Study N-200 January 5, 1996

Memorandum 96-4

Judicial Review of Agency Action: Comments on Tentative Recommendation

This memorandum continues to discuss letters of comment on the Tentative Recommendation on *Judicial Review of Agency Action*. The Commission began to consider letters of comment at the last meeting. This memorandum picks up where we left off, and incorporates decisions of the Commission at the last meeting. Only those letters are attached that were reproduced for the last meeting and are referred to in this memorandum. We kept the earlier pagination of exhibits, so pagination is discontinuous:

Robert Bezemek, California Federation of Teachers	Exhibit pp. 1-14
California School Employees Association	Exhibit pp. 15-21
Attorney Vicki Gilbreath	Exhibit pp. 24-27
Attorney Diane Marchant	Exhibit pp. 28-32
State Bar Public Law Section	Exhibit pp. 36-37
Department of Health Services	Exhibit pp. 39-48
Public Utilities Commission	Exhibit pp. 49-56
State Board of Equalization	Exhibit pp. 57-61
Workers' Compensation Appeals Board	Exhibit pp. 86-98
Attorney General	Exhibit pp. 99-103
California Energy Commission	Exh. pp. 104-110

The following issues are discussed in this memorandum:

STANDARD OF REVIEW

Findings of Fact in Adjudications by Local Agencies (§ 1123.430)

At the last meeting, the Commission approved the staff recommendation for independent judgment review of fact-finding of local agencies, unless the agency adopts procedural protections to assure due process, in which case substantial evidence review would apply. The Commission thought agency procedural protections should include the right to compel attendance of witnesses and production of documents by subpoena (Gov't Code §§ 11450.10-11450.40), limited discovery, and the administrative adjudication bill of rights — notice, opportunity to be heard, public hearing, separation of prosecutorial from adjudicative function, disqualification of presiding officer for bias, written decision, and no ex parte communication to presiding officer. This may be done by revising Section 1123.430, adding a new Section 1123.435, and amending Section 11410.40 of the Government Code (APA), as follows:

Code Civ. Proc. § 1123.430. Review of agency fact finding

1123.430. (a) This section applies to a determination by the court of whether agency action, other than a decision of a local agency in

an adjudicative proceeding, is based on an erroneous determination of fact made or implied by the agency.

(b) The standard for judicial review under this section is whether the agency's determination is supported by substantial evidence in the light of the whole record.

Code Civ. Proc. § 1123.435. Review of fact finding in local agency adjudication

1123.435. (a) This section applies to a determination by the court of whether a decision of a local agency in an adjudicative proceeding is based on an erroneous determination of fact made or implied by the agency.

(b) Except as provided in subdivision (c), the standard for judicial review under this section is the independent judgment of the court whether the decision is supported by the weight of the evidence.

(c) The standard for judicial review under this section is whether the decision is supported by substantial evidence in the light of the whole record if the agency did both of the following:

(1) Pursuant to Section 11410.40 of the Government Code, adopted Article 6 (commencing with Section 11425.10) and Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code for the formulation and issuance of the decision being reviewed.

(2) Pursuant to Section 11410.40 of the Government Code or otherwise, gave parties to the proceeding the right to discovery to the extent provided in Section 11507.6 of the Government Code.

Gov't Code § 11410.40 (amended). Election to apply administrative adjudication provisions

11410.40. Notwithstanding any other provision of this article, by regulation, ordinance, or other appropriate action an agency may adopt this chapter, Chapter 5 (commencing with Section 11500), or any of ~~its~~ their provisions for the formulation and issuance of a decision, even though the agency or decision is exempt from application of this chapter or Chapter 5.

Subdivision (c)(2) of Section 1123.435 above permits a local agency to provide for administrative discovery of the same matters that are discoverable under the Administrative Procedure Act. Under the APA, a party may discover names and addresses of all witnesses known to the other party, statements of a party and of witnesses, portions of investigative reports, all writings, including mental, physical, and blood examination reports the party will offer in evidence, and other things relevant and admissible. Gov't Code § 11507.6. Depositions for discovery purposes, interrogatories, and requests for admission are not used in

APA proceedings. Discovery of matters in possession of non-parties is not permitted. Discovery is obtained by filing a request for discovery — no showing of good cause, declarations, or motions are necessary. California Administrative Hearing Practice § 2.55, at 93-94 (Cal. Cont. Ed. Bar 1984). This limited APA discovery seems well suited for local agency proceedings.

The Comment to Section 1123.435 would note that independent judgment review of fact-finding under subdivision (b) only applies to a local agency "decision" — action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person, and not to action of general application, such as quasi-legislative action. Section 1121.250. For local agency action that is not a "decision," substantial evidence review will apply under Section 1123.430.

Delegated Authority to Agency to Interpret Its Statute (§ 1123.420)

At the last meeting, the Commission approved delegating authority to interpret substantive statutes to agencies that now enjoy a high degree of judicial deference, such as requiring the court to accept the agency determination unless "clearly erroneous." These agencies include:

• Public Employment Relations Board. Banning Teachers Ass'n v. Public Employment Relations Bd., 44 Cal. 3d 799, 804, 750 P.2d 313, 244 Cal. Rptr. 671 (1988).

• Agricultural Labor Relations Board. Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 400, 411, 546 P.2d 687, 128 Cal. Rptr. 183 (1976).

• Workers' Compensation Appeals Board. Judson Steel Corp. v. Workers' Compensation Appeals Bd., 22 Cal. 3d 658, 668, 586 P.2d 564. 150 Cal. Rptr. 250 (1978).

The staff would approximate existing law by adding the following to the PERB and ALRB statutes (Gov't Code §§ 3520, 3542, 3564; Lab. Code § 1160.8):

> For the purpose of Section 1123.420 of the Code of Civil Procedure, authority is delegated to the board to interpret and apply this ["chapter" for PERB, "part" for ALRB].

The staff would do the same for WCAB by adding the following to its statute (Lab. Code § 5954):

For the purpose of Section 1123.420 of the Code of Civil Procedure, authority is delegated to the appeals board to interpret and apply this division.

The Comments to these five sections would say this is a delegation of authority to interpret or apply agency statutes, resulting in abuse of discretion review under Section 1123.420.

The delegations above are not limited to adjudication, but will apply also to rulemaking. The discussion at the last meeting was focused on adjudication. The Commission's decision to delegate interpretive authority to PERB and ALRB for adjudication was to continue existing law. However, under existing law, abuse of discretion review does apply to review of regulations as well as to adjudicative proceedings. Government Code Section 11342.2 says no regulation is valid or effective "unless consistent with the statute and reasonably necessary to effectuate the purpose of the statute." The California Supreme Court has said "these issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with the strong presumption of regularity accorded administrative rules and regulations." In considering whether a regulation is reasonably necessary, "the court will defer to the agency's expertise and will not 'superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision.'" Moore v. California State Bd. of Accountancy, 2 Cal. 4th 999, 1015, 831 P.2d 798, 9 Cal. Rptr. 2d 358, 367 (1992). *Accord*, Ford Dealers Ass'n v. Department of Motor Vehicles, 32 Cal. 3d 347, 355-56, 650 P.2d 328, 185 Cal. Rptr. 453 (1982); Ralphs Grocery Co. v. Reimel, 69 Cal. 2d 172, 175, 444 P.2d 79, 70 Cal. Rptr. 407 (1968). **Thus the delegations above do not distinguish between review of adjudication and review of rulemaking, consistent with existing law.**

ADMISSION OF EVIDENCE OUTSIDE THE ADMINISTRATIVE RECORD

Prior Commission Action

At the last meeting, the Commission reaffirmed its July 1993 decision generally to require review on a closed record as recommended by Professor Asimow and codified in Section 1123.760(a). The AG supports the closed record requirement.

Subdivision (b) of Section 1123.760 states exceptions to closed record review, but is unclear whether it permits admission of any evidence if the exception

applies, or only evidence that satisfies subdivision (a) — evidence that could not have been produced at or was improperly excluded from the agency proceeding. At a minimum, subdivision (b) should be revised to say the court may only admit evidence "described in subdivision (a)," as set out below.

The Commission asked if case law permits a trial de novo in traditional mandamus to review discretionary action, rather than review of an administrative record. The Commission asked for analysis of Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995).

Closed Record in Review of Quasi-Legislative Action: *Western States* Case

Western States was a traditional mandamus case to review Air Resources Board regulations under the California Environmental Quality Act. The superior court refused to admit extra-record evidence. The Supreme Court held extra-record evidence is admissible in traditional mandamus to review quasi-legislative action only in those rare instances where the evidence existed before the agency decision and it was not possible in the exercise of reasonable diligence to present it at the administrative proceeding. That is the rule in administrative mandamus, and there is "no reason to apply a different rule in traditional mandamus." The court also noted that extra-record evidence is not admissible to review quasi-legislative action under CEQA, because the statute (Pub. Res. Code § 21168.5) requires the court to determine whether there is substantial evidence in the record to support agency findings, and therefore may not be disputed by contradictory evidence, and because the administrative record in quasi-legislative proceedings is usually adequate for review without extra-record evidence. The court rejected contrary dictum in No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 79 n.6, 529 P.2d 66, 118 Cal. Rptr. 34 (1974). Extra-record evidence might also be admissible under unusual circumstances or for very limited purposes not presented in the *Western States* case (e.g., for background or to determine whether the agency considered all relevant factors or fully explicated its course of conduct or grounds for decision). *Id.*, 9 Cal. 4th at 578-79, 38 Cal. Rptr. 2d at 149-50.

The court made clear its holding was not limited to CEQA cases: "It is well settled that extra-record evidence is generally not admissible in non-CEQA traditional mandamus actions challenging quasi-legislative administrative decisions." The court distinguished closed record review of quasi-legislative

action from open-record review of ministerial or informal action, because there is often little or no administrative record for ministerial or informal action, and because ministerial or informal action is entitled to less deference than quasi-legislative action:

> The appropriate degree of judicial scrutiny [of fact-finding] in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other. [Citation omitted.] Quasi-legislative administrative decisions are properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum.

Id., 9 Cal. 4th 559, 575-76, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 147-48 (1995) (dictum). For two recent environmental cases requiring closed record review, see Fort Mojave Indian Tribe v. California Dep't of Health Services, 38 Cal. App. 4th 1574, 45 Cal. Rptr. 2d 822 (1995); Barthelemy v. Chino Basin Mun. Water Dist., 38 Cal. App. 4th 1609, 45 Cal. Rptr. 2d 688 (1995).

Present Rules for Admission of Extra-Record Evidence

Rules for admission of extra-record evidence may be summarized as follows:

• In administrative mandamus to review an adjudicative proceeding, the court may remand to the agency to admit additional evidence only if in the exercise of reasonable diligence the evidence could not have been produced at, or was improperly excluded from, the administrative hearing. For independent judgment review, the court may either admit the evidence itself or remand if one of those two conditions is satisfied. Code Civ. Proc. § 1094.5(e). (Traditional mandamus is rarely, if ever, appropriate to review an adjudicative proceeding. See California Administrative Mandamus § 1.8, at 8 (Cal. Cont. Ed. Bar 2d ed. 1989).)

• In traditional mandamus to review ministerial or informal action, extra-record evidence is freely admissible if the facts are in dispute. Western States, 9 Cal. 4th at 575-76, 38 Cal. Rptr. at 147-48. The court simply takes evidence and determines the issues. California Civil Writ Practice § 5.24, at 168 (Cal Cont. Ed. Bar 2d ed. 1987). (By applying closed record review to all judicial review, the draft statute will significantly limit existing open record review of ministerial or informal action, including action affecting a public employee. For this reason, we

may expect this change to be vigorously opposed by public employee organizations.)

• In traditional mandamus to review quasi-legislative action, extra-record evidence is admissible only if the evidence existed before the agency decision and it was not possible in the exercise of reasonable diligence to present it at the administrative proceeding. Western States, 9 Cal. 4th at 578, 38 Cal. Rptr. 2d at 149.

Western States recognized limited exceptions to the closed record rule, discussed immediately below.

Revisions to Section 1123.760 Recommended by Staff

As noted above, the staff recommends making clear subdivision (b) of Section 1123.760 permits the court to admit evidence only if the evidence satisfies subdivision (a).

The staff also recommends adding a new subdivision (d) to permit the court to receive affidavits for background where only issues of law are presented. *Western States* recognized a limited exception to the closed record rule for the purpose of providing the court with background. Western States, 9 Cal. 4th at 579, 38 Cal. Rptr. 2d at 150. At the last meeting, Mr. Heath of CSEA said declarations are often used in traditional mandamus to provide factual background where the issues are primarily legal and are being considered on law and motion calendar. This procedure was approved in California School Employees Ass'n v. Del Norte County Unified School Dist., 2 Cal. App. 4th 1396, 1405, 4 Cal. Rptr. 2d 35, 39-40 (1992).

The foregoing two revisions may be accomplished as follows:

> 1123.760. (a) Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded in the agency proceedings, it may enter judgment remanding the case for reconsideration in the light of that evidence. Except as provided in subdivision (b), the court shall not admit the evidence on judicial review without remanding the case.
>
> (b) The court may receive evidence <u>described in subdivision (a)</u>, in addition to that contained in the administrative record for judicial review, in any of the following circumstances:
>
> (1) The evidence relates to the validity of the agency action and is needed to decide any of the following disputed issues:

(A) Improper constitution as a decision making body, or improper motive or grounds for disqualification, of those taking the agency action.

(B) Unlawfulness of procedure or of decision making process.

(2) The agency action is a decision in an adjudicative proceeding and the standard of review by the court under Section 1123.435 is the independent judgment of the court.

(c) If pursuant to statute the proper court for judicial review is the Supreme Court or court of appeal and evidence is to be received pursuant to this section, the court shall appoint a referee, master, or trial court judge for this purpose, having due regard for the convenience of the parties.

(d) Nothing in this section precludes the court from receiving affidavits to provide factual background where the only issues on judicial review are agency interpretation or application of law.

Other Possible Exceptions to Closed Record and Remand Requirements

Remand probably futile. According to Mr. Heath, the record may be so scanty for ministerial or informal action that there would be no benefit in remanding the case to the agency, and remand would only cause delay and expense. We could address this by adding a subdivision to give the court some discretion to receive the evidence itself where there was no administrative hearing:

> The court may receive evidence described in subdivision (a) without remanding the case if no administrative hearing was held and the court finds that (i) remand to the agency would be unlikely to result in a better record for review and (ii) the interests of economy and efficiency would be served by receiving the evidence itself.

Evidence to Evaluate Whether to Remand. In the *Fort Mojave* case, the superior court admitted extra-record evidence for the limited purpose of evaluating whether to remand. 45 Cal. Rptr. 2d at 830. The appellate court neither approved nor disapproved this practice. We could add a subdivision to Section 1123.760 as follows:

> The court may receive evidence, whether or not described in subdivision (a), for the limited purpose of determining whether to remand the case to the agency for reconsideration in the light of evidence described in subdivision (a).

Other Exceptions to Closed Record Requirement. *Western States* cited an article by Kostka and Zischke suggesting courts should admit evidence in review of quasi-legislative decisions relevant to any of the following (Western States, 9 Cal. 4th at 575 n.5, 38 Cal. Rptr. 2d at 147 n.5):

(1) Issues other than the validity of the agency action, such as petitioner's standing and capacity to sue. In existing administrative mandamus, petitioner must plead and prove he or she is "beneficially interested." Code Civ. Proc. § 1086; California Administrative Mandamus, *supra*, § 5.1, at 210. **The staff would make clear Section 1123.760 does not limit evidence on standing or capacity to sue by adding language to the Comment set out under the next paragraph.**

(2) Affirmative defenses such as laches, estoppel, and res judicata. Under existing law, whether the court may receive extra-record evidence on affirmative defenses depends on whether they relate to administrative action or to the review proceedings. A defense of laches for unreasonable delay of administrative action is waived if not raised in the administrative proceeding. California Administrative Hearing Practice, *supra*, § 2.22, at 67-68. A defense of laches for unreasonable delay in seeking judicial review may obviously be raised for the first time on review. See 8 B. Witkin, California Procedure *Extraordinary Writs* § 132, at 773-74 (3d ed. 1985); see generally California Administrative Mandamus, *supra*, § 7.14, at 248-49. The same is true of the estoppel defense. For example, a defense that the agency unreasonably delayed in seeking recoupment of overpayment of welfare must be raised at the administrative level or it is waived. See Lentz v. McMahon, 49 Cal. 3d 393, 404 n.8, 777 P.2d 83, 261 Cal. Rptr. 310, 316 n.8 (1989). But estoppel may be used to prevent the agency from invoking a limitations statute on judicial review. In such a case, the petitioner should allege in the petition facts establishing estoppel. California Administrative Mandamus, *supra*, § 7.17, at 251-52. Res judicata may be a defense in an administrative proceeding, and is waived if not raised in that proceeding. *Id.* § 2.9, at 39-40. **The staff would make clear Section 1123.760 does not limit evidence on affirmative defenses unique to the review proceeding by adding the following to the Comment:**

> Section 1123.760 deals only with admissibility of new evidence on issues involved in the agency proceeding. It does not limit evidence on issues unique to judicial review, such as petitioner's standing or capacity, or affirmative defenses such as laches for

unreasonable delay in seeking judicial review. For standing rules, see Sections 1123.210-1123.240.

(3) Accuracy of the administrative record. Section 1123.720 requires the agency official who compiled the record to certify its completeness by affidavit. **Should petitioner be permitted to introduce evidence in court to challenge the accuracy of the affidavit or of the administrative record?**

(4) Procedural unfairness. Section 1123.760 permits the court to receive evidence of "unlawfulness of procedure," but, as proposed to be clarified above, would require that the evidence could not have been produced at, or was improperly excluded from, the hearing. **Is this broad enough to cover "procedural unfairness"?**

(5) Agency misconduct. Section 11234.760 permits the court to receive evidence of the agency's improper constitution as a decisionmaking body or improper motive or grounds for disqualification of those taking the agency action, if the evidence could not have been produced at or was improperly excluded from the agency hearing. **Is this broad enough to cover "agency misconduct"?**

PROCEEDINGS TO WHICH STATUTE APPLIES

Out of concern that Section 1121.120 (statute replaces all other forms of judicial review) might be too inclusive, the draft statute includes the following limitations: Sections 1120 (application of title) and 1121.120 (other forms of judicial review replaced) make clear the draft statute does not replace or limit a case where some other statute provides for a trial de novo (examples in Comment to Section 1120), an action under the California Tort Claims Act, an action for a refund of taxes under specified provisions of the Revenue and Taxation Code, or habeas corpus. Section 1123.160 says the court may grant relief only if it determines that agency action is invalid under one of the grounds specified in the article on standards of review (Sections 1123.410-1123.450).

The staff would make the following additional revisions to the scope provisions to make clear the draft statute does not apply to (1) an action at law to recover sums due under a government bond, (2) a validating proceeding for a judicial declaration of the validity of a bond, contract, assessment, or special district, and (3) judicial review of a decision of a lower court.

Enforcement by Bondholder of Rights Under a Government Bond

Many statutes permit a bondholder to enforce rights under a government bond by mandamus, action at law or in equity, or other proceedings. Generally the holder of a matured public bond may maintain an action at law against the issuer to recover the amount due. In some cases, such as where the property of the issuer is not subject to execution to enforce a judgment, a money judgment is of little use and mandamus is the only useful remedy. 52 Cal. Jur. 3d *Public Securities and Obligations* § 60 (1979). In conforming revisions, the staff would replace all references to enforcement of a government bond by mandamus with a reference to a proceeding under the draft statute, but would preserve existing references to enforcing a bond by an "action at law."

The 1981 Model State Administrative Procedure Act does "not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim." MSAPA § 5-101. The draft statute does not have a similar provision. **The staff thinks it would be useful to include such a provision in Section 1120 to make clear the draft statute does not apply, for example, to enforcement of a bond in an action at law.** The staff would do this by adding subdivision (d) to Section 1120 as set out immediately below.

Transactions Involving Contract, Intellectual Property, and Copyright

The draft statute permits judicial review of "agency action," defined in Section 1121.240 as performance of, or failure to perform, any "duty, function, or activity, discretionary or otherwise." The Department of Health Services is concerned this broad definition may include transactions involving contract, intellectual property, copyright, and other legal issues. The staff would address this, and the question of enforcement of a bond discussed above, by adding the following to Section 1120:

> (d) This title does not govern litigation in which the sole issue is a claim for money damages or compensation, or is to vindicate a private right under common law, and the agency whose action is at issue does not have statutory authority to determine the claim.

Action To Validate Bond, Contract, Assessment, Special District, or Other Governmental Action

Sections 860-870 of the Code of Civil Procedure provide a validating proceeding by a public agency or interested person for a judicial declaration of

the validity of a "matter" which another statute authorizes to be determined in this manner. Many statutes incorporate and apply these validating provisions to determine the validity of bonds. E.g., Gov't Code §§ 26353, 26453, 43620.1, 43695, 50753, 61671.2; Health & Safety Code §§ 4624, 4803, 4996, 6653; Pub. Util. Code §§ 17101, 26341; Sts. & Hy. Code §§ 10601, 33148; Water Code §§ 9415, 23225, 23571, 52120, 52707. Some statutes authorize an action to determine the validity of a special district, Sts. & Hy. Code § 26260; Water Code § 34530, of a contract, Water Code §§ 35855, 50979, of an assessment, Water Code §§ 23571, 24021, 36531, or of governmental actions generally, Water Code § 43730. See generally *Selected 1960-1961 California Legislation*, in 36 Cal. St. B. J. 716-18 (Sept.-Oct. 1961).

The staff would make clear the draft statute does not replace existing proceedings to validate bonds, contracts, assessments, and special districts by adding the following to Section 1120:

> (e) This title does not govern a proceeding under Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.

In conforming revisions, the staff would amend Water Code Section 43730 to delete the authority to use the validating procedure for "the taking of any other action by the district or by the board." Determination of questions of validity of governmental action generally would be under the draft statute. The staff would make similar conforming revisions to any other statutes we find that refer to the validating procedure for governmental action generally.

Decisions of Lower Courts

The draft statute governs judicial review of agency action of the "state, including any agency or instrumentality of the state, whether in the executive department or otherwise." Section 1120. This might be read to include review of judicial decisions of lower courts. **The staff recommends adding the following to Section 1120:**

> (f) This title does not govern judicial review of a decision of a court.

Agencies Reviewed by Supreme Court

PUC and Energy Commission. At the last meeting, the Commission considered whether to exempt rate-making decisions of the Public Utilities Commission, and power plant siting decisions of the California Energy Commission. Both agencies now have direct review in the Supreme Court. Pending legislation (SB 1322) would expand jurisdiction for review of PUC and Energy Commission decisions to include the court of appeal. The bill would make quasi-adjudicative decisions for these two agencies reviewable on the same grounds as for administrative mandamus, and would make their quasi-legislative decisions reviewable on the same grounds as for traditional mandamus. The Commission was inclined to postpone the exemption question for these two agencies until final action on this bill. The Commission did not resolve this, and asked the staff to bring it back.

Under existing law, PUC fact-finding is reviewed by a standard not radically different from substantial evidence: PUC fact-finding is upheld if it has "an evidentiary basis in the record." Camp Meeker Water Systems, Inc. v. Public Util. Comm'n, 51 Cal. 3d 845, 864-65, 799 P.2d 758, 274 Cal. Rptr. 678 (1990). However, PUC fact-finding is subject to independent judgment review if constitutional questions are involved. Pub. Util. Code § 1760. For PUC conclusions of law, the standard of review is unclear, but it is clear the courts are not bound by them. See California Portland Cement Co. v. Public Util. Comm'n, 49 Cal. 2d 171, 176, 315 P.2d 709 (1957). Power plant siting decisions of the Energy Commission "are subject to judicial review in the same manner as the decisions of the Public Utilities Commission." Pub. Res. Code § 25531.

