

Pacific Gas and Electric Company

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Robert L. Harris
Attorney at Law

August 26, 1993

California Law Revision Commission
4000 Middlefield Rd.
Palo Alto, CA 94303-4737

Re: Comments on Tentative Recommendations --
Administrative Adjudication By State Agencies

Commission Members:

Thank you for this opportunity to comment on your tentative recommendations for the Administrative Adjudication by State Agencies. We commend the Commission for a thorough job; and for the most part, we support the recommended changes to the Administrative Procedure Act (APA). The following comments, however, are submitted for your consideration on those parts we believe should be further revised.

1. SERVICE BY FAX

With today's advancement in technology, accepting electronic filings would, to be sure, save all parties time and resources. We note that proposed APA Sections 613.210; 613.220, and 642.330(c) deal with this issue but only to a limited extent by permitting service by fax for some filings. We suggest that the new APA require agencies that are prepared to accept electronic filings to do so even with initial pleadings.

2. DISCOVERY

In many proceedings the discovery process often becomes a costly endeavor frustrating rather than enhancing the hearing process. Your proposed changes to the discovery rules, providing definite time frames and compulsory disclosure, would greatly improve discovery. However, since Section 645.110(b) would allow some state agencies to modify or make these proposed changes inapplicable to them, the benefits may escape the very agencies whose operations would profit most. With this in mind, we make the following specific comments on the proposed discovery rules.

a. Data Requests - Meaningful discovery requires timely requests and timely responses. We believe the proposed rules specifying times within which parties must not only submit but respond to written discovery requests (§§ 645.210; 645.310) will greatly improve discovery.

b. Subpoenas - Issuing subpoenas should not be routinely allowed as proposed by Section 645.420(a). Parties seeking subpoenas should at least be required to file an affidavit showing good cause along with the subpoena request, and parties should be able to oppose in advance the issuance thereof. While Section 645.430 permits a motion to quash, a showing of good cause would at the time of issuance reduce the necessity of the more expensive motion to quash. Thus, we recommend that Section 645.420 be revised to require at the time of issuance of a subpoena or subpoena duces tecum an affidavit showing good cause for the issuance.

c. Prehearing and Settlement Conferences - We are pleased that the proposed rules would, inter alia, list the matters generally covered at prehearing conferences and allow the use of telephonic prehearing conferences. We do suggest, however, that the presiding officer have authority to accord parties an opportunity to enter into a nondisclosure agreement prior to a settlement conference, in the event they may need more than the evidentiary protection proposed by Section 646.230.

d. Miscellaneous - We think proposed Section 642.210(b) (the continuing duty to disclose matters related to discovery requests); Section 645.130 (deposition of unavailable witnesses), and Sections 645.310 - 645.350 (motions to compel discovery) add immensely to the discovery process.

3. THIRD ROUND PLEADINGS

Far too often third round pleadings become issues in administrative hearings and often there are no rules specifying under what circumstances such pleadings are permitted, if at all. This issue is not addressed by the proposed rules which define only initial pleadings (§610.350) and responsive pleadings (§ 610.672). We suggest the proposed rules address this issue so that the parties will be clear if, and when, such pleadings are allowed.

4. WITHDRAWAL OF PLEADINGS

The proposed rules fail to indicate at what point in the proceedings pleadings may be withdrawn. We believe this issue should be addressed to encourage the withdrawal of pleadings before hearings are held that are meritless.

5. INTERLOCUTORY APPEALS

Frequently, hearing officers are called on to rule on requests to limit, alter, or refocus on-going proceedings. There should be a clear delineation of their roles in this area. Thus, we suggest the Commission promulgate new rules setting forth the procedures for hearing officers to deal effectively in this area of the law.

6. DISMISSAL OF COMPLAINTS AND SUMMARY DISPOSITIONS

The proposed rules do not cover when a defendant may move for dismissal of a complaint for failure to state a cause of action or for other summary dispositions. We believe such rules should be a part of the APA. Moreover, such procedures would help facilitate the early dismissal of meritless actions before resources are wasted defending them.

* * *

Again, we congratulate the Commission for its fine work and hope our comments will prove helpful as the Commission continues its work.

Sincerely,

ROBERT L. HARRIS, ESQ.

RLH:rt

RLH #1 - A:\COMM0826.LET [Administrative Adjudication]

DEPARTMENT OF INSURANCE
45 FREMONT STREET, 21ST FLOOR
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RISA SALAT-KOLM
SENIOR STAFF COUNSEL

August 30, 1993

California Law Revision Committee
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Committee:

The following questions and comments are in response to the California Law Revision Committee's proposed replacement of the current California Administrative Procedure Act and refer to the specific sections enumerated.

§613.210. Service

This section refers to service being made to a person or, if that person is a party, to his/her attorney "or authorized representative". I suggest that "authorized representative" be defined ie., letter of representation or other written proof of representation.

§614.110. Conversion authorized

The comment indicates that the courts will have to decide on a case-by case basis what constitutes substantial prejudice in connection with converting a particular agency proceeding. I am not convinced that the conversion procedure will result in swifter resolutions of administrative cases, particularly where a party objects to the conversion on "substantial prejudice" grounds. Once the courts become involved, the administrative process grinds to a halt (unless the court would be reviewing the proceeding for prejudice after it was concluded). It seems that, unless the parties agree to the conversion, the decision to convert would be a difficult one to make.

§614.150. Agency regulations

Regulations regarding conversion would be difficult to draft as it seems that a determination as to whether a person would be prejudiced by conversion needs to be made on a case-by-case basis. Nevertheless, regulations may at least provide some guidance as to when conversion is appropriate.

§642.240. Time for agency action.

Regarding Paragraph (2), it is unclear what is meant by "commence" an adjudicative hearing. Assuming that a full-scale

hearing before OAH is appropriate, does this mean that the adjudicative proceeding must actually begin within 90 days or that a request for a hearing be made by that time. Of course, an agency's ability to bring a case to hearing within 90 days depends not only upon the caseload and availability of agency staff but OAH's own calendar. Should the time limits in §642.320 become effective, this Department would need additional investigators and Compliance attorneys in order to meet those deadlines.

§642.420. Continuances.

The comments to this section indicate that denial of a continuance would be subject to judicial review "at the same time and in the same manner as other disputed matters." For the sake of fairness and expedience, it seems that the decision as to whether to grant a continuance should be fully resolved prior to the start of the administrative hearing. The damage will already have been done if the hearing takes place despite a reasonable request for continuance and the prejudiced party must then bring the matter up on a writ.

§643.230. Procedure for disqualification of presiding officer.

Regarding subdivision (d), I believe that it would be more expedient and less prejudicial to the objecting party to conduct a review of the decision as to whether to disqualify the presiding officer before the administrative proceeding begins.

§645.410. Subpoena authority.

Allowing subpoenas duces tecum to provide documents "at any reasonable time and place" rather than just at the hearing will do much to turn the streamlined administrative process into a more costly civil paper war. The parties' discovery rights under Section 11507.6 (and the proposed §§645.210-645.230) are already quite broad and this additional subpoena power will not promote but will, rather, detract from the orderly, prompt disposition of hearings.

§646.130. Subject of prehearing conference.

Regarding subdivision (i), it is unclear whether a party who has not requested discovery is entitled to receive at the prehearing conference copies of the actual exhibits the other party(ies) plan on using as evidence at the hearing or the party is just entitled to a list(s) of what the other side plans on using. In other words, assuming that a party has not requested discovery, I am uncertain as to what is meant by the Comment that the prehearing conference "is limited to an exchange of information concerning evidence to be offered at the hearing."

§648.310. Burden of proof.

Regarding subdivision (b), the standard of proof for professional licenses is "clear and convincing evidence to a reasonable certainty" (see Ettinger v. Board of Medical Quality Assurance (1982) 135 CA3d853, 185CR 601. In most situations, the standard of proof in administrative cases is a preponderance of the evidence. Skelly v. State Personnel Board(1975) 15 C3d 194, 124 CR 14. The standard of proof for in an administrative proceeding involving an insurance license should be preponderance of the evidence.

§648.330. Oral and written testimony.

In subdivision (c), are the the words "if available" meant to modify the words "original" and "complete text" or just "complete text"? If the former, I suggest that the second sentence should read: "On request and if available, parties shall be given an opportunity to compare the copy with the original and an exerpt with the complete text.". It is also unclear as to what is meant by "available". Does this mean available by subpoena or by more informal means?

§650.130. Probation

In order for the "other party" to receive compensation due to respondent's breach of contract, must the agency specifically allege breach of contract in its pleading?

§Bus. & Prof. Code §494.5. Reinstatement of license or reduction of penalty

Insurance licensees are regulated under the Insurance and not the Business & Professions Code. This section should be included under any revised APA as it is under the current one (Government Code Section 11522).

Please call me if you have any questions or would like to discuss this matter.

Very truly yours,

Risa Salat-Kolm
Senior Staff Counsel
(415)904-5353

cc: Janice Kerr
Patricia Staggs

OFFICE OF STATEWIDE HEALTH PLANNING AND DEVELOPMENT
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August 31, 1993

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Mr. Sterling:

Thank you for the opportunity to review and comment on the California Law Review Commission's tentative recommendation on administrative adjudication by state agencies. In general, the Office of Statewide Health Planning and Development supports the concepts embodied in the draft.

However, the Office is concerned about the potential impact of the proposed new Administrative Procedures Act on several of our programs. The Office administers three programs in which some type of appeal to an advisory board or commission is allowed, and in each case the Office or the hearing body currently has authority to establish specific procedures. These hearings are not intended to be full APA - type hearings, and the somewhat less formal procedures that have been developed are providing due process for appellants while at the same time meeting their need for an accessible, expeditious, affordable, and understandable forum.

In summary, the hearings requirements are as follows:

Hospital Seismic Safety Program Health and Safety Code §15080 establishes a Building Safety Board to advise the Office and to " . . . act as a board of appeals . . . " in matters relating to building standards with regard to seismic safety of hospitals. The Board consists of 17 members (appointed by the Director of the Office) with expertise in various areas relating to construction, design, seismic safety, and the hospital industry. Appeals may be filed by any person disputing the administration and enforcement of hospital building standards.

Cal-Mortgage Program Certain non-profit health facilities are eligible to apply for construction loan insurance through the Office's Cal-Mortgage program. Health and Safety Code §436.10 provides that "Every applicant for insurance shall

be afforded an opportunity for a fair hearing before the council . . . " "Council" refers to the California Health Policy and Data Advisory Commission (per Health and Safety Code §443.22), an advisory commission of 11 members (appointed by the Legislature and the Governor) established to advise the Office on health data and health policy matters (Health and Safety Code §443.20 and §443.26).

Health Data Collection Program Pursuant to the Health Data and Advisory Council Consolidation Act (Health and Safety Code §443 et. seq.), all health facilities (as defined) are required to regularly file certain data with the Office within specified time frames. Penalties of $100.00 per day accrue when reports are not filed by the due dates. A health facility affected by a determination under the act (almost always a penalty assessment), " . . . may petition the Office for review of the decision . . . The hearing shall be held before an employee of the office, a hearing officer employed by the Office of Administrative Hearings, or a committee of the commission [California Health Policy and Data Advisory Commission; see above] chosen by the chairperson for this purpose. If held before an employee of the office or a committee of the commission, the hearing shall be held in accordance with such procedures as the Office, with the advice of the Commission, shall prescribe." The Office's policy is to have these penalty appeals heard by a committee of the commission.

In each of these situations, the hearings currently provided are fairly simple in structure and the appeals are heard by a panel of lay people - the members have no formal legal training, but they have industry experience and expertise. Because of their backgrounds, they have credibility with appellants, they can deal knowledgeably with technical issues, and their judgement is respected. The fact that the hearings are not complex or highly technical allows the officials of the facility involved to represent themselves, to present their own case in their own way. In our experience, the result of these factors is that people really feel they have had a "fair hearing" , and at low cost.

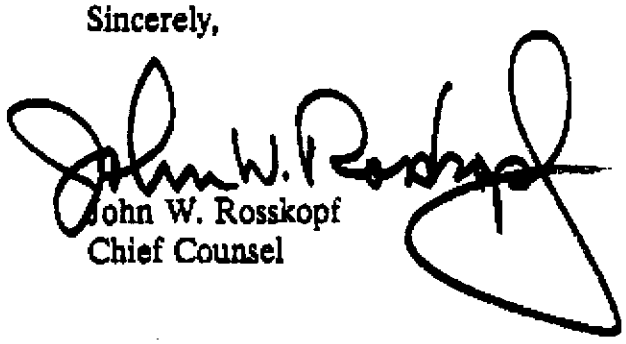
The Office is concerned that imposing additional procedural requirements would in fact reduce access to the hearing process. Program participants would be less likely to use these hearing processes, which were designed for their benefit, if they were subject to more complex and technical procedural requirements. They would be more likely to feel it necessary to be represented by counsel, which could impose a significant financial barrier.

