Study N-200 December 7, 1995

First Supplement to Memorandum 95-67

Judicial Review of Agency Action:
Additional Comments on Tentative Recommendation

Attached are two more letters commenting on the Tentative Recommendation on *Judicial Review of Agency Action*. These are from the Attorney General's Office and California Energy Commission.

GENERAL COMMENTS

The Energy Commission is generally pleased with our progress, finds the TR promising, and believes it will greatly simplify the complexities of administrative mandamus. The Attorney General, however, is concerned about significant problems in imposing one procedure in place of all existing forms of review for the various kinds of agency action. The AG is most concerned about the effect on review of administrative adjudication. The AG says it may be prudent to reconsider whether one form of review for all agency action is realistic.

STANDARD OF REVIEW

Agency application of law to facts (§ 1123.420). The AG has substantive concerns about Section 1123.420, which generally applies independent judgment review to questions of application of law to facts (mixed questions of law and fact) with appropriate deference to the agency finding. The AG says this could undermine substantial evidence review of fact-finding. Under existing law, application decisions are sometimes treated on judicial review as questions of fact and sometimes as questions of law. Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1213 (1995). Professor Asimow recommends application decisions be treated as questions of law with independent judgment review, consistent with case law in Washington and the recommendation of Professor Jaffe. He gives two reasons for doing this:

(1) Application decisions often involve questions of policy and are treated as precedents for future cases, thus resembling issues of law more than fact. The proposed standard permits the reviewing court to give deference to the agency

application where appropriate and to deny deference where deference is inappropriate. *Id.* at 1216-17. This preserves the judicial role in policymaking.

(2) It is easier to distinguish an application question (mixed question of law and fact) from a pure question of fact than it is to distinguish it from a pure question of law. Whether a question is a pure question of law or is a mixed question of law and fact depends on how it is phrased. Professor Asimow gives an example from a case. The question was whether newsboys were "employees" entitled to unionize. The question may be phrased "are newsboys employees," a pure question of law, or "are these newsboys employees," a mixed question of law and fact. Yet it really is the same question. If the same standard of review applies to both, there is no need to distinguish between them. On the other hand, fact questions may be answered without knowing anything about the law, for example, what these newsboys do and who controls their work. *Id.* at 1217.

A third argument is that applying independent judgment review to mixed questions of law and fact will soften the impact of eliminating independent judgment review of questions of fact involving a fundamental vested right. Thus, for example, the question of whether a doctor has been negligent in treating a patient (a mixed question of law and fact) will be subject to independent judgment review, the same as under existing law.

For these reasons, the staff recommends keeping independent judgment review of agency application of law to facts, with appropriate deference to the agency finding.

Agency fact-finding (§ 1123.430). The Energy Commission objects to replacing its present restrictive standard of judicial review of fact-finding with substantial evidence review, giving historical and policy reasons for keeping existing law. This presents a more fundamental question whether the Energy Commission should be exempted from the draft statute, discussed next.

AGENCIES TO WHICH STATUTE APPLIES

The Energy Commission joins the Workers' Compensation Appeals Board and Public Utilities Commission in seeking exemption from the proposed law. Decisions of these three agencies are now reviewed by writ of certiorari in the court of appeal or Supreme Court, and review is generally confined to the administrative record. Similarly, decisions of five other agencies are also reviewed by writ of certiorari in the court of appeal or Supreme Court with

review confined to the administrative record — Public Employment Relations Board, Agricultural Labor Relations Board, Department of Alcoholic Beverage Control, Alcoholic Beverage Control Appeals Board, and State Bar Court. The Commission has already decided to exempt the State Bar Court from the proposed law. The remaining seven agencies function in specialized fields, often involving complex scientific or economic facts, where the Legislature has delegated policymaking to them. Many of their statutes restrict judicial review by making fact-finding conclusive in the absence of abuse of discretion, and case law requires extra judicial deference to statutory interpretations by several of these agencies. The PUC (see basic Memo) and Energy Commission say the draft statute would increase judicial interference with the policymaking which the Legislature has delegated to them.

Should we exempt from the draft statute the seven agencies that now have review by certiorari in the court of appeal or Supreme Court? The Legislature has already determined that these agencies should to some extent be shielded from judicial review. Their procedures are different from the great majority of agencies that are reviewed in superior court. Exempting these agencies would partly address the criticism that we are trying to make one size fit all, and the fit is far from perfect.

COMMENTS ON SECTIONS IN THE DRAFT

The staff plans to raise for discussion at the meeting only the material below preceded by a bullet [•].

§ 1121.280. Rule

Section 1121.280 expands the definition of "regulation" in Section 11342 of the Government Code by adding "agency statement." The Energy Commission is concerned that "agency statement" is not defined, and asks whether it permits judicial review of informal telephone advice or an advice letter. The Energy Commission would make clear that informal advice in this manner is not subject to judicial review, both to ensure that the advice really represents the views of the agency and to avoid discouraging the giving of informal advice. The concern of the Energy Commission could be addressed, at least in part, by making clear the definition refers to a written statement:

> 1121.280. "Rule" means both of the following:

(a) "Regulation" as defined in Section 11342 of the Government Code.

(b) The whole or a part of ~~an~~ a written agency statement, regulation, order, or standard of general applicability that implements, interprets, makes specific, or prescribes law or policy, or the organization, procedure, or practice requirements of an agency, except one that relates only to the internal management of the agency. The term includes the amendment, supplement, repeal, or suspension of an existing rule.

The staff will ask for the comment of the Office of Administrative Law on this. The Comment should also note that subdivision (a) applies only to state agencies. Although subdivision (b) duplicates much of Section 11342 of the Government Code, it is nonetheless needed to apply to local agencies.

§ 1122.030. Concurrent agency jurisdiction

Section 1122.030 guides the court when to hear an administrative law case or when to refer it to the agency when the agency has "concurrent jurisdiction." The AG fears "concurrent jurisdiction" may be unclear, e.g., if a contractor is sued for incompetent work and also faces disciplinary action by the agency. But this term is from case law. E.g., National Audubon Society v. Superior Court, 33 Cal. 3d 419, 449, 658 P.2d 709, 189 Cal. Rptr. 419 (1983) (remedies before Water Board not exclusive and "courts have concurrent original jurisdiction"). The staff thinks the term will be satisfactory in the statute, and would address the AG's concern by adding the following to the Comment:

Section 122.030 does not apply if the jurisdiction of the court and agency involve different subject matter or issues arising out of the same event, such as where a licensee faces civil liability in court and disciplinary proceedings by the agency for the same act. The court does not have original jurisdiction to apply disciplinary sanctions and the agency does not have jurisdiction to determine the civil claim.