Professor Asimow says the present system makes PUC decisions essentially unreviewable, and that it is hard to explain why this one agency should be exempt from judicial scrutiny. Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* 33 (Nov. 1993). The same argument applies to the Energy Commission. The draft statute would replace existing review of PUC and Energy Commission decisions with procedures analogous to administrative mandamus.

The PUC objects to the following proposed changes in its procedure:

• The draft statute gives a broad grant of authority for the court to modify PUC action and grant injunctive relief and other remedies, replacing the existing rule under which the Supreme Court may only affirm or set aside the PUC order.

• The draft statute provides a broad scope of review, including independent judgment review of mixed questions of law and fact, replacing the existing rule that review is limited to determining whether the PUC exceeded its authority. Pub. Util. Code § 1757. The PUC says its fact-finding often involves predictive facts that look to the future and require an exercise of discretion. At least for mixed questions of law and fact, we could address this by giving the PUC the same delegated authority to construe its statutes as the staff recommends above for the Public Employment Relations Board, Agricultural Labor Relations Board, and Workers' Compensation Appeals Board. This would provide abuse of discretion review of mixed questions of law and fact. To do this, we could add the following to Section 1756 of the Public Utilities Code for the PUC, and to Section 25531 of the Public Resources Code for the Energy Commission:

> For the purpose of Section 1123.420 of the Code of Civil Procedure, authority is delegated to the commission to interpret and apply this code.

• The draft statute permits the court to receive additional evidence for independent judgment review or for deciding whether the PUC was improperly constituted as a decisionmaking body, acted with improper motive, or whether its procedures are lawful, replacing the existing rule that no new or additional evidence may be introduced in the Supreme Court and requiring the court to decide the case on the administrative record (except on constitutional questions). This is addressed by the staff recommendation generally to require review on a closed record, discussed under "Admission of Evidence Outside the Administrative Record" above. Moreover, despite the apparent statutory prohibition against new evidence (Pub. Util. Code § 1757), the Supreme Court may have inherent power to remand to the PUC to consider newly discovered evidence. See Yucaipa Water Co. No. 1 v. Public Util. Comm'n, 54 Cal. 2d 823, 357 P.2d 295, 9 Cal. Rptr. 239 (1960) (dictum).

• The draft statute provides that an interested person or a person who satisfies public interest standing rules may seek judicial review, whether or not a party to the administrative proceeding, replacing the existing rule that only a party to the PUC proceeding may seek judicial review.

The draft statute preserves the 30-day limitations period for review of PUC decisions in Section 1756 of the Public Utilities Code. As requested by PUC, the staff would make clear the provision extending the time to 180 days after the decision if the agency fails to notify the parties of the limitations period does not apply to PUC decisions. Parties will likely be represented by counsel in PUC proceedings, and the applicable limitations period in the statute will be accessible to counsel.

The changes in the draft statute to PUC and Energy Commission procedures are consistent with Senate Bill 1322, and the staff thinks they are sound policy. However, if SB 1322 is not enacted, that will preserve exclusive Supreme Court review and reject mandamus-like procedures for these two agencies. In that case, we could exempt rate-making decisions of the PUC (see Pub. Util. Code §§ 726-749) and power plant siting decisions of the Energy Commission from the draft statute. We would not exempt truckers' licensing of the PUC (see Pub. Util. Code §§ 3501-3810), consistent with Professor Asimow's recommendation and the Commission's inclination.

The PUC performs many other regulatory functions on which decisions to exempt or not exempt would have to be made. We would ask the PUC for help in identifying all these functions and in drafting appropriate language.

State Bar Court. The State Bar requested an exemption from the draft statute by letter of May 31, 1995, considered at the June meeting. The Commission decided not to change the proper court for review of State Bar matters, but did not consider the exemption request.

Decisions of the State Bar Court are reviewed by the Supreme Court as prescribed by rules of that court. Bus. & Prof. Code § 6082. The statute also authorizes review by the court of appeal, but the Supreme Court has not implemented that, and review of State Bar matters remains exclusively in the Supreme Court. It is not a review proceeding in the traditional sense. The Review Department of the State Bar Court makes recommendations only, and its findings of fact are not binding on the court. The court examines the record and independently reviews the evidence, giving the findings "great weight," but resolving reasonable doubts in favor of the attorney. Kapelus v. State Bar, 44 Cal. 3d 179, 183, 745 P.2d 917, 242 Cal. Rptr. 196 (1987); 1 B. Witkin, California Procedure *Attorneys* § 511, at 553-54 (3d ed. 1985). The court itself makes the determination. Witkin calls this proceeding "unique." 1 B. Witkin, *supra*.

A petition for review of a disbarment or suspension recommendation must be filed within 60 days after the State Bar decision is filed. Bus. & Prof. Code § 6083; Cal. R. Ct. 952. A petition for review of a recommendation to set aside a stay of suspension or to modify probation must be filed within 15 days after the decision is filed. A petition for review of an interim suspension, exercise of certain State Bar powers, or another interlocutory matter must be filed with 15 days after mailing of written notice of the decision. A petition for review of any other State Bar action must be filed within 60 days after mailing of notice. In each case, the State Bar may file an answer within 15 days after service of the petition. The petitioner may file a reply within 5 days after service of the answer. If review is ordered, the State Bar may file a supplemental brief within 45 days after the order is filed, and the petitioner may file a reply brief within 15 days after service of the supplemental brief. Some petitions for review must be verified, specify the grounds relied on, show that review within the State Bar Court has been exhausted, state why review is appropriate, and attach a copy of the State Bar decision. Some petitions must be accompanied by a record adequate to permit review, including copies of documents and exhibits, and either a transcript or summary of the State Bar proceedings. Cal. R. Ct. 952. The Supreme Court may also conduct a de novo review on its own motion. Bus. & Prof. Code § 6084.

The draft statute requires a petition for review to be filed within 30 days after the decision is effective. See discussion under "Limitations Period For Judicial Review of Adjudication" below. The briefing schedule is to be provided by Judicial Council rule (Section 1123.620), rather than by Supreme Court rule as at present. The draft statute provides substantial evidence review of fact-finding, rather than the present independent judgment with great weight.

Although regulation of attorney discipline is a judicial function where the court has inherent and primary regulatory power, the Legislature may constitutionally put reasonable restrictions on this function that do not defeat or materially impair it. 1 B. Witkin, California Procedure, *supra,* §§ 257-258, at 292-93. There may be a constitutional question whether the Legislature can take away the Supreme Court's inherent power to make rules governing attorney discipline, and assign that function to the Judicial Council instead. If the briefing schedule and other procedures are to be established by the Judicial Council for all review proceedings except for the State Bar Court, that weakens the argument for applying the draft statute to review of the State Bar Court. **Because of these**

constitutional considerations, the staff recommends that review of proceedings of the State Bar Court be exempted from the draft statute.

Agencies Reviewed by Court of Appeal

At the last meeting, the Commission decided not to exempt from the draft statute the five agencies that have review in the court of appeal — Workers' Compensation Appeals Board, Public Employment Relations Board, Agricultural Labor Relations Board, Department of Alcoholic Beverage Control, and Alcoholic Beverage Control Appeals Board. The closed record requirement recommended under "Admission of Evidence Outside the Administrative Record" above makes it harder to justify treating cases reviewed in the court of appeal differently from those reviewed in superior court. The Commission thought the short times applicable to PERB for a petition for review and filing the record with the court of appeal should be preserved. See Gov't Code §§ 3520, 3542, 3564. The Commission asked for historical information on why review for these five agencies is in the court of appeal, and how the draft statute would affect their procedures.

WCAB: The first workers' compensation legislation was enacted in 1911, and provided for superior court review of decisions of the Industrial Accident Board. Loustalot v. Superior Court, 30 Cal. 2d 905, 910-911, 186 P.2d 673 (1947). In 1913, jurisdiction to review decisions of this agency was moved from superior court to the Supreme Court or court of appeal, but available legislative materials do not show policy reasons for this. Appellate review of WCAB decisions is now provided for in the California constitution. Cal. Const. Art. XIV, § 4. Both fact-finding and legal interpretations of WCAB are entitled to deference: Fact-finding is subject to substantial evidence review, and no new or additional evidence is permitted. Lab. Code §§ 5951-5952. WCAB interpretation of a statute it enforces is upheld unless clearly erroneous. Judson Steel Corp. v. Workers' Compensation Appeals Bd., 22 Cal. 3d 658, 668, 586 P.2d 564, 150 Cal. Rptr. 250 (1978).

The draft statute would make the following changes in review procedures for WCAB:

• The existing requirement that application for judicial review must be made within 45 days after reconsideration is denied, or filing of the order after reconsideration, would be replaced with the general limitations period of 30 days after the decision is "effective." A decision is effective 30 days after the order is

delivered or mailed to the person seeking review unless the order provides a different effective date or a stay is granted. Thus the time period for seeking review is from 30 to 60 days, depending on when the agency makes the decision effective. See discussion below under "Limitations Period For Judicial Review of Adjudication." **The staff thinks the argument for one uniform time period for all agencies is less compelling than having a uniform judicial review procedure with standard remedies, and that to allow WCAB to keep its 45-day statutory time period would not significantly undermine the beneficial objectives of the draft statute.**

• The existing rule that the WCAB record is ordered produced by the writ of certiorari (Lab. Code § 5951; see also Code Civ. Proc. § 1071) is replaced by the rule in the draft statute that the administrative record is requested by petitioner and prepared by the agency. Section 1123.730. WCAB says this will be inefficient and burdensome, because in 90 percent of its cases the appellate court denies the writ on the basis of the application without the administrative record. This is consistent with certiorari generally, where the petition need only contain the order to be reviewed. But, because certiorari is discretionary, it is advisable to attach as much of the record as is reasonable. California Civil Writ Practice, *supra,* § 6.33, at 203. The staff is sensitive to cost issues. But, because a petitioner must now produce at least some of the record at the outset to avoid summary denial, the cost of producing the WCAB record in every case will not be as significant as feared.

• The existing rule prohibiting new or additional evidence is replaced by the rule that the court may receive evidence in limited circumstances. Section 1123.760. See discussion under "Admission of Evidence Outside the Administrative Record" above.

ALRB and PERB: Review of ALRB and PERB orders was put in the court of appeal because California law was modeled after the National Labor Relations Act which provides for review of NLRB orders in the federal court of appeal. Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd., 24 Cal. 3d 335, 347, 595 P.2d 579, 156 Cal. Rptr. 1 (1979); Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc., 165 Cal. App. 3d 429, 438, 211 Cal. Rptr. 475 (1985). (Judicial review of unit determinations by PERB was once in superior court, but it was moved to the court of appeal in 1979.) ALRB and PERB fact-finding is subject to substantial evidence review. Gov't Code §§ 3520, 3542, 3564 (PERB); Lab. Code § 1160.8 (ALRB). Their interpretations of statutes they enforce

are upheld unless clearly erroneous. Banning Teachers Ass'n v. Public Employment Relations Bd., 44 Cal. 3d 799, 804, 750 P.2d 313, 244 Cal. Rptr. 671 (1988); see Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 411, 546 P.2d 687, 128 Cal. Rptr. 183 (1976).

Department of ABC and ABCAB: Before 1967, review of orders of the Department of ABC and ABCAB was in superior court. In 1967, review was moved to the Supreme Court or court of appeal in a statute modeled after the WCAB statute. Department of Alcoholic Beverage Control v. Superior Court, 268 Cal. App. 2d 67, 70, 73 Cal. Rptr. 780 (1968). Fact-finding is subject to substantial evidence review, and no new or additional evidence is permitted. Bus. & Prof. Code §§ 23090.1-23090.2. It is unclear how much deference the courts must give to ABC and ABCAB interpretations of statutes they enforce.

Effect of draft statute: The existing court of appeal jurisdiction and substantial evidence review of fact-finding for these five agencies, and no new evidence and deference to legal interpretations for three of them, suggests a legislative intent to give them broad powers within their areas of expertise, and to insulate them from second-guessing by generalist courts. The draft statute preserves court of appeal jurisdiction and substantial evidence review of fact-finding for these agencies. The staff recommends preserving existing deference to WCAB, PERB, and ALRB interpretation and application of their statutes under "Standard of Review" above. Limitations periods for these agencies are discussed immediately below.

The draft statute would replace the no-new-evidence rule for WCAB, Department of ABC, and ABCAB with the limited admissibility rules of Section 11234.760, discussed under "Admission of Evidence Outside the Administrative Record" above. The staff does not believe these limited admissibility rules should pose insurmountable problems for these three agencies.

LIMITATIONS PERIOD FOR JUDICIAL REVIEW OF ADJUDICATION

Limitations Periods For Adjudication Generally (§ 1123.640)

Existing law. The limitations period for review of adjudication under the APA is 30 days from the last day on which reconsideration can be ordered. Gov't Code § 11523. The power to order reconsideration expires 30 days after delivery or mailing of a decision to the respondent, on such earlier date as the agency may set, or on termination of a stay. Gov't Code § 11521. Local school districts are

governed by the APA for hearings involving certificated employees. Educ. Code §§ 44944, 44948.5, 87679. For judicial review of a decision of a local agency other than a school district, the limitations period is 90 days after the decision is announced or after the time for reconsideration expires, whichever is later. Code Civ. Proc. § 1094.6(b). If a person seeking judicial review makes a timely request for the agency to prepare the record, the time to petition for review is extended until 30 days after the record is delivered. Gov't Code § 11523 (APA); Code Civ. Proc. § 1094.6(d) (local agency). Other sections discussed below provide special limitations periods for particular agencies. Adjudication not covered by any of these provisions is subject to the three-year or four-year limitations periods for civil actions generally.

Draft statute. The draft statute provides a single, uniform 30-day limitations period for judicial review of all adjudicative action, whether state or local and whether under the APA or not, except that the special limitations periods under the California Environmental Quality Act are preserved. The 30-day period commences to run from the time the decision is effective. Section 1123.640. A decision under the APA is effective 30 days after it is delivered or mailed to the respondent, unless the agency head makes it effective sooner or stays its effective date. Gov't Code 11519. Thus for review of most APA proceedings, the party seeking review will have 60 days from delivery or mailing of the decision in which to petition for review — 30 days until it becomes effective and an additional 30 days from the effective date. The agency may effectively shorten this to 30 days by making the decision effective immediately. *Id.* Unlike existing law, the time to petition for review is not extended by a request for the record.

As noted by Ms. Marchant, the proposed law is unclear as to when a decision in a non-APA adjudication is effective. This should be clarified in Section 1123.640. But if we merely continue existing law by saying a non-APA decision is effective when announced or after the time for reconsideration expires, whichever is later, the limitations period for review of non-APA decisions — 30 days — will be shorter than the 30 days plus an additional period of up to 30 days for APA decisions. This does not seem justifiable.

Non-adjudicative action remains subject to the general limitations periods of three or four years for civil actions.

Commentators' views. The State Bar Public Law Section finds considerable merit in having one uniform limitations period for judicial review. The State

Water Resources Control Board thinks the uniform 30-day limitations period is a good idea.

Ms. Marchant and Mr. Bezemek (California Federation of Teachers) object to shortening the limitations period for review of local agency adjudication from 90 to 30 days plus an additional period of up to 30 days, whether or not the petitioner has received the administrative record. Mr. Bezemek objects to eliminating the provision extending the time to petition for review until 30 days after the record is delivered. Gov't Code § 11523 (APA); Code Civ. Proc. § 1094.6(d) (local agency). Ms. Marchant says without the record, it is hard for a lawyer to decide if judicial review is justified. Mr. Bezemek says a short period will cause more litigation to be filed to contest teacher layoff decisions, and will reduce the opportunity for settlement.

Previous Commission action. Professor Asimow originally recommended a uniform 90-day period for review of all state and local adjudications. Asimow, *Judicial Review: Standing and Timing* 88-97 (Sept. 1992). The Commission first thought there should be a uniform 60-day limitations period for review of state and local adjudication, an increase from the existing 30-day APA limitations period and a decrease from the 90-day local agency limitations period. Later, the Commission wanted the limitations provision to parallel the procedure for civil appeals, with a relatively short period, such as 30 days, to petition for review. In civil appeals, a notice of appeal must be filed 180 days after judgment or 60 days after mailing or service of a notice of entry of judgment, whichever is earlier. Cal. R. Ct. 2(a).

The Commission adopted the 30-day period because that is the rule now in APA proceedings. There was also concern that, in a case where the ALJ orders a license suspension or revocation and the licensee gets a stay, a longer period would permit the licensee to delay the suspension or revocation with possible harm to the public. This rationale would justify continuing the 30-day limitations period for review of APA proceedings, but would not necessarily require such a short period for non-APA proceedings.

It is not clear why there must be one uniform limitations period for all state and local adjudication, APA and non-APA. There appear to be compelling reasons for a short period in APA licensing cases that are not present in other adjudications. No arguments have been made why the existing 90-day limitations period for local agency adjudications should be shortened. (There was concern that in land use proceedings of local agencies, opponents of a

planned development may use delay as a tactical weapon, but the draft statute does not change the existing three or four year limitations period for review of nonadjudicative action.)

Staff recommendation. The staff recommends the following limitations periods for judicial review:

• For formal APA adjudication involving state agencies generally, and local school districts for certificated employees, the staff would continue the existing 30 plus 30 day rule, subject to being shortened to 30 days if the agency makes the decision effective immediately. (Special statutes of particular state agencies are discussed under the next heading, "Special Limitations Periods for Particular Agencies.")

• For state agency adjudication not under the formal adjudication provisions of the APA, the staff would provide that the decision is effective 30 days after it is delivered or mailed to the respondent, subject to being shortened by the agency, unless reconsideration is ordered or the decision is stayed. This would make non-APA adjudication of state agencies subject to the same limitation period as formal APA adjudication — 30 days plus an additional period of up to 30 days.

• For local agency adjudication not under the APA, the staff would continue the existing 90-day period because parties are less likely to be represented by counsel in these proceedings, and because no persuasive reason has been offered for shortening it.

This may be accomplished by adding a new Section 1123.635, and by revising Section 1123.640 as follows:

> 1123.635. (a) This section applies to a decision in an adjudicative proceeding other than one described in Section 1123.640, but does not apply to other agency action.
>
> (b) The petition for review of a decision shall be filed not later than 90 days after the decision is announced. The time for filing the petition for review is extended as to a party during any period when the party is seeking reconsideration of the decision pursuant to express statute, regulation, charter, or ordinance.
>
> (c) The agency shall in the decision or otherwise notify the parties of the period for filing a petition for review. If the agency does not notify a party of the period at the time the decision is announced or when reconsideration is rejected, whichever is later, the party may file the notice within the earlier of the following times:
>
> (1) Ninety days after the agency notifies the party of the period.

(2) One hundred eighty days after the decision is announced or reconsideration is rejected, whichever is later.

1123.640. (a) This section applies to a decision of a state agency in an adjudicative proceeding, and to a decision of any agency under the formal adjudication provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, but does not apply to other agency action.

(b) The petition for review shall be filed not later than 30 days after the decision is effective. For the purpose of this section:

(1) A decision under the formal adjudication provisions of the Administrative Procedure Act is effective at the time provided in Section 11519 of the Government Code.

(2) A decision of a state agency not under the formal adjudication provisions of the Administrative Procedure Act is effective 30 days after it is delivered or mailed to the person to whom the decision is directed, unless a reconsideration is ordered within that time pursuant to express statute or regulation, or the agency orders that the decision is effective sooner, or a stay of execution is granted.

(c) The time for filing the petition for review is extended as to a party during any period when the party is seeking reconsideration of the decision pursuant to express statute or regulation.

~~(c)~~ (d) The agency shall in the decision or otherwise notify the parties of the period for filing a petition for review. If the agency does not notify a party of the period before the decision is effective, the party may file the notice within the earlier of the following times:

(1) Thirty days after the agency notifies the party of the period.

(2) One hundred eighty days after the decision is effective.

Special Limitations Periods for Particular Agencies

Statutes prescribe special limitations periods for review of actions of particular state and local agencies. The draft statute makes the following adjudications of state and local agencies subject to the general rule of Section 1123.640 — 30 days plus an additional period of up to 30 days:

• A decision of the Public Employment Relations Board, now 30 days after issuance. Gov't Code §§ 3520, 3542. The draft statute would extend the time by 30 days in most cases because of the provision for 30 days plus an additional period of up to 30 days. At the last meeting, the Commission thought PERB's 30-day limitations period, and the 10-day period for filing the record in the court of appeal (*id.* § 3542), should be preserved.

• Various state personnel decisions, including decisions of the State Personnel Board, now one year, but remedies are limited unless the challenge is made within 90 days. Gov't Code § 19630. To apply the general rule of 30 days plus an additional period of up to 30 days will significantly shorten the time for review of SPB personnel decisions.

• A decision of local zoning appeals boards, now 90 days. Gov't Code § 65907. If we adopt a longer period for review of local adjudicative action as recommended above, that will affect this provision also.

• A decision of the Agricultural Labor Relations Board, now 30 days after issuance. Lab. Code § 1160.8. The draft statute would extend this time by 30 days in most cases, the same as for PERB, *supra*.

• A decision of the Workers' Compensation Appeals Board, now 45 days after the filing of the order following reconsideration or 45 days after denial of petition for reconsideration. Lab. Code § 5950. A petition for reconsideration must be filed within 20 days after service of a final order. *Id.* § 5903. Thus the total time limit for judicial review is 65 days after service of the order. Under the draft statute, a petition for reconsideration is unnecessary, Section 1123.320, so the usual time limit will be 60 days (30 plus 30), not a significant change.

• A decision of the Unemployment Insurance Appeals Board, now six months. Unemp. Ins. Code § 410. The general rule of 30 days plus an additional period of up to 30 days will significantly shorten the time for review of CUIAB decisions.

• Drivers' license order, now 90 days after notice. Veh. Code § 14401(a). The general rule of 30 days plus an additional period of up to 30 days will significantly shorten the time for review of DMV drivers' license orders.

• A welfare decision of Department of Social Services, now one year after notice. Welf. & Inst. Code § 10962. The general rule of 30 days plus an additional period of up to 30 days will significantly shorten the time for review of DSS welfare decisions.

The draft statute preserves the various time limits for judicial review of action under the California Environmental Quality Act, but none of the other special limitation periods.

The Department of Health Services is concerned Section 1123.640 might affect Health and Safety Code Section 1428 which requires a licensee who wants to contest a citation to notify the agency within 15 days. The draft statute is not

intended to affect these internal procedures. See Section 1121.110. The staff will make this clear in the Comment to section 1123.640.

Staff recommendation. The staff is concerned the general rule of 30 days plus an additional period of up to 30 days may be too short for adjudications listed above where parties are unlikely to be represented by counsel — DMV drivers' license cases, DSS welfare cases, and CUIAB unemployment cases. The staff recommends preserving the longer limitations periods for these three agencies. The staff is unsure what to do about the existing long limitations period for personnel decisions of the State Personnel Board (now one year or 90 days).

COMMENTS ON SECTIONS IN THE DRAFT

The following are comments on sections in the draft statute, except for three sections that present fundamental policy issues which are discussed above — Sections 1123.430 (review of agency fact-finding), 1123.640 (limitations period), and 1123.760 (new evidence on judicial review). (Aspects of Section 1123.420, review of questions of law, are discussed both above and below.) The staff plans to raise for discussion at the meeting only the material below preceded by a bullet [•].