Again, these hearings were not intended to be full APA-type hearings. The Office or the panels were given authority to adopt simplified hearing procedures to create an accessible forum while protecting due process concerns. Our current structures are working very well, with high constituent satisfaction. The Office believes that the imposition of additional, unnecessary procedural requirements would have the effect, not of enhancing due process, but of reducing access to fair hearings. This would be counter to the intent of the proposal.

For the reasons described above, the Office believes that the best statutory approach would be to maintain our authority to adopt procedures for these three types of informal hearings.

Thank you again for the opportunity to comment on this proposal. If you have any questions, please call me at (916) 654-1488.

Sincerely,



John W. Rosskopf
Chief Counsel

STATE OF CALIFORNIA PETE WILSON, Governor

OFFICE OF ADMINISTRATIVE LAW
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August 31, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation of May 1993
(Administrative Adjudication by State Agencies)

Dear Commissioners:

The Office of Administrative Law ("OAL") is charged with administering the rulemaking portion of the Administrative Procedure Act ("APA"). See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 431 (good summary of OAL duties); *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697, 702 (same).

OAL appreciates the opportunity to take part in the administrative adjudication portion of the APA revision project. OAL looks forward to the phase of the project addressing agency rulemaking. Our long term objective is to make the rulemaking portion of the APA less burdensome for state agencies, while preserving public participation and the benefits of independent legal review of proposed regulations.

SPECIFIC CONCERNS RE TENTATIVE RECOMMENDATION

Introduction, p. 2

Paragraph 2 states that the provisions of the APA relating to "adjudication *and judicial review* have been little changed [since 1945]." (Emphasis added.) This statement needs to be qualified. APA provisions governing judicial review *of rulemaking* (Government Code sections 11350, 11350.3) were thoroughly reviewed in the dramatic 1979 changes to the APA which included the creation of OAL. In addition, a number of significant changes have been made since 1979. The declaratory relief statute, Government Code section 11350, was amended substantively in 1982. Government Code section 11347.5(d), concerning judicial review of OAL's regulatory determinations, was added in 1987. Government Code section 11353 was added in 1992: it specifically

provided for judicial review of OAL decisions concerning water quality control rules of the State Water Resources Control Board.

Proposed sections 610.010 through 610.770

Currently, OAL has the authority to adopt regulations interpreting terms used in its enabling act (the rulemaking portion of the APA). Two examples of such terms are "agency" and "regulation." The Tentative Recommendation seems to be moving in the direction of *removing* OAL's authority to adopt regulations defining key statutory terms. It is also possible that the generic definitions of key rulemaking terms which now appear in sections 610.010 through 610.770, while appropriate for administrative adjudication may not serve as well in the administrative rulemaking context.

There are now two distinct sets of definitional provisions in the APA. One set of definitions governs rulemaking: Government Code section 11342. A second set of definitions governs administrative adjudication: Government Code sections 11370.1, 11500. The plan seems to be to place virtually all definitions in *one* consolidated definitions provision: proposed sections 610.010-610.770.
It is true that the comment to proposed section 600 states:

> "This division, as currently drafted, applies only to the administrative adjudication portion of the Administrative Procedure Act. When the division is expanded to include rulemaking, the *general provisions will be reviewed for applicability.*" (Emphasis added.)

This comment in part addresses the OAL concern that definitions not be adopted which do not fit the rulemaking context. However, OAL continues to have grave reservations about the consolidated definitions concept insofar as the draft envisions enacting definitions which will govern rulemaking law, *but which OAL will not be authorized to interpret, implement or make specific in regulation.* OAL will oppose any legislative proposal which does not preserve OAL's rulemaking authority concerning the rulemaking portion of the APA.

It is unclear what, if any, policy justification exists for suddenly removing OAL's rulemaking authority concerning key statutory terms. OAL is continually called upon the interpret the APA, to determine, for instance, if a

given entity is a "state agency" within the meaning of the statute (i.e., if the entity must comply with APA rulemaking requirements).

Proposed section 641.430(b)

This subdivision provides that an administrative law judge employed by the Office of Administrative Hearings shall have been admitted to practice law in this state for at least five years immediately preceding the appointment "and shall possess *any additional qualifications established by the State Personnel Board* for the particular class of position involved." (Emphasis added.)

OAL suggests adding the words "in regulation" following the word "established." Additional qualifications for ALJ's should be established only after an opportunity for meaningful public participation and in a way that creates a full record that will facilitate effective judicial review. At present, the State Personnel Board takes the position that its power to create civil service classifications, granted by the California Constitution, is *not* subject to APA rulemaking requirements. Cf. *Armistead v. State Personnel Board* (1978) 22 Cal.3d 204; *Conroy v. Wolff* (1950) 34 Cal.2d 745; *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47. This exemption issue has been raised by a request for determination filed under Government Code section 11347.5, which is currently pending before OAL (docket no. 90-020), and which may result in litigation.

Proposed section 649.320 (Comment, paragraph 2)

We cannot agree that the first sentence of comment paragraph 2 accurately reflects the current state of the law. See Ogden, *California Public Agency Practice*, sec. 20.06[4]. Government Code section 11346 clearly provides that all quasi-legislative enactments of state agencies are subject to the minimum procedural requirements of the APA unless *expressly* exempted by statute. We have not located any presently effective statute which generally exempts all precedent decisions of all agencies from the APA. Cf. Government Code section 19582.5 (Personnel Board).

Also, OAL suggests modifying the second sentence of comment paragraph 2. We suggest a revision along these lines: "Agencies should, to the extent practicable, periodically review existing precedent decisions with an eye toward

including the rules thus established in proposed amendments to statutes or regulations." There are two reasons for this suggestion. First, it is much easier for lawyers (not to mention non-lawyers!) to locate the pertinent law if it is codified in statute or regulation. Precedent decision systems can be complex and time-consuming to learn and use. This can in effect limit practice in given legal areas to a small number of specialists. Second, many state agencies propose one or more pieces of legislation each year. Many agencies adopt one or more sets of regulations each year. In the process of deciding what to include in these proposals, it would be good practice to routinely review those uncodified general rules contained in precedent decisions.

Proposed section 641.480, comment (p. 111)

Why does the comment cite section 610.190?

Conclusion

Finally, OAL appreciates this and prior opportunities to offer comments on the proposed new administrative adjudication statute. However, we reserve our right to comment further on this proposal, both before the Commission and in subsequent legislative proceedings. We need to see the final product. We remain concerned about how provisions in the administrative adjudication statute will impact the rulemaking statute. Though the two areas are in theory separate and distinct, a number of administrative adjudication provisions profoundly impact the rulemaking statute: e.g., the new APA exemption for precedent decisions.

Sincerely,

Herbert F. Bolz

STATE OF CALIFORNIA PETE WILSON, Governor

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
1001 Sixth Street, Suite 401
Sacramento, CA 95814

August 31, 1993

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Subject: Tentative Recommendation dated May 1993, "Administrative Adjudication by State Agencies"

Dear Mr. Sterling:

We assume that the "new" Administrative Procedure Act will continue to cover the Department of Alcoholic Beverage Control but not the Alcoholic Beverage Control Appeals Board. If there is any doubt concerning this point, I would be happy to discuss the subject further. In any event, I do have a couple of comments to make concerning the draft, as follows:

EVIDENCE

Page 27, lines 10-12

Question: Is there a need to explain whether or not the "other" evidence must be at least a "cut above" the type of hearsay evidence that may not be sufficient in itself?

BURDEN OF PROOF

Page 27, fifth line from bottom

Question: Is "occupational license" defined anywhere?

Comment: It is my understanding that an ABC Act license may presently be granted to an applicant who is illiterate and who is without formal education. In decisions by the ABC Appeals Board,

the latter has ruled that ABC Act cases have the preponderance of the evidence standard rather than clear and convincing evidence.

I would be happy to discuss any of these points by telephone with a member of your staff.

Sincerely,

WILLIAM B. ELEY
Chief Counsel & Executive Officer
(916) 445-4005

STATE OF CALIFORNIA—THE RESOURCES AGENCY PETE WILSON, Governor

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200

September 3, 1993

Law Revision Commission
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Key: _____

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Sirs or Madames:

I have just reviewed the letter sent to you by the Coastal Commission's Chief Counsel, Mr. Ralph Faust, expressing concerns about the proposals being considered by your Commission to require all state agencies responsible for making quasi-judicial decisions to adopt and implement a formalized adjudicatory hearing process that would include trial-type procedures such as cross-examination, discovery (including depositions and subpoenas), and testimony under oath. I write to support Mr. Faust's comments and to express my own serious objections to the proposals.

Everyone associated with doing the public's business today must be acutely aware of and sensitive to changing public needs, demands and new "realities" affecting governance. The public wants less government, not more. At the same time, the public wants better services and it does not want to pay higher taxes unless those taxes go to high priority services that are effective and efficiently provided. Based on my experience and interaction with the public, I believe that in its dealings with administrative decision-making agencies, the public wants easy access to a process that is fair, that gives them an opportunity to be heard, that minimizes costs, that is understandable and relatively simple procedurally, and that results in timely and honest decisions. The Coastal Commission has a twenty year record of providing this type of service in a program that involves high stakes in terms of environmental, economic and individual needs and values. The Coastal Commission is not alone. Other agencies, such as the San Francisco Bay Conservation and Development Commission (BCDC), have a good record making important natural resource use and conservation decisions based on a relatively uncomplicated public hearing process. Two major characteristics of our program, as well as that of BCDC, are flexibility and simplicity (acknowledging that, by definition, virtually no bureaucratic process is perceived to be simple). We pride ourselves in making our processes readily accessible to everyone interested in the Commission's work.

The proposed recommendations would not, in my view, serve any substantial or important public purpose if applied to the Coastal Commission and perhaps many other state agencies. On the contrary! They would, at the very time we are trying to find creative ways to cut costs, government red tape and to make government more effective, increase the size and cost of government. They would make it more expensive and difficult for members of the public to participate in California's coastal protection program or other programs

requiring state agency adjudicatory decisions which do not now utilize the proposed new procedures. They would make it more costly for persons wishing to undertake development projects in the coastal zone. They would result in substantial delays in reaching regulatory decisions. On the other hand, I recognize the new procedures would provide more employment opportunities for attorneys, consultants and permit expeditors.

In conclusion, I fail to see what important public purpose or interest is going to be served by recommendations that state agency procedures be rendered more complicated, rigid and time-consuming. At a time of shrinking public sector budgets and when many vital public programs such as education, health care and public safety are desperately competing for limited public dollars, it seems to me ill advised to adopt recommendations that will be extremely costly to implement and that are devoid of any compelling public purpose. I realize the recommendations are well-intentioned and predicated on considerable study and discussion. I respectfully suggest, however, that, as they now stand, the proposals do not reflect good public policy and should be held for further review and possible future consideration.

I would be happy to discuss my concerns in person with you or the Commission, if you believe that would be helpful.

Sincerely,

PETER M. DOUGLAS
Executive Director

PMD/pmh

2711E

cc: Members, California Coastal Commission
Alan Pendleton, Executive Director, BCDC
Jan Stevens, Deputy Attorney General

State of California

Memorandum

STATE PERSONNEL BOARD COMMENTS

Law Revision Commission
RECEIVED
[illegible] 1993
File:
Key:

Date: August 31, 1993

To : California Law Revision Commission

From: **ELISE S. ROSE**, Chief Counsel
State Personnel Board

Re: Administrative Adjudication by State Agencies
Comments on Tentative Recommendation

The Tentative Recommendation has been reviewed by State Personnel Board (SPB or Board) staff to determine which proposed provisions are different than or conflict with existing laws and rules.

The SPB is a constitutional agency, charged with enforcing and administering the civil service statutes, prescribing probationary periods and classifications, and reviewing disciplinary actions. (California Constitution, Article VII, sec. 3).[1]

The civil service statutes are contained within the Government Code, Title 2, Division 5, Part 1 (General) (commencing with Government Code, section 18000) and Part 2 (State Civil Service) (commencing with Government Code, section 18500).[2]

The SPB also has constitutional authority to adopt rules authorized by statute. The rules so adopted are contained within Title 2, California Code of Regulations, Chapter 1.[3]

The California Law Revision Commission has inquired as to whether the procedures unique to the SPB should be retained based on the special nature of SPB hearings.