§ 1123.120. Finality

The staff agrees with the AG's suggestion to add "typically" to the third sentence of the Comment:

Agency action is typically 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.

§ 1123.230. Public interest standing

The introductory clause of Section 1123.230 gives standing for judicial review of agency action "that concerns an important right affecting the public interest" if listed conditions are satisfied. The AG would move the quoted language out of the introductory clause and into the list of conditions. The staff has no objection:

> 1123.230. A person has standing to obtain judicial review of agency action ~~that concerns an important right affecting the public interest~~ if all of the following conditions are satisfied:
>
> (a) The agency action concerns an important right affecting the public interest.
>
> ~~(a)~~ (b) 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)~~ (c) The person is a proper representative of the public and will adequately protect the public interest.
>
> ~~(c)~~ (d) 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.

The foregoing revision may increase the need to make clear that each section in the standing article provides an independent basis for standing:

> 1123.210. A person does not have standing to obtain judicial review of agency action unless standing is conferred by a section in this article or is otherwise expressly provided by statute.

• The AG has more fundamental concerns, fearing public interest standing may be too broad and encourage litigation. He suggests the federal approach. Federal law does not recognize public interest standing, requiring instead that a plaintiff must show palpable and particular injury. See, e.g., Schlesinger v. Reservists' Committee, 418 U.S. 208 (1974) (challenge to practice of members of Congress holding military positions); Sierra Club v. Morton, 405 U.S. 727 (1972) (Sierra Club lacks standing to challenge development program despite its historic commitment to protection of the Sierras); Asimow, *Judicial Review of Administrative Decision: Standing and Timing* 17 (Sept. 1992). Existing California law recognizes public interest standing, and California cases have been very forthcoming in allowing plaintiffs who lack any private injury nonetheless to sue to vindicate the public interest. Professor Asimow says the existing public interest rule works well, and that plaintiffs who wish to incur the expense and

bother of litigating public interest questions should be allowed to do so. Asimow, *supra.* When the Commission previously considered this question, the Commission thought the existing public interest standing rule should not be restricted. The staff thinks this was the right decision. The AG has not reached a firm conclusion on this, and will advise us later.

The Energy Commission is concerned about the proposed requirement that to have public interest standing a person must first serve on the agency a written request to correct the agency action. The Energy Commission points out that under existing law a person may make oral comments at a public hearing on a proposed regulation, that the person is not now precluded from seeking judicial review. However, only an "interested person" may challenge a regulation, such as a person potentially subject to the regulation. Gov't Code § 11350; Stoneham v. Rushen, 156 Cal. App. 3d 302, 310, 202 Cal. Rptr. 20 (1984). Under Section 1123.220, an interested person will have private interest standing without the need to make any request to the agency, written or oral.

The Energy Commission has similar concerns for proceedings under the California Environmental Quality Act, where a person may seek judicial review if the person has objected orally or in writing. Pub. Res. Code § 21177. The staff will make clear in the Comment to Section 1123.230 that the requirement of a written request to the agency does not supersede CEQA, citing Section 1121.110 (conflicting or inconsistent statute controls).

§ 1123.340. Exceptions to exhaustion of administrative remedies

• Section 1123.340 permits the court to relieve a person of the requirement of exhaustion of administrative remedies if the person lacked notice of the availability of a remedy. The AG objects, saying the court should remand the matter back to the agency in such a case. The lack of notice exception applies if the party did not have notice of the remedy in time to use it. Asimow, *supra,* at 49. The staff would make this clear in Section 1123.340. If the administrative remedy is still available, the court may not accept the case, but must dismiss because the exhaustion requirement is jurisdictional.

The exhaustion requirement applies even though the administrative remedy is no longer available, effectively denying judicial review entirely. Asimow, *supra,* at 32. Section 1123.340 allows the court to accept the case if the exhaustion requirement would be futile. But this exception is not intended to apply if the

administrative remedy existed at one time but is not available when the party seeks judicial review. See *id.* The staff would make this clear in Section 1123.340:

> 1123.340. The requirement of exhaustion of administrative remedies is jurisdictional and the court may not relieve a person of the requirement unless any of the following conditions is satisfied:
>
> (a) The remedies would be inadequate.
>
> (b) The requirement would ~~be~~ have been futile when the remedy was available.
>
> (c) The requirement would result in irreparable harm disproportionate to the public and private benefit derived from exhaustion.
>
> (d) The person lacked notice of the availability of a remedy in time to use it.
>
> (e) The person seeks judicial review on the ground that the agency lacks subject matter jurisdiction in the proceeding.
>
> (f) The person seeks judicial review on the ground that a statute, regulation, or procedure is facially unconstitutional.

§ 1123.420. Review of agency interpretation or application of law

Section 1123.420 generally applies independent judgment review in determining:

> (1) Whether the agency action, or the statute or regulation on which the agency action is based, is unconstitutional on its face or as applied.
>
> (2) Whether the agency acted beyond the jurisdiction conferred by the constitution, a statute, or a regulation.
>
> (3) Whether the agency has decided all issues requiring resolution.
>
> (4) Whether the agency has erroneously interpreted the law.
>
> (5) Whether the agency has erroneously applied the law to the facts.

The AG would replace these five paragraphs with a succinct reference to "considerations of questions of law." The staff is inclined not to make this change. Paragraphs (2) to (4) generally continue existing law, and seem clearer and less likely inadvertently to expand independent judgment review than the suggested language. Paragraph (2) comes from the existing administrative mandamus statute (Code Civ. Proc. § 1094.5(b)), which says the inquiry extends to "whether the respondent has proceeded without, or in excess of jurisdiction." Paragraph (4) deals with review of pure questions of law.

The AG finds paragraph (3) confusing, and, if it is to be preserved, would revise it to say "[w]hether the agency has failed to decide all material issues of fact." The Comment indicates paragraph (3) is not limited to factual issues:

> [Paragraph 3] deals with the possibility that the reviewing court may dispose of the case on the basis of issues that were not considered by the agency. An example would arise if the court had to decide on the facial constitutionality of the agency's enabling statute where an agency is precluded from passing on the question.

Since these five paragraphs purport to codify case law, the staff will take another look at the cases, and will work with the AG's Office to make sure we continue existing law without unnecessary duplication of language or confusion of the issues.

