Study N-200 August 17, 1995

Second Supplement to Memorandum 95-38

Judicial Review of Agency Action: Additional Communications

Letter From Public Utilities Commission

Attached as Exhibit pp. 1-6 is a letter from Daniel Fessler, President of the Public Utilities Commission, expressing concern about proposed revisions to the PUC statute. He objects to transferring review from the Supreme Court to the court of appeal, allowing venue in all six courts of appeal, and providing substantial evidence review of adjudicatory decisions. These proposals are drawn from Senate Bill 1322 which would do the three things Mr. Fessler finds objectionable. The staff draft attached to the basic memorandum assumes enactment of SB 1322.

Attached as Exhibit pp. 7-9 are sections of the PUC statute to be amended or repealed by our proposal, revised to include recent amendments to SB 1322. If the bill is not enacted, the staff will delete these sections from the Tentative Recommendation. The narrative on page 14 of the preliminary part ("Proper Court for Review") will also have to be revised in light of final legislative action on SB 1322.

Memorandum From State Water Resources Control Board

Attached as Exhibit p. 10 is a memorandum from William Attwater, Chief Counsel for the State Water Resources Control Board. He generally supports the staff draft, but is concerned about the venue provisions. The draft statute preserves existing venue rules. Professor Asimow recommended that venue for superior court proceedings should be in Sacramento County or, if the agency is represented by the Attorney General, in counties where the Attorney General has an office (Los Angeles, Sacramento, San Diego, and San Francisco). The basic memo has a draft provision to codify this approach. The argument for it is that it will avoid local judicial bias and permit development of judicial expertise. The Attorney General approves of this approach, as does Mr. Attwater.

Memorandum From State Bar Committee on Administration of Justice

Attached as Exhibit pp. 11-16 is a memorandum from the State Bar Committee on Administration of Justice. We will analyze their comments orally at the meeting.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA
505 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102

DANIEL WM. FESSLER
PRESIDENT

TEL: (415) 703-3703
FAX: (415) 703-5091

August 15, 1995

The Honorable Colin Wied
Chair
California Law Revision Commission
4000 Middlefield Rd. D-2
Palo Alto, CA 94303

Re: Judicial Review of Agency Action Draft of Tentative Recommendation

VIA FEDERAL EXPRESS

Dear Mr. Wied:

I am writing in a state of considerable perplexity respecting your Commission's recommendations on the judicial review of actions of this agency. Three factors account for my state of mind. First, I note at page fourteen of the draft the accurate statement that, under current practice, the decisions of this agency may only be reviewed in the California Supreme Court. It is also noted that similar direct review obtains for the Energy Commission and the State Bar Court. The reader then encounters the following emphatic statement: "The proposed law does not alter this scheme." Second, the text of the proposal seems to flatly contradict that statement and instead proposes support for a position demonstrably exacerbating the reasons why Governor Wilson vetoed SB 1041 as passed by the Legislature in 1991. Finally, the draft statute appears to leave in place the direct review of decisions of the State Bar Court.

In response I would like to state the predicates of our opposition to the textual recommendation, objections which mirror our submissions with respect to the currently pending provisions of SB 1322. Second, I would like to clarify the proposition first established in 1913, that, for good and abiding reasons, the Legislature has elected to vest this agency with a judicial function akin to that played by an intermediate appellate court.

My object is to persuade your Commission members that this scheme is both more timely and informed than the one envisioned in the tentative recommendation.

The Public Utilities Commission (PUC) is opposed to the proposals contained in the Draft Tentative Recommendation (Draft) concerning judicial review of the PUC, especially the provisions that would (1) authorize the district courts of appeal to review PUC decisions; and (2) revise the standard for judicial review of our orders.