What follows are some general comments on the introductory materials submitted with the proposed statutes. The balance of this document contains a brief summary of the various stages of the

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[1]Since the SPB is a constitutional agency, it is at least arguable that the SPB should continue to be exempt from the Administrative Procedures Act.

[2]All references to statutes are to the Government Code, unless otherwise noted.

[3]All references to rules are to those contained in Title 2 of the California Code of Regulations, unless otherwise noted.

SPB disciplinary appeals process[4] as it now exists with citations to applicable laws and rules. Comments on conflicts between the proposed recommendations and current procedures appear in bold. In many instances, the differences between current and proposed law are merely noted as more time is necessary to evaluate the potential impact of the changes on current operations.

GENERAL COMMENTS ON INTRODUCTION

p.2 Statement that the State Personnel Board (SPB) is "wholly uncovered" by the current Administrative Procedure Act (APA) is erroneous. Government Code section 19578[5] specifically incorporates section 11513 procedures into SPB administrative hearings.

p.4, 12 Modification(s) to model APA only by regulations adopted under APA rulemaking procedures. Arguably, current SPB regulations would be covered as authorized modifications. In addition, proposed section 612.150 states that a statute "expressly applicable to a particular agency prevails" over a different model APA provision. Thus, unless expressly repealed, sections 18570-18577, 18650-18683, 19570-19593, 19630-19635, 19700-19706 would arguably remain intact, notwithstanding contrary provisions in the model APA.

p.4 Effective date of model APA deferred one year to 1/1/96 to allow for regulations. Too short a period to comply with all notice, comment and response requirements under APA rulemaking procedures, given the numerous and diverse SPB constituents.

p.5 Statement that the most important elements of agency's procedural code are unwritten is not particularly applicable to SPB administrative adjudications. Numerous statutes (those cited above, i.e.) and regulations (tit. 2, Cal. Code Regs., secs. 31-37, 51-74, i.e.) already govern SPB procedures.

p.6 Statement that current system limits precedential decisions to the issuing agency. This procedure is completely appropriate, especially since the burden of proof may differ with the

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[4]The SPB also uses the adjudicatory hearing process to hear, inter alia, some discrimination complaints (Section 19702), medical appeals (Section 19253.5), and appeals from rejection during probationary period (Section 19173) and non-punitive terminations (Section 18585). Since the disciplinary appeals are by far the largest group of cases to go to adjudicatory hearing, and since all adjudicatory hearings before the SPB follow the same procedures, this memorandum refers to those appeals only.

[5]All references will be to the Government Code unless otherwise noted.

It is a continual challenge to keep current on one's own agency precedents and judicial decisions. It would be nearly impossible to keep informed of, much less be bound by, other agency precedents.

p.9 No central panel for administrative law judges (ALJ). Agreement with this approach to promote experience and expertise with particular agency precedents and operations.

p.22 SPB is interested in exploring the possible use of mediation as an alternative dispute resolution technique and would be interested in tracking the development by the Office of Administrative Hearings of model regulations for alternative dispute resolution proceedings.

IMPACT OF PROPOSED STATUTORY CHANGES ON CURRENT SPB LAWS AND RULES

INITIATION OF THE PROCESS

The SPB disciplinary process is initiated with the appointing power by serving a notice of adverse (disciplinary) action upon the affected employee and filing that notice with the SPB within 15 days of its effective date. (Section 19574). Further very specific requirements regarding the notice and service thereof are set forth in Rule 52.3 as well as in case law. [See Skelly v. State Personnel Board (1979) 15 Cal.3d 194.]

The proposed provisions on parties and pleadings are confusing to apply in the SPB disciplinary context (see sections 610.670, 610.672). While the appointing party (department or agency or respondent in SPB terms) files the notice of adverse action, the party actually initiating the adjudicatory proceeding before the SPB is the employee being disciplined (appellant). Terms should be clarified to encompass SPB process and avoid confusion that would result from changing terminology after more than 40 years of history.

More importantly, current due process requirements as established by statute, rule and case law as set forth above are not incorporated into the new law. (eg. service of papers upon which action is based, Skelly procedures, time requirements for service of adverse action.) The SPB would seek to retain its law pursuant to section 642.110.

The employee may within 20 days after service file with the SPB a "written answer" to the notice. (Section 19575). Notably, the courts have not construed this time frame as jurisdictional--late filings, where delay is short and for good cause, and where no prejudice is shown must be accepted. (Gonzales v. SPB). Whenever an answer is filed to an adverse action, the SPB shall within a reasonable time, set a hearing. (Section 19578). Although "reasonable time" is not further defined in this portion of the

statute, the general time provisions for all investigations and hearings may apply in which case the matter must be heard and decided in the shorter of six months from the time of the appeal or 90 days from the date of submission, whichever is less. (Section 18671.1).

Section 642.240 sets the time for commencing a hearing as 90 days from the date the appeal is filed or from the date the agency receives any further information it has requested regarding the appeal. Thus, the TR is in direct conflict with the time frames set forth in SPB law.

POST NOTICE, PRE-HEARING MATTERS

Continuances

Section 19579 and Rule 52.5 govern continuances of SPB hearings. An SPB hearing may be continued by mutual agreement or upon a showing of good cause. When acts or omissions that lead to an adverse action are also the subject of criminal proceedings, continuances shall be granted when parties mutually concur to allow for completion of criminal proceedings.

Proposed section 642.420 provides for a continuance only for good cause and sets out a procedure for requesting a continuance. The SPB may seek to preserve its unique statute and rule which deals with the criminal proceedings and allows for continuances upon mutual agreement of the parties.

Venue

The SPB has no venue provisions.

The venue provisions proposed in section 642.430 do not make practical sense for SPB hearings which are often held at prisons and other facilities located in remote areas. The appointing powers would strongly oppose centralization of hearings, especially when inmates, wards or patients are witnesses. The SPB may seek to be exempt from the venue provisions.

Bias

Currently, the SPB has no provisions regarding bias.

Concern regarding proposal (section 643.210-230) on peremptory challenges given small number of ALJS.

Discovery

Sections 19574.1 and 19574.2 govern discovery in SPB proceedings. Section 19574.1 provides the employee with the right to interview other employees having knowledge of the acts or omissions upon which the adverse action was based, and provides the appointing power with the duty to assure the cooperation of employees interviewed. Discovery motions are filed with the ALJ, and motions to compel are made to the superior court.

The SPB has not yet determined whether to opt out of Chapter 5 pursuant to 645.110 (b).

Subpoenas and Depositions

Sections 18671-18674, 18676 and 19581 govern SPB subpoena power, depositions, and witness fees. Currently, the ALJ has subpoena power and may require depositions of witnesses to be taken in the same manner as depositions are taken in civil cases in superior court. Subpoena power is limited to 100 miles unless party shows by affidavit that witness is material. Depositions may be taken of infirm witnesses, witnesses outside scope of subpoena power, or witnesses who will be unavailable for hearing. Witness fees are same as in civil proceedings. Special fee procedures apply to witnesses subpoenaed by state agency.

The SPB has not yet determined whether to opt out of Chapter 5 pursuant to 645.110(b). Fact that subpoena authority extended only to attorneys for parties would disadvantage non-attorney representatives who often appear in SPB hearings.

Prehearing and Settlement Conferences

Section 19581.5 governs in SPB proceedings and provides only that the board may require or any party may request such a conference. The ALJ who conducts such a conference may not preside over subsequent proceedings without consent of both parties.

The SPB has not yet determined whether to opt out of Chapter 6 pursuant to section 646.110. In practice, such conferences are rarely held.

Settlements

Section 18681 governs settlements before the SPB.

That section should be preserved pursuant to proposed 646.210 (b). The SPB need authority to review settlement agreements to assure the integrity of the civil service system is not compromised.

Hearing Alternatives

Section 19576 allows the SPB to conduct an "investigation" in lieu of hearing under certain specified circumstances and for specified minor disciplinary actions. The disciplinary actions considered of a minor nature under section 19576 include actions other than those specified in 647.110 (b)(4). Even so, a memorandum of understanding may supersede the SPB statute. Currently, the SPB is not relying on the statute to deny an adjudicatory hearing in any disciplinary cases.

Section 647.110(b)(4) should be amended to be consistent with section 19576.

CONDUCT OF HEARING

The SPB has not yet determined whether to opt out of Chapter 8 pursuant to section 648.110. Currently, however,
Section 19578 provides that the hearing is to be conducted in accordance with the provisions of **Section 11513**, except that witnesses may be examined under section 19580 (refers to examination by deposition or at hearing (under Evidence Code, section 776).

Default

Section 19579 provides that failure of either party to proceed at hearing shall be deemed a withdrawal of the action or appeal absent a continuance.

Proposed section 648.130 provides a much more detailed provision setting forth conditions under which a default occurs, effect of default, and procedures for setting aside default.

Open Hearings

SPB Rule 51.4 provides specifically that hearings are public. Rule 52.1 provides for the exclusion of witnesses.

Proposed rule 648.140, from which exemptions under 648.110 will not be granted, does not address the exclusion of witnesses rule, unless subdivision (2) could be construed to allow the exclusion of witnesses where credibility is an issue.

Evidence

Section 19578 currently makes provisions of section 11513 applicable.

DECISION

Issuance of Decision

Current law provides that the SPB board shall render a decision within a reasonable time after hearing. (Section 19583). While "reasonable time" is not defined in section 19583, section 18671.1 more specifically provides the time frames for processing SPB appeals. Section 18671.1 provides that "the period from the filing of the petition to the decision of the board shall not exceed six months or 90 days from the time of submission, whichever time period is less, except that the board may extend the six-month period up to 45 days."

Generally, after the case is submitted the ALJ renders a proposed decision. The contents of the SPB decision are also specified by statute. [Section 19582(d)]. **Section 649.120 provides more detail as to the contents of the decision than does current SPB law.**

The proposed decision is transmitted to the Board for review. There is no specified time frame for transmission so long as the time frames of section 18671.1 are met. As a practical matter, the decision is transmitted to a hearing office which packages the decision, along with approximately 35-45 other decisions, for submission to the Board at its next Board meeting. (Board meetings are held twice a month).

Section 649.110(b) provides that the presiding officer shall deliver the decision to the agency head within 30 days of submission. The cases before SPB ALJs are often lengthy, sometimes consuming several days of hearing. As noted above, Section 18671.1 gives the Board 90 days from the date of submission to issue a decision. It would also be difficult for the proposed decisions to be prepared for submission to the Board in such a short time frame. The SPB will probably opt out of the timeframes imposed in the proposed statute, as authorized.

The proposed decision becomes public record and must be served on the parties within 10 days after it is filed with the Board whether or not the Board has acted on the decision. **Section 649.130 provides a proposed decision becomes public within 30 days after delivery to the agency head.**

Based upon a review of the decision only, the Board may adopt the proposed decision, modify the penalty downward and adopt the balance of the decision, reject the decision, or remand the case to an ALJ for further findings of fact. (Section 19582).

Section 649.140 provides that an agency has 100 days (a different time may be specified by SPB) to either adopt the decision as a final decision, adopt with technical changes or reduce the penalty and adopt the balance of the proposed decision. The options of

reject, remand and rehear are available under a separate administrative review procedure. (See section 649.210).

If the Board adopts in full or modifies the penalty and adopts the balance of the proposed decision, the decision is issued by serving a copy of the decision on the parties. (Section 19582). If no petition for rehearing is filed (Section 19586), the decision becomes final 30 days after service on the parties.

Section 649.150 implies a decision becomes final immediately upon its adoption. (But see section 649.160 re effective date) Applying this statute to SPB's petition for rehearing process (statute refers to administrative review), section 649.150 appears to provide the decision would become final on denial of petition for rehearing. Finality is automatic 100 days after submission to the Board, but SPB could change this time frame by regulation.

Section 649.160 provides 10 day time limit within which copy of final decision must be served on parties. Also provides decision must state its effective date and time within which judicial review may be initiated. Failure to state time within which judicial review may be initiated extends time to six months after service of decision. (Query-- does this mean decision becomes final 6 months after service of decision? Petitions for writ of administrative mandamus may be filed up to 1 year after decision becomes final.)