§ 1123.520. Superior court venue

• As noted in the basic Memorandum, Section 1123.520 generally continues existing venue rules. The basic Memorandum asks whether the Commission wants to consider expanding venue to include Sacramento County, and, in cases where the agency is represented by the Attorney General, in any county where the AG has an office. This was recommended by Professor Asimow to take advantage of judicial expertise, is urged by the Department of Health Services (basic Memo) and the AG, but was considered and rejected by the Commission, primarily in the interest of convenience to private parties. **Does the Commission wish to reconsider?**

§ 1123.660. Type of relief

The AG remains troubled by the open-endedness of Section 1123.660, which permits "appropriate relief." As noted in the basic Memorandum, the staff tried to address this concern by adding Section 1123.160 to say the court may grant relief only if it determines agency action is invalid under one of the grounds specified in Sections 1123.410-1123.460 (standards of review). Also, "appropriate relief" does not appear significantly different from existing law of administrative mandamus (Code Civ. Proc. § 1094.5(f)), which permits the court to:

> enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as

> is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

The last clause of Section 1094.5(f) (no judicial control of agency discretion) is continued in Section 1121.140.

• The AG wants the remedies provision to be harmonized with Section 1123.630, which requires the petition for relief to state facts to demonstrate that petitioner is entitled to judicial review, reasons why relief should be granted, and a request for relief, specifying the type and extent of relief requested. The AG is concerned that if the petition shows entitlement to some type of relief, the court may grant any appropriate relief. The AG says the agency should be put on notice of exactly what type of relief it should defend against. But this would be more restrictive than general civil litigation, which is based on fact pleading, and where the court may grant any relief established by the facts: A complaint in a civil action must plead facts constituting the cause of action, and contain a request for "the relief to which the pleader claims he is entitled." Code Civ. Proc. § 425.10. But the prayer for relief is not essential, and the court may grant relief without a prayer. 4 B. Witkin, California Procedure *Pleading* § 447, at 491 (3d ed. 1985). The staff thinks the rules should not be more restrictive in judicial review than in civil actions generally.

• The staff is concerned about narrowing the remedies provision. The proposed law will replace traditional mandamus, declaratory relief, and injunctive relief (Section 1121.10), so it must be clear that all remedies now available in those proceedings will remain available. **The staff will confer with the AG's Office to see if we can arrive at mutually acceptable language.**

§ 1123.760. New evidence on judicial review

• The AG says expanding admissibility of evidence on judicial review to permit admission of all relevant evidence is ill-advised, because it will permit a litigant to withhold evidence at the administrative hearing and use it for the first time in court. But Section 1123.760 permits admission of all relevant evidence only where the court uses independent judgment. Section 1123.430 now requires all fact-finding to reviewed by the substantial evidence test. In the basic Memorandum, the staff recommends applying independent judgment review to fact-finding of local agencies, except where the agency adopts the administrative adjudication bill of rights. Thus, independent judgment review will not apply to

adjudication of state agencies. **The staff recommends making this clearer by revising subdivision (b) of Section 1123.760 as follows:**

> (b) The court may receive evidence, in addition to that contained in the administrative record for judicial review, in any of the following circumstances:
> (1) . . . .
> (2) The agency action is a decision in an adjudicative proceeding and the standard of review by the court under Section 1123.430 is the independent judgment of the court.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

State of California

Office of the Attorney General

Daniel E. Lungren
Attorney General

November 27, 1995

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

RE: Commission's August 1995 Tentative Recommendation:
Judicial Review of Agency Action

Dear Commission Members:

The Commission has sought comments on its proposal to restructure the law governing judicial review of agency actions. I have previously provided comments on the Commission's earlier (April 14, 1995) staff draft. The following views are offered on the August 1995 "Tentative Recommendation" which is currently before the Commission.

Concurrent Jurisdiction (Section 1122.030): I remain concerned that the term "concurrent jurisdiction" is unclear, and could lead to abuse. Where a contractor has allegedly performed incompetent work, for example, he may be sued by a dissatisfied client and also face an agency license revocation hearing. Are the agency and judicial proceedings considered concurrent under this section? If so, this could lead to an unwarranted usurpation of agency jurisdiction.

Finality (Section 1123.120): The April draft defined the term "finality" as part of the statutory text. The Tentative Recommendation now lists that definition as a comment. The change is appropriate, but one modification is advisable. The categorical nature of the definition should be qualified, so that instead of stating that "Agency action is not final if...", it should state that "Agency action is typically not final if ...." The qualification would allow for the fact that in a limited number of cases, agency jurisdiction can be ongoing (e.g., some State Water Resources Control Board matters), yet a particular action in that case can be final and reviewable.

1300 I Street • Suite 1740 • Sacramento, California 95814
(916) 324-5437

Standing (Section 1123.210, et seq.): The first sentence in section 123.230 is ambiguous; it is unclear whether or not a party seeking public interest standing must separately show that the agency action "concerns an important public right affecting the public interest," or whether such a showing is deemed satisfied if the three subsequently listed conditions (a) through (c) are met. Since the three listed conditions do not in fact address whether an important right affecting the public interest is involved, a separate showing should be required. This can be made clear by listing the requirement as a fourth condition that needs to be satisfied.

More generally, as noted in my prior letter, current law may be too broad; the federal approach to standing may be more appropriate. I have asked my staff to continue their analysis of this issue, and will let you know when a firm conclusion has been reached.

Exceptions to Exhaustion (Section 1123.340): The Tentative Recommendation retains subdivision (d), which provides that where a person lacked notice of the availability of a remedy, the court can review the matter even though it has not been reviewed by the agency. This approach, however, improperly avoids administrative review. There is no reason to bypass the agency with the particularized expertise and experience regarding a matter just because certain notice was not provided. Rather, the individual's due process rights and the agency's authority can both be protected by remanding the matter back to the agency for its review.

Review of agency interpretation or application of law (Section 1123.420): This office continues to believe that it would be best to replace issues (2) through (5) under subdivision (a) with "considerations of questions of law." This language is simple, avoids confusion, and averts an unintentional alteration of existing law.

If that suggestion is not followed, at a minimum two changes are needed. Most significantly, subdivision (a)(5) (independent judgment review for mixed questions of law and fact) should be modified to state that independent judgment review only applies to the extent that the facts are not in dispute. That is current law. It is also good policy. Changing the law by allowing independent judgment review even where facts are in dispute can undermine the general Tentative Recommendation rule (which this office supports) that factual determinations should be reviewed using the substantial evidence test. The mixed questions of law and fact exception, if not properly limited, can subsume the general rule.