As you may be aware, the PUC opposes SB 1322 (Calderon) of the current legislative session which would also authorize district court of appeal review of PUC decisions under a revised standard of review. The PUC has opposed similar legislation in previous years, including SB 1041 which was vetoed by Governor Wilson in 1991. In his veto message Governor Wilson said:

> The Railroad Commission, and its modern successor [the] Public Utilities Commission, were deliberately fashioned to centralize the state's authority with respect to regulated economic activity. In the process of enacting these reforms, function[s] of both the legislative and judicial branches of government were transferred by Constitutional amendment to the Commission. In a deliberate departure from a system in which powerful economic interests used litigation to delay, if not block, the final orders of the Commission, the Legislature limited the scope and centralized the function of judicial review in the California Supreme Court. Such a system has functioned for three-quarters of a century to balance the need for agency accountability with the public interest in having vital economic decisions settled with finality.
>
> I remain committed to that vision. At this critical stage in its economic and social evolution, California can ill afford the delay, expense and uncertainty invited by the enlarged predicates for judicial review contained in this bill.

These comments were directed at a bill which would have centralized the intermediate appellate review in a single district court of appeal. My contention that your tentative proposal is more objectionable is grounded on your desire to lodge this function with all six intermediate appellate courts thus turning California's regulatory landscape into the Balkans. Under the tentative recommendation, nearly one hundred court of appeal justices would function as on again, off again utilities commissioners. The PUC's decisions could have one meaning in Fresno and yet another in Santa Rosa and yet they would pertain to the same service offered by the same utility! History and function combine to suggest that these are not improvements over the status quo.

Since the Public Utilities Act was first passed by the California Legislature in 1911, the statutes have provided that: "No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission". Max Thelen, a principal author of the 1911 Public Utilities Act, explained the purpose of the Act's judicial review provisions: "It is hoped that the procedure thus provided will tend to prevent the long drawn-out court proceedings and the reliance on technicalities to which public utilities have largely resorted in other states to tie the hands of the state...".

The Draft's statutory language would repeal this longstanding provision for direct and exclusive review by the Supreme Court and would instead provide for review of PUC decisions by the courts of appeal. It is difficult to discern a public benefit so substantial, or a need so unmet that it would justify overturning this process, especially in light of the impact this proposal would have on the regulation of utilities and the workload of the courts, as well as the costs it would impose on the state.

Impact on Regulation of Utilities

The added layer of appellate review will cause lengthy delays and interfere with the PUC's ability to effectively regulate the state's public utilities. The need for prompt review of PUC decisions reflects a strong public interest in having vital economic decisions settled with finality. This was true historically and today there is an even stronger need for prompt final review in light of the rapid changes in the industries regulated by the PUC.

In the current competitive environment, there are numerous parties to PUC cases, not just ratepayers and utilities. Competitive pressures give parties an incentive to use litigation as a weapon to delay and frustrate their competitors.

The added layer of appellate review will increase uncertainty about PUC decisions while a court decision is pending, even if the decision is not stayed. Moreover, the draft statutory language gives the court of appeal authority to stay PUC decisions, authority that only the Supreme Court now has. Therefore, stays of PUC decisions, and resulting interference with the PUC's work, will be more likely even if rate changes are not subject to stay.

The Draft's statutory language would allow appeals to be heard by courts of appeal throughout the state. This would prevent any court from developing the expertise necessary to review PUC decisions and invites conflicting decisions from different courts. Proponents of intermediate appellate review respond that the Supreme Court would be available for resolution of these conflicts -- an entirely new workload for the Supreme Court as well as indecision, confusion and delay for California's businesses and consumers.

The Draft's statutory language would permit a party to go to the court of appeal if the PUC does not issue a decision within 120 days after it grants a rehearing. For those PUC decisions with significant statewide impact and long lists of participants, 120 days may be insufficient time for preparation and filing of testimony, holding hearings, writing a decision, and the comment period(s) required by Public Utilities (PU) Code Section 311. Thus parties could go to court before the PUC had an opportunity to act, even though the PUC had indicated its intention to act by granting a rehearing.