Administrative Review Procedure

There are two situations in which the Board will decide the case itself on the record and issue its own decision. The first situation arises when the Board initially rejects the proposed decision of the ALJ, orders the transcript prepared, asks the parties to brief particular issues, and issues its own written decision after first affording the parties the opportunity to present oral and written arguments. [Section 19582(c)].

The second situation in which the Board decides the case itself is where one of the parties has petitioned for rehearing within 30 days after the Board has adopted a proposed decision of an ALJ. In such a case, the Board serves the petition for rehearing on the non-petitioning party. The Board has 60 days after a petition for rehearing is served upon all parties to grant or deny the petition for rehearing based upon briefs filed by the parties. (Section 19586).

If the petition for rehearing is granted, the Board may remand the case to an ALJ or decide to hear the case itself. If the Board is hearing the case, the transcript is prepared and the parties may further brief the issues and may offer oral argument. As in the case of a rejection, the Board issues its own decision. There is no time limit within which the Board must issue its own decision. (Section 19587).

The proposed administrative review procedure is somewhat unclear. The agency head may initiate administrative review of a proposed or final decision on its own motion or a party may do so "on service of a copy of the decision but not later than the effective date". Does this mean the initiation of the review procedure occurs after the decision has already been adopted under section 649.140? Since the SPB board reviews all proposed decisions of the ALJ, this article would seem to apply only when the Board rejects a proposed decision of an ALJ or when a party files a petition for rehearing after the Board has adopted a proposed decision. The provisions of section 649.210 would not appear to apply to the Board since the Board has a constitutional mandate to review all disciplinary actions and the procedure appears to assume review is only an option and that delegation of review is proper. (see also Comment to section 649.210)

Sections 649.220 (Initiation of review) and 649.230 (Review procedure) appear to be fairly consistent with the petition for rehearing and rejection processes employed by the Board. What is unclear is whether the agency head first either grants or denies the petition for rehearing and then, if the petition has been granted, reviews the case, or whether the agency head does not even act on the petition for rehearing until the record has been prepared and the issues briefed and argued. The SPB process which occurs in two separate steps [(1) grant or deny petition for rehearing based on briefs only; (2) if petition granted, prepare record, accept oral arguments and further briefs, issue decision] appears clearer and cleaner.

Section 649.240 provides that within 100 days after presentation of briefs and arguments, or other time provided by agency regulation, the reviewing authority must take action. The actions available are issue a final decision, remand the matter, or reject the decision without remand (in the SPB proceeding the decision is rejected and the case remanded or retained for Board review upon the granting of the petition for rehearing process.)

Precedent Decisions

Section 19582.5 provides that the SPB may designate certain of its decisions as precedents, shall publish its precedential decisions, and may adopt rules for the adoption of previously issued decisions as precedents. The Board has been issuing precedential decisions for almost two years and they are being published by Continuing Education for the Bar. The Board has not adopted rules for the adoption of previously issued decisions as precedents.

The proposed statutes (sections 649.310 - 649.340) would change the current practice in that SPB would be authorized to designate a part of a decision as precedential. The SPB would, however, be limited to issuing a decision as precedential only if it contained a significant legal or policy determination of general application

that is likely to recur. The index would be required to be publicized in the California Regulatory Notice Register. The proposed statutes contain no authorization for adopting rules for the adoption of previously issued decisions as precedents.

Implementation of Decision

Currently the SPB does not have any law pertaining to effective date of decision. The current law does not specify whether the decision becomes effective upon its adoption or upon it becoming final.

The proposed law would delay the effective date until 30 days after it becomes final absent other direction from agency head.

If you have any further questions, please call Chris Bologna, Chief Administrative Law Judge at (916) 653-0544 or me at (916) 653-1403, TDD (916) 653-1498.

STATE OF CALIFORNIA—THE RESOURCES AGENCY PETE WILSON, Governor

CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET
SACRAMENTO, CA 95814-5512

August 30, 1993

Nathaniel Sterling, Executive Director
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Dear Mr. Sterling:

Enclosed are the comments of the California Energy Commission regarding the Law Revision Commission's tentative recommendation on administrative adjudication. As the enclosed comments indicate, I believe the Law Revision Commission has made an impressive effort to develop an adjudicative statute that could apply to all the state's adjudicative proceedings, and not just prosecutorial ones. I hope you will use these comments to make the proposal even more adaptable to the needs of the non-prosecutorial agencies such as the Energy Commission and the Public Utilities Commission. I look forward to working cooperatively with the Law Revision Commission in the future on this proposal.

Sincerely,

William M. Chamberlain

WILLIAM M. CHAMBERLAIN
Chief Counsel

COMMENTS OF THE CALIFORNIA ENERGY COMMISSION
ON THE LAW REVISION COMMISSION'S PROPOSED
AMENDMENTS TO THE ADMINISTRATIVE PROCEDURE ACT

I. THE WARREN-ALQUIST ACT: DUE PROCESS BEFORE THE CALIFORNIA ENERGY COMMISSION

The California Energy Commission ("CEC") was created in 1974 in the midst of an energy crisis that caused many to realize that shortages of electricity would have a devastating effect on the state's economy and environment. To avoid such effects, the Legislature established (1) a state role in forecasting electricity need (Pub. Resources Code §§ 25300 et seq.), (2) programs to bring about more efficient use of electricity and natural gas (Pub. Resources Code §§ 25400 et seq.), (3) programs to advance the development of new sources of energy (Pub. Resources Code §§ 25600 et seq.), and (4) a unique licensing process for major thermal powerplants and the transmission lines needed to serve them (Pub. Resources Code §§ 25500 et seq.). The Legislature also created the CEC as a multi-member collegial body in order to tap the combined expertise of several disciplines in the creation and implementation of sensitive energy policies. (Pub. Resources Code § 25201).

The CEC's power facility licensing process is a quasi-adjudicatory process that will be affected by the new proposed Administrative Procedure Act ("APA"). It is a unique and important process, however, whose purposes must be carefully considered as these changes in the APA are developed. For example, unlike any other quasi-adjudicatory process, the CEC's powerplant siting process was designed to be a "one-stop" permit forum that would ensure both timely decisions on needed electricity facilities and increased access by the public to the decisionmaking process. The CEC's approval of a major powerplant preempts all other state and local permit requirements (Pub. Resources Code § 25500) while at the same time ensuring, in all but the most extreme cases of need for a project, that all state and local laws, standards, and other requirements are met. (Pub. Resources Code § 25523). Once the CEC makes its decision, in order to avoid lengthy delays from multi-level judicial review of CEC decisions to license power facilities, the Legislature provided that these decisions would be reviewed in the same manner as decisions of the Public Utilities Commission on certificates of public convenience and necessity, thus prescribing direct review in the California Supreme Court. (Pub. Resources Code § 25531). All of these unique features respond to the concern that needed power facilities might be delayed with disastrous consequences.

In addition to concern that needed power facilities might be delayed in multi-layered permit processes, the Legislature in 1974 also knew that the public was becoming increasingly concerned that some powerplants were being licensed without adequate safeguards to

public safety and the environment. The Legislature therefore created the CEC's licensing process as an open public process, designed to give the interested public a full and fair opportunity to be involved in power facility licensing cases that affect them. For very large powerplants, applicants are required to submit three alternative sites and the CEC is required to conduct "informational hearings" near each site to provide the public the information it needs to determine if the proposed facility is objectionable. (Pub. Resources Code §§ 25503, 25509). In addition, public hearings are required for every powerplant, and the location of the hearings must accommodate the public as much as is reasonably possible. (Pub. Resources Code § 25521). Moreover, all public hearings before the CEC are required to be open to the public and each member of the public who wishes to be heard must be given a reasonable opportunity to speak. (Pub. Resources Code § 25214). Finally, to emphasize the importance of the full opportunity for public participation in these powerplant licensing proceedings, the Legislature established a special office of "Public Advisor," appointed by the Governor, in order to ensure that the public has assistance in understanding the Commission's procedures and the technical aspects of power facility licensing proceedings. (Pub. Resources Code §§ 25217.1, 25222).

It is only through this extraordinary care and attention to the needs of the public for an open and accessible process that the Legislature could hope to achieve CEC licensing decisions that would appropriately balance competing interests thus resulting in decisions that would withstand public criticism and deserve abbreviated judicial review. Thus the CEC has taken very seriously, as it has adopted regulations providing further detail for its siting process, the need to create a very open process that is fair to all participants. For example, in the first year of its existence, the CEC adopted an ex parte rule that prohibits contact between parties (including CEC staff) and members of the Commission or their advisors with respect to substantive issues in a case. (Cal. Code Regs., tit. 20, § 1216). The CEC has also fashioned a process in which two members of the CEC are assigned to each case as a "committee" and at least one of them is personally present at all evidentiary hearings. The commissioners are assisted by hearing officers, but the responsibility for the hearings, for rulings on motions, and for the resulting proposed decision that will be considered by the full commission, belongs to the presiding member of the committee. The CEC staff acts as an independent party in these proceedings in order to ensure a thorough review of every powerplant proposal whether there are intervenors or not, and separation of function between staff and decisionmaker is carefully observed.

While these basic tenets of due process and fairness are maintained in the CEC's process, many of the more formal aspects of administrative hearings that are prosecutorial in nature are often not adhered to in CEC hearings. Because the CEC's proceedings deal

with very technical material, efforts are made to keep the hearings as informal as possible in order to increase public accessibility. Witnesses are subject to cross-examination, but their direct testimony is provided in writing. Discovery tends to be fairly informal, emphasizing data requests and workshops rather than formal depositions. Intervention is rarely denied and may even be permitted at a late stage in the proceeding if it can be accommodated within the statutorily mandated schedule of the proceeding. Proceedings in which multiple intervenors participate are not unusual at the CEC.

The success of the CEC's power facility licensing process attests to the wisdom of the Legislature in establishing this unique adjudication structure. In the 18 years in which this process has existed, the CEC has provided timely licensing for several dozen powerplants and associated transmission facilities without a single day of construction delay resulting from judicial review of any CEC power facility licensing decision. At the same time, public participation in decisions regarding where and under what conditions to allow these essential infrastructure improvements to be developed has been substantially increased in comparison to what typically existed before the creation of the CEC and in comparison to current opportunities for public participation in local licensing proceedings for other kinds of projects. The CEC's process could not possibly be emulated in most quasi-adjudicatory settings, but it works very well for the special purpose for which it was created. The CEC hopes that the Law Revision Commission will be sensitive to the need to retain the effectiveness of this unique process as it proceeds to amend the APA.

II. GENERAL COMMENTS ON THE PROPOSED NEW ADMINISTRATIVE PROCEDURE ACT

The CEC has carefully monitored the Law Revision Commission's work as it has developed the new proposed APA because these revisions could potentially disturb the CEC's power facility licensing process. The CEC recognizes the importance of this project and appreciates the Law Revision Commission's desire to develop, to the maximum extent feasible, a uniform procedure for administrative adjudication. This is a formidable task because such a procedure must try to encompass many very different kinds of decision processes. Moreover, when the state conducts literally thousands of hearings that uniformly involve only two parties, that are prosecutorial in nature, that are often handled at the evidentiary stage by a hearing officer, and that tend to involve straight-forward factual questions rather than complex technical and economic questions requiring expert opinion testimony, it is natural for the proposed APA to fit this mold. By contrast, the state only conducts a few power facility licensing proceedings each year. These are characterized by multiple parties, many of whom

are not represented by counsel, they are not prosecutorial in nature, they are considered important enough that they must be presided over by appointees of the Governor, and they involve highly technical issues and seldom involve disputes about past events. It is difficult for an APA designed to meet the needs of the first type of proceedings to perform as well in the second. In the past, the Legislature has accommodated these differences by merely excepting the CEC's power facility decisions from the APA. The question today is whether such an exception should continue or whether the desire for a uniform APA can be achieved without undue harm to the successful CEC licensing process.

Our first reaction to the project was, frankly, that it was an impossible task to develop an APA that could serve the needs of professional licensing agencies in prosecutorial proceedings while also accommodating the very special needs of the CEC's power facility licensing process. We assumed that it would be necessary to request an exception for that process even though other CEC adjudications could readily conform to the new APA. However, we have been impressed with the efforts of the Law Revision Commission, its staff, and its consultant to provide adequate flexibility in the new APA that special kinds of adjudicatory proceedings might be accommodated through changes that could be made by regulation. We are continuing to study the proposal and reserve the right to decide ultimately that an exception is still the most appropriate course when your final version is released in bill form, but it currently appears that with a few additional changes to accommodated some of the more unique aspects of our process, an exception may not be necessary. We congratulate the Commission for the substantial progress that has been made toward its goal of a workable uniform APA. The specific comments provided below detail some of these additional changes that we hope you will consider.