§ 1120. Application of title

Section 1120 says the draft statute does not apply to an action for refund of taxes under specified provisions of the Revenue and Taxation Code. The State Board of Equalization points out other statutes in the Revenue and Taxation Code that provide a trial de novo for tax refunds and are overlooked in the draft statute. The staff would make clear in Section 1120 that the draft statute does not apply to any action for refund of taxes under the Revenue and Taxation Code:

> 1120. (a) . . . .
> (b) This title does not govern or apply where a statute provides for judicial review of agency action by ~~any~~ either of the following means:
> (1) A trial de novo, including an action for refund of taxes under the Revenue and Taxation Code.
> (2) An action under Division 3.6 (commencing with Section 810) of the Government Code.
> ~~(3) An action for refund of taxes under Chapter 5 (commencing with Section 5096) of Part 9 of Division 1 of, or Article 2~~

~~(commencing with Section 6931) of Chapter 7 of Part 1 of Division 2 of, the Revenue and Taxation Code~~.

(c) This title does not govern or apply to judicial review of action of a nongovernmental entity, except a decision of a private hospital board in an adjudicative proceeding.

(d) This title does not govern litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(e) This title does not govern a proceeding under Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.

(f) This title does not govern judicial review of a decision of a court.

(The addition of subdivisions (d), (e), and (f) is discussed under "Proceedings to Which Statute Applies" above.)

§ 1121.110. Conflicting or inconsistent statute controls

Section 1121.110 says a "statute applicable to a particular entity or a particular agency action prevails over a conflicting or inconsistent provision" of the draft statute. This is from existing law which says judicial review of APA proceedings is subject to "statutes relating to the particular agency." Gov't Code § 11523. Ms. Marchant is concerned "statute" might be read to include a local ordinance. But "statute" is a constitutional term, and may be enacted only by a bill in the State Legislature. Cal. Const. Art. IV, § 8(b). Cities and counties may make "ordinances and regulations not in conflict with general laws." *Id.* Art. XI, § 7. The staff will add language in the Comment to make this clear.

§ 1121.150. Operative date; application to pending proceedings
Uncodified. Operative date; application to pending proceedings

The two operative date provisions should be revised to reflect that it is likely the bill will not be introduced until the 1997 legislative session:

1121.150. (a) Except as provided in this section, this title becomes operative on January 1, ~~1998~~ 1999.

(b) This title does not apply to a proceeding for judicial review of agency action pending on the operative date, and the applicable law in effect continues to apply to the proceeding.

(c) On and after January 1, ~~1997~~ 1998, the Judicial Council may adopt any rules of court necessary so that this title may become operative on January 1, ~~1998~~ 1999.

SEC. ___. (a) Except as provided in this section, this act becomes operative on January 1, ~~1998~~ 1999.

(b) This act does not apply to a proceeding for judicial review of agency action pending on the operative date, and the applicable law in effect continues to apply to the proceeding.

(c) On and after January 1, ~~1997~~ 1998, the Judicial Council may adopt any rules of court necessary so that this act may become operative on January 1, ~~1998~~ 1999.

§ 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 by deleting "statement" from subdivision (b). Subdivision(c) should be added to make clear "rule" includes a local agency ordinance:

1121.280. "Rule" means ~~both~~ all of the following:

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

(b) The whole or a part of an 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.

(c) A local agency ordinance.

The Comment should 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.

The Department of Health Services would make the last sentence of subdivision (b) ("rule" includes amendment etc.) a separate subdivision, and would revise subdivision (a) as follows:

1121.280. "Rule" means both of the following:

(a) ~~"Regulation" as defined in Section 11342 of the Government Code~~. A regulation adopted, or in the process of being adopted, pursuant to the Administrative Procedure Act (Government Code Section 11342 et seq.).

(b) . . . .

This suggestion does not appear to present substantive issues, because of the broad definition of "rule" that would remain in subdivision (b). The staff will ask the Office of Administrative Law for comment, both on the DHS suggestion and on the Energy Commission suggestion above to delete "statement" from subdivision (b). ("Rule" is used in six sections in the draft statute — Sections 1121.240, 1121.290, 1123.130, 1123.140, 1123.330, and 1123.350.)

§ 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 or criminal 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 or criminal question.

§ 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.

§ 1123.220. Private interest standing

In discussing the stay provision (Section 1123.650), Ms. Marchant gives an example of a county department head using administrative mandamus to challenge a decision of a county civil service commission. Under existing law, an agency may not petition for judicial review of its own decision. But a public agency with a beneficial interest may use administrative or traditional mandamus to challenge a decision of another public agency. California Administrative Mandamus, *supra*, §§ 5.11-5.12, at 220-22.

The Comment to Section 1123.220 makes clear private interest standing includes state and local public entities. The statement that this "reverses a contrary case law implication" should be deleted, because the cited case (*Star-Kist Foods*) involved the limited question whether a public agency may challenge state action as violating its federal constitutional rights. The Comment should be revised to include cases and statutes providing that a public agency has standing to get judicial review of a decision of another public agency:

> It should be noted that the standing of a person to obtain judicial review under this section is not limited to private persons, but extends to public entities as well, whether state or local. See Section 1121.270 ("person" includes governmental subdivision). See also Bus. & Prof. Code § 23090 (Department of ABC may get judicial review of decision of ABCAB); Veh. Code § 3058 (DMV may get judicial review of order of New Motor Vehicle Board); Martin v. Alcoholic Beverage Control Appeals Bd., 52 Cal. 2d 238, 243, 340 P.2d 1, 4 (1959) (Department of Alcoholic Beverage Control could get judicial review of decision of Alcoholic Beverage Control Appeals Board); Tieberg v. Superior Court, 243 Cal. App. 2d 277, 283, 52 Cal. Rptr. 33, 37 (1966) (Director of Department of Employment could get judicial review of decision of Unemployment Insurance Appeals Board, a division of that department); Los Angeles County Dep't of Health Serv. v. Kennedy, 163 Cal. App. 3d 799, 209 Cal. Rptr. 595 (1984) (county department of health services could get judicial review of decision of county civil service commission); County of Los Angeles v. Tax Appeals Bd. No. 2, 267 Cal. App. 2d 830, 834, 73 Cal. Rptr. 469, 471 (1968) (county could get judicial review of tax appeals board decision); County of Contra Costa v. Social Welfare Bd., 199 Cal. App. 2d 468, 471, 18 Cal. Rptr. 573, 575 (1962) (county could get judicial review of State Social Welfare Board decision ordering county to reinstate welfare benefits); Board of Permit Appeals v. Central Permit Bureau, 186 Cal. App. 2d 633, 9 Cal. Rptr. 83 (1960) (local permit appeals board could get traditional mandamus

against inferior agency that did not comply with its decision). ~~This reverses a contrary case law implication. See~~ But cf. Star-Kist Foods, Inc. v. County of Los Angeles, 42 Cal. 3d 1, 719 P.2d 987, 227 Cal. Rptr. 391 (1986) (city or county standing to challenge state action as violating federal constitutional rights)~~; *cf.* County of Contra Costa v. Social Welfare Bd., 199 Cal. App. 2d 468, 18 Cal. Rptr. 573 (1962)~~.

Section 1123.220 permits an "interested person" to seek judicial review. The Department of Health Services thinks it would be better to say "beneficially interested person" or "aggrieved person." But the real substance of this provision is in case law cited in the Comment. The Comment makes clear "a person must suffer some harm from the agency action" to have private interest standing to obtain judicial review. Should we change "interested person" to "affected person"? The staff is inclined not to do this because of the substantial case law gloss on the term "interested person."

§ 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:

> 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 staff is reluctant to make this change, because it blurs the distinction between this section and the other standing sections, and may suggest that if a person fails to satisfy Section 1123.230, the person lacks standing altogether. If the AG's drafting suggestion is to be accepted, we should make clear that each section in the standing article provides an independent basis for standing:

> 1123.210. (a) A person does not have standing to obtain judicial review of agency action unless standing is conferred by this article or is otherwise expressly provided by statute.
>
> (b) Each section in this article confers an independent basis for standing.

• 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.

• Section 1123.230 gives a person standing to obtain judicial review of nonadjudicative agency action that concerns an important right affecting the public interest if the person has served on the agency a written request to correct the agency action and the agency has not done so within a reasonable time. The Department of Health Services would add a requirement that the request specify the time the requester considers reasonable for the agency to act, and that the time specified shall be appropriate to the action requested, and be not less than 30 days unless the request shows why a delay of 30 days will cause irreparable harm. DHS says that, without this addition, Section 1123.230 may be abused by attorneys who request corrective action, immediately file suit, settle, and seek attorneys' fees. Section 800 of the Government Code (continued in Section 1123.850 in the draft statute) permits attorneys' fees if the administrative action was "arbitrary or capricious."

• **The staff thinks this suggestion may have merit.** To add a 30-day period to allow corrective action would not cause a problem with the statute of limitations — three or four years for nonadjudicative action. We could do this by revising subdivision (c) of Section 1123.230 as follows:

> 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:
>
> . . . .
>
> (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. A reasonable time shall not be less than 30 days unless the request shows why a shorter period is required to avoid irreparable harm.

• The Energy Commission is concerned about the written request requirement, and says that under existing law a person may make oral comments at a public hearing on a proposed regulation and that person is not now precluded from seeking judicial review. Under existing law, public interest standing applies in a mandamus proceeding to challenge a regulation, but not in an action for declaratory judgment where only an "interested person" may challenge a regulation, such as one potentially subject to the regulation. Asimow, *supra*; Gov't Code § 11350; Stoneham v. Rushen, 156 Cal. App. 3d 302, 310, 202 Cal. Rptr. 20 (1984). Under Section 1123.220, a person subject to a regulation will have private interest standing to challenge it, without the need to make any request to the agency, written or oral. But the requirement of a request for correction will limit existing public interest standing to challenge a regulation. **Should we limit the requirement of a request for correction to ministerial or informal action where a request might have some practical significance, and not apply it to a regulation where a request would seem to be generally useless?** We could do this by revising subdivision (c) as follows:

> 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) . . . .
>
> (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. This requirement does not apply to judicial review of an agency rule.

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).

§ 1123.240. Standing for review of decision in adjudicative proceeding

Section 1123.240 gives standing to a "party" to seek judicial review of an adjudicative proceeding if it was under the APA, and to a "participant" in all other adjudications. The Comment says "participant" includes persons who appear and testify, submit written comments, or are otherwise directly involved in the adjudication. The Department of Health Services says this is too broad for formal, trial-type adjudications not under the APA, such as their hearings before the State Personnel Board. The staff will discuss this with DHS to see if we can address their concern without unnecessarily restricting standing for non-APA adjudication.

§ 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. If the administrative remedy is still available, the court may not accept the case, but must dismiss because the exhaustion requirement is jurisdictional. 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:
>
> . . . .
>
> (d) The person lacked notice of the availability of a remedy and the remedy is no longer available

§ 1123.420. Review of agency interpretation or application of law

• Under Section 1123.420, the general standard of review of agency interpretation or application of law is independent judgment, giving deference to the determination of the agency appropriate to the circumstances. However, abuse of discretion review applies to a local legislative body's interpretation of its own legislative enactment. Mr. Bezemek, California Federation of Teachers, objects to abuse of discretion review for local agency interpretation of its own

legislative enactment. The staff shares this concern because of the risk that a local agency will achieve by an innovative interpretation of its ordinance to reach a particular result that it could not constitutionally have achieved by retroactive amendment of the ordinance. This concern was expressed by Professor Clark Kelso at a Commission meeting, and is illustrated by a recent case, Briggs v. City of Rolling Hills Estates, 95 Daily Journal D.A.R. 15675, 15679 (Nov. 28, 1995):

> In *Langsam* v. *City of Sausalito* (1987) 190 Cal.App.3d 871 the court held that as a matter of law the city misinterpreted its parking ordinance in denying a building permit to convert part of a building to offices. The court . . . [held] that in reality the city council amended its ordinance in the guise of an adjudicatory process.

• The local agency provision was adopted by the Commission after considering and rejecting this argument and the argument that there is no justification for distinguishing between a local and a state agency in this respect. **Does the Commission wish to reconsider?**

At the last meeting, the Commission approved the staff recommendation to keep independent judgment review of questions of agency application of law to facts. The Commission asked the staff make clear in the Comment the difference between pure questions of fact and application questions to address concerns of the AG. **The staff recommends adding the following to the Comment to Section 1123.420:**

> Agency application of law to facts should not be confused with basic fact-finding. Typical findings of basic facts include determinations of what happened (or may happen in the future), when it happened, and the state of mind of the participants. These findings may be subject to substantial evidence review under Section 1123.430 or 1123.435. Basic fact-finding can be made without knowing anything of the applicable law. In contrast, application of law to facts requires a determination whether basic facts fall within a particular legal standard, classification, or characterization, e.g., whether a particular type of behavior is negligent or is consistent with general community standards. Such a situation-specific application of law to facts is subject to independent judgment review under Section 1123.420. See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1211-12 (1995).

The Department of Health Services finds the term "independent judgment" anomalous in the context of deciding legal issues, and prefers "de novo review." The existing administrative mandamus statute (Code Civ. Proc. § 1094.5) uses "independent judgment" for review of fact-finding, but does not use either term for review of questions of law. Neither term is used in the 1981 Model State APA, but both are used in case law for review of questions of law. E.g., 20th Century Ins. Co. v. Garamendi, 8 Cal. 4th 216, 271, 32 Cal. Rptr. 2d 807, 841 (1994) ("independent review" and "de novo scrutiny" of issue of law). The staff is not inclined to change the term "independent judgment."

The staff recommends preserving existing deference to legal interpretations by WCAB, PERB, and ALRB of statutes they enforce, discussed under "Agencies To Which Statute Applies" above.

The Office of Administrative Law has concerns about the possible effect of abuse of discretion review in subdivision (c) of Section 1123.420 on regulations where a statute expressly delegates interpretive authority to the agency because many existing statutes may arguably be read to provide such a delegation. **We would try to address this concern by tightening up subdivision (c) as follows:**

> (c) The standard for judicial review under this section of the following agency action is abuse of discretion:
>
> (1) An agency's interpretation of a statute, where a statute ~~expressly~~ delegates that function to the agency and expressly provides that the delegation is for the purpose of this section.
>
> (2) An agency's application of law to facts, where a statute ~~expressly~~ delegates that function to the agency and expressly provides that the delegation is for the purpose of this section.
>
> (3) [local legislative body]

The last paragraph of the Comment to Section 1123.420 should be revised as follows:

> Subdivision (c)(1) codifies the rule that, where the legislature has expressly delegated authority to the agency to interpret the law, the court must accept a reasonable agency interpretation under the abuse of discretion standard. See, e.g., Henning v. Division of Occupational Safety & Health, 219 Cal. App. 3d 747, 268 Cal. Rptr. 476 (1990). ~~But~~ The requirement that the statute must expressly provide that the delegation is for the purpose of this section makes clear that mere authority for an agency to make regulations generally or to implement a statute is not in itself a delegation of authority to construe the meaning of words in the statute. ~~And a~~

~~delegation of authority to construe a statute is not to be implied merely because the statute is ambiguous. Subdivision (c)(1) applies only when a statute expressly delegates to the agency the power to interpret particular statutory language. See Asimow, *supra* at 1198.~~ The same rule applies under subdivision (c)(2). For statutes delegating authority to interpret or apply a statute, see Gov't Code §§ 3520, 3542, 3564 (Public Employment Relations Board); Lab. Code §§ 1160.8 (Agricultural Labor Relations Board), 5954 (Workers Compensation Appeals Board); Pub. Res. Code § 25531 (Energy Commission); Pub. Util. Code § 1756 (Public Utilities Commission). The absence of a delegation of authority to an agency to interpret or apply its statute should not be construed to weaken the deference appropriate under subdivision (b) to the agency interpretation or application.

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.

§ 1123.450. Review of agency procedure

Section 1123.450 provides independent judgment review on questions of agency procedure, giving deference to the agency determination. Ms. Marchant is concerned about requiring deference to the agency determination if, for example, the agency puts the burden of proof on the wrong party. The deference due to the agency on procedural matters is analogous to the deference due to the agency in interpreting or applying the law under Section 1123.420. In either case, the question of the degree of deference to be given is for the court to decide. Perhaps it would be useful to add the following to the Comment to Section 1123.450:

> The degree of deference to be given to the agency's determination under subdivision (c) is for the court to determine. This deference is not absolute. Ultimately, the court must still use its own judgment on the issue.

§ 1123.510. Superior court proper court for judicial review

Section 1123.510 says that, except as provided by statute, the superior court is the proper court for judicial review. The Department of Health Services asks if this is meant to prohibit direct access to the courts of appeal and Supreme Court for writs of mandamus against an agency. The draft statute is intended to provide the exclusive remedy for judicial review of agency action. Section 1121.120. But the California Constitution gives the Supreme Court, courts of appeal, and superior courts original jurisdiction in mandamus proceedings. Cal. Const. Art. VI, § 10. Appellate courts are cautious in exercising original mandamus jurisdiction, and require the proceeding to be brought in superior court unless the issues are of great public importance and must be resolved promptly. California Administrative Mandamus, *supra*, § 8.15, at 269. The Comment to Section 1123.510 says the superior court is the proper court for

judicial review "whether or not issues of great public importance are involved." If appellate courts disregard Section 1123.510 and Comment and exercise original mandamus jurisdiction to review agency action, that is their constitutional prerogative which we cannot change by statute.

• DHS wants to prevent health care providers from avoiding superior court review of a rejected claim for payment by suing in small claims court. DHS says small claims courts often do not consider whether statutory and regulatory conditions of payment have been met. Under Section 1120 above, the staff proposes to say the draft statute "does not govern litigation in which the sole issue is a claim for money damages or compensation, or is to vindicate a private right under common law, and the agency whose action is at issue does not have statutory authority to determine the claim." Assuming DHS has statutory authority to determine these claims, Section 1121.120 (draft statute exclusive judicial review procedure) would prohibit suit in small claims court to review DHS denial of a claim. **Is this good policy, or should we preserve a right to sue in small claims court on a rejected claim for payment?** The staff will ask DHS for the statutory authority, if any, that gives it the right to determine these claims.

§ 1123.520. Superior court venue

• Section 1123.520 generally continues existing venue rules. The AG and Department of Health Services would expand venue by saying venue to review state agency action is proper in Sacramento County and in the county where the agency headquarters is located. DHS says venue in Sacramento County would provide judicial expertise in cases involving difficult issues of public and administrative law. The Commission considered and rejected a similar provision at the August meeting, which would have made venue proper in Sacramento County, or, if the agency is represented by the Attorney General, in any county where the AG has an office. The Commission wanted to protect the convenience of private parties. **Does the Commission wish to reconsider?**

§ 1123.610. Petition for review

The Department of Health Services is concerned the definition of "party" in Section 1121.260 to mean the agency "and any other person named as a party" will continue the annoying problem of litigants naming as parties every employee of the agency who took part in the agency action. DHS would limit "party" to the agency and any official designated by statute or regulation to take

the action, and recommends a provision making dismissal of a proceeding against an improper person mandatory and automatic on notice to the court by the agency without the need for a motion to dismiss.

In existing administrative mandamus proceedings, the proper respondent is the agency, city or county, board or commission or agency head responsible for the decision, and usually the governing statute or ordinance will specify who is responsible. California Administrative Mandamus, *supra*, § 6.1, at 225. For a state agency, the proper respondent is the agency, not individual employees. *Id.* § 6.2, at 226. If a board or commission makes the decision, the proper respondent is the board or commission, not its individual members. *Id.* § 6.3, at 227.

Under existing law, service of process on a public entity is effective if served on the clerk, secretary, president, presiding officer, or other head of its governing body. Code Civ. Proc. § 416.50(a); California Administrative Mandamus, *supra*, § 8.48, at 298.

We could more clearly preserve existing law by revising Section 1123.610 as follows:

> 1123.610. (a) A person seeking judicial review of agency action may initiate judicial review by filing a petition for review with the court.
>
> (b) The petition shall name as respondent only the agency whose action is at issue, and not individual employees of the agency.
>
> ~~(b)~~ (c) The petitioner shall cause a copy of the petition for review to be served on the other parties in the same manner as service of a summons in a civil action.

The Comment would note that, under Section 1121.230 ("agency" defined), "agency" includes the agency head.

The staff would keep the requirement of dismissal only on noticed motion, since the petitioner should have notice and an opportunity to be heard. The showing required on the motion to dismiss should be relatively simple, and not consume undue time and resources.

§ 1123.630. Contents of petition for review

• Section 1123.630 requires a petition for review to state the name and mailing address of the petitioner. Ms. Marchant says this should be the mailing address of petitioner's attorney. This provision came from the 1981 Model State APA. Under existing practice, a mandamus petition in superior court must state the

name, office address or, if none, residence address, and telephone number, of petitioner's attorney or of the petitioner if he or she is not represented. Cal. R. Ct. 201(e); California Administrative Mandamus, *supra*, § 8.22, at 274. A mandamus petition in the Supreme Court or Court of Appeal must state the name, address, and telephone number of the attorney filing the petition. Cal. R. Ct. 56(a).

• **The staff thinks Ms. Marchant makes a good point, and would revise Section 1123.630 as follows:**

> 1123.630. The petition for review shall state all of the following:
> (a) The name ~~and mailing address~~ of the petitioner.
> (b) The address and telephone number of the petitioner or, if the petitioner is represented by an attorney, of the petitioner's attorney.
> (c) . . . .

§ 1123.650. Stay of agency action

Section 1123.650 continues the existing rule that, if the trial court grants relief from the agency decision, the decision is automatically stayed during an appeal unless the appellate court orders that the decision is not stayed. Code Civ. Proc. § 1094.5. Ms. Marchant is concerned about the effect of the automatic stay in a specific example: She postulates that a county civil service employee is discharged by the department head. On administrative review, the county civil service commission overturns the department head's decision and orders the employee reinstated. The department head petitions the superior court for review. The administrative action is not stayed during review at the trial court level, so the employee is reinstated during judicial review proceedings as ordered by the civil service commission. The trial court upholds the original action of the department head discharging the employee. The employee appeals, which automatically stays the administrative decision of the civil service commission, resulting in the employee being off the payroll while the appeal is determined. The staff thinks this kind of case is adequately addressed by the appellate court's discretion to order that the administrative decision is not stayed during the appeal.

• However, Ms. Marchant's example reveals a peculiarity of existing law. The automatic stay on appeal from the granting of relief by the trial court is a double stay — both the administrative decision and the trial court order overturning the administrative decision are stayed during the appeal unless otherwise ordered. Code Civ. Proc. §§ 916 (trial court order), 1094.5

(administrative order), 1110b (relief from stay in mandamus proceeding). So, despite automatic stay of the trial court's grant of relief during an appeal, the appeal will temporarily nullify the administrative order because of the automatic stay of the latter. See generally California Administrative Mandamus, *supra*, §§ 14.21-14.22, at 458.

• Both under existing law and the draft statute, relief from automatic stay of the administrative order is by the appellate court. *Id.* § 1094.5 (existing law); Section 1123.650 (draft statute). Under existing law, relief from automatic stay of the trial court's grant of a writ of mandamus may be either by the trial or appellate court. Code Civ. Proc. § 1110b. The agency must apply to the appellate court for relief from automatic stay of its administrative order, which will probably prompt a counter-motion by petitioner for relief from the automatic stay of the trial court's grant of relief. If the petitioner's motion is also made in the appellate court, the appellate court can grant one motion and deny the other to achieve the desired result. There is the possibility of conflicting orders, however, if the agency's motion is made in the appellate court and the petitioner's motion is made in the trial court. **We should add a provision to allow the appellate court, but not the trial court, to grant relief from the automatic stay of the trial court's order granting relief and overturning the administrative order.** This will permit both motions to be resolved in the same court and avoid the possibility of conflicting orders. We would do this by revising subdivision (f) of Section 1123.650 as follows:

> (f) If an appeal is taken from a granting of relief by the superior court, the ~~decision of the~~ agency action is stayed pending the determination of the appeal unless the court to which the appeal is taken orders otherwise. Notwithstanding Section 916, the court to which the appeal is taken may direct that the appeal shall not stay the granting of relief by the superior court.