In providing for intermediate appellate court review, the draft statutory language ignores the way in which the PUC's application for rehearing procedure serves the same functions that intermediate appellate court review is intended to provide (e.g. correction of legal errors, narrowing of issues). The PUC's opinions inform parties of the detailed analysis that underlies decisions denying rehearing.

The Workload of the Courts

The draft statutory language adds an entirely new workload to the already burdened courts of appeal. Because PU Code Section 1767 affords judicial review of

PUC decisions preference over all other "civil business", these utility review cases will have to be heard before other cases.

Furthermore, in any case before the court of appeal, the dissatisfied parties could petition the Supreme Court for review. Given the large dollar amounts and the major statewide issues frequently involved in PUC decisions, at least as many parties will go to the Supreme Court as do so now. Accordingly, intermediate appellate court review would only delay the Supreme Court's ultimate resolution of these cases.

Costs to the State

Adding this layer of appellate review will create significant new costs. Current estimates of additional annual costs are in the range of $800,000 to $1.25 million for the PUC, and additional hundreds of thousands of dollars for the courts.

Supreme Court Review of PUC Cases

Proponents of intermediate appellate review argue that there is a virtual absence of judicial review of PUC decisions. In fact, the Supreme Court has issued five opinions reviewing PUC decisions in the past ten years, and a total of nine decisions in the past fifteen years, and it has recently granted another petition for writ of review. Moreover, as the Judicial Council has pointed out, even if the Supreme Court does not issue a written opinion, when a petition is filed with the court it reviews the PUC's decision based on the arguments of the parties and the portions of the PUC record that the parties have attached to their briefs.

The question to be answered, before spending scarce resources, is whether the Supreme Court's review has been less than effective or whether the PUC's process for deliberation and rehearing has left little reason for the Court to intervene. The PUC believes the latter is the case, and opposes not only the significant cost of adding an unnecessary layer of appellate review but also the delay and confusion which will ensue.

As I noted at the outset, the Draft's introductory text does states that the "the proposed law does not alter [the existing] scheme" under which the Supreme Court reviews decisions of the PUC and the State Bar Court. (Draft at p. 14.) Unfortunately, the accompanying statutory proposal does not follow through on this statement with regard to the PUC; instead it includes language borrowed from SB 1322 which would

authorize the district courts of appeal to review PUC decisions. (See Draft at pp. 72 & ff.) In contrast, in response to a letter from the State Bar Court citing problems of inconsistency and delay that would be caused by court of appeal review, the current Draft retains direct Supreme Court review of the State Bar Court. For similar reasons, direct Supreme Court review of the PUC should also be retained.

The PUC has formally committed itself to explore innovative models for providing meaningful and effective appeals of its decisions, as part of our "Vision 2000" process. However, for the reasons stated above I urge you to exclude the PUC from the proposed judicial review statute.

Sincerely,

Daniel Wm. Fessler
President

PUBLIC UTILITIES COMMISSION

(This replaces the material starting at line 29 of page 72 and ending at line 11 of page 76 of the staff draft of 7/20/95.)

Pub. Util. Code § 1756 (amended). Review of commission decisions

1756. (a) Within 30 days after the commission issues its decision denying the application for a rehearing, or, if the application was granted, then within 30 days after the commission issues its decision on rehearing, or at least 120 days after the application is granted if no decision on rehearing has been issued, any aggrieved party may petition for a writ of review in the court of appeal or the Supreme Court for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. If the writ issues, it shall be made returnable at a time and place specified by court order and shall direct the commission to certify its record in the case to the court within the time specified.

(b) The petition for review shall be served upon the executive director of the commission either personally or by service at the office of the commission.

(c) For purposes of this section, the issuance of a decision or the granting of an application shall be construed to have occurred on the date when the commission mails the decision or grant to the parties to the action or proceeding.

(d) The venue of a petition filed in the court of appeal pursuant to this section shall be in the judicial district in which the petitioner resides. If the petitioner is a business, venue shall be in the judicial district in which the petitioner has its principal place of business in California.