The second suggested change is to subdivision (a)(3) (independent judgment review of "[w]hether the agency has decided all issues requiring resolution.") Our office finds that exception confusing, especially when read in conjunction with the comment. The quoted language should probably read: "Whether the agency has failed to decide all material issues of fact." The only example in the comment, however, indicates that subdivision (a)(3) may have a different purpose. The example is a situation in which "the court had to decide on the facial constitutionality of the agency's enabling statute where an agency is precluded from passing on the question." That, however, is essentially the type of question already covered by subdivision (a)(1) (although a slight modification of subdivision (a)(1) may be needed to make this clear.) Addressing this constitutional issue under subdivision (a)(3) is rather awkward and confusing.

Venue (Section 1123.510(b)): The proposal calls for superior court venue in the county where the party seeking review resides or has a principal place of business. Professor Asimow recommended that state agency decisions be reviewed in Sacramento, or, where representation is provided by my office, in counties where such an office is located.

Professor Asimow's suggestion is a wise approach. Administrative law, especially as it pertains to state agency practices, is highly specialized. Fair, efficient and consistent application of the law is promoted by assigning these cases to courts that are familiar with this area of the law. Indeed, for this very reason, these courts now tend to assign all such cases to specific departments for all purposes. Moreover, since these court proceedings are usually very short, and generally limited to the administrative record, any inconvenience to private parties should be minor. This inconvenience would be far outweighed by the advantage of having courts with specialized expertise hearing these cases.

Type of Relief (Sec 1123.660): Our office remains troubled by this section's open-ended approach. At a minimum, this section needs to be harmonized with section 1123.630 (contents of petition for review) to ensure that the petition properly states facts entitling a petitioner to a particular type of relief before the court is authorized to grant that relief. As an example, for declaratory or injunctive relief to be available, a petition should be required to include allegations of facts showing an actual dispute and irreparable injury. Section 1123.630 might be interpreted as only requiring the petitioner's pleading to contain allegations sufficient to establish a right for some type of review; once that is shown, the court can arguably grant any type of relief it deems proper. In that event, the respondent agency would be required to defend itself, without notice, against every form of relief the statute authorizes. Unrestricted availability of relief without tighter pleading requirements would thus be unfair, unwieldy and unwise.

At the very least, as to review of adjudicatory proceedings, the judicial review inquiries listed in Code of Civil Procedure section 1094.5, subd. (b,) should be retained.[1] Subdivision (f), outlining the appropriate judgment options, should also be retained.[2]

New Evidence (Section 1123.760): Under existing law, whether using the substantial evidence or independent judgment test, courts reviewing both adjudicatory and quasi-legislative decisions are not to receive new evidence unless the evidence falls under one of two exceptions. ("Relevant evidence which, in the exercise of reasonable diligence, could not have been produced [at the hearing]" or relevant evidence "which was improperly excluded at the hearing before the respondent ...." [Code Civ. Proc. Section 1094.5, subd. (e); *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 574.])

As currently drafted, however, subdivision (b)(2) appears to allow courts reviewing adjudicatory decisions under the independent judgment test to receive new evidence whether or not it falls under one of the two exceptions. This is ill-advised. Permitting unrestricted admission of new evidence at the judicial level is virtually certain to undermine the administrative adjudication process by encouraging the practice (frequently warned against in appellate decisions insisting on the limitations embodied in Code of Civil Procedure section 1094.5, subd. (e)), of withholding evidence at the administrative hearing for the purpose of using it to attack the hearing decision in court.

As before, we appreciate your consideration of these views on the elements of the proposal as it evolves into the final recommendation to the Legislature. In reviewing the current form the Tentative Recommendation, it is apparent that significant problems continue to be attributable to the proposal's attempt to embody an omnibus approach to judicial review

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[1] Subdivision (b) of section 1094.5 provides:

> "(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

[2] Subdivision (f) of section 1094.5 provides:

> "(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent."

of all administrative action. The proposal's attempt to meld together rules that have evolved in separate forms of review for differing kinds of agency action is likely to have a particularly significant effect on review of adjudicatory decisions of administrative agencies. If fundamental problems affecting jurisdiction, standing and application of exhaustion requirements, and issues such as sufficiency of allegations to secure review, judicial treatment of factual determinations, admissibility of new evidence, and relief available from the court, continue to evade effective resolution before the Commission, it may be prudent to reconsider whether a single form of practice for review of all agency action is realistic. For the Commission's effort to result in legislation that will improve and simplify, rather than confuse, the rules of judicial review, it must take into account the last half-century's experience with the different means that have evolved for judicial review of different forms of agency action.

We appreciate having had this opportunity to comment on the Tentative Recommendation.

Sincerely,

DANIEL E. LUNGREN
Attorney General

STATE OF CALIFORNIA—THE RESOURCES AGENCY PETE WILSON, Governor

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

November 27, 1995

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

SUBJECT:N-200; TENTATIVE RECOMMENDATION REGARDING JUDICIAL REVIEW OF AGENCY ACTION, AUGUST 1995

Dear Commissioners:

As you are aware, the California Energy Commission has followed with great interest your work in reforming the California Administrative Procedure Act as well as your current effort to streamline the law regarding judicial review of agency action. In general, we are pleased with the progress you have made in the August 1995 Tentative Recommendation. The draft proposal looks promising and should greatly simplify the current complexities regarding review by administrative mandamus. However, the Energy Commission must respectfully take issue with one aspect of the Tentative Recommendation, namely the proposed modification of the standard of judicial review of decisions this Commission makes with respect to the siting of power facilities. In addition, we have several comments concerning areas that may warrant further attention before the Recommendation is ready to be proposed as legislation.

The most significant concern of the Energy Commission is the proposed changes to the judicial review provisions in the Warren-Alquist Act (Pub. Resources Code, § 25531). The existing provision strictly limits judicial review as follows:

> No new or additional evidence may be introduced upon review and the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the United States Constitution or the California Constitution. The findings and conclusion of the commission on questions of fact are final and are not subject to review except as provided in this article. These questions of fact shall include ultimate facts and the findings and conclusions of the commission.

The Tentative Recommendation would ask the Legislature to repeal this provision, thus making the decisions of the Energy Commission on power facilities subject to the same

standard of review applied to every other agency's decisions. This greatly increases the power of the courts to set aside power facility decisions of the Energy Commission, permitting the courts to accept new evidence under some circumstances and allowing the courts to subject the findings of the commission to the test of whether they are supported by what the court deems to be "substantial evidence in light of the whole record." Recommendation Proposed Code of Civil Procedure §§ 1123.430, 1123.440, 1123.760. The Recommendation would even allow the courts to exercise their independent judgment with respect to some facts (e.g. whether a member of the commission should have been disqualified for alleged bias) and overturn Commission decisions on this basis. Id. § 1123.450. The Recommendation thus proposes a fundamental change in California law relating to the siting of critical energy facilities and does so merely for the sake of uniformity in the law of judicial review of agency action.