The Comment should say the second sentence of subdivision (f) is drawn from Section 1110b, and make clear it replaces Section 1110b for judicial review proceedings under the draft statute.

"Agency action" should replace "decision of the agency" in subdivisions (e) and (f), since "action" is broader than "decision" (see Sections 1121.240, 1121.250), it is agency "action" that is reviewed (Section 1123.110), and "action" is consistent with usage in the section generally.

§ 1123.660. Type of relief

• Section 1123.660(a) permits the court to "award damages or compensation only to the extent expressly authorized by statute." Ms. Marchant says this limitation will cause hardship for discharged employees whose discharge is overturned by the court. She says under existing law a discharged employee may receive back pay whether or not there is a statute authorizing it. Robert Bezemek, California Federation of Teachers, agrees: "It is wrong to eliminate the right to back pay and other make-whole compensation remedies."

• Ms. Marchant's and Mr. Bezemek's view of existing law is correct. Code of Civil Procedure Section 1095 expressly permits an award of damages in mandamus proceedings, including administrative mandamus. O'Hagan v. Board of Zoning Adjustment, 38 Cal. App. 3d 722, 729, 113 Cal. Rptr. 501, 506 (1974). Damages may be awarded in tort or contract, but governmental immunities under the California Tort Claims Act apply and the claim-filing requirements of that act usually apply. California Administrative Mandamus, *supra*, § 1.13, at 13. If a discharged employee seeks reinstatement and back pay, this is not considered damages within the meaning of Section 1095 or the Tort Claims Act. It is considered relief incidental to the petition, and compliance with the Tort Claims Act is not required. *Id.*

• **The staff thinks Section 1123.660(a) should be revised to preserve existing law as follows:**

> 1123.660. (a) The court may award damages or compensation ~~only to the extent expressly authorized by statute~~ , subject to Division 3.6 (commencing with Section 810) of the Government Code, if applicable, and to other express statute.

The Comment to Section 1123.660 should say subdivision (a) continues the effect of Code of Civil Procedure Section 1095 permitting the court to award damages in an appropriate case, citing the *O'Hagan* case, *supra*. The Comment should also say that, if a discharged employee seeks reinstatement and back pay, the back pay is considered relief incidental to the petition, and compliance with the Tort Claims Act is not required.

The Department of Health Services is concerned the broad remedies in Section 1123.660 may encourage judicial activism. Under existing law (Code Civ. Proc. § 1094.5), the inquiry in administrative mandamus is:

> 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.

• Similar concerns were expressed earlier by representatives of the Attorney General's Office about the open-endedness of the authority in Section 1123.660(b) for the court to grant "other appropriate relief." To address these concerns, Section 1123.160 says 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). The staff believes Section 1123.160 will solve this problem. The staff will add a cross-reference to Section 1123.160 in the Comment to Section 1123.660 (type of relief). Also, "other appropriate relief" does not appear significantly different from existing law of administrative mandamus (Code Civ. Proc. § 1094.5(f)), which permits the court to "order respondent to take such further action as is specially enjoined upon it by law."

• 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.**

§ 1123.720. Contents of administrative record
§ 1123.730. Preparation of record

For proceedings not under the formal adjudication provisions of the APA, Section 1123.730 requires the agency to prepare the record on request of the petitioner for judicial review. Section 1123.720 says the record includes a "table of contents that identifies each item contained in the record and includes an affidavit of the agency official who has compiled the administrative record for judicial review specifying the date on which the record was closed and that the record is complete."

Ms. Marchant says these provisions will not work for many local agencies because the record is so often incomplete. She says the agency does not now prepare the administrative record. Although the agency may keep exhibits and documents from the hearing, the transcript is prepared by an independent court reporter over whom the agency has no control. She would continue present practice of making petitioner responsible for presenting the record to the court.

Existing law says the "complete record of the proceedings shall be prepared by the local agency or its commission, board, officer, or agent which made the decision." Code Civ. Proc. § 1094.6(c). Nonetheless, the burden is on the petitioner attacking the administrative decision to show entitlement to judicial relief, so it is petitioner's responsibility to make the administrative record available to the trial court. Foster v. Civil Service Commission, 142 Cal. App. 3d 444, 453, 190 Cal. Rptr. 893, 899 (1983); California Administrative Mandamus, *supra*, § 8.11, at 265 (chapter co-authored by Ms. Marchant).

The staff would address these points by adding a reference to the *Foster* case in the Comment to Section 1123.730.

• The Department of Health Services wants to say only an agency-certified record may be used by the court. This would stop the petitioner's attorney from submitting an unofficial record prepared from the hearing tape and copied from exhibits. The requirement in Section 1132.720 that the record shall include an affidavit of the agency official who compiled it seems to address this problem. **Should we go further and expressly prohibit the court from using an unofficial record prepared by the petitioner?**

• DHS is concerned about the requirement in Section 1123.730 that, for an adjudicative proceeding required to be conducted under the formal adjudication provisions of the APA, the record is prepared by the Office of Administrative Hearings. DHS says it provides APA hearings before its own administrative law judges, and in such cases DHS should prepare the record. **The staff would address this by revising subdivision (a) of Section 1123.730 as follows**:

> 1123.730. (a) On request of the petitioner for the administrative record for judicial review of agency action:
>
> (1) If the agency action is a decision in an adjudicative proceeding required to be conducted under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code by an administrative law judge employed by the Office of Administrative Hearings, the administrative record shall be prepared by the Office of Administrative Hearings.
>
> (2) If the agency action is other than that described in paragraph (1), the administrative record shall be prepared by the agency.

DHS would change "affidavit" to "declaration under penalty of perjury" in Section 1123.720. But "affidavit" is the standard statutory term. The affidavit requirement may be satisfied by a declaration under penalty of perjury under Section 2015.5 of the Code of Civil Procedure, as the Comment to Section 1123.720 notes.

Respectfully submitted,

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

RE: Judicial Review of Agency Action - Opposition to Proposed Changes

Dear California Law Revision Commission:

I represent the California Federation of Teachers and more than fifty labor organizations certified as exclusive bargaining agents in a variety of California public jurisdictions, including public schools, cities, counties, and community colleges. I write to oppose, in the strongest terms, proposed changes concerning judicial review of agency action.

These proposed changes eviscerate due process protections established by statute and case law over the last fifty years. With virtually no discussion of the precedents that these changes would reverse, the Commission's tentative recommendation would deprive employees, students, holders of administrative licenses, and labor organizations of important rights.

In the tentative recommendation it is argued that there is no rational policy basis for applying independent judgment review to non-constitutional agencies where substantial vested rights are involved. This statement discloses an ignorance of how California labor and employment relations systems operate, and totally disregards the well-reasoned opinion of Chief Justice Tobriner in the decision he authored in 1971 in Bixby vs. Pierno (1971) 4 Cal.3d 130.

I. INTRODUCTION

Several fundamental errors underlie the tentative recommendation of the Commission. Unless corrected, these errors

would create chaos within the California labor relations system. The errors in analysis I intend to address are as follows:[1]

(1) It is wrong to eliminate the independent judgment test to review non-constitutional agency action under ordinary mandate, as recommended in proposed CCP §1121.120(c).

(2) It is wrong to apply the substantial evidence test, as opposed to the independent judgment test, when reviewing administrative actions which take away or derogate liberty or property interests or vested rights as recommended in proposed CCP §1123.420(c).

(3) It is wrong to eliminate the right to back pay and other make-whole compensation remedies, which would be the effect of proposed CCP §1123.660(a).

(4) It is wrong to make abuse of discretion the standard for review of an agency's interpretation of its own rules and regulations as recommended in proposed CCP §1123.420(c)(3).

(5) It is wrong to curtail the right to discovery in ordinary mandamus actions brought pursuant to CCP §1085, as recommended in proposed CCP §§1123.620(a) and 1121.120(a).

(6) It is wrong to eliminate the 90-day statute of limitations for filing petitions for writs of administrative mandate against local agencies under CCP §1094.6. It is also wrong to eliminate the provision in Government Code §11523 which states that a request for an administrative record made within 10 days after the last day on which an agency could order reconsideration of a decision extends the deadline for filing a petition for writ of mandamus to 30 days after the record was delivered as a time. The effect of a uniform 30-day period will be to cause more litigation to be filed to contest teacher layoff decisions made by school and community college districts under Government Code §§44949 and 87740.

(7) It is wrong to make the standards for judicial review established in proposed §1123.420(c)(1)-(3) apply to petitions for ordinary mandate by way of proposed CCP §1121.120(a).

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[1]Because I only recently received the Tentative Recommendation, this list should not be considered inclusive of all recommendations we oppose.

I am appalled at the lack of discussion of critical precedents in the tentative recommendation of the Commission. The Commission proposes a radical derogation of existing rights and ascribes far more significance to Tex-Cal Land Management, Inc. vs. Agricultural Labor Relations Board, 24 Cal.3d 335, 156 Cal.Rptr. 1 (1979) than is warranted. As described more fully herein, the meaning and import of that decision is distorted in the tentative recommendation.

The ideas presented in this tentative recommendation are radical and wrong, and do not deserve support. For the reasons set forth herein, we strongly oppose these tentative recommendations of the Commission.

II. THE TENTATIVE RECOMMENDATION WOULD ELIMINATE THE INDEPENDENT JUDGMENT TEST FOR REVIEWING THE TERMINATIONS OF TENURED TEACHERS AND OTHER PERMANENT EMPLOYEES

The tentative recommendation would eliminate the requirement of independent judicial review when a school or community college district terminates a tenured teacher, or when a local agency terminates a permanent employee. Proposed CCP §1123.430 would significantly lower the standard of review applied to 1,000 school districts, 70 community college districts, county boards of education, as well as the standard of review applied to thousands of cities, counties and special districts. There is no justification for such a radical diminution of employee rights.

Professor Asimow, upon whose advice the recommendation is apparently based, understands that the independent judgment test is applied in reviewing actions by local governments, schools, and other non-constitutional agencies. He also recognizes that the substantial evidence test is applied to Constitutional agencies. He calls this distinction "utterly incoherent" (Asimow, The Scope of Judicial Review of Decisions of California Administrative Agencies, (1995) 42 UCLA L.Rev. 1157). In the tentative recommendation of the Commission it is asserted that there is "no rational policy basis" for this distinction. As we explain, this distinction is "coherent," "rational" and essential to the fair adjudication of employee rights.

The Commission writes that independent judgment review is "inefficient" because it requires litigation over whether a vested right is involved and this involves the "loose standard" of the "degree" of "vestedness" and "fundamentalness" of the right affected. It is the proper duty of the courts to determine when a vested property right is involved. After 77 years of caselaw, this determination is not "vexing." The Commission also says that independent judgment review encourages more people to

seek judicial review than would under a substantial evidence standard. No empirical evidence is offered to support this opinion. But it may be that decision-making by self-interested lay elected bodies such as school districts or city councils is more flawed than adjudication by expert Constitutional agencies, causing more "independent judgment" reviews. If Professor Asimow believes you can discourage employees from seeking to vindicate their rights by reducing effective access to judicial review, he may be right. But such a mechanism is wrong. Justice Tobriner, in Bixby, recognized the need for judicial vigilance in these situations.

The question of what is or is not a vested right is not a particularly vexing question and does not involve the "loose standard" which the Commission suggests. Let me offer some examples. Retirement health benefits are a form of deferred compensation for public service. Promised compensation is protected by the contract clause of the Constitution. Olson vs. Cory (1980) 27 Cal.3d 532, 538. "Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation." Id.

Public employees acquire vested rights to additional benefits granted during employment. Betts vs. Board of Administration (1978) 21 Cal.3d 859, 866; Olson, 27 Cal.3d at 540. The right to deferred pension benefits "vests" upon acceptance of employment. Kern vs. City of Long Beach (1947) 29 Cal.2d 848, 852-853, 856. Retirement health benefits have been found to be vested rights. Thorning vs. Hollister School District, (1992) 11 Cal.App.4th 1598, 1607; 15 Cal.Rptr.2d 91. (Rev.den. 1993). Other forms of compensation have also held to be protected by the contract clause and vest. California League of City Employee Associations vs. Palos Verdes Library District, (1978) 87 Cal.App.3d. 135, 136, 139 (longevity salary increase, increased vacation benefits for lengthy service and paid sabbatical.) The notion that certain aspects of employment constitute vested rights and garner special protection is not unique to California, despite Professor Asimow's suggestion. The U.S. Supreme Court recognized that vested rights are created by policies which contain promises, and numerous federal cases accord them protection in both public and private settings. See, e.g., Allied Chemical and Alkali Workers of America vs. Pittsburgh Plate Glass Co. (1971) 404 U.S. 157, 181; Terpinas vs. Seafarer's Int. Union of N. America, (9th Cir. 1984) 722 F.2d 1445, 1447-1448.

One must go back to the turn of the century to find cases which held, for example, that pension benefits did not vest and were a gratuity. See, e.g., Burke vs. Police Relief and Pension Fund, (1906) 4 Cal.App. 235, 87 P. 421. The proposal of the

Commission would take vested rights back to the turn of the century, and undermine the protections afforded them by the California Supreme Court in a string of decisions going back nearly 80 years. Since 1917, the California courts have recognized that pensions are deferred compensation which vest upon acceptance of employment. See, e.g. Kern, 29 Cal.2d 848; O'Dea vs. Cook, (1917) 176 Cal. 659; Aitken vs. Roche, (1920) 48 Cal.App. 753.

In Olson vs. Cory, (1980) 27 Cal.3d 532, 538, 178 Cal.Rptr. 568, the Supreme Court held that promised salary increases for judges were vested rights protected by the contract clause which could not be abridged by placing a limit on cost of living increases for judicial salaries. In Frank vs. Board of Administration of PERS, (1976) 56 Cal.App.3d. 236, the Court of Appeal held that a disability pension vested at the time of employment.

Permanent employment, or tenured status, is also a form of property which becomes "vested" by virtue of the rules which create it. Skelly vs. State Personnel Board, (1975) 15 Cal.3d 194, 124 Cal.Rptr. 114. Independent judgment review is critical to assuring that school districts, community college districts, cities, counties and special districts do not diminish or take away vested rights without complying with the law. It is necessary that courts have the authority to exercise independent judgment to assess actions taken by these agencies. It is not difficult to find scores of pension and employment rights cases which address situations in which agencies have improperly reduced or eliminated vested rights, or wrongfully terminated permanent or tenured employees. A few examples are worthwhile to consider.

Under the California Education Code, teachers in 1,000 school districts may be laid off if there is a decline in average daily attendance (ADA) or due to a reduction of a particular kind of service. (Education Code §44949). If a district decides to do a layoff, it initiates the process under §44949 and a hearing is conducted, under the APA, by an administrative law judge who issues a recommended decision to the district's governing board. These hearings are to decide if the layoff is prompted by discriminatory bias, Bekiaris vs. Board of Education, (1972) Cal.3d 575, if proper procedure has been followed Karbach vs. Board of Education, (1974) 39 Cal.App.3d 355, and a myriad of other issues. Having handled hundreds of these hearings, I can assure you that a district's initial decision to layoff is routinely upheld and "recommended" by administrative law judges. School boards routinely approve the "recommendation" and do what they intended all along: they lay off the teachers. Then the issues go to superior court where the court exercises its

independent judgment and determines whether or not the layoff was valid. See, e.g., Alexander vs. Delano Joint Union High School District, (1983) 139 Cal.App.3d 567. Public school boards are made up of lay people. Their decisions to terminate tenured teachers should not be entitled to the great weight which would be given them by the proposed revision but should be independently reviewed by the Courts. This was recognized by Justice Tobriner in Bixby vs. Pierno, supra, at 138. Justice Tobriner relied on a 1939 case, Drummey vs. State Board of Funeral Directors, (1939) 13 Cal.2d 75, 82-85. The court in Drummey recognized the problem:

> "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights or liberty and property are involved ... is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with a multiplication of administrative agencies, is not one to be lightly regarded." Drummey, supra, at 853.

Justice Tobriner recognized in Bixby that since the 1930's "the courts have redefined their role in the protection of individual and minority rights." Id. at 142. As he explained,

> "by carefully scrutinizing administrative decisions which substantially affect vested, fundamental rights, the courts of California have undertaken to protect such rights, and particularly the right to practice one's trade or profession, from untoward intrusions where the massive apparatus of government. If the decision of an administrative agency will substantially affect such a right, the trial court not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence disclosed ..." Id. at 143.

One need look no further than such significant cases as Bagley vs. Washington Township Hospital District, (1966) 65 Cal.2d 499, 501-502 or Morrison vs. State Board of Education, (1969) 1 Cal.3d 214, situations in which lay boards punished employees for exercising political rights, or because of their lifestyle. No doubt "substantial evidence" could have been found to support the decisions of the trustees of Washington Hospital to fire a hospital worker because she vociferously opposed the

board of the hospital in a public election or to strip a teacher of his credentials because of his lifestyle. Justice Tobriner recognized that the California rule "yields no fixed formula and guarantees no predictably exact ruling in each case." Yet, it "performs a precious function in the protection of the rights of the individual. Too often the independent thinker or crusader is subjected to the retaliation of the professional or trade group ..." Id. at 146-147.

Another example is where a school district terminates a teacher, or takes other adverse action, due to his political activities. Ordinary or administrative mandate may be available to challenge the action. The trial court exercises its independent judgment to determine if an improper motive caused the action in question. See, e.g. Adelt vs. Richmond Unfied School District, (1967) 250 Cal.App.2d 149; DeGroat vs. Newark Unified School District, (1976) 62 Cal.App.3d 538. Under the proposed revision, the school board's decision to find its motives pure could only be reviewed under the substantial evidence test, even though it makes a self-serving decision.

It is absurd to characterize the independent judgment test, under these conditions, as irrational or "utterly incoherent" as Professor Asimow does. [2] In attempting to apply a lesser standard of review to complex legal questions affecting vested or fundamental rights, the Commission misunderstands the current standard of review, which for labor law practitioners is neither vexing nor uncertain. Different standards apply to different issues, a principle which has a sound judicial basis. For example, consider a situation in which a group of retirees claim that their vested rights to cost-free retirement health benefits were impaired when a community college district chose to stop paying their premiums for health benefits and shifted the cost onto the retirees. The trial court must determine what policy the district adopted, since its terms will decide whether or not any rights were vested, and the scope of those rights is. Even where evidentiary facts are undisputed, conflicting inferences may arise from those facts. Under such circumstances the trial court's resolution of conflicting inferences is accepted by the reviewing court pursuant to the substantial evidence standard of review. Hicks vs. Reis, (1943) 21 Cal.2d. 654, 660. But the facial meaning of a policy adopted by a community college board

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[2]Professor Asimow wrongly asserts that eliminating the independent judgment test at the trial court level will expand review at the appellate level. As Justice Tobriner recognized in Bixby, "our scope of review on appeal from such a judgment is identical to that of the trial court." Id. at 149, (citations omitted).

is a question of law. If the meaning of the policy is ambiguous, then the trial court's determination of its meaning from extrinsic evidence must stand, unless erroneous. Parsons vs. Bristol Development Co. (1965) 62 Cal.2d. 861, 866. Rules, regulations and school board policies are part of an employee's contract. Frates vs. Burnett, (1970) 9 Cal.App.3d. 63, 69-70. Extrinsic evidence is admissible to prove intent. Pacific Gas and Electric Co. vs. G.W. Thomas Drayage & Rigging Co. (1968) 69 Cal.2d. 33, 37. Contemporaneous evidence of the meaning of the statute is entitled to great weight. Judson Steel Corp. vs. W.C.A.B., (1978) 22 Cal.3d. 658, 668. A trial court must discern the meaning of a policy from its language and/or extrinsic evidence. Under current law, the present opinion of the school board as to the meaning of its policy would not be afforded weight, as it is a self-serving declaration after the controversy erupted. See, e.g., Carmona vs. Divn. of Industrial Safety, (1975) 13 Cal.App.3d 303, 311 (fn 8). But the proposed revision would totally change the law and would afford the board's present interpretation greater weight by requiring that the court apply a substantial evidence test to a local legislative body's current construction or interpretation of its own enactment. Instead of independent judgment in reviewing actions taken concerning vested rights, the court would apply the lesser substantial evidence test. This is a fundamental change in the law and would allow an agency which is in an adversary position with its employees to make a decision which will stand if there is some evidence to support it. Professor Asimow's claim that the substantial evidence test requires independent and searching review is, in practice, untrue. As one of the contributors to CEB's Handling Administrative Mandamus (Regents of the University of California, 1993) and a labor lawyer since 1973, I have tried scores and read hundreds of mandate cases. In practice, it is rare that substantial evidence cannot be found to support any disputed issue resolved by a board or ALJ. To change the rules and give lay boards such power amounts to a rape of public employee rights. You should not believe that more procedural protection (such as applying the APA to teacher layoffs or decisions by civil service commissions or merit boards) will "solve" the problem. Because the final administrative decision rests with school boards, commissioners or ALJ's who do not specialize in employment cases, independent judicial review in vested rights cases is essential.

In summary, the proposal sweeps away the protections recognized by Justice Tobriner in Bixby vs. Pierno, and gives undue deference to lay bodies whose decisions affect property rights of employees. We urge the Commission to reject this proposed revision. Scores of California appellate justices who decided these vested rights cases understood the protection which needed to be afforded property interests acquired by employees

and subject to decision by publicly elected or appointed lay bodies such as school boards. Without so much as a mention of these many cases, the recommendation proposes a complete reversal of nearly a century of decisions. This is wrong.

III. THE TENTATIVE RECOMMENDATION WOULD ELIMINATE BACK PAY IN CASES WHERE EMPLOYEES ARE WRONGFULLY FIRED

Proposed CCP §1123.660(a) states:

> "The Court may award damages or compensation only to the extent expressly authorized by statute.

This proposed change strips employees of rights won over the last fifty years in providing that compensation (such as back pay or back benefits) may be only awarded to the extent "expressly authorized by statute." Under the proposal, an individual wrongfully fired must look to statutes which expressly authorize back pay. The problem is, much of the authority for awarding back pay and back benefits through ordinary mandate and administrative mandate arises by case law, not by statute.

The comment to proposed §1123.660 states that it is drawn from the 1981 Model State APA Section. To use the Model State APA to paint with such a broad brush ignores the fact that in California the authority for back pay awards does not necessarily derive from specific statutes, but sometimes arises from case law.

The comment also says that it supersedes "former Section 1094.5(f). "Section 1094.5(f) does not restrict the rights of the courts to award back pay. Here is what Section 1094.5(f) states at present in pertinent part:

> "The Court shall enter judgment either commanding respondents to set aside the order or decision, or denying the writ. When the judgment commands that the order or decision be set aside, it may ... order respondent to take such further action as is specially enjoined upon it by law ..."

The proposal will lead to more litigation over whether a specific statute "expressly" provides for pack pay. Different categories of similarly situated and wrongly terminated teachers will be treated dissimilarly; some will get back pay, some will not. More legislation would have to be proposed, or the new statute proposed by Professor Asimow would have to be challenged on equal protection grounds.

In order to illustrate this situation, let me describe an actual case, Gianopulos vs. San Francisco Community College District, (1986) decided by the California Court of Appeals in an unpublished decision found at A024816 (San Francisco Superior Court No. 756440). (We will forward you a copy of this Decision). In 1972, Peter Gianopulos, possessing an adult teaching credential in the subject of welding, was hired as a probationary teacher and became a tenured instructor. In 1976, he was granted sick leave due to a lung disease primarily attributed to his exposure to welding fumes while working for the District, and received a workers compensation award. In 1977, Gianopulos advised the District that he desired to return to work. Meetings between Gianopulos and the District led to the idea that he apply for a credential in subjects other than welding and in 1977 he applied for and received credentials in five new subject areas. He requested, since he was tenured, that the District assign him to teach the new subjects. But the District refused. He subsequently filed a Petition for Writ of Mandate in 1979. Gianopulos was never laid off or discharged; he was kept on "involuntary" unpaid leave for many years.