(e) Except as provided in this article, judicial review of decisions of the commission shall be in accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Comment. Section 1756 is amended to add subdivision (e) to make judicial review of decisions of the Public Utilities Commission subject to general provisions in the Code of Civil Procedure for review of agency action.

Staff Note. *Section 1756 is set out as amended by SB 1322, which has passed the full Senate and Assembly policy committee.*

Pub. Util. Code § 1757 (repealed). New evidence; finality

~~1757. (a) No new or additional evidence shall be introduced upon review by the court. In a complaint, enforcement, or other adjudicatory proceeding, the review by the court shall not extend further than to determine, on the basis of the entire record which shall be certified by the commission, whether any of the following have occurred:~~

~~(1) The commission acted without, or in excess of, its powers or jurisdiction.~~

~~(2) The commission has not proceeded in the manner required by law.~~

~~(3) The decision of the commission is not supported by the findings.~~

~~(4) The findings in the decision of the commission are not supported by substantial evidence in light of the whole record.~~

~~(5) The order or decision of the commission was procured by fraud or was an abuse of discretion.~~

~~(6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.~~

~~(b) Nothing in this section shall be construed to permit the court to hold a trial de novo, to take evidence other than as specified by the California Rules of Court, or to exercise its independent judgment on the evidence.~~

Comment. Former Section 1757 is superseded by Section 1756. New or additional evidence may be considered to the limited extent provided by Section 1123.760 of the Code of Civil Procedure.

Staff Note. *Section 1757 is set out as amended by SB 1322, which has passed the full Senate and Assembly policy committee.*

Pub. Util. Code § 1758 (amended). Parties; judgment; procedure

1758. ~~(a) The commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court or court of appeal shall enter judgment either affirming or setting aside the order or decision of the commission.~~

~~(b) The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with this part, apply to proceedings instituted in the Supreme Court or court of appeal under this article.~~

~~(c)~~ Under this article, the Supreme Court may review decisions of the court of appeal in the manner provided for other civil actions.

Comment. Former subdivisions (a) and (b) of Section 1758 are superseded by Section 1756.

Staff Note. *Section 1758 is set out as amended by SB 1322, which has passed the full Senate and Assembly policy committee.*

Pub. Util. Code § 1760 (repealed). Independent judgment

~~1760. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court or court of appeal shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.~~

Comment. Former Section 1760 is superseded by Section 1756.

Staff Note. *Section 1760 is set out as amended by SB 1322, which has passed the full Senate and Assembly policy committee.*

Pub. Util. Code § 1762 (technical amendment). Order of stay or suspension

1762. (a) Except as provided in this section, no order staying or suspending an order or decision of the commission shall be made by the Supreme Court or court of appeal except upon five days' notice and after hearing. If the order or decision

of the commission is stayed or suspended, the order suspending it shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto.

(b) The specific finding made pursuant to subdivision (a) shall certify that great or irreparable damage would otherwise result to the petitioner and specify the nature of the damage.

(c) The Supreme Court or court of appeal may grant a temporary stay restraining the operation of the commission order or decision, other than an order or decision authorizing an increase or decrease in rates or changing a rate classification, at any time before the required hearing and determination of the application for a stay when, in the opinion of the court, irreparable loss or damage would result to petitioner unless the temporary stay is granted. The temporary stay shall remain in force only until the hearing and determination of the application for a stay upon notice. The hearing of the application for a stay shall be given precedence and assigned for hearing at the earliest practicable day after the expiration of the notice.

Comment. Subdivision (c) of Section 1762 is amended to add a missing word.

Staff Note. *Section 1762 is set out as amended by SB 1322, which has passed the full Senate and Assembly policy committee.*

Pub. Util. Code § 5251 (amended). Procedures

5251. Except as otherwise expressly provided, in all respects in which the commission has power and authority under the Constitution of this state or under this chapter, applications and complaints may be made and filed with the commission, process issued, hearings held, opinions, orders, and decisions made and filed, petitions for rehearing filed and acted upon, in regard to the matters provided for in this chapter, in the same manner, under the same conditions and subject to the same limitations, and with the same effect specified in the Public Utilities Act (Part 1 (commencing with Section 201) of Division 1), as far as applicable.