III. SECTION-BY-SECTION COMMENTS ON THE MAY 1993 DRAFT

Section 610.460. Party. The definition of "party" states that it "includes the agency that is taking the action, ..." In adjudicatory proceedings before the CEC (and the Public Utilities Commission as well as other boards and commissions) the agency staff is the party, while the commission is the decision-maker (or "agency head"). To make it entirely clear that the "party" to such a proceeding is the staff, the phrase "or agency staff" should be inserted after "agency" in the first line of the section.

Section 612.150. Contrary Express Statute Controls. This section states that "a statute expressly applicable to a particular agency prevails over a contrary provision of this division." This leaves unclear whether an applicable statute, such as the California Environmental Quality Act ("CEQA"), would be controlling

to the extent it conflicted with the APA regarding, for example, the applicable statute of limitations. In other words, would a generic statute that an agency must comply with, but which is not expressly applicable to a particular agency, control over provisions of the APA? This issue will be even more important if local agencies adopt the new APA regulations for utilization on applications that are subject to CEQA.

Section 641.220. Declaratory Decision Permissive. The first sentence of this section states that "a person may apply to an agency for a declaratory decision as to the applicability to specified circumstances of a statute, regulation, or decision within the primary jurisdiction of the agency." (Emphasis added.) For the CEC, the declaratory decision would probably be most useful for determining whether (or to what extent) a proposed power plant project is within the CEC's jurisdiction. The language should be amended to clarify that issues of agency jurisdiction are appropriate for declaratory decisions.

Section 641.370. Agency Review. This section requires the agency, upon petition by the respondent, to "not later than 15 days . . . . review and confirm, revoke, or modify an emergency decision . . . ." Boards and commissions such as the CEC must conduct their business in publicly noticed business meetings, which under the Open Meetings Act require a minimum 10-day notice. In reality, many such agencies, including the CEC, try to have their business meeting agendas mailed to interested persons at least two weeks before the meeting. Agency action within 15 days on the petition is thus infeasible for boards and commissions. The section should be amended to state that, where the "agency head" is a multi-member body, action on the petition is required within 30 days.

Section 641.380. Judicial Review. Subdivision (c)(1) requires judicial review of any agency emergency decision on the petition within 15 days after service of the petition on the agency. As stated above, multi-member boards and commissions require more time to act on petitions. In addition, if the agency has 15 days to act, and does act on the 15th day, it would be almost impossible for the court to conduct its review on the same day. A somewhat longer time period is needed if the court's time limitation is to be feasible.

Section 642.210. Initiation by Agency. Agency's like the CEC must frequently initiate actions to determine whether a project is subject to their jurisdiction. Although it is well-established California law that agencies are authorized to determine their jurisdiction in the first instance, this section should restate that principle with the following additional language:

> An agency may initiate an adjudicative proceeding with respect to a matter within the agency's jurisdiction, or to determine the agency's jurisdiction.

Section 642.240. Time for Agency Action. This section allows agencies to vary time limits set forth in the section by adopting regulations. This is a good provision in that it helps agencies like the CEC conform its process to the new APA requirements.

Section 643.310. When Separation Required. The comment to this section states that "[w]hile subdivision (a) precludes an adversary [party] from assisting or advising a presiding officer, it does not preclude a presiding officer from assisting or advising an adversary," and goes on to say that it would allow an agency head to communicate to an adversary (party) that a particular case should be settled or dismissed. While we recognize the efficiency of such a procedure in the context of two-party hearings, it is more problematic in multi-party hearings such as those that occur at the CEC. The basic fairness of the process may be called into question by the public if decisionmakers in proceedings involving controversial issues of public policy begin to advise some parties but not others. Moreover, an ex parte communication will seldom be a one way conversation. A decisionmaker's suggestion to settle an issue will often elicit at least a question whether the decisionmaker is aware of some key fact, and a discussion of the evidence, some of which may not be on the record, is likely to follow. For these reasons, the CEC commissioners would be routinely advised to avoid initiating comments to parties that would violate our ex parte rule. We suggest that the comment to this section be expanded to include these considerations so that the basic purposes of the new APA ex parte rule are not inadvertently undermined by encouraging decisionmakers to freely become involved in counseling adversaries who appear before them.

Section 644.110. Intervention. This section sets the requirements that a motion to intervene in a proceeding must meet for the motion to be granted. Subdivision (b) requires that the motion be made in advance of any prehearing conference. While motions to intervene should be made early in a proceeding, an inflexible requirement that such motions come prior to any prehearing conference is too strict. In CEC powerplant siting proceedings, the locational alternatives analysis required under CEQA is frequently performed during and after the period when a prehearing conference is held. A project location alternative may become public after the first prehearing conference; persons affected by alternative project locations may thus be informed that their interests may be affected after the first prehearing conference. Obviously, it would be an unfair denial of due process to disallow the ability of such parties to participate fully in the proceeding as intervenors.

We therefore suggest that subdivision (b) be revised to allow agencies by regulation to allow intervention after the first prehearing conference if the motion for intervention indicates that the intervenor could not reasonably have known that his rights

would be affected until after the prehearing conference. This could be accomplished by adding a second sentence to subdivision (b), as follows:

> However, an agency may, by regulation, allow intervention after the prehearing conference if the motion for intervention demonstrates that the person seeking intervention could not reasonably have known that his rights would be affected until after the prehearing conference.

Section 644.120. Conditions On Intervention. This section provides the presiding officer with power to limit and condition an intervenor's participation. These discretionary limitations are well-considered and should promote an orderly hearing process.

Section 644.140. Intervention Determination Nonreviewable. This section provides that the presiding officer's rulings on motions to intervene, including the denial of such motions, or the modification of orders granting intervention, are not subject to administrative or judicial review. Although the presiding officer in a proceeding should have broad discretion regarding intervention, and should not fear that the final decision would be in legal jeopardy because of a decision regarding intervention, a blanket denial of judicial and administrative review seems extreme. It leaves a party with no recourse if the presiding officer is behaving capriciously or abusively. This section would also contravene the CEC's current procedure which would at least permit a party denied intervention to appeal that question to the full commission.

The Law Revision Commission should consider alternatives short of denying all administrative review. We would at least request that agencies be permitted to provide for administrative review by regulation.

Section 649.160. Service of Final Decision on Parties. The final sentence of subdivision (a) states that "[f]ailure to state the time within which judicial review may be initiated extends the time to six months after service of the decision." This would not apply to the CEC, as its judicial review provisions are expressly set forth in the Warren-Alquist Act. However, the six month provision would also conflict with the time specified for judicial review of any adjudicative decision made pursuant to CEQA, which sets forth a specific statute of limitations for challenges to licensing decisions based on environmental impact reports and negative declarations. We believe that the rule of statutory construction providing that a specific rule (i.e. one for CEQA decisions) controls the general (one for all APA decisions) would be applied to resolve this conflict, but it may be appropriate for the Commission to clarify in a comment to this section that

specific statutes of limitations under CEQA or other statutes would still apply notwithstanding this provision.

Section 649.230. Review Procedure. Subdivision (a) states that "[a] copy of the record shall be made available to the parties." In CEC power plant licensing proceedings (or PUC ratemaking proceedings) the record may be voluminous, including thousands of pages of testimony, transcripts, exhibits, and so forth. The section or its comment should clarify that, at least in these situations, an agency may "make available" the record by either (1) copying it at the expense of the requesting party, or (2) allowing it to be reviewed in the agency's docket office. The latter option may avoid time-consuming and expensive copying duties that would inconvenience both the agency and the parties. In any event, it is important to clarify that this provision is not intended to require the agency to provide a copy at its own expense.

STATE OF CALIFORNIA—THE RESOURCES AGENCY PETE WILSON, Governor

CALIFORNIA COASTAL COMMISSION
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SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200

September 2, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Sirs or Madames:

I am writing concerning the Law Revision Commission's (LRC) tentative recommendation which is titled "Administrative Adjudication by State Agencies." I appreciate the opportunity to comment about this proposal, but have serious concerns about it in light of the effects that it would have on the Coastal Commission.

The proposal would generally require that all state agencies adopt a formalized adjudicatory hearing process that would include trial type procedures such as compulsion of testimony, cross-examination, discovery, and testimony under oath. Although the recommendation provides that agencies may be exempted from some of those formal procedures, it appears that the means provided (the conference adjudicatory hearing process and the adoption of regulations to modify the otherwise required procedures) would not be available to the Coastal Commission.

The California Coastal Zone Conservation Commission was created through a statewide initiative which was passed in 1972. As required by the initiative, that Commission developed a plan for the management of development on the California coast over a four year period, after which time it went out of existence. Through the adoption of the Coastal Act in 1976 (Public Resources Code, Section 30000 et seq.), the Legislature created a permanent agency in the form of the Coastal Commission to address coastal planning and development.

The organizational structure and procedures chosen by the Legislature indicate that it intended that the Commission function as a body that would make planning and land use decisions in a way that is more like that of a city council or board of supervisors than that of a judge. The LRC proposal is wholly inconsistent with the decision-making model chosen for the Coastal Commission by the Legislature because it would require a hearing process that would function more like a trial than that which is typically used for planning and land use decisions. Its implementation would undercut the spirit

and purpose of the Coastal Act in a number of ways, including significantly lengthening the decision-making process, substantially increasing its cost and making public participation in the process more burdensome.

First, the Legislature placed a priority on ensuring that the Coastal Commission's review of the statewide and regional impacts of coastal development projects would occur on an expedited basis while at the same time maximizing public participation. Thus, the Coastal Act directs that the Commission set permit matters for public hearing within only forty-nine days. The Commission has implemented this in part by adopting a regulation that requires that an applicant must have already obtained preliminary approvals from other state and local governments in order to file a permit application with the Commission. (14 Calif. Code of Regs., Section 13052.) Because its permitting process occurs last, the Commission's review allows for an efficient overlay of a statewide perspective on the review of development projects.

The LRC proposal would significantly expand the time required for the Commission to process permits through hearing beyond the 49 days allowable under the Coastal Act. This is due in large part to a proposed adverserial formalization of the process, in particular because of the time required for formal discovery and cross examination. In light of the current political climate in California that emphasizes the perceived need for streamlining (i.e., shortening) governmental review of development applications, it is inappropriate to lengthen the Commission's review period beyond that which the Legislature ever intended. This is particularly true because it does not appear that any real public benefit would occur. As discussed above, the Commission is typically the last agency to review proposed development in the coastal zone. We know of no basis for concluding that adding various new and complex administrative procedures would improve decision-making at such a late point in the permit review process.

Second, in an era of austere budgets, it is important to consider the fiscal impacts that would occur if the proposal is fully implemented. The LRC tentative recommendation would pose a severe financial strain on the Coastal Commission and on state government generally. In this regard the Commission, for example, over the last five years has acted on approximately ninety quasi-judicial actions that require public hearings per month. The Commission would have to hire a number of additional staff, including lawyers, hearing officers, and court reporters. It would need to schedule longer hearings, and would be forced to rent additional hearing rooms. The Commission does not have sufficient resources to absorb those expenses; thus significant supplemental appropriations would be required to implement the proposal.

Finally, the Coastal Act emphasizes the importance of public involvement in the Coastal Commission's decision making process. The Commission's hearings have been conducted for seventeen years so that any member of the public who is concerned about a Commission action may comment orally to the

Commission. This has enabled the public to become involved with no greater expenditure than the time and travel costs to attend a Commission meeting. Under the proposal, members of the public would almost certainly be required to hire an attorney or other representative in order to comply with the additional procedural requirements that would be imposed. This would greatly increase the cost of public participation in Commission hearings, thereby limiting the ability of the public to participate in the Commission's review of coastal development.

In anticipation of the kinds of difficult integration problems discussed above, the proposed legislation authorizes state agencies to adopt regulations in order to modify the provisions of specific chapters of the Act or to make those chapters inapplicable. But these provisions are inadequate to meet the Commission's needs in various ways. First, as drafted, the authority to modify or make inapplicable the new APA provisions would apply only to an adjudicatory proceeding that "by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings." (See for example section 642.110.) Under existing law, the Coastal Commission is exempt from that requirement. (Government Code section 11500-11502.) However, the proposed legislation would also repeal the provisions that currently specify the agencies that are required to hold hearings conducted by administrative law judges employed by the Office of Administrative Hearings. Thus, it is unclear how the Commission or any agency would be authorized under the proposed statute to modify or make inapplicable the otherwise required procedures.