Gianopulos, and his union, asserted that his tenured status required the District either to assign him to classes or to fire him, which would entitle him to a due process hearing under the Education Code on whether he was entitled to teach. The Court recognized that the issue was whether the District's action was "arbitrary, capricious, entirely lacking in evidentiary support, contrary to established policy or unlawful or procedurally unfair." Citing, Lewin vs. St. Joseph Hospital of Orange, (1978) 82 Cal.App.3d 368, 386-387. The Court found that under the law, he was entitled to either be assigned and paid, or to be fired (triggering his right to a due process hearing). The Court held that the District had violated Gianopulos' rights and that the appropriate remedy was reinstatement and back pay, less mitigation. There was no specific statute guaranteeing back pay, just a matrix of statutes and principles which, taken together, confirmed his rights. In another context, this matrix supported an award of back pay and front pay for wrongly underpaid part-time teachers whose ordinary mandate action was successful. Ferris vs. Los Rios Community College District, (1983) 146 Cal.App.3d 1.

Public employees cannot be deprived of their employment without due process. Skelly vs. State Personnel Board, (1975) 15 Cal.3d 194, 124 Cal.Rptr. 114. In Barber vs. State Personnel Board, (1976) 18 Cal.3d 395, 134 Cal.Rptr.206, the Court held that a permanent employee with vested property rights who was discharged without receiving due process was entitled to back pay from the date of the discharge until the final post-hearing decision was reached. Barber's action was pursued via a petition

for writ of mandate under CCP §1094.5. In Barber, a statute entitled the employee to compensation for the period of wrongful punitive action. Id at 401. Although there are many statutes "both in California and elsewhere" which demonstrate a "general policy in favor of full back pay awards," the right to back pay to make employees whole and discourage similar unconstitutional dismissals arises by case law as well as by statute. Ofsevit vs. Trustees of California State University, (1978) 21 Cal.3d 763, 776-778, 148 Cal.Rptr.1. In Mass vs. Board of Education (1964) 61 Cal.2d 612, 39 Cal.Rptr.739, a statute was partly relied upon to uphold an award of back pay. The employer argued that because the statute did not require back pay, but was merely "permissive," that there was no duty. Although this argument was rejected by the California Supreme Court, an argument might reasonably be made that the statute in question did not "expressly authorize" the court to award back pay. There are nearly 1,000 school districts, 70 community college districts, and hundreds of other public jurisdictions. No doubt many of them lack statutes expressly providing for back pay. Under Ofsevit and Mass, back pay nevertheless is awarded by courts.

In another context, even absent a specific statute, the Supreme Court, in Sonoma County Organization of Public Employees v. County of Sonoma, (1979) 23 Cal.3d 296, 152 Cal.Rptr. 903, ordered back pay for thousands of public employees whose contracts were impaired.

The proposed change would create an illogical anomaly where public employees' entitlement to back pay for similar violations of their rights could turn on the statute or regulation governing their employment. Public employers would, by such legislation, be given an incentive to limit back pay, thus discouraging employees from suing to vindicate their constitutional and statutory rights.

IV. THE PROPOSAL WRONGLY ELIMINATES THE RIGHT OF DISCOVERY IN ORDINARY MANDATE CASES

Ordinary mandate cases often require no less discovery than other civil actions. But by sweeping ordinary mandate cases into the administrative mandate statute, the Commission recommends that the right of discovery be limited except to the extent it is provided by future rules. I have handled scores of mandate cases in which discovery was essential to litigate the case. In the mid-1980's the California Federation of Teachers discovered that community college districts, and the Chancellor's Office of the California Community Colleges, were misinterpreting and misapplying the "50%" law. Education Code §84... That law required that 50% of the current expense of education be paid to teachers in the way of salaries. It was a progressive statute

enacted by the legislature more than 100 years earlier to guarantee that money went into teaching, not administration of teaching. A thorough discussion of this case may be found in "The 50% Law: Time for Enforcement", CPER, No. 66, pp. 19-28 (R. Bezemek, 1985, Regents of the University of California). Discovery required the taking of many depositions, and the assimilation of thousands of documents in a challenge no less intensive than that occurring a decade earlier in Serrano vs. Priest, (1976) 18 Cal.3d 728.

Counsel for all parties in ordinary mandate actions understand the need for discovery. Yet there is no rationale offered for eliminating this right.

We strongly oppose the proposal to curtail discovery in ordinary mandate cases. There is no reason why discovery in such mandate actions should not proceed in accordance with other civil actions. To establish a "two-tiered system" without any evidence of need is hard to fathom. Over the last 10 years California discovery statutes have undergone extensive change, and there is currently in place an efficient system for discovery. Is the Commission intent on tossing out that system with respect to civil mandate actions when no problem exists? That would be the impact of proposed CCP §1123.620(a).

V. THE MODIFICATION OF TIME LIMITS FOR ADMINISTRATIVE MANDATE ACTIONS WILL LEAD TO MORE LITIGATION

Teachers are often laid off in the Spring, as school districts do not know what their budgets will be like in the Fall, since their budget is a product of legislative processes in Sacramento. By March 15th of every year, a district must announce whether it will lay off teachers, and final layoff notices must be issued by May 15th. Under the proposal of the Commission, teachers unions would have to file suit by June 15th, regardless of the fact that the State budget is never determined until July. Under the present system, a union or affected employees may request a copy of the administrative record. If the request is made within 10 days, then the time limit for filing suit is extended until 30 days after the record is prepared. Since it usually takes 30 - 90 days to prepare the record, a suit need not be filed until after the budget of the State has been adopted. In my experience, this has obviated the need to proceed on hundreds of layoff cases. Under the proposal of the Commission, we will now have to file suit in these cases, subjecting teachers unions, teachers and school districts to unnecessary time and expense.

In addition, we presently have 90 days to file suit against many public jurisdictions on writs of mandate. This 90-day period allows for negotiation of settlements. That opportunity will disappear if every jurisdiction is forced to have a 30-day statute of limitations.

Professor Asimow's obsession with conforming everyone to the same set of rules will generate increased litigation, increased costs to the parties, and do a disservice to everyone. The maxim that "if it's not broke, don't fix it" certainly applies in this context. For these reasons we urge you to reconsider the proposal to reduce the statute of limitations. We also note the 30-day time limits for filing suit have undergone substantial criticism by academics and professionals over the last decade. The statute of limitations for civil rights violations is 1 year; for claims against governmental entities it is 6 months or 1 year. In civil actions the statute of limitations for most cases is between 1 and 4 years. To reduce to 30 days the time limit for filing these writs is egregious. I note, although it is not my area of expertise, that your limitations period would change the period for recipients of public assistance to seek to vindicate their rights if they are denied public assistance. From a 1-year statute, it will go to 30 days -- I suspect there are many homeless, poor and other people under the care of conservators who could never file suit in 30 days, much less know within 30 days, that their rights have been affected.

I urge you in the strongest possible terms to rethink this recommendation to reduce the statute of limitations.

I have only had an opportunity to review your recommendations for 3 days. I would like to be placed on the mailing list for all future events surrounding this matter, and I would like to appear at your next meeting to address the subject. I expect to provide you further information and authorities concerning the serious diminution of rights which would occur if the tentative recommendation were adopted.

At a time when the California Legislature is considering amending the Education Code to eliminate a number of permissive statutes as unnecessary, this ill-considered legislation may encourage more litigation by limiting damages or other compensation only to the extent "expressly authorized" by statute, and will require the Legislature to enact or continue in effect a plethora of statutes dealing with back pay and back benefits.

For the above reasons, proposed §1123.660(a) should be eliminated, and current §1094.5(f) should be continued.

Very truly yours,

Robert J. Bezemek

ROBERT J. BEZEMEK

by Katherine J. Thomas

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cc: Mary Bergen, President, CFT
Margie Valdez, CSEA
Bernard McMonigle, PERB

November 14, 1995

Colin Wied, Chairperson
California Law Review Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: **Comment on Tentative Recommendation**
Judicial Review of Agency Action

Dear Chairperson Wied and Members of the Commission:

California School Employees Association, on behalf of over 175,000 public employees in California, urges the Commission to retain independent judgment review of factfinding, at least for those administrative adjudicatory decisions that are reached without the safeguards of the Administrative Procedure Act (APA).

I.

On August 24, Professor Asimow responded to my August 10 letter to the Commission and claimed:

1. "[I]n most areas, [school employee disciplinary] decisions are made by personnel committees, not by the school board directly."

2. According to a former school administrator, "classified employees are treated sympathetically by both appointed personnel committees and also by elected school boards.... [M]ost are represented by unions under collective bargaining agreements and have negotiated additional layers of protection beyond what's provided in the Education Code."

3. The former administrator opposes independent judicial judgment as "unnecessary and improperly giving employees a second shot at the apple."

Professor Asimow characterizes these claims as reflecting "additional research." I have previously characterized <u>some</u> school and community college disciplinary hearings as "kangaroo courts" undeserving of mere substantial evidence review. While Professor Asimow correctly notes my pro-worker predisposition, that predisposition is derived from extensive practical experience representing parties in such hearings.

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Professor Asimow's first claim is simply not true. There are 1,065 school and community college districts in California. (California Department of Education, California Public School Directory (1995) pp. 675-683.) Only 95 of these have adopted the Education Code's merit system with its independent personnel commission[1]. (Ron Dunn, Executive Secretary, California Personnel Commissioners' Association.) For all the rest, these decisions are made by the school board. Such boards cannot delegate disciplinary decisions to any other forum. (United Steelworkers of America v. Board of Education of the Fontana Unified School District (1984) 162 Cal.App.3d 823.)

II.

Professor Asimow's second claim relies entirely on the opinion of Eugene Tucker, former superintendent of the Santa Monica-Malibu Unified School District. I spoke to Bart Diener, former business agent for Service Employees International Union, Local 660, who represented the workers employed by this district and had frequent dealings with Mr. Tucker about employment related matters. Mr. Diener does not share Mr. Tucker's opinion.

Although Santa Monica is one of the few districts in California where school disciplinary decisions can be appealed to a personnel commission, Mr. Diener states that he handled "several cases where there was no semblance of justice." As one example, he told me about a case where, after serving one suspension for misconduct, two workers were given a second and much longer suspension for the same misconduct. The personnel commission sustained the second suspension in violation of "double jeopardy" concepts applicable to disciplinary proceedings. (See Elkouri and Elkouri, How Arbitration Works (1985) pp. 677-679.) Finally, the superior court exercised its independent judgment to overturn the administrative decision. (Estrada and Walker v. Personnel Commission of the Santa Monica-Malibu Unified School District.)

While it is true that many classified school and community college workers are represented by unions, Mr. Tucker's comment that these unions have negotiated additional layers of protection beyond what is provided in the Education Code is not true. The Education Code sections relevant to the discipline of classified

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[1] Professor Asimow's citation to Education Code section 45306 relates to personnel commissions, not "committees."

workers have been held to preclude collective negotiations which would insulate workers from Education Code procedures. (San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d 850, 866.) For example, as much as unions would like to negotiate binding arbitration of discipline, so that workers would receive the benefit of "the expert and professional conclusions ... of [hearing officers] who try cases of this sort every day..." (See Tentative Recommendation, p. 10), such expertise cannot be negotiated for classified school and community college workers. (Fontana, supra, 162 Cal.App.3d at 840.)

III.

Professor Asimow's third claim asks this Commission to assume without evidence that workers are afforded a fair "shot at the apple" in the local administrative adjudications subject to review. The Commission did not consider changing the standard of judicial review for state agencies until after a detailed examination of the APA. With due process safeguards now assured by the enactment of SB-523, there is some merit to the argument that independent judgment review of state agency adjudications amounts to "two shots at the apple."

I recall pleading with the Commission, back in the days before it abandoned the "one size fits all" approach to administrative adjudication, for a recommendation that statutory safeguards similar to those required for state agencies should also be required for local agencies. I believe it was Commissioner Skaggs who correctly noted that, while he did not disagree with my argument, it just was not politically feasible.

The Commission then carefully excluded local agencies not subject to the APA from a proposed minor amendment to Code of Civil Procedure section 1094.5. (Study N-100, Memorandum 93-30, May 1993 Draft, p. 159.) The recommended change was limited to adjudications found by the Commission to contain procedural safeguards that guaranteed administrative due process. This is the same route followed by the California Supreme Court in Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board (1979) 24 Cal.3d 335, a case heavily relied upon by Professor Asimow.

In Tex-Cal, the Court did not approve substantial evidence review until after it assured itself that the administrative adjudication subject to review, under the Agricultural Labor

Relations Act (ALRA), mandated adequate due process safeguards such as the separation of prosecutorial from adjudicatory functions (Labor Code § 1149), notice, written pleadings, evidentiary hearings (Labor Code § 1160.2), and a requirement that orders be accompanied by findings based on the preponderance of the reported evidence (Labor Code § 1160.3):

> "We therefore hold that the Legislature may accord finality to the findings of the statewide agency that are supported by substantial evidence on the record considered as a whole and are made under safeguards equivalent to those provided by the ALRA for unfair practice proceedings, whether or not the California Constitution provides for that agency's exercising 'judicial power'." (Tex-Cal, supra, 24 Cal.3d at 346, emphasis added.)

The Commission is now in a position to assure itself that local administrative adjudications, which it will never have time to individually review, do not benefit from a lower standard of judicial review unless the decisions "are made under safeguards equivalent to those provided by the ALRA" and the APA.

The new section 11410.50 of the Government Code allows a local agency exempt from the APA to adopt the APA for its own adjudicatory decisions. If the standard for judicial review is lowered, this change should be used as an inducement to encourage local agencies to adopt the APA, a politically acceptable, voluntary process which would tend to bring more uniformity to administrative adjudication throughout the State. To assure that parties are afforded one fair "shot at the apple," the standard of review should remain unchanged for local agency adjudicatory decisions that are not subject to the protections of the APA.

IV.

It cannot be stressed too strongly that the decisionmakers to whom classified school and community college workers must appeal discipline are not the experts in adjudication the Tentative Recommendation finds deserving of greater deference. They are elected or appointed laypersons charged with many responsibilities besides adjudication. As local public officials, they are particularly vulnerable to political pressures. On the infrequent occasions when they must preside over a disciplinary hearing, they usually find that the superintendent's charges against a worker are being prosecuted by

the same attorney on whom they depend for advice in other employment-related matters.

The classified worker may or may not be represented by a union. In any case, California School Employees Association, like many unions, cannot afford to furnish an attorney for most disciplinary hearings. There is no right of discovery. There is no power to subpoena witnesses. There is no guidance provided by the Education Code once a hearing begins. It is understandable that, without guidance from comprehensive statutory safeguards such as those provided by the APA, school and community college disciplinary hearing occasionally fall below the minimum guarantees of due process, regardless of the best intentions of governing board members.

Even Professor Asimow admits that "local governments sometimes furnish inadequate adjudicatory procedures." (Asimow, The Scope of Judicial Review of Decisions of California Administrative Agencies (1995) 42 UCLA L.Rev. 1157, 1172.) I suspect the worst examples are those where union representation is not available or requested. Here are four examples where California School Employees Association provided representation:

1. On October 9, 1995, The Board of Trustees of the Redwoods Community College District scheduled a hearing to adjudicate 22 separate allegations of misconduct against a classified worker. The Board set a time limit of one hour for the hearing.

2. On October 17, 1994, the County of Del Norte sent an employee a notice of dismissal alleging that he was accused of "serious inappropriate behavior with a minor female participant in the Second Chance Program in the presence of other participants." Despite repeated requests for clarification, the county refused to specify the nature of the alleged behavior, where or when it occurred, or the names of anyone involved. The employee was required to defend himself by guessing at the meaning of the charge. After the union threatened litigation to enjoin the disciplinary proceedings until adequate notice was furnished, the employee was reinstated and further investigation revealed there was no factual basis for the charge.

3. On May 25, 1989, the Governing Board of the Salinas Union High School District rejected a finding of a hearing officer that the employer had authorized the actions for which workers were disciplined. The Board then placed three permanent workers on probation in violation of the maximum period for probation allowed by the Education Code. The Board rejected the hearing officer's finding only after meeting in closed session to discuss the proposed decision with the attorney prosecuting the case. The worker's representative was neither notified of, nor invited to, the meeting with opposing counsel.

4. On November 15, 1990, the Board of Trustees of the Soledad-Agua Dulce School District conducted an administrative hearing to adjudicate the termination of a classified worker for failing to keep his school bus clean. A review of the administrative transcript filed in support of the union's successful petitions for writs of mandamus for back pay and a hearing that comports with due process (see Los Angeles Superior Court Case Nos. BS009347 and BS016292) reveals the following:

   a. The Board did not require the district to meet its burden of proof but, rather, indicated that the worker should present his case first.

   b. The Board did not require the district to call or swear any witnesses. The record is devoid of any sworn testimony whatsoever.

   c. The Board did not require the district to authenticate or introduce any documentary evidence, although Board members received and relied upon documents regarding the worker.

   d. The Board did not receive information from one witness at a time, using a question and answer format. Rather, the Board conducted a wide-ranging discussion lacking any discernable pattern.

   e. Board members conducted independent investigations regarding the charges and interviewed persons who were not present at the hearing.

f. Board members persistently inquired into a number of job performance issues unrelated to the allegations contained in the charges.

g. The Board's decision contained no findings.

Independent judicial review, or the threat of such review, is not the "second shot at the apple," as claimed by Professor Asimow. It is the only way workers subject to such procedures can obtain one fair shot at careful, reasoned and equitable adjudication. Without comprehensive statutory safeguards that guarantee due process, such as the safeguards in the recently revised APA, independent judicial review should be retained.

Thank you for the opportunity to present these comments to the Commission.

Sincerely,

William C. Heath
Deputy Chief Counsel

cc: Margie Valdez, CC
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November 15, 1995

VIA FACSIMILE TRANSMISSION

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

Re: Judicial Review of Agency Action

Dear Sirs and Madames:

We are writing to provide our comments concerning the Commission's tentative recommendation to the Legislature concerning Judicial Review of Agency Action. We are opposed to legislation that would change the independent judgment test as the standard for judicial review of decisions of local agencies. Our opposition is based upon many years of practice before several different local agencies. To understand our familiarity with the issues addressed in the Commission's tentative recommendation, it will be helpful to understand who we are and what we do.

This firm is composed of two partners, James M. Gattey and Everett L. Bobbitt, and two associates, Vicki L. Gilbreath and Hilary A. Hager, who have combined experience of over 50 years as lawyers and more than 30 years representing client organizations.

This firm specializes in the representation of public employees regarding issues directly related to their employment. We provide the full range of legal services necessary to effectively address those issues, ranging from negotiation of labor agreements, grievance processing assistance and initiation of proceedings before administrative agencies and courts as necessary. We frequently appear before civil service commissions and personnel boards, local legislative bodies and state and federal courts from trial through appeals and reviews by the highest courts. Included in this range of services are petitions for writ of mandate to review agency decisions.

Our clients include the San Diego Police Officers Association, Deputy Sheriffs Association of San Diego County, San Diego County District Attorney Investigators Association, the Legal Defense Fund of the Peace Officers

Research Association of California, exclusive representatives of faculty in the San Diego Community College District, Grossmont-Cuyamaca Community College District and Poway Unified School Districts, Big Bear City Community Services District Employees Association, Management Employees of the City of Oceanside, the El Cajon Police Officers Association, the Coronado Police Officers Association and many other similar organizations.

With this large client base, we appear before local agency commissions and boards as many as fifty times a year. As you can tell, we have vast experience with local agencies and review of agency decisions by courts of law. Our experience convinces us that the independent judgment test is an essential standard of review of these agencies' decisions.

The makeup of local agencies is distinctly different from most state agencies. State agencies are generally composed of trained, experienced quasi-judicial officers, whose actions are often controlled by a body of published, precedential decisions and rulings (i.e., the State Personnel Board). Local agencies are comprised of appointed members of the community, often with little or no training in the area of their responsibilities. Training is acquired "on-the-job." Many local agencies involve *ad hoc* committees or members to hear discipline appeals and other matters within the jurisdiction of the local agency.

We deal primarily with constitutional issues of due process and fundamental vested rights of public employees. These issues are often handled differently by each local agency before which we appear. The general approach by the hearing officer of these local agencies is to determine whether or not the employee's employer treated him or her fairly. The agency's written decision is then framed to address the court's standards for findings and conclusions, and may in fact not be a true statement of what the agency actually did or the considerations about the evidence actually made by the agency/hearing officer. Without the independent judgment test standard of review and using the substantial evidence test, the court would be limited to a review of the evidence in support of the agency's decision and findings. This review may not be comprehensive enough to review the actual process of the hearing or the decision of the agency.

A recent case illustrates this concern. A police officer was terminated allegedly because of a violation of the department's policy of placing oneself in a position of danger, however the evidence at the administrative hearing clearly revealed the termination was a political decision by the chief of police, not a decision based upon the actual conduct or rehabilitative possibilities of this officer. The chief wanted to send a message to the public and his other officers about the use of deadly force using our client as the messenger. The local civil

service commission hearing the termination appeal upheld the termination, finding that the facts supported a determination that the policy violation ostensibly relied on by the department did in fact occur and that termination was the appropriate discipline based upon the violation. Under the sufficiency of the evidence standard of review, the court would have been limited to a review of whether there was sufficient evidence to support the findings, which in this case arguably there was. However, would the sufficiency of the evidence standard of review have allowed the court to get to the true motivation for the termination, which termination was ultimately overturned on appeal because of the improper motive? Local agencies are subject to political considerations, which are difficult to overcome under the substantial evidence standard of review.

Another recent case involved a police department's suspension of an officer based upon three allegations of department violations, essentially issues of rudeness and discredit to the department caused by this officer's contacts with members of the public. This case involved a small, incorporated city whose personnel appeals board, established by city resolution, was unsophisticated and used infrequently for discipline appeals. Compared to other local agency commissions and boards before which we appear, the board members were relatively untrained in how to handle an administrative appeal,.

This lack of sophistication resulted in a hearing at which the employee was constantly required to object both to the evidence being allowed in and the procedures being utilized, which objections were mostly overruled by the board members, with obvious expressions of frustration for the constant interruptions. The board members were generally unconcerned about the due process requirements of burden of proof, admissible evidence and generally favored a proceeding where the employer's counsel could "tell" the entire story and the employee needed to explain away the "evidence." The board members clearly wanted to hear and consider everything, whether or not the officer had been charged with the misconduct in his discipline papers or not. A sufficiency of the evidence review would not have allowed a court to review the other factors involved in this hearing and to rule out possible disfavor of the employee by the board members because of the manner in which the hearing was conducted.

One argument advanced in support of a change to the sufficiency of the evidence standard of review is that members of administrative agencies have specialized expertise and technical knowledge of the matters before them, expertise and knowledge that the court's do not have, and therefore great deference should be afforded to the decisions of these agencies. That degree of expertise is clearly lacking in many local agencies. These local agency members are not professional triers of fact.

The cases that we deal with, particularly those involving the termination of employment, are comparable to the defense of criminal cases. Termination is the "capital punishment" of employment cases. Public employees have a fundamental vested right to continued employment and cannot be terminated without due process of law. In criminal cases, the defendant is entitled to a fair trial and all of the due process protections before he or she may be convicted of a criminal offense. The differences between employment law cases and criminal cases is the degree of due process protection and the sophistication of the processes. In a criminal case, the judge is a professional and highly trained judicial officer. The defendant is entitled to a jury. There is a large body of cases and statutes establishing the defendants' rights and interpreting the law upon which the judge must rely.