(b) A person aggrieved by a final order of the commission under this chapter may file an application for a writ of review (Chapter 1 (commencing with Section 1069) of Title 1 of Part 3 of the Code of Civil Procedure) or ~~a writ of mandamus (Chapter 1 (commencing with Section 1084) of~~ commence a proceeding for judicial review in accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil ~~Procedure)~~ Procedure in superior court, upon a showing that the commission has denied rehearing in the matter.

Comment. Subdivision (b) of Section 5251 is amended to refer to the new provisions for judicial review in the Code of Civil Procedure.

Staff Note. *Section 5251 is set out as amended by SB 1322, which has passed the full Senate and Assembly policy committee.*

State of California

Memorandum

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

Date: AUG 1 4 1995

Law Revision Commission
RECEIVED
AUG 1 5 1995
File:

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

Subject: STUDY N-200; JUDICIAL REVIEW OF AGENCY ACTION

My staff has reviewed the latest version of this study, Memorandum 95-38, and generally supports the proposal. We are concerned about the venue issue and would favor the suggestions made by the Attorney General in that regard.

There are a number of sections in the Water Code and elsewhere that may be either inconsistent with or duplicative of your commission's proposal. I have asked my staff to prepare a complete list of those items so that conforming changes can be made when your study is introduced in legislation. I am concerned that you may have a deadline that will affect our ability to add those changes to your study. Please let me know what, if any, time limits there are with regard to such a submittal.

Ted Cobb is the staff attorney who will be working on this issue. His number is (916) 657-0406.

cc: Ted Cobb

MEMORANDUM

TO: California Law Revision Commission

FROM: Committee for Administration of Justice (Denis T. Rice, Reporter)

DATE: August 17, 1995

RE: Comments Regarding 95-38 (California Law Revision Commission Staff Draft of Tentative Recommendation on Judicial Review of Agency Action)

RECOMMENDED ACTION OF CAJ: Support in Part, Oppose in Part

BACKGROUND

The new proposed statute would create a single form of judicial review of state and local agency action. While CAJ had commented upon earlier versions of the proposed revisions to the judicial review procedures in January, 1994, and supplemented those comments most recently in June, 1995, (when it responded to the memorandum from staff of the California Law Revision Commission dated May 18, 1995, entitled "Policy Issues in Judicial Review of Agency Action"). We reviewed the matter in a joint North-South televideo conference on June 9, 1995. The present memorandum and proposals are somewhat more expansive and contain some differences. Following are the CAJ comments on the CLRC staff proposal and other proposals.

PROPOSAL OF CLRC STAFF

1. Essentially, an exclusive new procedure for judicial review would replace administrative mandamus, ordinary mandamus, certiorari, prohibition, declaratory relief and injunctive relief (Section 1121.120). The statute would be supplemented with existing injunction procedures, including temporary restraining orders, in order to provide a vehicle for immediate action. We support.

2. On the standard of judicial review of agency interpretations of law, under the present draft the test would be "independent judgment with appropriate deference." However, the standard of "abuse of discretion", would be applied to one context: a local agency's construction or interpretation of its own legislative enactment. It is probably true, as argued in Professor Asimow's study, that a local agency is more likely to be familiar

with regulations it authored and to be sensitive to the practical implications of one interpretation as opposed to another.

The Staff of CLRC, however, recommends that instead of the "abuse of discretion" standard, the same standard of review be applied to a local agency construing its own ordinance as to a state agency construing its own regulation, i.e., "independent judgment with appropriate deference." We feel strongly that neither test is appropriate because they both involve abandonment of the well-established independent judgment test.