The above-quoted language is part of an 80 year tradition in California law that certain types of decisions are best left to expert administrative bodies rather than allowing the decisions of those bodies to be disturbed by courts of general jurisdiction.[1] The language has not only existed in the Warren-Alquist Act since its enactment in 1974, but is drawn directly from Public Utilities Code section 1757 (also proposed for repeal by the Recommendation) which has its roots in an enactment of the California Legislature 1915. Stats. 1915, c. 91, p. 161, § 67. Indeed following its first enactment in 1915, this concept was revisited and re-enacted in 1933 (Stats. 1933, c. 442, p. 1157, § 1) and again, in its current form in 1951 (Stats. 1951, c. 764, p. 2090, § 1757. All such enactments reflected the judgment that the people of the State are better served if an expert body--the Railroad Commission (later renamed the "Public Utilities Commission")--decides complex economic and scientific questions relating to the provision of essential utility services without having courts of general jurisdiction second-guessing those decisions and without offering litigants the opportunity to invite courts of general jurisdiction to reverse those decisions except in cases of clear legal error.

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[1] Although the quoted language of section 25531 and the similar language of its parent Public Utilities Code section 1757 could be read literally to preclude judicial review of a decision whose findings are unsupported by any evidence, the California Supreme Court has long since rejected that extreme interpretation. See Southern Pacific Company v. Railroad Commission of California (1939) 13 Cal.2d 125, 87 P.2d 1052. In essence, the Court has held that no administrative agency is entitled to make findings supported by no competent evidence whatsoever. At the same time, the Court has respected the Legislature's wish that the Energy Commission and the Public Utilities Commission be accorded the respect that an expert court should enjoy, thus precluding the type of judicial scrutiny of the substantiality of the evidence in light of the whole record that courts routinely apply to decisions of other agencies. The Court has appropriately fashioned and adhered to the most limited judicial review that is possible under the state and federal constitutions.

The Legislature extended this concept of limited judicial review to power facility licensing in 1974 with the enactment of the Warren-Alquist Act which created a second expert body--the Energy Commission--and gave that body the responsibility to provide one-stop licensing for major thermal powerplants and appurtenant facilities.[2] The Legislature found that meeting the increasing demand for electricity is essential to the health, safety, and welfare of the people of this state. (Pub. Resources Code, § 25001.) Indeed, electricity is a commodity that every citizen and business has taken for granted for many decades and while it was first a luxury, it has become an essential service upon which the lives and welfare of many of our citizens now depends. The Legislature established the Energy Commission's unique licensing process with two goals in mind: (1) to open the process of licensing of these facilities to greater public scrutiny and public participation,[3] and (2) to ensure that once the Commission made a decision that a facility, with appropriate conditions to protect environmental quality, was needed for the public convenience and necessity, that decision would not merely be the starting point for years of litigation between project proponents and detractors. This second factor was critical to obtaining the support of electric utilities for a more thorough licensing process for their facilities. They supported the Warren-Alquist compromise not because they longed for more thorough public review of their plans but rather because they feared that it was becoming difficult, in the face of public opposition to any power facility, to build the facilities necessary to provide a reliable supply of power to the public. They needed a licensing process that they could depend upon to provide meaningful decisions that would avoid the costly delays occasioned by litigation following licensing. Thus, as explained more fully in the attached 1982 Declaration of Charles Warren, one of the principal authors of the Warren-Alquist Act, the provisions calling for expedited and limited judicial review of these power facility licensing decisions were a key

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[2] Public Resources Code section 25201 requires one member of the Energy Commission to be an engineer or scientist, one member to be an attorney and member of the State Bar of California with experience in administrative law, one member to be an economist with background or experience in natural resources management, one member to have background or experience in environmental protection or the study of ecosystems, and one member to represent the public at large.

[3] Public Resources Code section 25214 requires every meeting of the Commission to be open to the public and further requires that the public be permitted to address the Commission on any item of business before the Commission. Sections 25217.1 and 25222 create a unique position of Public Adviser to provide assistance to the public in participating in a meaningful way in lengthy hearings dealing with multiple complex technical subjects. The Public Adviser is an attorney, appointed by the Governor for a fixed term and thereby granted a significant measure of independence from the Commission.

element in this legislative effort to improve public decisionmaking regarding critically important energy facilities.[4]

The question the Law Revision Commission must ask before proposing repeal of this important concept, especially as it relates to power facility licensing, is whether there is any evidence that this limitation on judicial review has resulted in harm to the public interest. Is the proposed repeal of this provision occurring because a careful study has shown that decisions of the Public Utilities Commission and/or the Energy Commission are in great need of additional judicial review to ensure that they are based on adequate evidence? Or is the proposed repeal simply a question of academic preference for symmetrical judicial review provisions regardless of how well these special provisions may have served the State in the past? Will conforming judicial review of decisions of the Energy Commission and the Public Utilities Commission to the same rules that apply to decisions of other agencies--so that courts may consider litigants' requests to reopen the record and second-guess the substantiality of the evidence supporting the findings of the commission--provide better decisions, or will the cost of the litigation and delay far outweigh any perceived benefits? The Law Revision Commission should be aware that Governor Wilson, in vetoing SB 1041 (Roberti) in 1991 (providing for increased opportunity to litigate the validity of decisions of the Public Utilities Commission and the Energy Commission), has concluded that lawyers, and not the public, would be the principal beneficiaries of such a change.

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[4] Courts provide expertise in ensuring that fundamental rules embedded in the United States and California Constitutions are not violated. They also provide expertise in interpreting the law enacted by the Legislature. They do not necessarily provide expertise on questions of complex scientific or economic facts. Moreover, judges live in communities and share with all citizens the influence of public opinion concerning the merits of locating power facilities in that community. Most judges take seriously their responsibility to exercise judicial restraint and avoid allowing personal bias to enter their decisionmaking, but there can be no question that if courts enjoyed the same judicial review powers for powerplant licensing decisions that they do in reviewing other agency decisions, it is reasonable to assume that more of those decisions would be subjected to litigation and more would be overturned. It was therefore also reasonable for the Legislature to conclude that the public interest is better served by limiting judicial review of these decisions to those areas where the courts provide clear expertise. By contrast, most other adjudicative administrative agency decisions apply directly to individuals, most often do not involve multiple complex economic and scientific judgments, and generally do involve the same type of judicial hearing processes that courts are expert in providing. It is reasonable for the Legislature to allow the courts more authority in reviewing such decisions than the Legislature has prescribed for decisions of the Energy Commission regarding power facility licensing.