The employee does not have these protections in a local agency proceeding. The hearing officers or board members, although mostly well-intentioned and conscientious, are often untrained, unassisted by precedential agency decisions, and provide only a small amount of their time to their tasks as volunteers or appointed members, for limited. These local agency members come from other professions and are often untrained in judicial and quasi-judicial procedures. Yet they have the power to uphold the employment context "capital punishment" conviction - termination.

Although a revision of the Administrative Procedures Act for consistency throughout the state is an admirable, and, in many ways, a desirable concept, application of a uniform set of standards and particular standard of review to local agencies is fraught with potential problems. The nature and variety of local agencies and their rules and regulations make a blanket application of standard procedures and a sufficiency of the evidence standard of review impractical and unworkable. Local agencies are not at all like state agencies in the exercise of their quasi-judicial functions. We regularly appear before both local agencies and state agencies and their abilities and expertise are extremely different.

We urge the Commission to reconsider its recommendations with reference to local agencies. If the Commission desires additional information from us, we would be glad to participate in any way. Please do not hesitate to contact us.

Very truly yours,

Vicki L. Gilbreath

DIANE MARCHANT
A LAW CORPORATION

Diane Marchant
Andrew Sak
Sabine Wromar

Of Counsel:
Darryl Mounger
Patrick Thistle

October 19, 1995

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

Re: Comment on Tentative Recommendation
Judicial Review of Agency Action

Dear Commission:

Since December, 1984, my law practice is approximately 80% devoted to the filing of petitions for writ of mandate under Code of Civil Procedure Section 1085 and 1094.5 in the Los Angeles County Superior Court. I co-authored two chapters in the CEB book, "California Administrative Mandamus," Second Edition.

Virtually none of my practice involves judicial review of state agency decisions. Rather, it is almost 100% involved with the review of *local agency decisions* which are not covered by the APA -- quasi-adjudicatory decisions by the City of Los Angeles Employee Relations Board, the Los Angeles County Civil Service Commission, the Los Angeles Police Department, the Los Angeles City Civil Service Commission, and various other local decision-making bodies.

In my opinion, the Tentative Recommendation is made without due consideration to the current realities of *local agency quasi-adjudicatory procedures*.

Abolishing the 90-Day Statute of Limitations for Review of Local Agency Quasi-Adjudicatory Actions Under C.C.P. §1094.5.
On pages 8-9, it is proposed that a 30-day statute of limitations be instituted for the filing of all petitions, whether the petitioner has yet received the record of the administrative proceedings or not. This is a bad idea.

Many quasi-adjudicatory proceedings before *local agencies* are conducted by lay persons, such as union representatives and other non-lawyers and they may last for several days. When an aggrieved party wishes to petition for review, he must consult with a lawyer, who probably hasn't got a clue as to what the issues are and whether such review has any merit.

Please Reply To:
☐ 523 West Sixth Street, Suite 542 • Los Angeles, CA 90014 • (213) 312-9100 • FAX (213) 362-0303
☒ 3255 Wilshire Blvd., Suite 830 • Los Angeles, CA 90010-1419 • (213) 386-8005 • FAX (213) 386-8009

Under the proposed new rule, the petitioner will be forced to retain counsel and file his petition before his counsel has had an opportunity to review the administrative record. (Note that under proposed Section 1123.730, the local agency has as long as 60 days to produce the record.) This forces an attorney to file potentially unmeritorious actions, contrary to his ethical obligation to file only meritorious actions.

I can tell you from my personal experience that 90-days is already a pretty short period of time for an attorney to get a clear picture of what happened at the administrative level and advise a client on the merits of petitioning for judicial review.

Abolishing the Independent Judgment Test for Review of Local Agency Decisions Which Affect Fundamental Vested Rights. On pages 10-11, it is stated that "independent judgment review substitutes the factual conclusions of a non-expert trial judge for the expert and professional conclusions of the administrative law judge and agency heads." That paragraph goes on to state that the "professionals are the administrative law judges who try cases of this sort every day, hear the lay and expert witnesses testify, and can take the necessary time to understand the issues and to question the experts until they do understand." This is the most amazing statement I have seen in black and white in a long time.

There are no "administrative law judges" in *local agency decision-making*. Decisions about whether a local agency department head was justified in discharging an employee, for example, may be made by the city manager after a hearing where there are no rules of evidence. Decisions about whether a police officer has a disability which entitles him to a PERS pension may be made by the Chief of Police, also at a hearing where there are no rules of evidence.

While it is true that some local agency decisions are made by official bodies such as Civil Service Commissions, these Commissions are not "administrative law judges." They are political appointees who are subject to political and public pressures. There is absolutely no justification for stating that "these professionals are more likely to be in a position to reach the correct decision than a trial judge reviewing the record."

As noted, *local agency adjudications* are usually made without benefit of the right to discovery, rules of evidence, proper allocation of burden of proof, and frequently without the benefit of an experienced, let alone neutral, decision maker. *Local agency adjudications* are sometimes conducted under procedures that are invented on the spot.

In short, for many persons affected by these decision-makers, the trial judge is the first and only opportunity for neutral and unbiased review of actions taken against aggrieved parties by local chiefs of police, city managers, civil service commissions and the like. In my opinion, it is only the potential threat of subsequent independent judgment review by a Superior Court judge which motivates some *local agency decision makers* to be as fair as they are. Without such a check, local agency adjudicatory procedures and decisions will degenerate even further into whimsy and arbitrariness.

Finally, there is no problem for most judges or litigants on the question of whether the independent judgment test applies or not. This issue is seldom litigated any more; there is ample appellate literature to guide the confused.

Proposed Section 1121.110. Conflicting or Inconsistent Statute Controls. Does this mean that if a local agency decides to adopt a 2-day statute of limitations, that local provision prevails? Does this mean that if a local agency decides to immunize all of its quasi-adjudicatory decisions from judicial review, that local provision prevails?

Proposed Section 1123.450. Review of Agency Procedure. Does this mean that when the petitioner complains that the local agency has used an unlawful procedure, for example, putting the burden of proof on the wrong party, that the court must defer to the agency if the agency has determined that this is an appropriate procedure?!

Proposed Section 1123.630. Contents of Petition for Review. Why does the Court need to know the mailing address of the Petitioner? Is is your goal to enable newspapers to track down the petitioner? Since when is anything more than the attorney's mailing address required?

Proposed Section 1123.640. Time for Filing Petition for Review in Adjudicative Proceeding. Let's say that a Civil Service employee is discharged by his County Department head on May 1. His discharge is effective that date. He appeals to the Civil Service Commission, which conducts a hearing and renders its decision upholding the Department head on January 1. The Commission's decision is rendered and "final" on January 1, but it is "effective" the previous May 1. Under the proposal, the discharged employee is precluded from seeking judicial review because he can't possibly get his petition filed within 30 days of the "effective" date of the decision. Why don't you just use the old word "final" instead of "effective." Everyone knows what "final" means.

Proposed Section 1123.650. Stay of Agency Action. I recognize that subdivision (f) is carried over from Section 1094.5, but it is one subsection that really needs revision. Let's say that a Civil Service employee is discharged by his County Department head. He appeals to the Civil Service Commission which conducts a hearing and renders a decision reinstating the employee. The Department head petitions the Superior Court and because the filing of the petition does not stay the agency action, the employee is reinstated while the petition is pending. The Superior Court ultimately renders a decision in favor of the Department head. The employee (who had been reinstated to his employment by virtue of the unstayed agency decision) appeals from the Superior Court's grant of relief to the Department head. Under this provision, the decision of the agency (reinstating the employee) would be automatically stayed pending a determination of the employee's appeal. In other words, the employee becomes unemployed again, pending a decision on his appeal.

Proposed Section 1123.660. Type of Relief. Under this proposal, the Court could award "ancillary relief to redress the effects of official action wrongfully taken or withheld." This is akin to the present C.C.P. Section 1095. However, the proposal goes on to limit the award of damages or compensation to the "extent expressly authorized by statute."

This is going to cause extreme hardship to discharged employees whose discharge is overturned by the Court. Currently, such employees customarily receive reinstatement and back pay plus all other benefits lost as a result of the "wrongful discharge," whether or not there is a statute which expressly authorizes such a remedy. Under this provision, there will be no back pay remedy without an expressly authorizing statute. There are very few such authorizing statutes (local ordinances) currently on the books. I predict that those that do exist will be repealed as soon as this proposal is adopted.

Proposed Section 1123.720. Contents of Administrative Record. Subsection (a)(6) of this provision will not work for many *local agencies*. This is because many local decision makers do not recognize any obligation to make a complete formal record. Because local decision makers operate from their common knowledge about local conditions, they frequently omit from the record certain documents that would be essential for court review, such as the copies of the rules at issue, Charter provisions and the like. This problem is exacerbated when, as is frequently the case, the parties putting on the case before the decision maker are lay persons rather than attorneys.

I suggest that the present practice of making the petitioner responsible for presenting "the record" to the Court be continued. Otherwise, petitioners are going to get bogged down in tangential lawsuits trying to force local agencies into complying with this subdivision.

Proposed Section 1123.730. Preparation of Record. Subsection (a)(2) assumes that local agency currently prepares the record. This is simply not the case. In most local agency decisions, the local agency may keep the exhibits and other documents from the hearing, but the transcript is prepared by an outside independent court reporter. The petitioner will not get a transcript if he makes a request to the local agency. The petitioner has to obtain the transcript from the independent court reporter. You can be sure that the court reporter is not going to feel any particular obligation to get the transcript prepared within 30 days or 60 days or any set time period without a "rush" fee premium.

Very truly yours,

Diane Marchant

Diane Marchant

PUBLIC LAW SECTION
THE STATE BAR OF CALIFORNIA

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November 14, 1995

Law Revision Commission
RECEIVED
NOV 16 '95
File:

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road
Suite D-2
Palo Alto, Ca. 94303-4739

Dear Members of the Commission:

The Public Law Section of the California State Bar wishes to express its general support for the Commission's tentative recommendation on the subject, "Judicial Review of Agency Action" (August 1995).

As the Commission's background report notes, current statutory and common law provisions governing judicial review of administrative decision-making are rather obtuse, often difficult to access, and at times inconsistent. The Commission's recommendation to consolidate these provisions within a single title of the Code of Civil Procedure is therefore a welcome reform. Such an approach, if adopted, would go a long way to address the defects noted above.

The August 1995 draft contains a number of specific, salutary reforms as well. They include the following:

--Abandonment of the "independent judgment test". At present, California is the only jurisdiction to utilize the independent judgment test to review agency fact-finding (albeit in limited circumstances). The federal courts and all other states utilize the time-honored "substantial evidence" standard. The latter test affords agency decision-makers appropriate deference, and seems more faithful to separation of powers concerns than does the current California rule. We therefore urge the Commission to go forward with this recommendation.

--Closed Record. The California Supreme Court's recent decision in Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559 should go far to remove the untenable dichotomy between "open" and "closed" records in litigation brought to review administrative decisions. Nevertheless, the Commission's proposed statutory reforms address the same objective, and are therefore welcome. In particular, we believe that the only proper exceptions to the "closed record" rule are those found in current Code of Civil Procedure section 1094.5(e). We agree, moreover, that in the face of a judicial determination that the agency record is lacking, the proper judicial remedy is for the court to remand to the agency for further proceedings, rather than to allow new evidence to be introduced in court in the first instance.

--Consolidated Limitations Period. There is considerable merit in the Commission's recommendation to adopt a consolidated statute of limitations governing judicial review of quasi-judicial administrative decisions. This modification corrects a significant ambiguity contained in existing law.

The Commission's recommendation does not address every current problem or potentially-significant issue concerning judicial review of administrative decision-making. Nor is the current proposal perfect. (For example, the Commission staff's suggestion that "mixed" issues of law and fact be subject to the independent judgment test is troublesome.) On balance, however, the Public Law Section believes that the Commission proposal is worthy of support.

Please contact the undersigned if you have questions, or if you believe the Public Law Section could be of assistance in connection with the Commission's deliberations on this proposal.

Sincerely,

RICHARD M. FRANK
Chair
Public Law Section

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY PETE WILSON, Governor

DEPARTMENT OF HEALTH SERVICES
714/744 P STREET
P.O. BOX 942732
SACRAMENTO, CA 94234-7320

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November 14, 1995

Sent Via Federal Express

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

RE: TENTATIVE RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Dear Mr. Sterling:

Enclosed are the comments of the Department of Health Services on the Commission's Tentative Recommendation concerning Judicial Review of Agency Action.

Please keep me on your mailing list for future correspondence concerning this issue.

Very truly yours,

ELISABETH C. BRANDT
Deputy Director and
Chief Counsel

Enclosure

COMMENTS OF DEPARTMENT OF HEALTH SERVICES
concerning

Tentative Recommendation of the California Law Revision Commission:

JUDICIAL REVIEW OF AGENCY ACTION

Background:

The Department of Health Services (Health Services) Office of Legal Services is a large legal office with extensive expertise in administrative law both at the agency level and on judicial review. Health Services employs seven Administrative Law Judges (ALJ's) who hear cases both under the California Administrative Procedure Act (APA) and under special procedures unique to Health Services. ALJ's employed by the Department of Social Services preside at Medi-Cal "fair hearings," but any resulting court cases are tracked by Health Services legal staff. In addition, Health Services conducts both APA and non-APA hearings before the Office of Administrative Hearings, using both its own legal staff and Attorney General staff.

Health Services is in charge of a great variety of licensing and other regulatory schemes, as well as the operation of several benefit programs. As a result, the agency has several thousand regulations, many of which are amended regularly.

Health Services also engages in a large variety of "other" agency actions, from contracting for a variety of media campaigns to contracting for extensive projects, to awarding discretionary grants.

In providing comments, these activities have been taken into account, together with the experiences of the Office of Legal Services in litigation related to these activities.

General Comments:

This proposal does many good things, and it appears in general to provide some significant improvements over current law. We agree that the line between administrative mandate and "regular" mandate is at times painfully difficult to draw and at other times relatively nonsensical.

The specific comments below are aimed at a few problems that seem to arise mainly from a mismatch between the Model APA and specific aspects of California law, and also offer a few additional improvements Health Services would find beneficial.

Comments on Specific Sections:

§ 1121.240: Subdivision (c) defines as "agency action" subject to court review under the new title the "agency's performance of, or failure to perform, any other [that is, other than related to a decision or rule] duty, function, or activity, discretionary or otherwise."

Careful consideration should be given to whether this broadens the scope of the new title beyond what was intended. Agencies engage in many activities that are not inherently related to their regulatory functions, and should not necessarily be reviewed in the context of a process developed to review actions that are fundamentally different from those engaged in by private persons and businesses.

For example, Health Services contracts with an advertising agency to produce television, radio, billboard and print advertising for its anti-tobacco campaign. In the process, it engages (just like any other purchaser of media) in transactions which involve contract, intellectual property, copyright, and other legal issues which may give rise to litigation.

The suggested provision would allow suit against the agency concerning these kinds of activities to be brought under the new title. Nothing else in the title seems to us to contradict that possibility.

The decision to bring all actions against public agencies into a single procedural vehicle, whether or not they involve functions that are inherently governmental, is one that has potentially wide-ranging effects. Procedure can easily affect the development of the law as much as do substantive rules. Is it a good idea to allow contract law, for example, to develop differently if a public agency is involved than if only private parties are involved? Particularly, is it a good idea to do so indirectly and perhaps inadvertently (through use of a different procedural vehicle for suit) rather than through conscious changes in the substantive law?

We do not have a definitive answer to this question, but raise it as an issue that should be carefully considered in connection with development of the draft proposal.

§ 1121.260: An annoying problem regularly faced by attorneys litigating on behalf of public agencies is that plaintiffs/petitioners feel compelled to name every employee of the agency who had any involvement in a formal agency action, and may even name "Does" in an action seeking review of a formal final decision of the agency after a hearing. Much judicial and

public waste of time occurs having these improper and totally superfluous parties dismissed.

Either as a part of this section (which defines "party" for purposes of the new title) or elsewhere in the new title, it would be beneficial to limit who can be sued over agency action or inaction to the agency itself and to any official (such as the Director) who is designated by statute or regulation as the individual who must take the action at issue. There is no improper agency action or inaction which could not be remedied by a court which has jurisdiction over the agency or the specifically-designated responsible official, or both.

It might save additional time and effort to make dismissal of improperly-named additional respondents mandatory and automatic upon notice to the court by the agency, so that a formal motion to dismiss is not necessary if improper respondents are named in spite of the statutory requirement to the contrary.

§ 1121.280: This section defines "rule" for the purposes of the new title. As written, it is very confusing. This confusion appears to arise by attempting to combine language from the Model APA with language from the California APA, which is atypical in how it deals with formal rulemaking.

Subsection (a) states that a rule is a "regulation" as defined in the Government Code. Subsection (b) enumerates what, in addition, is considered a rule. However, almost all (arguably all) of the items listed in subsection (b) are within the definition of a "regulation," and therefore already covered by subsection (a). Further, it is not necessary to state that the term "rule" includes the "amendment, supplement, repeal, or suspension of an existing rule," since this is also already within the definition of a "regulation."

The Comment on the proposed section states an intent to cover both duly promulgated regulations and other standards. However, under existing California law, such other standards are prohibited "underground regulations."

We would suggest that subsection (a) read as follows:

"(a) A regulation adopted, or in the process of being adopted, pursuant to the Administrative Procedure Act (Government Code section 11342 et seq.)."

Subsection (b) should be limited to its first sentence, which would then clarify that any "rule" covered by that definition which has not been adopted pursuant to the APA is still a proper subject of a petition under the new title.

The second sentence of subsection (b) should be deleted. If it is desired that the existing rule to that effect be expressly stated, it should become a new subsection (c), since it mostly applies to the "rules" covered in subsection (a), and less so to "rules" covered in subsection (b).

§ 1123.220: This section defines the standing of persons litigating a private interest, and simply states that an "interested person" has standing. The Comment indicates that this is intended to codify existing definitions of an "interested person" existing in statutory and case law.

We do not believe that the bare reference to an "interested person" is adequate. No public purpose is served by allowing persons with no genuine stake in the matter at issue to file a lawsuit against a public agency. At a minimum, "beneficially interested" or "aggrieved" should be used.

§ 1123.230: This section defines the standing of a person representing a public interest. Subsection (c) requires that the person seeking standing have "served on the agency a written request to correct the agency action and the agency has not, within a reasonable time, done so."

Cases brought in the public interest are often brought with an express intent to seek attorneys' fees under a "private attorney general" theory. Often, no prior request to "fix the problem" is made (since this would not allow collection of fees), or if notice is given, it is so minimal that the agency cannot act before suit is filed. The ideal situation from the attorneys' standpoint (and the attorneys may well be the driving force behind the action), is to rush in with a complaint, have the agency acknowledge the problem and settle by fixing it, and then get a large amount of fees because "the lawsuit was responsible for the change." This is particularly unfortunate and contrary to good public policy when a simple phone call to the right person would have caused the change to occur.

Because of these dynamics, it is critical that subsection (c) be more specific about what "reasonable time" means. We suggest the following additional language:

"The written request to the agency shall specify the time the requestor considers a reasonable time for the agency to act. The length of time given shall be appropriate to the nature of the action requested, and shall not be less than 30 days unless the request states good cause as to why a delay of 30 days will cause irreparable harm to the requestor."

§ 1123.240: This section governs standing in cases to review decisions after adjudicative proceedings. It grants standing only to parties in cases that arise from

APA proceedings. It grants standing to "participants" in cases that arise from non-APA adjudicative proceedings. This distinction seems unwarranted, particularly since the term "participants" is defined in the Comment to include persons who testified or submitted written comments.

The distinction between an APA proceeding and a non-APA proceeding is not necessarily one of substance in California. For example, proceedings before the State Personnel Board are for all practical purposes the equivalent of APA proceedings, as are reviews of audit appeals before Health Services. In such cases, the reason for the special procedure is that the APA structure contains elements that are inappropriate to the particular type of adjudication, not because the hearing is any less structured than an APA proceeding. It makes no sense to give standing to witnesses or persons who submitted written comments to seek review from an adjudicative proceeding conducted formally between parties, and leading to a decision which affects only the rights of those parties.

We suggest the following language instead:

"(b) [Existing language]

"(1) A party to a proceeding at which the right to participation is given only to parties.

"(2) [Existing language]"

The suggested language, we believe, would limit participation in judicial review to the proper persons in connection with all "individual" adjudications, yet allow broad standing for review of proceedings where non-parties can participate actively.

Article 4. Standards of Review: Sections 1123.420 through 1123.450 all contain an identical problem. Each recites a set of issues which is proper for the court to decide, but only for the apparent purpose of specifying the standard for judicial review. However, it is clearly the intent of the sections to put the types of determinations which can be made into statute as well.

In addition, we find the use of the term "independent judgment" to be confusing when used as a substitute for the normal de novo review of legal issues by the court. Traditionally, "independent judgment review" refers only to review of facts without any deference to the agency decision. We therefore suggest the use of "de novo review" for the review of legal issues.

We suggest that each section be rewritten along the pattern suggested below for section 1123.420.

"**1123.420.** (a) The court may determine any of the following issues pursuant to this section:

" [list issues]

"(b) Except as provided in subdivision (c), the standard for judicial review to be used for determinations described in this section is de novo review of determinations of law, giving deference to the determination of the agency appropriate to the circumstances of the agency action.

"(c) The court may review any of the following types of agency action, using an abuse of discretion standard:

"[list issues]."

§ 1123.510: This section provides that the Superior Court is the proper court for judicial review under the new title. Two things should be clarified:

1. Is it the intent of this provision to prohibit direct access to the Courts of Appeal and the Supreme Court with cases that seek "mandate" relief against an agency?

2. Health Services currently has a problem with providers of health care services avoiding Superior Court review of agency action denying payment by suing for money in Small Claims Court. Small Claims Courts normally limit review to whether the services were in fact provided, and do not concern themselves with whether statutory and regulatory conditions precedent to payment have been met. It would be very helpful to this agency and probably others if this practice were expressly prohibited. This section seems to be the place to do that.

§ 1123.520: This section provides for venue. The only proper venue for review of state action is "the county where the cause of action, or some part thereof, arose."

Both attorneys seeking review of state agency action and state agencies often prefer to have major cases challenging state agency action filed in Sacramento, where most state agencies are headquartered and both counsel and judges are familiar with difficult issues of public and administrative law.

It would appear to be sometimes helpful and never detrimental to allow, as an alternative venue, Sacramento, or in the case of an agency not headquartered in Sacramento, the city in which the agency has its principal office.

§1123.640 This section provides a limitation period for initiating judicial review of agency adjudicative decisions. The time for filing a petition for review is no later than 30 days

after the decision is final, but is extended if the agency fails to notify a party of the time within which to file the petition.

Although the comments to this section state that the proposed section 1123.64 does not override special limitation periods statutorily preserved for policy reasons, the proposed language is silent as to this issue. We believe this ambiguity could adversely impact the Department's administrative appeals. For example, provisions of the Long-term Care, Health, Safety and Security Act of 1973, require a licensee who desires to contest a citation to notify the Director within 15 days of the decision of the licensee's intent to perfect a judicial appeal (H & S Code § 1428). Several other statutory requirements are then imposed on the licensee to satisfy the appeal process and, if those requirements are not complied with, the Superior Court is required to dismiss the appeal. The intent of this statutory language is to clearly place the burden on the party challenging the agency decision to preserve its appeal rights. We suggest section 1123.640(b) and (c) be amended to read as follows:

"(b) Except as otherwise provided, the ...."