3. The Staff also recommends moving to substantial evidence review for agency fact-finding, retaining independent judgment review only if the proceedings involve an occupational license provided for in the Business and Professions Code and the agency has changed a finding of fact, or increased a penalty, in a proposed decision made by an administrative law judge employed by the Office of Administrative Hearings in a formal adjudicative proceeding. This is contrary to the CAJ position and CAJ continues to adhere to the position that the independent judgment test should be applicable.

The Attorney General had argued for completely abolishing independent judgment review of fact-finding, whereas CAJ opposed eliminating independent judgment review of agency fact-finding. The Staff has now decided to agree with the Attorney General. We oppose this change.[1]

There is no reason to impose a tougher standard on a decision made by an Administrative Law Judge employed by the OAH in a formal adjudicative proceeding, even if limited to the situation where the agency has changed a finding of fact or increased the penalty imposed by the Administrative Law Judge. Moreover, we had previously (in January, 1994) raised the point that the traditional appellate standard of independent judgment has its roots in the State Constitution.

4. The Staff is also recommending language in the statute which would preserve application of the judicial review statute to private hospitals, while making clear that it does not apply to non-governmental entities

[1]By moving to a "substantial evidence" test, the special use of that test for decisions hospital boards would become merged in the general statute.

generally. Thus, Section 1120.110(b) would state: "This title does not govern judicial review of action of a non-governmental entity, except the decision of a private hospital board in an adjudicative proceeding." This is designed to continue the effect of subdivision (d) of former Section 1094.5, Code of Civil Procedure. To the extent that the change is deemed within the purview of CAJ, as opposed to a substantive matter of particular interest to the medical community, the proposal seems unexceptionable. However, as noted in Item 3 above, the Staff would have hospitals governed by the substantial evidence test because all agencies would have that test; we oppose this test.

5. CLRC has apparently decided to preserve existing law by keeping most judicial review in superior court, instead of transferring it to the courts of appeal. The venue rules would be changed. Venue for superior court proceedings would be in Sacramento County, or, if the agency is represented by the Attorney General, in counties where the Attorney General has an office (Los Angeles, Sacramento, San Diego and San Francisco). While in January, 1994 CAJ opposed making this change, on the ground that the Attorney General already had the power upon motion to move venue to one of the counties where he has an office, we now can accept the change. The argument, after all, cuts both ways: since the Attorney General can compel a proceeding to be moved to one of the four counties, there is probably no dramatic change worked by requiring venue in one of those counties initially. The statute as proposed (Section 1123.520) would specifically provide that a case filed in the wrong court shall not be dismissed for that reason but transferred to the proper court.

6. Other procedural provisions involved in the Staff recommendations which are probably unexceptionable to CAJ include:

(1) the power of the court to dismiss summarily on the pleadings, by general demurrer or summary dismissal, would be retained;

(2) the name of the initiating document would be the "petition" rather than "notice" of review;

(3) the notice (or petition) of review would be required to set out factual allegations;

(4) the limitations period would be increased from 30 days to 45 or 60 days (under existing law, judicial review must be commenced within 30 days after the last day on which reconsideration can be ordered);

(5) existing rules for service of the notice or petition, and rules for pleading and practice, would be essentially retained;

(6) the few specific statutes giving the hearing preference to certain judicial review of agency action (enjoining public improvement project; zoning administration ruling; welfare decision) have not been altered.

7. The Staff recommends that the statute be revised to provide a longer time period to prepare the record for local agency adjudications (Section 1123.730). In non-adjudicative agency proceedings, the time to prepare the record would be increased to 60 days from 30 days. This is not objectionable.

8. The Staff recommends a general provision that, except as otherwise provided by Judicial Counsel Rule, the prevailing party on judicial review is entitled to recover costs of suit (not including attorneys fees) as a matter of right. The rules for recovery of costs presently are that in APA proceedings and non-APA, state agency proceedings, a prevailing party is entitled to recover the cost of preparing a record as a matter of right, while filing and service fees are at the court's discretion. In proceedings against a local agency, recovery of all the foregoing costs is at the court's discretion. The uniformity is probably desirable. We support.