Nor should the Law Revision Commission assume that because the enactments that embody these special rules of judicial review are all more than 20 years old, the reasons for them have diminished. One of the biggest challenges facing the electric industry and the California Legislature today is the question whether and how to restructure that industry to provide more competition among generation sources. This concept is being pursued by the Public Utilities Commission, with the support of the Energy Commission and the Wilson Administration, because electricity rates in California are considerably higher than in most other states. Should the Law Revision Commission include in its judicial review proposal the repeal of provisions that limit opportunities for litigation of the validity of Energy Commission licensing decisions, it will be proposing to add costly delay and risk to the path that potential developers of these facilities will face. This would put the judicial review reform proposal completely at odds with efforts to reduce the cost of electricity in California through competition because it would discourage the development of new, more efficient, lower cost facilities in California and would also encourage development of such facilities outside California, imposing costs of increased transmission losses on California consumers.

In sum, the process envisioned by the Legislature in 1974 has worked well and is likely to be even more important in the restructured electricity market. In 20 years of licensing power plants, only two decisions of the Energy Commission have been judicially challenged, despite extensive public interest and involvement in most of the siting proceedings. Both of those challenges were unsuccessful. The result is that needed electric generation and transmission has been built, and it has been sited with unusual sensitivity to environmental and social concerns. On the other hand, permit applicants benefit from a high degree of certainty that a permit for a capital intensive project, once granted, is unlikely to be delayed by judicial challenge, and that any such challenge will not require the court to review an extensive record in search of substantial evidence regarding a myriad of issues. Broadening the scope and standard of judicial review would create significant uncertainty about the outcome of the siting process and would guarantee that your bill would be opposed not only by the Energy Commission and the Public Utilities Commission but also by utilities and others who plan to participate in the new competitive generation market. The Energy Commission therefore urges the Law Revision Commission to delete from its proposal any changes to Public Resources Code Section 25531.

Our additional comments are listed numerically below:

1. Standing. Contrary to the text at the top of page 6, any interested person affected by a regulation currently has standing to seek review of it, whether or not the person participated in the rulemaking proceeding. (Govt. Code § 11350.)

2. § 1121.280. Rule. The definition of "rule" in subdivision (b) (which is used to define when an agency has done something that can be subject to judicial review) is ambiguous and may be overly broad. Subdivision (b) is little more than a restatement of subdivision (a),

which incorporates by reference Government Code Section 11342 and its definition of "regulation." The only thing added by (b) is the term "agency statement" which suffers from its own lack of definition. What is an "agency statement?" When agency staff or counsel answer a phone inquiry or write an advice letter regarding a regulation, is that an "agency statement" that comprises a "rule" subject to judicial review? This is a sensitive subject among agencies because the Office of Administrative Law (OAL) has tended to regard such advice as an "underground regulation" subject to invalidation by OAL. The Energy Commission suggests that the Law Revision Commission develop a definition of "agency statement" that allows agency staff to discuss issues of compliance with the general public and provide informal advice but which also allows the public, if it is dissatisfied with that advice, to elevate the question to one calling for a formal agency interpretation or policy position prior to judicial review. This is necessary to be sure that issues are truly ripe for judicial review since informal advice of agency staff might not really represent the views of the agency upon careful consideration of the issue. But the definition should also avoid discouraging agency staff from interacting with the public in an informal manner by subjecting agencies to judicial review simply because their staffs offer informal advice. Such a limitation makes government regulation unwieldy, inflexible, and unresponsive.

As a practical matter, agencies must be able to discuss and informally interpret their regulations in working with the outside world. OAL's advocacy that all such activities constitute "underground regulations" has not stopped agencies from responding to informal inquiries. Indeed, even OAL provides this service through an "attorney of the day." The proposed definition, by including the ambiguous term "agency statement," would arguably make all such discussion of an agency's rules with the public or other agencies targets for litigation just as they are now targets for OAL's underground regulation process. The Energy Commission recognizes that there may be situations in which an agency really does take a policy or legal position that should be subject to judicial review prior to its embodiment in a formal regulation. But surely a party seeking such judicial review should have the burden of ensuring that the interpretation he or she seeks to attack actually represents the position of the agency and not just the position of one member of the agency or of lower level staff. Members of the public deserve a clear path to judicial redress where government establishes rules or policies that adversely affect them, but they also need and deserve a thoughtful response to their first inquiries about statutes or regulations that they find ambiguous. It is not helpful to the public to force agencies to direct their staffs respond to all inquiries as follows: "That's a good question. We'll try to answer it in our next formal rulemaking, which we'll initiate next year, and which will complete OAL review and reach publication by 1998 at the earliest."

The Commission could address this problem by deleting subdivision (b) and relying on the present definition of "regulation" in Government Code Section 11342(g). Alternatively, the Commission might provide more guidance with respect to what constitutes an "agency statement" that permits judicial review even before a regulation is adopted.

3. §1123.230. Public Interest Standing. The proposed statute would require, for public interest standing, that the person "has previously served on the agency a written request to correct the agency action. . . ." This is appealing in the sense that such a written notice lets the agency know that it must take the request seriously or face judicial review. However, this appears to be inconsistent with current practice. Does the Commission intend to change the law to this degree?

As and example of this current practice, the APA rulemaking provisions allow a person to make oral comments on rulemaking proposals (Govt. Code, § 11346.8(a)), and the adopting agency has equal duty to respond to such oral comments as it does to written comments in its final statement of reasons. (Govt. Code, § 11346.9(a)(3).) Under these circumstances, one might ask why should oral comment participants be denied public interest standing for mere failure to provide comments in writing? Likewise, the California Environmental Quality Act (CEQA) requires agencies to respond to all comments, oral or written, concerning draft environmental impact reports. (Cal. Code of Regs., tit. 14, § 15088.) Many comments are oral comments at public hearings that are encouraged under CEQA. (Cal. Code of Regs., tit. 14, § 15087.) CEQA allows actions to be judicially challenged by persons who presented their objections to the agency "orally or in writing." (Pub. Resources Code, § 21177, subds. (a) and (b).) The proposed requirement of written objections would deprive CEQA proceeding oral participants public interest standing. Of course, some of these participants could claim "private interest" standing. However, to the extent private interest claims could not be made, the Commission's recommendation appears inconsistent with the CEQA provision. The Energy Commission does not object to a requirement of a written request if that change in current law is really intended, but we raise the issue to be sure that intent is clearly expressed so that there will be no confusion on this point following enactment of the new provisions.