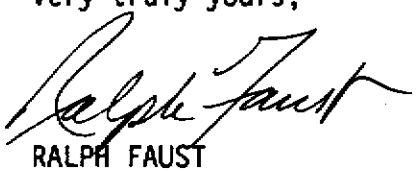
Second, the provisions are procedurally unwieldy because they require that an agency that wishes to avail itself of the opportunity they provide must do so by adopting regulations. The rulemaking process is expensive, time consuming and cumbersome. Rulemaking is a labor intensive endeavor for state agencies. It could take a significant part of one or more attorney's time over the course of a year to prepare proposed regulations for adoption by the Commission and filing with the Office of Administrative Law. Additionally, the Commission as a whole would be required to have lengthy public hearings to consider the pros and cons of modifying the requirements.

It seems unnecessary to require that agencies that have statutory requirements that cannot be harmonized with the proposal expend valuable time and resources to conduct a rulemaking proceeding to make the APA statutory provisions inapplicable. The better approach would be to include an express statutory exemption that would obviate the need for rulemaking. This could be accomplished by revising the proposal to require that only those agencies specified therein would be subject to the new administrative hearing requirements. Then the Legislature could affirmatively decide to which agencies it wanted to apply the proposal and how properly to balance the various procedural and monetary considerations.

In conclusion, I would like to offer some general thoughts about the proposal. Part of the wisdom embodied in the development of government decision-making in this century is reflected in the notion that no single process best suits the variety of needs of all administrative agencies which make determinations. Because different kinds of factual determinations need to be made from one agency to another, because different interests need to be identified and considered, including those without advocates, and because of a potential multiplicity of views among various parties, agency practice justifiably varies greatly within the overall confines of due process of law. To contend that only trial-type adjudications effectively resolve disputes is to cast aside much of this development of law in government. Even in the judicial context, alternative methods of dispute resolution are being explored, developed and utilized. Agencies should develop and refine their administrative procedures, borrowing liberally as necessary from our traditions, to properly implement the specifics of the laws which the Legislature has adopted, in the particular ways best suited to fulfill those various legislative mandates. The boundaries of this search for effective government should not be limited to one unitary procedure imposed without regard to substance or function, but rather be the tradition and law of due process as developed by the courts. Instead of reinventing government into a twenty-first century model, this mandate would recast government into a nineteenth century model, exhalting procedure over the proper implementation of substance. Only lawyers would benefit.

I urge you to reconsider your proposal or the alternative to make it adaptable to the needs of government agencies. Please do not hesitate to contact me if I can answer any questions, or be of further assistance.

Very truly yours,



RALPH FAUST
Chief Counsel

2561L

State of California — Health and Welfare Agency

Memorandum

To : CALIFORNIA LAW REVISION COMMISSION
Attention: Nathaniel Sterling
Executive Secretary

Date : September 1, 1993

Subject : Comments on Tentative Recommendation on Administrative Adjudication

From : Department of Social Services

This memorandum is intended to cover the concerns of this department with the exclusion of the hearing function of the state supervised, county administered, welfare and services programs. Comments concerning procedures for the welfare and services hearings will be addressed in a supplemental memorandum. Currently the major use of the central panel by the California Department of Social Services (CDSS) is in the licensing of facilities to care and supervise those persons who cannot do so themselves in community facilities. These include child day care, adult day care, residential facilities for adults, residential facilities for the elderly, foster care homes, group homes for children and other programs generally found at sections 1500 et seq. of the Health and Safety Code. By statute the denial of applications for or revocation of licenses for these facilities is governed by both procedures within the Health and Safety code and the Administrative Procedure Act adjudication procedures (APA).

As an agency we have a disagreement with the guiding philosophy of the commission. While we can see the advantages of revamping the current APA, we cannot agree that the various alternatives to the act create the problems discussed within the Introduction to the Tentative Recommendation. We believe that the efficiencies of tailoring due process procedures to specific needs of programs outweighs the advantages of a single act for all hearings. For example, the welfare hearings system processes almost 6,000 requests for hearings each month, and has its own state and federal rules which govern every aspect of the process. On the other hand procedures for uniform processing of cases that go before the central panel and similar cases makes good sense to us. As an agency we are willing to forego some of the special statutes in our programs for the sake of uniformity.

Although our specific comments appear on the attachment to this memorandum, we are especially concerned with the scope of the

new APA. Section 641.110 requires an APA hearing not only as now provided, when the statute so requires, but when any hearing or adjudicatory proceeding is required by statute or by either the state or federal constitution. This is a troubling requirement. While we recognize that the conference hearing will ameliorate some of our concerns, it does not do so in a manner that will substantially meet our needs. First, there are times that the proper place to go for constitutional relief is the court system. Even though as a general rule the APA proceedings are less expensive then Superior Court such is not always the case.

Where an applicant for the test of Administrator in one of our facilities misses the deadline for application or on the application fails to include transcripts for education, we do not give that person an APA hearing on not accepting the application or returning it without a denial. Nor do we give the person a right to an APA hearing when they flunk the test. In these cases the person is free to bring a writ of mandate against the department, but he or she knows that barring something extraordinary they will not only lose they will be wasting resources. This will not be the case if a right to appeal is included with the notice that the applicant flunked the test or that the application was incomplete. The same is true for monetary fines levied against persons operating without a license and those operating in violation of the law or regulation. There is no doubt in our minds that the constitution requires that these people be given an adjudicatory proceeding, but the court system is that place not an APA hearing. At this time our statutes require that any fine may be appealed up three levels of informal review at the field staff and deputy director level. After that there is no further remedy at the departmental level. These fines start at $25 and go up to $200 per day per violation. The department still has to enforce the debt, but can do so through means other than court. Finally, the licenses issued by the department have no renewal date. There are yearly fees however. Should a licensee not pay their fee their license is subject to forfeiture. Certainly they have a constitutional right to an adjudicatory proceeding over that forfeiture, but we do not give them an APA hearing.

There are other situations in which a hearing is fashioned to to meet the minimal precepts of the flexible concept of due process. In those cases the multiplicity of hearing procedures is not a sin. The agency gives the person a full description of their hearing rights at the time of the agency decision. Certainly the Skelly hearing for personnel matters is constitutionally required, but would become meaningless if it were to become a full APA hearing.

Clearly we believe that the definition is too broad. We suggest that the section be simplified to cover only statutorily required adjudicative proceedings. The state and federal constitutions are just too broad to attempt to fit the varied due process rights into one act no matter how flexible. The cost of such an endeavor is prohibitive and wasteful.

We would like to highly commend the commission for many of the changes in the act, and be excused for not mentioning all the most worthwhile provisions, but the exigencies of time force a tilt in our comments toward the trouble areas.

Thank you this opportunity to comment, and for the generous and informal manner in which you conducted the meetings of the commission in the discussions which led to this Tentative Recommendation.

Lawrence B. Bolton
Deputy Director, Legal
Division

COMMENTS

Section 610.190. Agency

This proposed section sets forth a new definition of agency. One problem this section tries to solve is that of to whom to appeal an action taken by a person purporting to act for the agency. We think that a practical approach to solving this problem would be to require that any agency action from which an appeal is permitted by law include the name of the agency taking the action and the proper manner in which to appeal in its notice of the action. We were under the impression that this was the typical statutory requirement. It often the case that a division chief or other person will be given authority to act for the director, but that does no make the delegatee and his or her unit the agency for purposes of the APA hearing. That transformation is apparently what happens under this section. In the federal system with its multiplicity of commissioners within agencies a definition such as this might be necessary, but in California it is not.

Section 610.460 Party

This section includes within the definition of "party" an intervenor. This overly broadens the definition. Parties are given certain responsibilities and powers in this act, and many may be inappropriate for interveners. Even picking the site of the hearing would require agreement of the intervenor under section 642.430(b)(3). As a practical matter the reviewers of this code are not going to be thinking that party includes intervenors every time they see the term. I know that commenting on the code is difficult when the term refers to more than the respondents and the complainant. For clarity the sections should include reference to intervenors when they are to be included.

Section 612.150 Contrary statute

We support this section which clearly sets forward the general rule that an express statute overrules a contrary general provision. This is not an academic exercise as there is currently a dispute over a statute in the Welfare and Institutions Code that varies the definition of regulation, but predates the latest amendments to the Government Code definition of regulation. Also should an agency or the commission miss a statute which provides for a exemption from the APA this statute will make it clear that the exemption is not lost by oversight.

Section 612.160 Suspension of APA by Governor

This section provides for the suspension by the Governor of the APA when he or she determines that to do otherwise would cause a denial of federal funds. The experiences of this department and others in matters such as this is that placing the decision in the hands of the already overburdened Governor creates a hardship on all concerned. While a decision such as this one should not be taken lightly, the commission may wish to reconsider placing the decision making authority in the hands of the Secretary of the Agency under whose authority the funding or services resides or the Governor where the funds are not under such authority. This will avoid the problem of having the director of a department make this decision by removing it to a cabinet level decision, but will not overburden an already overburdened Governor.

Sections 613.210, 613.220 and 642.330 Service and delivery

The effect of these sections is to end the exception to personal service where the initial pleading is mailed by registered letter to the respondent at the respondent's official address in cases where the respondent is required to maintain an address with the agency. Currently the service is effective even though returned pursuant to Government Code 11515(c). This deletion of service being effective by registered mail will cause confusion, expense and public detriment. No one should be able to keep a license or certificate by the expediency of evading service, especially where the person is required to keep the licensing agency appraised of his or her mailing address. In the case of our department licenses where there is no renewal required, this would be a very expensive game of hide and seek. The current provision of law should be retained.

Section 641.110. When adjudicative procceeding required

Please see our opposition to including all ajudicative proceedings required by statute or constitutional decisions in the memorandum transmitting these comments.

Article 2. Declaratory Decision

We support this article in that it permits agencies to decline with reasons any request for such decisions. The department has not yet thought of how this process would be used in the context of the programs it administers, and that being the case has no further comment.

Article 3. Emergency Decisions

Our department currently issues Temporary Suspension Orders which suspend a license prior to hearing, at a date set by the order, and require that the hearing, if there is to be one, begin within 30 days of the receipt of a notice of defense. It is unclear from the draft, and we cannot ascertain if the commission intends to repeal our current statutes on Temporary Suspension Orders. We are going to presume that the commission does not intend to repeal the current statutes.

Section 641.310 Regulation Required

We support the concept that agencies may have a need to act quickly even where the Legislature has not addressed the issue. Regulations appear most appropriate.

Section 641.350 Completion of proceedings

Although we understand that the commission does not intend to change our current authority to issue Temporary Suspension Orders, we would like to comment upon this section. It is our agency's current requirement to serve the accusation as part of the Temporary Suspension Order, but this system of bifurcating the two might be beneficial in that there may be reasons to revoke a license in tandem with the reasons for the emergency order, and this method will define the issues clearly.

Section 642.230. Action on Application

This section requires an APA hearing be initiated when required by Section 641.110. As we believe that the breath of 641.110 is over broad, this statute suffers the same malady. Subdivision (f) permits the agency to deny an application for a decision when the application is not submitted in a form substantially complying with an applicable statute or regulation. We do not believe that this subdivision goes far enough in permitting on agency to deny hearings to applicants who fail exams or fail to show qualification to sit for a test.

It would be preferable to approach this section from the obverse. This section gives everyone a right to a hearing unless one of the exceptions is met. We prefer the sureness of the present statute which delineates when a hearing is required.

Section 642.240. Time for action

This section is somewhat difficult to read. Under the current scheme in the licensing context, the agency denies the

application and the applicant may then appeal the denial. It is the appeal of the denial that requires the agency commence an adjudicative proceeding. At first we thought that this statute kept that scheme of things. But under this section the agency has 90 days to act on an "application for agency decision" by either (1) granting or denying the application or (2) commencing an adjudicative proceeding. It is easier to read the phrase "application for an agency decision" as the appeal from the denial than as the simple denial of an application. The comments to section 642.220 state that an application for a decision can either be to conduct an APA hearing or issue a decision. In the context of 642.240 which is about time frames it could easily be read as a substantive section which requires not just a denial to an application for a license, but also an initial pleading. This is because of the choice given. An application should always be answered with a grant or denial, but the command to commence an administrative proceeding puts that matter in doubt. An applicant once served with a detailed pleading should be required to respond with a notice of defense to confirm a desire to have a hearing.