ATTORNEY GENERAL'S SEPARATE PROPOSALS

9. In addition, the Attorney General has raised separately a number of other points which Staff has not adopted. Those of significance include deleting the second sentence of Section 1123.120, dealing with finality of decisions. The section, as written, states:

> "A person may not obtain judicial review of agency action unless the agency action is final. Agency action is not final if the agency intends that the action is preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency."

The Attorney General believes that "finality" of agency action has been defined by extensive case law and that an attempt to redefine the term in the statute could lead to uncertainty. We agree with the Attorney General on this point, and would support his position.

10. The Attorney General also wants to amend Section 1123.350, which says that a person may not obtain judicial review of an issue not raised before the agency, unless in an adjudicative proceeding the person was not adequately notified of the proceeding. The Attorney General wants to provide that notice to a person's address of record, maintained with an agency which has required such address to be on file, is sufficient.

We think the draftsmanship of the proffered sentence is faulty should be changed to read: "If a statute or regulation requires the person to maintain an address with the agency, adequate notice includes notice given to the person at the address maintained with the agency."

11. Several revisions requested by the Attorney General are specifically not recommended by the Staff. Among these the most significant one has to do with standing. The draft statute preserves taxpayer actions to enjoin wasteful expenditure of public funds (Section 526a, Code of Civil Procedure). However, it replaces the existing standing rules for taxpayer actions with so-called general public interest standing rules. See Section 11234.230. The Attorney General says the new rules may be "too broad" and "encourage excessive litigation." The Staff believes that the effect of the new rules is exactly the opposite. Under existing law, a plaintiff must merely be a resident of the jurisdiction and be liable to it for taxes. Under the new statute (Section 1123.230) a person obtains public interest standing if the following conditions are satisfied:

> "(a) The person resides or conducts business in the jurisdiction of the agency, or is an organization that has a member that resides or conducts business in the jurisdiction of the agency if the agency action is germane to the purposes of the organization.
>
> "(b) The person is a proper representative of the public and will adequately protect the public interest.

"(c) The person has previously served on the agency a written request to correct the agency action and the agency has not, within a reasonable time, done so."

Thus, the public interest plaintiff no longer would have to be a tax payer within the jurisdiction. However, consistent with existing law, the plaintiff would have to be a proper representative of the public and adequately protect the public interest. We support the Staff's position.

12. We agree with the Staff's position rather than the Attorney General's, on the questions of joining causes of action and type of relief available (Section 1123.660).

ASIMOW RECOMMENDATIONS

The most significant remaining recommendations of Professor Asimow not yet incorporated in the draft statute are those dealing with enforcement of an agency rule or order. The Model Act has a whole chapter with five sections on civil enforcement which permit an agency to seek enforcement of its rule or order by filing in court a petition for civil enforcement. The agency may request declaratory relief, temporary or permanent injunctive relief and any other civil remedy provided by law. If the agency fails to seek civil enforcement, any person with standing may file a petition for civil enforcement after notice to the agency. Under the Model Act, the contents, preparation and transmittal of the agency record are the same as for judicial review generally. The Staff points out that of the three states that have enacted the 1981 Model Act (Arizona, New Hampshire and Washington), only Washington has enacted the civil enforcement proceedings. Accordingly,

"[t]he Staff is concerned that the Model Act provision for an interested individual to obtain civil enforcement of an agency order (but not a regulation) when the agency itself chooses not to enforce it may interfere with agency discretion and encourage needless litigation."

The Staff therefore has proposed, in the event CLRC believes that new statutory authority is needed, a new chapter to the draft statute (Chapter 4) called "Civil Enforcement" this would allow petitions by interested persons for civil enforcement of an agency's order. It would not apply to enforcement of regulations. CAJ supports the position of the Staff's position on this issue.