Thank you for considering these comments on the Tentative Recommendation.

Sincerely,

William M. Chamberlain

WILLIAM M. CHAMBERLAIN
General Counsel

I, Charles Warren, declare:

All of the matters stated herein are known to me of my personal knowledge, or (where indicated) of my personal qualifications, experience, studies, and if called as a witness I would testify as follows:

1. From the years 1963 to 1977, I served as an Assemblyman in the California Legislature representing the 56th and 46th Districts in Los Angeles. While a member of the California Assembly, I served as Chairman of the Resources, Land Use and Energy Committee in 1975-77; Chairman of the Energy and Diminishing Materials Committee in 1974-75; and Chairman of the Planning and Land Use subcommittee on State Energy Policy in 1972-74.

2. I was principal author in 1973 of Assembly Bill 1575 which the Legislature enacted as the Warren-Alquist State Energy Resources Conservation and Development Act, Public Resources Code sections 25000, et seq. In this declaration, I will set forth facts relating to the history and rationale for the legislation which I proposed and which the California Legislature adopted.

3. One of my major concerns during the years I served in the California Legislature, which is reflected in legislation I introduced, was prudent development of energy resources which did not unduly impair the quality of California's environment or threaten its economy. I introduced AB 1575 at a time when the public was only slowly becoming aware of the need for energy conservation and for sensitive energy development which respected both economics and environmental protection.

4. I knew that numerous state and local agencies in California, pursuant to their traditional police powers, had long possessed the authority to regulate the siting, construction, and operation of electric generating power plants in order to protect public health and safety, to promote environmental quality, and to ensure the wisest use of land within their respective jurisdictions. During legislative hearings it became apparent, however, that this fragmented authority spread over so many agencies, resulted in haphazard, inconsistent and often totally ineffective regulation. In addition, even though the California Public Utilities Commission had exercised its constitutional authority to regulate the economic activities of California utilities to ensure a fair rate of return to the companies and to protect the consuming public from unnecessarily high rates, PUC regulation was inadequate, in my view, in its lack of any serious scrutiny of alternatives to utility proposals and its lack of comprehensive energy resource planning.

5. Existing authority was so fragmented among state and local agencies, that in order to construct a proposed power plant a utility might find itself faced with the prospect of obtaining as many as forty or fifty permits from different agencies. These local and state agencies regulated in a variety of ways many aspects of powerplant construction and operation, including structural design, environmental impacts such as water quality and air quality, transportation of fuel and materials into and out of the facility, waste disposal, land use and socioeconomic impacts, emergency services requirements, transmission line

locations and impacts, seismic considerations, and economic impacts. In many instances the problem was not as much lack of regulation, as it was uncoordinated and overlapping regulation by the agencies and local governments who were entitled to regulate under existing state law.

In addition, California laws before 1975 provided no coordinated, systematic, state-wide review of forecasts for energy demand, in fact, no significant projections of future demand were prepared by anyone other than the utilities and those were not publicly scrutinized. There was no mechanism for comprehensive planning to meet energy needs, except blind faith in the unchallenged judgment of utility executives. No public process existed for a rational selection among alternative energy technologies or alternative sites for a given technology. Decisions made behind closed doors in utility executive offices constituted California's energy resource planning.

The most disturbing aspect of the status quo in my view was the exclusion of the public from this energy resource decision-making process. The utilities decided privately what was best for the people of the State of California and that is what they got. I was already aware of the significant impact that energy choices would have on the future of Californians and I was determined to replace those decisions which the utilities viewed as their private reserve with an open and public planning process in which all citizens could participate.

6. The existing fragmented authority to regulate power plants, particularly siting authority, and the absence of coherent

energy planning and policy formulation, suggested the need to consider centralizing planning and siting authority in one state-wide body. Therefore, the Assembly Committee on Planning and Land Use over which I presided held a special hearing on power plant siting on November 18, 1971. Testimony at these hearings demonstrated widespread support for state level energy planning and power plant siting. In these hearings, Pacific Gas and Electric Co. ("PG&E") and Southern California Edison ("SCE") strongly supported the concepts of a "one-stop state permitting agency" for power plant siting and licensing, and "site banking" -- presenting a state siting agency with multiple sites, whose approval could then be "banked" for future power plants.

At the hearing, David Fogarty, Vice-President of Southern California Edison Company, comprehensively summed up the necessary factors which a state siting agency should address in "making judgments about power plant sitings":

(1) Population growth factors to include at least a 20-year projection of population and industrial growth in the utility's service area and in the area surrounding the proposed plant site.

(2) An estimate of the public's acceptance of the proposed power plant should be made.

(3) Power requirements at present and projected in the future for the requesting utility's service area. These estimated power requirements should be obtained from as many different sources as are available. An independent study should be made if estimations are not available.

(4) Land requirements of the plant site and for associated transmission lines, fuel lines, fuel tank farms, safety buffer areas, and so forth. Also include a study of projected land use in surrounding areas.

(5) The geology of the site to include mapping and examination of the faults in the siting area and determination of the acceptability of the foundation material.

(6) Seismological design requirements for the power plant.

(7) The hydrology of the proposed plant site to include analysis of dangers from storm runoffs, flash floods, and/or tidal waves.

(8) The requirements for cooling waters to include studies of quantities of water necessary, inlet and outlet water temperatures, changes in the water quality such as increased salinity, and water availability in the present and future. If cooling towers or ponds are used, the source of make-up water and the effects of carry-over and blowdown water on surrounding areas must be included.

(9) Meteorology of the proposed site to include wind velocity and directions, atmospheric stability, site diffusion, precipitation, temperature ranges, and air mass movements.

(10) The aesthetic impact of the proposed plant upon the surrounding terrain and communities.

(11) Potential effects upon air quality in the surrounding areas.

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(12) Noise levels and their impact upon the surrounding communities.

(13) Environmental impacts to the surrounding flora and fauna both upon land and in the marine environment. Monitoring and studies of surrounding flora and fauna started prior to plant installation and continuing during plant operation are the most valid method for detecting unfavorable environmental impacts. Correction can then be made to remove these adverse effects.

(14) Laws, regulations, and rulings of Federal, State, and local agencies with jurisdiction over the proposed plant site and over the surrounding communities affected by the operation of the power plant.

(15) In the case where the proposed plant's operation will have effects upon environment of surrounding sites, consultation and coordination with the proper agencies of the affected state will be necessary.

(16) The economic factors relating to the proposed plant's design and operation including the costs of installation of devices to protect the environment such as cooling towers, air filtering equipment, etc.