"(c) Except as otherwise provided, the agency shall in the decision or otherwise notify the parties of the period for filing a petition for review. If the agency does not notify a party as required under this section of the period ...."

§ 1123.660: This section delineates the types of relief which the court may order.

Although we appreciate the desire to have a single statute covering relief for all cases of review of administrative agency action, Health Services is very concerned that the existence of this statute will result in abandonment of the type of judicial restraint currently mandated by Code of Civil Procedure section 1094.5.

When an administrative agency has rendered a formal decision concerning, for example, an individual license, the court currently is (and should be) very limited in its power. It can basically uphold the agency's decision or not. If not, it can tell the agency why not, and what, if anything, the agency can do to take its action in a manner which is to the court's satisfaction.

This section, however, suggests that other, more creative remedies may apply. It is difficult to predict the exact direction judicial activism may take, but we urge very careful scrutiny of this provision to determine whether it may create mischief that is not intended by this proposal.

§ 1123.720: This section prescribes the contents of the administrative record. It specifically requires an "affidavit" (to be consistent with California law, this should probably be changed to "declaration under penalty of perjury") by the agency official who compiled the record.

Although this provision strongly implies that only the agency can prepare the administrative record for review, it would be beneficial to state this expressly. Health Services has repeatedly run into the situation where courts accept an "administrative record" prepared by the petitioner's counsel from a copy of the hearing tape and copies of the exhibits offered at the hearing. The court's tendency will be to then put the burden on the agency to prove that there is some inaccuracy in the uncertified record, rather than to reject it and wait for the agency's properly certified original.

Because of the tendency for some petitioners' attorneys to engage in this practice, and because it has been successful with courts, it would be useful to add to the section an explicit requirement that only an officially-certified record submitted by the agency may be used by the court.

§ 1123.730: This section specifies who prepares the administrative record. Unfortunately, it specifies in subsection (a)(1) that the record in all adjudicative cases under the APA is to be prepared by the Office of Administrative Hearings. This should not be the requirement.

Not all APA adjudicative proceedings are heard by ALJ's in the Office of Administrative Hearings. Health Services, for example, provides APA hearings in front of its own ALJ's. For those hearings, it should be Health Services that prepares and certifies the record.

We suggest the subsection be reworded to provide that the agency which issued the decision, or the Office of Administrative Hearings in any case heard before an ALJ of that Office, is to prepare and certify the record.

§ 1123.760: This section specifies when new evidence may be admitted by the court during judicial review. We believe subsection (b)(2) is confusing and inappropriate. This subsection allows the court to receive extra-record evidence where:

"The agency action is a decision in an adjudicative proceeding and the standard of review by the court is the independent judgment of the court."

The Comment specifies that the reference is to mixed questions of law and fact covered under section 1123.420.

Although a court is authorized by section 1123.420 to review the legal aspects of a mixed question of law and fact de novo, there is nothing in that section which suggests that, once a mixed question of law and fact exists, the court is also authorized to exercise its independent judgment on the facts (i.e., to find different facts to exist). Yet this provision suggests that this is permitted, because there is no limit on the type of evidence the court may receive, and the natural assumption would be it includes pure factual matter on which the court can then exercise independent judgment.

We suggest that the provision be restated as follows:

"The agency action is a decision in an adjudicative proceeding, and the evidence is necessary to allow the court to make any determination authorized by section 1123.420."

The suggested language allows the court to receive that type of evidence which will elucidate the legal issues it may address, but does not at the same time suggest that the court may use its independent judgment on pure factual determinations.

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November 14, 1995

VIA FEDERAL EXPRESS

The Honorable Colin Wied, Chair
California Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94303-4739

Re: Judicial Review of Agency Action, Tentative Recommendation

Dear Mr. Wied:

I am writing again to urge you to exclude the Public Utilities Commission (PUC) from the new judicial review statute proposed in the Law Revision Commission's Tentative Recommendation. I previously wrote you on August 15, 1995 concerning the prior Draft of the Tentative Recommendation. That letter focused on the proposal to shift review of PUC decisions from the Supreme Court to the Court of Appeal. I appreciate the changes that have been made in the Tentative Recommendation that would retain exclusive Supreme Court review of the PUC (unless the Legislature enacts separate legislation making that change -- legislation that we oppose). However, the Tentative Recommendation still contains numerous provisions that are not appropriate for judicial review of the PUC, primarily because they would have the effect of increasing judicial interference with policymaking functions properly delegated to the PUC, and also because they would tend to confuse the procedural rules applicable to judicial review of the PUC. Accordingly, I once again request that you exclude the PUC from the new judicial review statute proposed in the Tentative Recommendation.

The State Constitution and the Public Utilities (P.U.) Code delegate to the PUC the authority to make important economic decisions concerning the state's public utilities and related businesses. They also provide for limited judicial review of PUC actions, so as to avoid judicial interference with the important policymaking functions that have been delegated to the PUC. (See Pacific Telephone v. Eshleman (1913) 166 Cal. 640, 654-55.) The statutory changes proposed in the Tentative Recommendation would increase judicial interference with the actions of the PUC, without sufficient justification. This problem can most clearly

be seen in three areas: the scope of relief authorized, the standard of review, and the introduction of new evidence.

Scope of Relief Authorized

Under current law, the Supreme Court may either affirm or set aside the order or decision of the PUC. (See P.U. Code sec. 1758.) This provision helps to ensure that the court does not usurp the policymaking functions of the PUC, but simply determines whether or not the PUC's decision is legally proper. The Tentative Recommendation, however, would repeal sec. 1758. (See Tentative Recommendation at 73.) Under the Tentative Recommendation the court could grant a number of other kinds of relief; among other things, it could order mandatory injunctive relief or modify the agency action. (See proposed sec. 1123.660(b).) Such authority to modify PUC decisions (rather than just reverse and remand) could allow the court to take over decisionmaking authority that the P.U. Code delegates to the PUC. The Tentative Recommendation does not justify this change in existing law.

Standard of Review

Under current law, the standard for review of PUC decisions is whether the PUC "has regularly pursued its authority". (P.U. Code sec. 1757.) The comment to proposed sec. 1123.410 says that the standard of review in P.U. Code sec. 1757 would control over the standards of review in the proposed new statute. (Tentative Recommendation at 34-35.) However, the Tentative Recommendation's conforming revisions to the P.U. Code would repeal section 1757 (Tentative Recommendation at 73), thus subjecting the PUC to the standards of review contained in proposed sections 1123.420 through 1123.450. This change in the standards of review would have a number of adverse impacts on the PUC.

The most egregious change involves the standard for reviewing the application of law to facts. Under proposed sec. 1123.420(a)(5) & (b), the court would review such mixed questions using its "independent judgment . . . giving deference to the determination of the agency appropriate to the circumstances of the agency action." This independent judgment standard is vastly different than the "regularly pursued its authority" standard in current law. The proposed new standard could effectively permit the court to substitute its judgment for that of the PUC whenever a

mixed question of fact and law is presented.[1] This would be inappropriate, given the thrust of the P.U. Code to delegate to the PUC, and not the courts, the authority to make important economic decisions concerning the state's public utilities.

The Tentative Recommendation justifies the proposed standard for review of application issues by arguing that "[a]pplication decisions are often treated as precedents for future cases, thus resembling issues of law more than fact." (Tentative Recommendation at 12; see also Asimow, 42 UCLA L. Rev. at 1216.) That may be true for other agencies which repeatedly apply a legal standard to different sets of facts concerning past events. Indeed, Asimow's "typical application issue" concerns the application of such a legal standard to past events (did a particular injury "arise out of and in the course of the employment," 42 UCLA L. Rev. at 1211), as do many of the examples cited in his footnotes (42 UCLA L. Rev. at 1212-16). However, the majority of the PUC's work involves ratemaking and policy issues, and deals more with predicting the future than with deciding what happened in the past. In that context, the application of law (particularly some of the very general standards found in the P.U. Code) to facts more nearly resembles an exercise of discretion, than the determination of a pure question of law. Nevertheless, the Tentative Recommendation would apparently authorize the court to review the PUC's determination of mixed questions under an independent judgment standard, rather than an abuse of discretion standard.

The Tentative Recommendation does provide for an abuse of discretion standard for an "agency's application of law to facts, where a statute expressly delegates that function to the agency." (Proposed sec. 1123.420(c)(2), Tentative Recommendation at 35, emphasis added.) Existing P.U. Code sec. 1757 certainly was intended to delegate to the PUC the function of applying law to facts:

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1 Given the broad language of many of the PUC's governing statutes, the PUC's decisions might often be characterized as involving mixed questions of fact and law. (See Asimow, The Scope of Judicial Review of Decisions of California Administrative Agencies, 42 UCLA L. Rev. 1157, 1212, 1219 n.226, 1222 (1995).)

> The findings and conclusions of the commission on questions of fact shall be final and not be subject to review except as provided in this article [under the "regularly pursued its authority" standard of review]. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

However, the Tentative Recommendation would repeal P.U. Code sec. 1757. (Tentative Recommendation at 73.) Moreover, even if that section were not repealed, some might question whether that section is an "express" delegation of authority to the PUC to decide all questions involving the application of law to facts.[2]

The Tentative Recommendation's proposed standard of review for agency procedure also seems inappropriate for the PUC. The Tentative Recommendation states that the Law Review "Commission believes that California courts should retain the power to impose administrative procedures not found in a statute." (Tentative Recommendation at 14.) However, the California Constitution, Article XII, Section 2 states: "Subject to statute and due process the [public utilities] commission may establish its own procedures."

Introduction of New Evidence

The provisions of proposed sec. 1123.760 (new evidence on judicial review) would also permit an unwarranted shift of authority from the PUC to the court. P.U. Code sec. 1757 currently provides that "[n]o new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it." However,

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2 Compare Asimow, 42 UCLA L. Rev. at 1219 n.226, & 1222. Asimow argues that "there are situations in which it is demonstrable in statutory text or legislative history that the legislature did intend to delegate to the agency the power to apply the law. One good example would be the application of such terms as . . . 'just and reasonable rates.' Clearly [such] phrases are so lacking in content that the legislature must have intended that agencies have primary responsibility for applying them to the facts." (42 UCLA L. Rev. at 1222 (emphasis in original).) However, it is not clear that the Tentative Recommendation adopts this approach.

the Tentative Recommendation would repeal sec. 1757. (Tentative Recommendation at 73.) Therefore, the provisions of sec. 1123.760 allowing new evidence to be introduced on judicial review would control.

The most troubling of these provisions is 1123.760(b)(2). This subdivision would allow the court to receive additional evidence not contained in the administrative record where the "agency action is a decision in an adjudicative proceeding and the standard of review by the court is the independent judgment of the court." As the proposed Comment points out, this means that the court could, in its discretion, receive new evidence not contained in the administrative record when reviewing an agency application of law to facts. (Tentative Recommendation at 47.)[3] As noted above, the PUC's decisions often involve issues that could be characterized as mixed issues of law and fact. Thus, this provision might often permit the court to consider evidence not considered by the PUC. This would necessarily tend to shift policy and decisionmaking powers from the PUC to the court, contrary to the basic thrust of the P.U. Code to delegate to the PUC the authority to make important economic decisions concerning the state's public utilities.

This shift would likely occur even though sec. 1123.760(b)(2) only allows the introduction of new evidence upon review of a "decision in an adjudicative proceeding." Based on the definitions of "decision" and "adjudicative proceeding", it appears this provision would allow the introduction of new evidence in court upon review of individualized ratemaking and initial licensing proceedings.[4] These kinds of cases

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3 Under the Tentative Recommendation, the independent judgment standard applies to agency applications of law to facts.

4 Proposed sec. 1121.220 defines "adjudicative proceeding" as "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." (Tentative Recommendation at 22, emphasis added.) The Tentative Recommendation defines "decision" as "an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." (Proposed sec. 1121.250, Tentative Recommendation at 23.) The Comment to sec. 1121.250 indicates that the section is drawn from the Administrative Procedure Act (APA). Proposed Law

(Footnote continues on next page)

constitute a major portion of the PUC's workload.

The Justifications Offered for a Single Judicial Review Statute Do Not Warrant Placing the PUC Under It

The Tentative Recommendation proposes replacing the several different methods for obtaining judicial review of agency action with a single, straightforward statute. The Tentative Recommendation justifies this approach primarily because of the difficulty of telling whether administrative mandamus, traditional mandamus, or declaratory relief applies in a particular case, and the major differences in review that depend on the distinction. (See Tentative Recommendation at 3-5.) "The goal is to allow litigants and courts to resolve swiftly the substantive issues in dispute, rather than to waste resources disputing tangential procedural issues." (Tentative Recommendation at 3.)

However, the current method of seeking review of PUC action is quite straightforward. It is not difficult to determine the proper method for seeking judicial review of the PUC. The difficulty of determining whether administrative or traditional mandamus applies, as is often the case with other agencies (see Tentative Recommendation at 4), does not arise in connection with the PUC. Administrative mandamus (CCP sec. 1094.5) does not apply to any PUC actions. Where a Commission order or decision is being challenged, a petition for writ of review is the normal method of seeking judicial review. (See P.U. Code sec. 1756.)

(Footnote continued from previous page)

Revision (LRC) Comments to the definition of "decision" in the APA state that this definition of "decision" encompasses "rate making and licensing determinations of specific application, addressed to named or particular parties such as a certain power company or a certain licensee." (See, e.g., page 3 of attachment to LRC Memorandum 94-18.) Thus, it appears that sec. 1123.760(b)(2) would authorize the introduction of new evidence in court when the court is reviewing a mixed question of law and fact in a PUC proceeding involving individualized ratemaking or initial licensing.

Moreover, under the current system neither the litigants nor the court waste resources disputing tangential procedural issues. (Compare Tentative Recommendation at 3.) In contrast, as explained in greater detail below, applying the new statute to the PUC is likely to introduce questions and doubts into an area of practice that is now relatively clear.

Placing the PUC Under the Proposed Statute Would Create Unnecessary Confusion

The proposed statute would raise a number of procedural questions, the answer to which is fairly clear under current law, but less clear under the proposed statute. For example, proposed section 1123.640(c) requires an agency to notify the parties of the period for filing a petition for review of a decision in an adjudicative proceeding. In addition that subdivision extends the time for filing a petition for review if the party is not so notified. It is not clear whether this would require the PUC to notify parties to adjudicative proceedings of the time limit for filing a petition set by P.U. Code sec. 1756. Nor is it entirely clear whether this subdivision would extend the time for filing a petition if the PUC did not notify a party of the time limit set by sec. 1756. The correct answer should be that the absolute 30 day limit set by P.U. Code sec. 1756 controls over the provisions of the proposed section. (See proposed section 1121.110, Tentative Recommendation at 21.) If not, the often numerous parties to PUC adjudicative proceedings would be unable to readily ascertain when a PUC decision is final. However, the language of proposed section 1123.640(c) does raise a question that would not arise if the PUC were not subject to the proposed statute.

For another example, the provisions of proposed sections 1123.220 & 1123.230 raise questions about whether persons not a party to a PUC proceeding can challenge the PUC's order. (See also, Tentative Recommendation at 5-6. The proposed statute "would change the rule that a person challenging a regulation must have been a party to the rulemaking proceeding" (Tentative Recommendation at 6).) The correct answer should be that P.U. Code sections 1731 and 1756 control. (Section 1731 generally requires a person to have been a party to a PUC proceeding in order to file an application for rehearing, and section 1756 requires a person to have filed an application for rehearing in order to petition the court.) But again, the proposed statute seems to raise unnecessary questions.

Proposed sections 1123.340 and 1123.350 also raise unnecessary questions. Those proposed sections provide exceptions to the exhaustion of administrative remedies requirement and the exact issue rule. The question they raise is whether these exceptions apply only to the requirements contained in the proposed statute,

or whether these exceptions also apply to the exhaustion of administrative remedies requirements and exact issue rules contained in the P.U. Code. I submit that the correct answer should be that the provisions of the P.U. Code control and that the proposed exceptions would therefore not apply.

Given that the provisions of the P.U. Code will control over a good number of the provisions of the proposed statute, the argument for applying the statute to the PUC in the first place is reduced. In short, existing law provides a simpler, clearer, and more certain framework for judicial review of the PUC than does the Tentative Recommendation, even if it were modified to accommodate some of the PUC's problems.

In sum, the PUC should be excluded from the new statute proposed in the Tentative Recommendation. The proffered justifications for the proposed new statute do not apply to the PUC. Instead, the new statute would unnecessarily confuse judicial review of the PUC. Moreover, as explained above, the proposed statute would increase unwarranted judicial interference with functions delegated to the PUC. Indeed, the functions of the PUC are generally unlike the functions performed by most other state or local administrative agencies. Much of the PUC's work, although classified as "adjudication" under the proposed statute, in fact primarily involves rate-making, policymaking, and other future-oriented decisionmaking. On the other hand, as argued above, much of the proposed statute seems primarily designed for judicial review of adjudication concerning past facts. Furthermore, leaving the PUC out of the proposed new statute should not create any particular confusion; the PUC is a constitutional agency and one of a very few agencies that are subject to review only by the Supreme Court. In addition, the Tentative Recommendation already recognizes that some exemptions from the proposed judicial review statute are justified. (See Tentative Recommendation at 5 n.11.) In recognition of its unique role, the PUC should also be exempt from the proposed judicial review statute.

Sincerely,

Daniel Wm. Fessler
President

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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November 15, 1995

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

Dear Mr. Sterling:

This is in response to your request for comment on your proposed comprehensive revision of the procedures for judicial review of governmental action. Specifically, we are responding to the Commission's Tentative Recommendation in regard to Judicial Review of Agency Action dated August 1995.

The State Board of Equalization is a constitutional agency made up of four members elected from equalization districts, with the State Controller as an ex-officio member.

The Board has administrative responsibilities with respect to the revenue laws of this state related to business and excise taxes, property tax, and income and franchise tax. The Board enforces and administers various of the excise tax and fee laws of this state, including the Sales and Use Tax Law, and laws related to the taxation of alcoholic beverages, cigarettes, gasoline, diesel fuel, electricity, telephone service, hazardous waste, solid waste, and insurance premiums. Insofar as property tax is concerned, the Board functions as a central assessing agency with respect to public utility properties, and the Board enforces and administers two property taxes imposed by the state --the Private Car Railroad Tax and the Timber Yield Tax. The Board also serves as an administrative appellate body with respect to assessments made by the Franchise Tax Board under the Personal Income Tax Law and the Bank and Corporation Tax Law.

As the Commission is aware, the distinction between the power to tax (revenue raising) and the power to regulate (police powers) is well recognized in the law. In re Guerrero, (1886) 69 Cal. at p. 91. A tax is not a penalty. This central distinction is recognized in the California Constitution at Article XIII, section 32, which provides as follows:

> "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature." (Emphasis added.)

This distinction is also recognized by the courts in the standard of judicial review which the courts have adopted as appropriate in matters of taxation. Insofar as taxes are concerned, claimants are entitled, upon prior payment of the tax, to maintain a suit for refund, in which the claimant is entitled to a de novo consideration of evidentiary matters. In other words, review is not "upon the record" nor subject to the "substantial evidence" standard, as generally it is when the government exercises its regulatory powers. Standard Oil Co. v. State Board of Equalization (1936) 6 Cal.2d 557.

Your Commission has itself recognized this distinction in its analysis and in proposed Code of Civil Procedure section 1120. Section 1120 provides that, except as provided for in subdivision (b), the new title governs judicial review of agency action by any state agency. Subdivision (b) specifically provides that the new title does not govern or apply in regard to the following:

> "(3) An action for refund of taxes under Chapter 5 (commencing with Section 5096) of Part 9 of Division 1 of, or Article 2 (commencing with Section 6931) of Chapter 7 of Part 1 of Division 2 of, the Revenue and Taxation Code."

The quoted language refers to the remedies which are available to persons who have paid locally-imposed property tax (Rev. & Tax. Code § 5140), and to persons who have paid sales and

use tax (Rev. & Tax. Code § 6933). In both cases, the tax must be paid prior to commencement of the action. As to property tax, review is de novo in the case of state-assessed property. As to sales tax, review is de novo.

The same principles which support the exclusion of the referenced subject matters would also apply with respect to the following state-imposed and state-administered business taxes and fees and property taxes (references are to Revenue and Taxation Code sections):

Business Taxes:	Action for Refund
Insurance Tax	13101
Energy Resources Surcharge	40127
Emergency Telephone Users Surcharge	41110
Hazardous Substances Tax	43473
Childhood Lead Poisoning Prevention Tax	
Occupational Lead Poisoning Prevention Fee	
Integrated Waste Management Fee	45703
Underground Storage Tank Maintenance Fee	50145
Tire Recycling Fee	55243
Oil Recycling Fee	
Hazardous Spill Prevention Fee	
Oil Spill Response Fee and Oil Spill Prevention and Administration Fee	46523
Motor Vehicle Fuel License Tax	8148
Use Fuel Tax	9173
Diesel Fuel Tax	60543
Alcoholic Beverage Tax	32413
Cigarette and Tobacco Products Tax	30403
Property Taxes:	
Private Railroad Car Tax	11573
Timber Yield Tax	38613

Insofar as property taxes are concerned, there are two additional areas where the Board conducts adjudicative hearings

relating to the taxpayer's property tax issues, but judicial review of those decisions only occurs when the taxpayer files a suit for refund challenging the underlying assessment. There is no direct review of the Board's action. One situation arises under Revenue and Taxation Code section 254.5, subdivision (b), relating to the Board's determination of whether an applicant qualifies for the property tax welfare exemption. The other situation occurs under subdivision (g) of section 11 of Article XIII of the California Constitution relating to the review of assessment of publicly-owned property. The provisions of subdivision (g) are implemented by Revenue and Taxation Code sections 1840 and 1841. In both of these cases, payment of the tax must be made before judicial review may be sought (by way of suit for refund) and in both cases the trial is de novo.

Finally, insofar as income and franchise tax matters are concerned, Revenue and Taxation Code section 19381 provides that taxpayers may not bring injunction actions, or writs of mandate, to prevent or enjoin the assessment or collection of any tax, except an individual may, after appealing to the State Board of Equalization, file in a superior court an action against the Franchise Tax Board to determine the fact of his or her residence in California. Otherwise, Revenue and Taxation Code section 19382 provides that after payment of income tax and a denial by the Franchise Tax Board of a claim for refund, any taxpayer may bring an action against the Franchise Tax Board upon the ground set forth in the refund claim.

The law does not contemplate that there should be judicial review of the State Board of Equalization action in hearing income tax appeals. This is because of the anti-injunction provision in the California Constitution, and because the remedy available to the taxpayer--a suit for refund--is specifically identified in the referenced sections. In both cases, the Superior Court proceedings are de novo.

* * * * *

We are confident that it is not the intention of the Commission to propose a modification to the Code of Civil Procedure which would be inconsistent with the California Constitution or which would afford to the taxpayers of this state a lesser standard of judicial review than they now enjoy.

We would request that the Commission revise proposed Code of Civil Procedure section 1120(b)(3) to exclude from the reach of the proposed mandamus procedure the tax and fee processes which we have identified for you. The items we have identified could be excluded by specific references, although that mechanism would be cumbersome. Additionally, such an approach would not address the problem of remedy with respect to taxes and fees which may be enacted in the future. We would recommend that section 1120(b)(3) be revised to deal with the problem generically. We would be happy to assist the Commission in developing language to resolve this matter.