Section 642.440. Notice of Hearing

While this section may be changed by regulation the 15 day advance notice, 20 days when sent by mail, may be unnecessarily long. We have had few problem with the requirement of 10 days now in law. In order to change these time frames by regulation the department will have to show a necessity to do so. We cannot read the minds of the Office of Administrative Law, but that office may require a strong showing where time lines are being altered. Our department now has a require that all virtually all matters be brought to hearing within 90 or 60 days of the request for a hearing (receipt of the notice of defense). Adding 5 more days to the process will make it that much harder to schedule the hearing. Also in cases of Emergency Decisions and in the department's case Temporary Suspension Hearings the extra days may create hardships. The TSOs are required to be brought to hearing within 30 days of the receipt of the notice of defense.

Section 643.210 Disqualification of Hearing Officer

Our agency has been on record as favoring a method by which pre-emptory challenges by declaration would be in the APA. Unfortunately, as brought out at the hearings, the logistics of such a plan are quite difficult to execute. The suggestion by some parties at the hearings that the names of everyone on the panel of judges for the district be sent out to the parties and

the challenge be made to one name on the panel by each party (but not intervenors) does answer many of the concerns of scheduling and multiple challenges. We think that this approach might be worth further exploration.

Section 644.110 Intervention

The chapter on intervention does not permit the departments to make it inapplicable by regulation. It is mandatory. We cannot recommend the adoption of this chapter without it becoming optional.

On a subject by subject analysis, intervention might be a good idea. In welfare hearings, the fact that the party is receiving aid or services is confidential. In many licensing matters, the names and details of the residents (victims in some cases) is confidential. The intervenor would have access to all sorts of confidential information. In many cases the insurance company representing the licensee will want to intervene, and with this law change may believe compelled to intervene to protect future interests.

This section will also represent a possible cost item. The agencies must pay for their own time, and the time of the OAH. These costs are substantial. The hours or days spent on motions to intervene will cost thousands of dollars in each case. We can see clients of licensees wishing to intervene that they or their relative can continue to receive care or reside at a now licensed facility which is the subject of the hearing. While such a person would not seem to have rights, duties, privileges or immunities affected by the action, it is not that big a stretch to say such rights are affected. The question at a licensing hearing deals with whether the license should be affected. The licensee can bring any relevant item to his or her defense. A third person intervening will unnecessarily lengthen the process and cause undue expense.

Section 645.130 Depositions

This section continues the current rules for deposition of witnesses who will be unable to attend the hearing. Under the current statute and this section, it appears that when a deposition is to be held outside the state a court order must issue to that effect. The court order is to be obtained by the agency. This seems wasteful in the case in which the witness is willing to testify. It would seem that even if one party objects, no further order should be necessary. The ALJ should be able to quash the subpoena on a noticed motion in such a case. Also the order of the Superior Court should be obtained by the party seeking the deposition.

Section 645.230 Discovery of statements, writings, reports

One substantial change in this section from current law is the dropping of the phrase "and which would be admissible in evidence" from the phrase "Any other writing or thing that is relevant." This omission is not explained in the comments. It would seem to put to rest the withholding of writings and statements that would only be used in rebuttal. A comment to the effect of this change would be helpful to guide the public.

Article 4. Subpoenas

This article gives the agency and presiding officer more authority then under current law. The presiding officer can quash a subpoena, rather than forcing the parties to go to superior court. This will save much time and expense in these matters.

It would seem that this is the place to put any relief available in Superior Court. In matters of subpoenas such relief prior to compelled discovery is necessary for the protection of protected information. Compelled discovery cannot be undone just as a bell cannot be unrung.

647.110 Conference hearing

Paragraph (a)(5) by implication gives licenses a right to a hearing in matters that do not involve revocation, suspension, annulment, withdrawal or amendment of a license. Disciplinary matters that involve fines and the like should not be the subject of an APA hearing unless the Legislature explicitly gives such a right. These matters that do not put a license at jeopardy should not be the subject of an APA hearing. Even though factual matters will be in dispute, an informal process is all that is needed. The hearing need only be before someone who did not make the decision in the first place which can be a relatively low level manager.

Section 648.130 Default

Vacancy Of Default

This section would define good cause for vacating a default on the basis of mistake, inadvertence, surprise, or excusable neglect. Even though the agency may grant the new hearing on these bases the definition of good cause is such that it appears the grant will become mandatory as it will be an abuse of discretion to do otherwise. After a showing of failure to receive the initial pleading or notice of hearing an agency would be hard pressed to deny a vacation of the default. As the inclusion in the statute of mistake and inadvertence is

given equal status to failure to receive notice, we believe that a court would determine that no matter what the mistake or inadvertence, it was good cause. It would be preferable to give no example of good cause to avoid the problem.

Burden Of Going Forward

Current law is ambiguous in regard to the action necessary to take a default. Where no notice of defense is filed our agency makes finding of fact based upon the evidence in the file. Where the notice of defense is filed and the respondent fails to appear at the hearing there is a split of opinion. Some would hold that the agency must put on its case through witnesses or affidavits, and the ALJ will write a proposed decision determining if there is enough evidence to revoke the license. The others would hold that a default can be had at a failure to appear by the agency making its own finding at a time other than at the scheduled hearing. In keeping with this draft, since missing a settlement conference can be a default, it would appear that a default for failure to appear at the hearing would not lead to a one sided hearing unless the agency wished to make such a record.

Section 648.140. Open Hearings

Please see our comments to 648.350 concerning the protection not only child witnesses, but also developmentally disabled, mentally ill, and others whose privacy rights might require the closure of the hearing to the public.

648.310. Burden of Proof

This section paints with too broad a brush. There is no definition of an occupational license. By statute our agency need only prove its case by a preponderance. We understand that the statutes will override this provision. Nonetheless, there is quite a difference between an occupational license that was earned at the expense of 7 or 8 years of college work and an occupational license that requires no real preparation other than an application and payment of fees. Adopting this standard may end some confusion, but it appears to go way beyond the current state of the law. The ability to change the burden by regulation is unrealistic. The statement in this section will become the law and agencies will not be able to change it by regulation, but only by statute. We believe that a further definition of "occupational license" is needed, or that subdivision (b) should be deleted in favor of permitting case law to stand.

648.340. Affidavits

Subdivision (d) of this section state that for this section affidavit includes declaration. As we understand that declarations will always substitute for affidavits so long as they are made within the state, this subdivision appears unnecessary. That being the case it might cause confusion in that other affidavits required in the Government Code might be wrongly presumed to not include declarations. If felt necessary the reference to the Code of Civil Procedure in the comment would suffice to make the matter clear.

648.350. Protection Of Child Witnesses

This section does not go far enough. Under Seering this department has been successful in also showing that developmentally disabled persons are entitled to the same protections as children. Also looking at 648.140 the reason to close the hearing in the interest of fairness, not the protection of the witnesses. We would suggest that the reference to "children" in this section be removed, thus giving discretion to the judge to weigh the right to confront witnesses and the public interest in open hearings against the harm to witnesses and their unavailability otherwise.

648.450. Hearsay

This section permits a finding to be based upon hearsay only if that hearsay would otherwise be admissible in a civil action. The federal rules of evidence vary from the rules in California. We would suggest that this section specifically adopt both the federal and state rules. We can see no purpose in restricting the rules to hearsay exemptions found only in state court. Also the experience with the federal rules may give some impetus to studying those rules for adoption in this state.

Section 649.230. Review Procedure

An interesting question comes up under this section. Should an agency that finds no fault with any of the decision of the administrative law judge except the penalty be forced to order the entire transcript in order to make the penalty more severe? While the notice and opportunity to argue provisions are no doubt necessary in such a situation, why should the agency be forced to order a very expensive transcript over uncontroverted findings. On a motion by the respondent, without the transcript, the agency can lessen the penalty. The distinction for increasing the penalty is really without a difference except that limited budget agencies must weigh the cost of the transcript against the public good.

Article 3. Precedent Decisions

The authority given to adopt precedential decisions will be a valuable resource both to the agencies and the public.

CONFORMING REVISIONS AND REPEALS

Gov't Code section 11340.4. Study of rulemaking

When the Office of Administrative Hearings had nominal control of the rulemaking process this provision of law was innocuous. Now that the Office of Administrative law has been created with all its powers concerning underground regulations this section is no longer innocuous. We can see no necessity to transfer theses responsibilities and investigative requirements to OAL. Reports to the Legislature on a continuing basis have recently met with disfavor in the Legislature.

THE STATE BAR
OF CALIFORNIA

OFFICE OF RESEARCH

555 FRANKLIN STREET, SAN FRANCISCO, CALIFORNIA 94102-4498 (415) 561-8200

September 2, 1993

Robert Murphy
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Comments on Tentative Recommendation Concerning Administrative Adjudication by State Agencies

Dear Mr. Murphy:

Enclosed are the comments of the State Bar's Committee on Administration of Justice concerning the Law Revision Commission's tentative recommendation on administrative adjudication by state agencies circulated for comment in June 1993.

These comments are only those of the Committee on Administration of Justice. They have not been adopted or endorsed by the State Bar's Board of Governors and should not be considered the position of the State Bar of California.

We appreciate the opportunity to comment on this tentative recommendation. Please contact me if you questions or need further information concerning these comments.

Sincerely,

David C. Long
Director of Research

DCL:ec
Enclosures

cc: Margaret Morrow
William Dato
Donn Pickett
Monroe Baer

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THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

TO: David C. Long,
Director of Research

FROM: Committee on Administration of Justice

DATE: September 3, 1993

RE: Law Revision Commission's Tentative Recommendation on Administrative Adjudication by State Agencies

INTRODUCTION

In 1987 the Legislature authorized the California Law Revision Commission to study whether there should be any changes to the current Administrative Procedures Act, Government Code 11500 et seq. The Commission divided its tasks into four parts, roughly defined in order of priority as (1) administrative adjudication, (2) judicial review, (3) rule making, and (4) non-judicial oversight. In May of this year, the Commission circulated for comment its first tentative recommendations directed at the initial area of study: administrative adjudication by state agencies. The State Bar Committee on Administration of Justice ("CAJ" or "the Committee") has reviewed the Commission's recommendations and respectfully submits the following comments.

BRIEF HISTORY

California's Administrative Procedure Act ("the Act") was enacted in 1945 in response to a study and recommendations by the Judicial Council a year before the federal act and before that of almost any other state. No comparable APA then existed and the entire concept of an administrative procedure code applicable to agencies in general was untried and controversial. In New York, the Benjamin Commission recommended in 1942 that no such statute be enacted, believing that the variation in adjudicatory practice among the state's administrative agencies made it inadvisable or even impossible. At the federal level, the majority of the Attorney General's Committee on Administrative Procedure had recommended enactment of a federal statute whose provisions on adjudication had limited scope.

Today the Act regulates adjudicatory procedure in about sixty-five agencies. It provides for a single, unvarying mode of formal trial type procedure conducted by an independent

administrative law judge assigned by the Office of Administrative Hearings. The current Act is limited in scope because its adjudication provisions fail to cover a large number of important agencies that engage in adjudication: the Public Utilities Commission, the Workers' Compensation Appeals Board, the Unemployment Insurance Appeals Board, the State Board of Equalization, the Agricultural Labor Relations Board, the State Personnel Board, and others. The Commission states that the non-APA agencies conduct at least 95% of the adjudication occurring each year at the state level in California, leaving less than 5% of the adjudication for agencies covered by the APA. Adjudication in non-APA agencies is subject to procedural rules outside the Act and, of course, there are statutes, regulations, and unwritten rules prescribing the adjudicatory procedures of each non-APA agency, waiting to trip the unwary public or the unseasoned or inexperienced practitioner. These procedures vary enormously from formal adversarial hearings to informal meetings. The only unifying theme among them is that adjudication in these agencies is not conducted by an Administrative Law Judge assigned by the Office of Administrative Hearings. Generally the persons who make the initial decisions in these agencies are employed by the public agency.

Based on this backdrop the California Law Revision Commission sets forth the tentative recommendations, which promise to incorporate a customized statute that adds procedural and substantive improvements such as conference hearing, alternative dispute resolution and other features.

CENTRAL PANEL OF ADMINISTRATIVE LAW JUDGES

The Commission reports that California was the first jurisdiction to adopt a central panel of hearing officers who would hear administrative adjudications for different agencies which do not employ their own administrative law judges and hearing officers. The Commission recommends that there should not be a general removal of state agency personnel and functions to a central panel, but that any transfer of hearing functions to a central panel should be specific to the particular agency involved, and its functions should be based on a showing of the need for the particular transfer.