Other factors depending upon the proposed plant site, the plant design, and other conditions may appear and must also be considered. Mr. Fogarty did add a qualification that decisions concerning nuclear plant safety should remain with the Atomic Energy Commission. (Special Hearing on Power Plant Siting Before the Assembly Committee on Planning and Land Use, November 18, 1971, at 78, 80-82.)

7. In 1972, the California Senate Public Utilities and Corporations Committee held hearings similar to those which I conducted on power plant siting focusing on: 1) energy demand forecasting; 2) method for lowering demand; 3) coastal vs. inland siting of power plants; 4) the appropriateness of various existing and proposed governmental agencies to site power plants; 5) selection among alternative types of generating technologies; 6) land use and environmental considerations; and 7) research and development of alternative energy technologies. (Hearings on Power Plant Siting Before the Senate Public Utilities and Corporations Committee, February 10-11, 1972.) In response to these concerns, two Senate bills, SB 1195 and 1310, were introduced in 1972 proposing the establishment of an Electrical Power Facilities Siting Council.

8. In September 1972, the Rand Corporation issued its report on California's electrical energy problems. The study had been commissioned in 1971 by the Assembly Committee on Planning and Land Use, to assist the Legislature in understanding the complex technical questions involved in developing a state electrical energy policy. The reports included: 1) California's Electricity Quandry I: Estimating Future Demand, W.E. Mooz, et al.; 2) California's Electricity Quandry II: Planning for Power Plant Siting, R.H. Ball, et al.; 3) California's Electricity Quandry III: Slowing the Growth Rate, R.D. Doctor, et al. (R-1084-NSF/CSRA, R-1115-RF/CSA, R-1116-NSF/CSA, Rand Corp., Sept., 1972.)

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9. After Rand released the study, as Chairman of the Subcommittee on State Energy Policy of the Assembly Committee on Planning and Land Use, I supervised the drafting of four sets of interrogatories on specific findings of the Rand reports and on the broader questions of energy policy. We submitted these questions to five major California utilities, state agencies and environmental groups. Their responses are compiled in Survey of Energy Problems and Programs, Assembly Committee on Planning and Land Use, Subcommittee on State Energy Policy, June 1973. Again the interrogatories and responses addressed concerns about energy demand forecasting, power plant siting, and energy conservation.

10. In addition to obtaining written comments on interrogatories in these areas, my Energy Subcommittee held six days of hearings on state energy policy in February and March of 1973. These hearings focused on 1) California's electricity demand and supply characteristics, 2) the consequences of pursuing present policies relying heavily on nuclear power production, 3) reducing undesirable consequences of electrical energy use, 4) power plant siting and 5) review of AEC nuclear reactor safety criteria. (Hearings on State Energy Policy, before the Assembly Committee on Planning and Land Use, Subcommittee on State Energy Policy, February 15-16, 22-23; March 8-9, 1973.)

11. After extensive review and reflection on the information derived from these extensive studies and hearings, I proposed a comprehensive energy policy bill, Assembly Bill 1575, ultimately enacted as the Warren-Alquist Energy Resources Conservation and Development Act.

Senate Bill 283, incorporating AB 1575, passed both houses of the Legislature in 1973, but was vetoed by Governor Reagan. Later, following the oil embargo which occurred during the October 1973 mideast hostilities, we held further discussions with Governor Reagan with the result that Governor Reagan agreed to support AB 1575. Exhibit A to this affidavit is a letter I signed shortly before passage of the bill which reflects this agreement. As a result of my discussions with Governor Reagan and the utilities, on May 16, 1974 the Legislature enacted the bill and Governor Reagan signed it on May 21.

12. Throughout the extended legislative process described above, I often expressed my concerns about the lack of credible state-wide demand forecasting, the absence of energy conservation and efficiency efforts, the irrational and complex power plant siting and licensing requirements, and the unavailability of opportunities to select among existing and future alternative electricity-generating technologies, and the absence of any significant public involvement in such decisions.

The four years of hearings and legislative studies culminated in a majority of the Legislature voicing similar concerns and adopting findings as follows:

- Electrical energy is essential to the health, safety and welfare of the people of California and that it is the responsibility of state government to ensure that a reliable supply of electrical energy is maintained at a level consistent with the need for such energy for the protection of the peoples' health and safety and for environmental quality protection.

- The present rapid rate of growth in demand for electrical energy is in part due to wasteful, uneconomic, inefficient and unnecessary use of power and a continuation of this trend will result in serious depletion or irreversible commitment of fuels, land and water resources and potential threats to California's environmental quality.

- Planning for future electrical generating and transmitting facilities should be coordinated with state, regional, and local plans for land use, urban expansion, transportation systems, environmental protection and economic development.

- There is a pressing need to accelerate research and development into alternative sources of energy and to improve technology of design and siting of power facilities.

- Prevention of delays and interruptions in the orderly performance of electrical energy, protection of environmental values, and conservation of energy resources requires expanded authority and technical capability within state government.

Based on these findings, the Legislature declared that the policy of this state shall be:

- First: to establish and coordinate within state government responsibility for managing the state's energy resources, for encouraging and conducting research and development into energy supply and demand problems, and for regulating electrical generating and transmitting facilities;

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- Second: to employ a range of measures to influence the rate of growth and electrical consumption in order to reduce wasteful, uneconomical and unnecessary uses, prudently conserve energy resources and assure state-wide environmental, public safety and land use goals.

13. During the legislative process by which AB 1575 was enacted it became clear that lengthy judicial review of power facility licenses, particularly if construction were enjoined while the courts reviewed the licensing record, was a serious obstacle to meeting the goals of the act to (1) insure adequate electricity supplies, while (2) avoiding overcommitment of resources to unneeded facilities. If two to three years of judicial review had to be added to the anticipated lead time of a facility, the state's energy planners would not be able to rely on an Energy Commission license to cover expected increased demand and would therefore have to commit other resources to further projects in order to insure a reliable supply of electricity. Since the Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission for all such projects is reviewable only in the California Supreme Court, and since the Energy Commission certificate displaces a portion of the Certificate of Public Convenience and Necessity, I included in the bill, and the Legislature enacted Public Resources Code section 25531 providing that Energy Commission power facility licenses should be reviewed in the same manner as equivalent Certificates of Public Convenience and Necessity. This expedited judicial review is a key element

in establishing a forward planning energy policy framework in California, as we attempted to do in the Warren-Alquist Act.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Sacramento, California this 13th day of January, 1982.

Charles Warren

CHARLES WARREN