The Commission expresses six reasons for its position:

1. The Commission's investigation did not reveal any evidence of unfairness or perception of unfairness in California.

2. The various agencies are generally satisfied with their present in-house hearing personnel.

3. Most agencies that employ a significant number of in-house judges are themselves purely adjudicatory agencies, instead of agencies with a mixture of

prosecutory and adjudicatory functions.

4. Centralization is not likely to generate savings and could increase costs, based on a 1977 study.

5. The agency charged with administering an area of state regulation needs to be able to control the enforcement process.

6. Each agency, its mission, and its needs are unique.

CAJ questions certain of the rationales articulated by the Commission. The existing Administrative Procedure Act by its terms applies to specifically identified agencies and proceedings, whose hearings would be conducted by personnel employed by the Office of Administrative Hearings. (Govt. Code Sections 11500(a) and 11501.) Under the proposed statute this drafting technique would be reversed; the Administrative Procedure Act would apply to all agencies, and hearings of all agencies would be conducted by Office of Administrative Hearing personnel unless expressly excepted. The hearings expressly excepted, however, are those not presently governed by the Administrative Procedure Act which constitute 95 percent of the administrative adjudication in California.

Administrative proceedings may provide the only effective opportunity for the citizen to assert or protect certain rights in disputes with state agencies. Both fairness and the appearance of fairness in such proceedings is critical. The Committee questions the Commission's observation that its investigation "did not reveal any evidence of unfairness or perception of unfairness in California." Our collective experience indicates that there is an appearance of unfairness, under the current structure, particularly to the average citizen who is the responding party. To the extent the public perceives that the administrative agency is acting as accuser, judge, jury and executioner, its faith in the process may be eroded.

Creating large-scale exemptions to the central panel concept is also not excused by the second reason cited by the Commission, namely that "the various agencies are generally satisfied with their present in-house hearing personnel." Respondents may not be satisfied with those same personnel and the existence or even appearance of unfairness is one of the causes of increasing alienation of members of our society from government and its adjudicatory structures.

The rationale that the agency charged with administering the area of state regulation needs to be able to control the enforcement process is a succinct expression of the very reason why hearing

officers should be as independent of the administrative agency as reasonably possible if respondents are to receive the appearance of a fair hearing. Citizen-respondents will understandably question a hearing before an administrative hearing officer not clearly separated from the prosecuting agency.

Exemptions from the central panel process should be sparingly created only be statute and only in those situations where the agency regulates a specialized and sophisticated constituency or the subject matter is so new or complex that the use of an agency judge or hearing officer is the only realistic means of achieving justice. Where a requested exemption is purportedly based on the need for technical expertise, it should be granted only where there is a consensus among parties and attorneys regularly participating in such adjudications that central panel hearing officers cannot develop sufficient expertise on a case-by-case basis.

ROLE OF THE ADMINISTRATIVE LAW JUDGE

Under the existing Act, fact finding is done by an administrative law judge (ALJ) employed by the Office of Administrative Hearings. The head of the administrative agency may either adopt the proposed decision of the administrative law judge or reject it and decide the case itself on the record. The new proposal could change the format:

1. Each agency head will decide whether the hearing will be conducted by an ALJ or by the agency head itself.

2. If the agency head conducts the hearing, the agency head will issue a final decision within 100 days after the end of the hearing.

3. If an ALJ conducts the hearing, the ALJ renders a proposed decision within thirty days after the end of the hearing. The agency head has 100 days within which to act on the proposed decision. If the decision is not acted upon within that time, it becomes final by operation of law.

4. A proposed decision or a final decision is subject to administrative review only in the discretion of the agency.

Under current law, the general rule is that an appeal to the head of the agency is available as a matter of right. If the Commission proposal is adopted, an appeal to the head of the agency will only lie in the discretion of the agency. The

reviewing authority will then be limited to a review of the record, except for newly-discovered evidence or evidence that was unavailable at the time of the hearing.

A possible result of this change will he an increasing number of administrative mandamus proceedings. To the extent that the agency elects not to allow the head of the agency to reconsider a decision, the parties will be left with no recourse other than judicial relief. The Commission points out that an appeal to the agency head has "attendant expense." The expense of appealing to the head of an administrative agency is substantially lower than the expense of filing or responding to a petition for administrative mandamus or other judicial proceedings. The Commission does not discuss any reasons for its recommended change, nor does it analyze the fiscal impact on the judiciary. Particularly in light of recent significant reductions in judicial budgets, CAJ opposes the change to optional review by the agency head on grounds it will force more administrative cases into the courts. Otherwise the Committee supports the proposed changes.

IMPARTIALITY OF THE DECISION MAKER

The Commission has recommended five additions to the APA to assure fairness and due process. The proposal is written so that almost each element which would assure fairness is offset by exceptions which take away such assurances.

The proposal will require that:

1. The decision be based exclusively on the record in the proceeding.

2. Ex parte communications to the decision maker are prohibited.

3. The decision maker be free of bias.

4. Adversarial functions be separated from decision making functions within the administrative agency.

5. Decision making functions should be insulated from command influence within the agency.

The requirement that the decision be based exclusively on the record of the proceeding codifies current decisional law in California. (Section 649.120(c).) The evidence of the record may include the knowledge of the decision maker and other supplemental evidence not produced at the hearing, if that

evidence is made a part of the record and all parties are given an opportunity to comment on it.

Another change is the prohibition against ex parte communications with the decision maker. Under present law, factual information must be given to the decision maker on the record, but the law is not clear whether ex parte contacts concerning law or policy are permissible. The principle which ought to govern administrative proceedings is stated by the Commission: "Fundamental fairness in decision making demands that any arguments to the decision maker on law and policy be made openly and subject to arguments by all parties." But the proposal nevertheless permits the decision maker to obtain advice and assistance from agency personnel, clouding the "fundamental fairness" concept. (See generally Howitt v. Superior Court (1992) 3 Cal. App. 4th 1575, 1582.) The decision maker would be permitted to discuss "non-controversial matters of practice or procedure." The proposal does not define this phrase but creates an expansive exception for ex parte communications at section 648.520.

The proposal also contains provisions for disqualifying the decision maker for bias, prejudice, interest, or any other cause provided in this part. Section 643.210. The proposal goes beyond existing law to provide that, if disqualification of the decision maker would prevent the agency from acting, the decision maker is nevertheless disqualified, and another person may be substituted for the decision maker by the appointing authority. The subcommittee supports these provisions proposed in section 643.130.

Existing statutory and decisional law on the separation of administrative and adjudicatory functions is not clear. The proposal attempts to clarify the law as follows:

1. Agency personnel may confer in making preliminary determinations, such an probable cause for issuing the initial pleading. Proposed section 643.330 destroys the separation of functions by permitting a person who participated in determining that there was probable cause to serve as the presiding officer in the proceeding which results from that person's decision. If the person who decides to prosecute an administrative proceeding may ultimately adjudicate the result of that proceeding, the bias is inherent.

2. If the adjudicatory proceeding is non-prosecutorial, and a person has been an investigator or advocate more than one year before the time he or she sits as an adjudicator in the case, there in no disqualification. The Committee agreed that the likelihood of bias also

in inherent even here.

Section 643.330 also would permit an investigator or advocate to give advice to the adjudicator concerning a technical issue, if the proceeding is non-prosecutorial in character and the advice is necessary for and not otherwise reasonably available to, the adjudicator, provided that the content of the advice is disclosed on the record, and all parties have an opportunity to comment on the advice. Although this may be necessary in administrative cases that involve specialized, technical issues, an additional element should be required. Before seeking or receiving the advice, the adjudicator ought to give notice to the non-agency parties and an opportunity for them at least to be present.

Proposed section 643.330(a)(3) would also permit an investigator, prosecutor, or advocate to advise the adjudicator concerning a settlement proposal advocated by that person. The Committee opposes this provision.

VENUE

Section 642.430 provides that administrative hearings shall be held in San Francisco, Los Angeles, Sacramento, and San Diego. This section should include other sites as venues, such as Riverside, Fresno, Redding, San Luis Obispo, etc. The state is in a much better position to move the venue than litigants. At a minimum there should be a venue in each location in the state at which the Court of Appeal is authorized by the Legislature to regularly hear cases.

PREHEARING CONFERENCE

Section 646.110 is a new provision and the Committee supports it. However, CAJ recommends that prehearing conferences not be converted into an adjudicatory hearing and ADR should be considered where possible. The proposed law makes the prehearing conference, presently available in proceedings before 1945 California APA agencies, applicable to all state agencies, subject to the ability of an agency to control its use by regulation. The prehearing conference is conducted by the presiding officer who will preside at the hearing. Settlement possibilities may be explored at the prehearing conference. If it appears that there is a possibility of settlement, the proposed law allows the presiding officer to order a separate mandatory settlement conference, to be held before a different settlement judge if one is available. Offers of compromise and settlement made in the settlement conference are protected from disclosure to encourage open and frank exchanges in the interest of achieving settlement.

CONFERENCE ADJUDICATIVE HEARING

Section 647.110 is a new provision which allows for a more informal but non-biased decision-making process with some input from the parties. The standard formal adjudicatory hearing procedure may be inappropriate for some types of decisions. In some respects the administrative adjudication process has become too judicialized and too imbued with adversary behavior to provide an efficient administrative dispute resolution process. To address this concern, the proposed law proposed law permits agencies to resolve matters involving only a minor sanction by means of a conference adjudicative hearing process, drawn from the 1981 Model State APA. Section 647.110 allows an adjudicative process when there is no disputed issue of fact. The section allows a very relaxed procedure and permits the ALJ to drastically limit the proceeding. The Committee supports the proposal as modified.

ALTERNATIVE DISPUTE RESOLUTION

Section 647.210 is a new provision. CAJ questions why an agency should be able to pass ADR and recommends that the section be eliminated.

Section 647.220 unnecessarily restrict the use of ADR procedures. There is no need to limit the types of ADR processes when the parties are in agreement.

The proposal does not go far enough in connecting the relationship between ADR and settlement conference, especially if the parties agree to ADR.

Section 647.240 contains a good confidentiality and admissibility clause but the immunity provision is unnecessarily limited to mediators and arbitrators.

INTERVENTION

Under the old law it is unclear whether a third party may intervene. The proposal states a clear right to intervene upon an appropriate showing. Section 644.140 makes the decision regarding intervention nonreviewable. The Committee at least partially disagrees. The right to intervene may be significant and it should be reviewable along with any other part of the agency's decision, a denial of intervention should be immediately reviewable as a matter of right, whereas a grant of intervention should be subject to a more limited discretionary review.

CONTINUANCES

The Administrative Law Judge may grant a continuance when requested to do so by the parties. The proposal changes existing law in two respects. It increases the statutory period for seeking a continuance from 10 days to 15 days from the date when the need for a continuance comes to the party's attention. It also eliminates the judicial review component. CAJ opposes this latter change. There are circumstances in which the denial of a continuance can severely prejudice a party's ability to present his or her case.

SETTLEMENT CONFERENCE

The Committee believes there is no reason to limit the Office of Administrative Hearing proceeding and recommends deleting everything after the first comma in section 646.220 (b) and rewriting subdivision (d) to require use of telephonic conferences when available.

CONSOLIDATION AND SEVERANCE

The present APA contains no provisions for consolidation or severance. Proposed section 648.120(a) would permit consolidation of proceedings that involve common questions of law or fact. Proposed section 648.120(b) would permit the agency or the presiding officer to order a separate hearing of any issue in furtherance of convenience or to avoid prejudice or when separate hearings would be conducive to expectation and economy. These provision are copied from CCP 1048.

Proposed section 658.120(c) would provide that, if the agency and the presiding officer make conflicting orders for consolidation or severance, the agency's order controls.

The comment to proposed section 648.120 goes beyond the analogous provisions of CCP 1048 by permitting the agency to employ class action procedures at its discretion.

The Committee was divided on whether it is appropriate for an agency to have class action powers at the administrative level, but agreed that any employment of class actions procedures should be specifically spelled out rather than hidden in the comment to a narrowly drawn statute.

CONCLUSION

Consistent with the foregoing CAJ generally supports the California Law Revision Commission's legislative initiative with the proposed modifications. We very much appreciate being given

the opportunity to provide our comments.

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c:work\CAJ\ADJUD