Sincerely,

Burton W. Oliver
Executive Director

BWO:sr

cc: Honorable Johan Klehs
Honorable Ernest J. Dronenburg, Jr.
Honorable Dean Andal
Honorable Brad Sherman
Honorable Kathleen Connell

bc: Mr. Glenn A. Bystrom - MIC:43
Ms. Judy A. Agan - MIC:69
Mr. John W. Hagerty - MIC:63
Mr. Allan K. Stuckey - MIC:31
Mr. E. L. Sorensen, Jr. - MIC:83
Ms. Margaret S. Shedd - MIC:66

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Workers' Compensation Appeals Board
455 Golden Gate Avenue
San Francisco, CA 94102
Tel: (415) 703-1870 ATSS (Caldex): 593-1870

PETE WILSON, *Governor*

October 6, 1995

NATHAN STERLING
Executive Secretary
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

Re: CLRC TENTATIVE RECOMMENDATION - Judicial Review of Agency Action

Thank you for the opportunity to comment on the above recommendation. The purpose of this letter is to express the Workers' Compensation Appeals Board's opinion on application of your proposal to appellate review of Appeals Board's decisions.

You will recall that the Division of Workers' Compensation and the Workers' Compensation Appeals Board previously requested exemption from the CLRC TENTATIVE RECOMMENDATION -JULY 1994 - Administrative Adjudication by State Agencies. A copy of the September 29, 1994 correspondence with attached memorandum from Casey Young, Administrative Director of the Division of Workers' Compensation and your response of December 5, 1994 is attached. Mr. Young's memorandum will provide useful background as well as support for the following commentary.

Article XIV, Section 4 of the California Constitution expressly vested the Legislature with plenary power to create and enforce a complete system of workers' compensation by appropriate legislation. It was mandated that such legislation have full provision for vesting power, authority and jurisdiction in an administrative body with requisite government functions to determine any workers' compensation dispute to the end that administration of workers' compensation legislation "shall accomplish substantial justice in all cases, expeditiously, inexpensively and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State..."

The California Constitution specifies that the Legislature has plenary power to provide for settlement of disputes by "an industrial accident commission, by the courts, or by either, any or all of these agencies, either separately or in combination..." The Legislature chose to treat workers' compensation adjudication in a special way by vesting in the seven member Workers' Compensation Appeals Board "judicial power" to adjudicate workers' compensation disputes.

Consistent with this "judicial power," the Labor Code provides general guidelines for pleadings and trial procedures for the workers' compensation referees, reconsideration procedures for the Appeals Board and appellate review procedures for the appellate courts. In addition, the Workers' Compensation Appeals Board is given authority to adopt rules of practice and procedure. Labor Code section 5708 provides that all

hearings and investigations by the Appeals Board or its workers' compensation referees are governed by the Labor Code and Appeals Board rules. In this regard, the Workers' Compensation Appeals Board is not bound by the Administrative Procedures Act and its rules of practice and procedure are exempt from substantive review by the Office of Administrative Law. Workers' compensation law is a certified specialty of the State Bar. Certified specialists in workers' compensation law must have a thorough knowledge of substantive law on issues including rehabilitation, nature, extent and duration of disability, medical and factual issues of industrial causation, insurance coverage and a myriad of other complex issues unique to workers' compensation law and procedures. This expertise of the members of the State Bar enhances the Appeal Board's own expertise which is consistently relied upon by the appellate courts.

Pursuant to the Article IV, section 4 of the California Constitution, it is the intent of the Legislature that the Workers' Compensation Appeals Board not only resolve disputes but judicially carries out the social policy of Article IV, section 4 by interpreting and implementing workers' compensation laws. This is usually done by three member panels reviewing individual cases.

Persons aggrieved by decisions of workers' compensation referees may file petitions for reconsideration with the seven member Appeals Board in San Francisco. Workers' compensation referee decisions issue after hearings where attorneys present evidence in an adversarial setting. If reconsideration is not sought, the decision of the workers' compensation referee becomes final with no further review by the Appeals Board or the appellate courts. The grounds for such petitions are set forth in Labor Code section 5903 and include that by such order, decision or award, the Appeals Board acted without or in excess of its power; that the order, decision or award was secured by fraud; that the evidence does not justify the findings of fact; that there is new evidence available which could not have been discovered and produced at hearing; and that the findings of fact do not support the order, decision or award. The Appeals Board reviews petitions for reconsideration in panels of three and must issue its decisions within 60 days from the date the petition for reconsideration is filed. The Appeals Board, on its own motion, may review final orders, decisions or awards of workers' compensation referees within 60 days of the filing of such order, decision or award. The Appeals Board has full authority to consider both issues of fact and law with reference to petitions for reconsideration. In addition, the Appeals Board may use its removal power under Labor Code section 5310 to review interim and non final orders. Also, the Appeals Board is empowered to issue en banc decisions to achieve uniformity of decision or in cases presenting novel issues.

The Legislature passed the Margolin-Bill Greene Workers' Compensation Reform Act of 1989 and since that time has continued to modify and refine that reform legislation. Such reforms were both substantive and procedural and were intended to provide appropriate workers' compensation benefits to injured employees in an expeditious matter. The judicial responsibility for interpreting and implementing this legislation belongs to the Appeals Board. The unique and special effect of these reforms on the workers' compensation community cannot be over emphasized as well as the special expertise of the Appeals Board, its workers' compensation referees and staff to which the appellate courts defer. (See *West vs. IAC* (1947) 79 C.A. 2d 711, 719; *Raymond Plastering vs. WCAB* (1967) 252 C.A. 2d 748, 753; *Nickelsberg vs. WCAB* (1991) 54 Cal. 3d 288, 299.)

Presently, a party aggrieved by a final order, decision or award from the Appeals Board must file a petition for writ of review with the court of appeal for the appellate

district in which that person resides within 45 days after the filing of the order decision or award. The extent of that review is set forth in Labor Code section 5952 which provides:

> "The review by the court shall not be extended further than to determine , based upon the entire record which shall be certified by the appeals board whether:
> (a) The appeals board acted without or in excess of its powers.
> (b) The order, decision, or award was procured by fraud.
> (c) The order, decision, or award was unreasonable.
> (d) The order, decision, or award was not supported by substantial evidence.
> (e) If findings of fact are made, such findings of fact support the order, decision or award under review.
>
> Nothing in this section shall permit the court to hold a trial de novel or take evidence, or exercise its independent judgment on the evidence."
> (Emphasis added.)

Labor Code section 5953 provides that the "findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the appeals board..."

Presently, some ninety percent of the petitions for writ of review are denied without further proceedings. The remaining ten percent of the cases, where the petitions for writ of review are granted, are set for oral argument and the Appeals Board is obligated to certify its record to the court. (Labor Code section 5951)

The above review procedures have worked efficiently and been cost effective for more than eighty years and carry out the Legislature's intent that the Appeals Board be the arbiter of workers' compensation disputes and the primary interpreter and implementer of workers' compensation law.

The proposals contained in CLRC's July 1995 tentative recommendation on judicial review of agencies are inconsistent with both the California Constitution and Labor Code mandates for workers' compensation administration and adjudication and would result in confusion in the appellate courts and be contrary to the proposal's stated goal to swiftly resolve substantive issues in dispute and limit the time spent on review of tangential procedural issues.

First, the Legislature has specifically rejected any exercise of independent judgment by the appellate courts on review of workers' compensation matters. The substantial evidence test as provided in Labor Code 5952 has been applied by the appellate courts since the inception of workers' compensation in the early 1900s. The appellate courts have deferred to the Appeals Board's expertise in applying the substantial evidence test. An application of the independent judgment test to the appellate courts would allow them to needlessly intrude into interpretation and implementation of workers' compensation law to the detriment of the constitutional and legislative mandate for a complete workers' compensation system with judicial power for determining disputes in the Workers' Compensation Appeals Board.

Second, there is concern about the proposed rule which deletes the requirement that a person seeking review of a regulation must have objected to agency action. The adoption of rules of practice and procedure by the Appeals Board involved participation by every

segment of the workers' compensation community including injured employees, employers, insurers, attorneys and the medical community which both treats injured employees and furnishes forensic medical reports. Proposed rules are widely circulated in the community before the formal rules making process takes place. The proposed rules of practice and procedure are fully aired at public hearing with every segment of the community given an opportunity to respond. Permitting a person who has not participated in the rule making process to seek review, allows that person to impede implementation of rules to the detriment of the entire workers' compensation community. It would also discourage participation in the rule making process which would leave the Appeals Board without necessary input to make a final decision on adoption of rules.

Third, the procedures for review outlined in the CLRC's July 1995 proposal are cumbersome and time consuming when compared to the expedited review process now available for workers' compensation cases. Presently a petition for writ of review must be filed within 45 days from the date of filing of the Appeals Board decision. Under the proposed procedures, the time for filing what is essentially a notice of appeal could be up to 180 days from the date of decision if the party is not given notice of the date which review must be sought. Even if the 30 day provision applies, there is another 60 days to file an opening brief and another 15 days if the record of the agency is requested. Presently, the certified record of the Appeals Board proceedings is furnished the appellate court only if the petition for writ of review has been granted. When denying a petition for writ of review, the court has already reviewed relevant documents attached by the filing party to that party's petition for writ for review. Under the proposed procedure, the Appeals Board certified record would be requested in nearly every case placing an undue burden on the Appeals Board and the appellate courts. In short, the present appellate review process for workers' compensation cases is extremely expeditious and is usually completed within 60 days after the petition for writ of review is filed if the petition for writ of review is not granted. This again is consistent the stated goal of CLRC's recommendation.

Petitions for writs of mandate or prohibition are filed in the appellate courts to challenge interim or procedural orders or action by the Appeals Board. In most workers' compensation cases, such relief is denied because the petitioner is not yet aggrieved, has not exhausted administrative remedies, irreparable harm has not been demonstrated or the issue which is the subject of the petition has become moot. CLRC's proposal would allow the courts to use independent judgment and impose administrative procedures not found in a statute. This would again be an intervening impediment to the Appeals Board's constitutional mandate and could result in additional costs to a system which presently provides a straight forward, efficient, cost effective method for appellate review.

The above comments constitute our preliminary response to the CLRC's TENTATIVE RECOMMENDATION JULY, 1995. As we continue to study this proposal, we look forward to further opportunity to comment as well as participation in further proceedings. If you have any questions, please contact the undersigned at (415) 703-1870 or, on or after October 16, 1995, (415) 975-2030.

Effective immediately, our new mailing address is:

Workers' Compensation Appeals Board
POB 429459
San Francisco, CA 94142-9459

Effective, October 16, 1995, special deliveries via U.P.S., Express Mail, or other private express services (Federal Express, etc. must be addressed as follows:

Workers' Compensation Appeals Board
45 Fremont, Suite 410
San Francisco, CA 94105-2204

Please send all regular mail including notices and correspondence to the above mailing address. Thank you for your cooperation.

Very truly yours,

RICHARD W. YOUNKIN
Secretary and Deputy Commissioner
Workers' Compensation Appeals Board

cc. CASEY YOUNG, Administrative Director
DIVISION OF WORKERS' COMPENSATION

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
OFFICE OF THE ADMINISTRATIVE DIRECTOR
455 Golden Gate Ave., Rm. 5182
San Francisco, CA 94102
Tel: (415) 703-4942
Casey L. Young

PETE WILSON, Governor

September 29, 1994

Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Stuite D-2
Palo Alto, CA 94303

Dear Mr. Sterling:

Enclosed please find a memorandum on behalf of the Division of Workers' Compensation commenting on the California Law Revision Commission's July 1994 Tentative Recommendation on Administrative Adjudication by State Agencies. We appreciate the opportunity to comment on the proposal.

Please feel free to contact me if you would like further information regarding the structure and functioning of the Division of Workers' Compensation and the Workers' Compensation Appeals Board.

Sincerely,

CASEY L. YOUNG

CLY/JS/ml
encl.

STATE OF CALIFORNIA Division of Workers' Compensation
DEPARTMENT OF INDUSTRIAL RELATIONS
455 Golden Gate Avenue Room 5182
San Francisco, CA 94102

MEMORANDUM

Date: September 29, 1994

To: CALIFORNIA LAW REVISION COMMISSION

From: CASEY L. YOUNG
Administrative Director
Division of ~~Workers'~~ Compensation

Subject: CALIFORNIA LAW REVISION COMMISSION
TENTATIVE RECOMMENDATION - JULY 1994
ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

I appreciate the opportunity to comment upon the California Law Revision Commission's Tentative Recommendation for unifying the procedures applicable to administrative adjudication by state agencies in California. I support the goals of the proposal: making agency procedures more accessible and fair, increasing flexibility of agency procedures, and maximizing efficient use of state resources. However, I believe these goals can only be served by exempting the Division of Workers' Compensation and the Workers' Compensation Appeals Board from the Administrative Procedure Act. Inclusion of workers' compensation proceedings would undermine the Constitutional mandate to provide "substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character ..." California Constitution Article XIV, Section 4.

THE UNIQUE CONSTITUTIONAL NATURE OF THE WORKERS' COMPENSATION SYSTEM NECESSITATES EXEMPTION OF THE DIVISION OF WORKERS' COMPENSATION AND THE WORKERS' COMPENSATION APPEALS BOARD FROM THE ADMINISTRATIVE PROCEDURE ACT

The proposed statute exempts hearings of the Public Utilities Commission from the APA. Page 10 of the textual material prefacing the proposed amendments to the Government Code states that the Public Utilities Commission is exempted because it is a constitutional agency authorized to establish its own procedures, subject to statute and due process. The DWC/WCAB is also a constitutionally authorized agency. While the Legislature is given some latitude in providing an adjudicatory system, the Legislature is

instructed that it may combine into one statute all the provisions for a complete system of workers' compensation.

The California Constitution, Article XIV, Section 4 expressly vests the Legislature with "...plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability....The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by other, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate court of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined." The Constitution describes "a complete system of workers' compensation" to include "adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury ... incurred ... in the course of their employment ...; full provision for such medical, surgical hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage...; full provision for regulating such insurance coverage in all its aspects...; ... full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute...." California Constitution, Article XIV, Section 4.

The justification for excluding the Public Utilities Commission from the proposed Administrative Procedure Act applies with equal force to the DWC/WCAB. Like the Public Utilities Commission, the workers' compensation system is mandated by provisions of the State Constitution. The Legislature has created the DWC and WCAB, and has adopted numerous provisions in the Labor Code to create and enforce a complete system of workers' compensation.

Workers' compensation has been the subject of intense legislative interest in recent years and there have been many statutory changes adopted to reform the system. Major reform bills were passed in 1989 and 1993. The legislation effected many procedural as well as substantive changes in workers' compensation law. For example, the procedure used to "commence proceedings before the WCAB" was changed in 1989, and changed again in 1993. Labor Code §5401. The time at which the parties may undertake discovery was changed in 1989 and 1993. Labor Code §5401. The parameters for admissibility of medical opinion evidence were substantially changed. Labor Code §4060, 4061, 4062. A rebuttable presumption of compensability was created for claims that are not denied within 90 days. Labor Code §5402. A mandatory settlement conference procedure and discovery cut-off date were instituted. Labor Code §5502. Mandatory and voluntary arbitration were authorized. Labor Code §5270 et seq. These statutory provisions are all part of the complete system of workers' compensation that the legislature has created in the Labor Code pursuant to the constitutional directive. The legislature needs to maintain maximum ability to revise workers' compensation procedures to carry out its constitutional obligation to provide a complete system. Subjecting the workers' compensation system to the Government Code's APA provisions would substantially interfere with the ability to craft workers' compensation procedures to the unique needs of the system.

The DWC/WCAB is not just another state agency. It has a special constitutional mandate which calls for special procedures. The many regulatory and decision making functions of the Division of Workers' Compensation need to be integrated into a "complete system." The Legislature has set forth its intent in Labor Code §3201 as follows: "This division [4] and Division 5 (commencing with Section 6300) [statutes relating to workers' compensation] are an expression of the police power and are intended to make effective and apply to a complete system of workers' compensation the provisions of Section 4 of Article XIV of the California Constitution." Subjecting the workers' compensation adjudication system to the Administrative Procedure Act would frustrate the efforts to maintain a complete integrated system to provide for injured workers. Workers' compensation is vitally important to workers in California and to the economy as a whole due to its impact on the cost of doing business in the State. The Legislature should not restrict the flexibility to shape special workers' compensation provisions by making the APA applicable.

DWC recommends that proposed APA §612.110 be revised to include the following language:

"(d) This division does not apply to the Division of Workers' Compensation or the Workers' Compensation Appeals Board."

THE WORKERS' COMPENSATION SYSTEM INVOLVES A SPECIALIZED AND INSULAR BODY OF LAW THAT IS MOST APPROPRIATELY SEGREGATED FROM ADMINISTRATIVE ADJUDICATION PROCEDURES APPLICABLE TO EXECUTIVE BRANCH AGENCIES

Clearly one of the main purposes of the proposal is to establish uniformity of administrative procedure so advocates appearing before various agencies do not have to be burdened and disadvantaged by having to identify and comply with a multitude of different procedures. The explanatory text notes that some agencies have poorly developed or unwritten procedures which are not generally available to non-specialists. This justification for unification of administrative procedure is not applicable to matters before the DWC and WCAB. Procedures of the DWC and WCAB are promulgated in accordance with Labor Code §§5307, 5307.3, 5307.4, and are codified in Title 8, California Code of Regulations. They are easily accessible to all attorneys and parties who appear before the WCAB.

Workers' compensation is a very specialized area of law. Generally attorneys who come before the WCAB and DWC practice exclusively in the workers' compensation field and are thoroughly familiar with the procedures that govern the proceedings. It is particularly noteworthy that the State Bar recognizes workers' compensation as an area of specialty certification for attorneys.

The Labor Code and interpretive regulations constitute an integrated system of substantive rights and dispute resolution mechanisms that have been unhampered by provisions of other codes. There is a long history of workers' compensation as a creature of the Labor Code, and a large body of appellate case law exists. Workers' compensation is not like most other administrative systems that may handle only a few score or few hundred administrative hearings per year. In 1993, over 320,000 hearings were conducted by the WCAB. The procedures for hearings by the DWC/WCAB have evolved over a very long period to cope with the volume and complexity of matters to be resolved. Breaking the integrity of workers' compensation as a creature of the Labor Code would wreak havoc with the system.

THE AVAILABILITY OF THE SPECIAL HEARING PROCEDURE UNDER THE ADMINISTRATIVE PROCEDURE ACT IS NOT ADEQUATE FOR THE DWC AND WCAB BECAUSE APPLICABILITY OF THE APA WOULD ENGENDER CONFUSION AND LITIGATION AND WOULD NOT RESULT IN ANY ADDITIONAL PROCEDURAL PROTECTIONS

The prefatory text of the proposed APA acknowledges that "there will be some cases where the general procedure is not appropriate, and there are situations where it is clear that the provisions of the statute will not work for the circumstances of a particular agency or type of hearing". There are a multitude of Labor Code and regulation provisions setting adjudication procedures that conflict with the proposed APA. Section 612.140 specifies that "a statute applicable to a particular agency or decision prevails over a contrary provision of this division". If a special hearing procedure were not adopted to supersede the APA procedures, it would be horrendously burdensome for parties to determine where the Labor Code and APA overlapped or conflicted. As a practical matter, it would be absolutely critical that the WCAB and DWC adopt special hearing procedures so that all parties would know the applicable procedure. Most likely the DWC and WCAB would adopt the "existing regulations" pursuant to §633.040, since these comprehensive regulations have been specially tailored over time to the needs of the workers' compensation system.

The question thus arises, of what use is it to have the APA applicable to DWC/WCAB if the current Labor Code and DWC/WCAB regulations will continue to govern the compensation proceedings? None whatsoever. It will only create confusion to have the APA "apply" to DWC/WCAB and yet have all of the proceedings be governed by rules of the Labor Code and DWC/WCAB regulations. I recognize that for certain agencies the APA's provision of specified requirements for adoption of special hearing procedure will in effect establish due process constraints that the agency rules might otherwise lack. This rationale does not apply to workers' compensation as the practice and procedure of the DWC and WCAB already substantially comply with the "requirements for special hearing procedure" set forth in §633.030.

Section 633.030(a)(1) requiring the presiding officer to be free of "bias, prejudice, and interest" has its parallel in Labor Code §5311 which allows a party to object to a workers' compensation judge on the grounds specified in Code of Civil Procedure §641 (applicable to objections to a referee.)

Section 633.030(a)(2) requires that the adjudicatory function be separated from the investigative, prosecutorial, and advocacy functions within the agency. Many of the separation of functions concerns are not relevant to the WCAB and DWC which serve almost exclusively as neutral agencies to resolve disputes between private parties. The WCAB is more akin to a court than to an administrative agency that investigates and then prosecutes a person for regulatory violations. Neither workers' compensation judges nor the WCAB itself have any prosecutory or advocacy functions, and are disinterested in the substantive outcome of the case.

Within the DWC, employees in the Rehabilitation Unit called "Rehabilitation Consultants" conduct some informal administrative proceedings to resolve disputes between private litigants. Labor Code §4645. It is unclear whether any of these proceedings would be subject to the proposed APA. Even if the proceedings were subject to the APA, there would not be any separation of functions problems. The Consultants are disinterested in the outcome of the case and do not serve any prosecutorial or advocacy role. They serve as neutral hearing officers for disputes between private parties.

The only function of the DWC/WCAB in which the DWC acts as prosecutor is the audit function. Under Labor Code §§ 129 and 129.5 the Administrative Director of the DWC is charged with auditing insurers, self-insured employers, and third-party administrators to determine if the entities are complying with their workers' compensation obligations. Section 129.5 provides that the Administrative Director shall assess administrative penalties where violations are found. Labor Code §129.5(e) provides that an insurer, self-insured employer, or third-party administrator may request a "conference" with the administrative director after the assessment of penalties. By regulation, this conference is a hearing where the agency and the audit subject may present evidence to support or rebut the alleged violations. The Labor Code does not separate the functions of auditing and reviewing a challenge to the audit findings, but allows the agency head, the administrative director of DWC, to act in both functions. In practice, there is a complete separation of the audit unit staff from the Administrative Director and his hearing officer. The administrative director has delegated authority to the audit unit to conduct audits of workers' compensation claims files, and to assess administrative penalties in a "Notice of Penalty Assessment". The administrative director delegates to a hearing officer the authority to hold a hearing, and issues a decision after review of the entire record. The hearing officer who presides over the hearing is not a part of the audit unit staff and ex parte contact between audit unit staff and the hearing officer and administrative director is scrupulously avoided.

Section 633.030(a)(3) requires that ex parte communications be restricted. Title 8, California Code of Regulations §10324 precludes written or oral ex parte communications with the WCAB or a workers' compensation judge.

Section 633.030(a)(4) requires the hearing to be open to public observation. The Labor Code makes reference to "open hearings" in §5703 and §5704. In practice, WCAB hearings are open to the public unless they involve sensitive issues requiring privacy, such as HIV infection of a worker.

Section 633.030(a)(5) requires language assistance be made available, and §648.245(c) specifically states that, for workers' compensation matters, the costs of interpreters are to be paid in accordance with regulations of the DWC and WCAB. Labor Code Section 5811 provides for interpreters at hearings, depositions, and other settings necessary to ascertain the validity or extent of injury. It also provides that interpreters fees may be allowed as costs. The DWC rules at Title 8, California Code of Regulations §9795.1 through 9795.4 set forth a fee schedule, require notice to injured workers of the right to an interpreter, and describe the circumstances in which an interpreter would be provided.

Section 633.030(a)(6) requires that each party have the right to present and rebut evidence. Labor Code §5700 states that "Ether party may be present at any hearing, in person, by attorney, or by any other agent, and may present testimony pertinent under the pleadings." In addition to testimony, a party is permitted to present other kinds of evidence in support of its case and in rebuttal to its opponent's case. Labor Code §5703 states that "The appeals board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing: (a) Reports of attending or examining physicians...(b) Reports of special investigators..., (c) Reports of employers, containing copies of time sheets, book accounts, reports, and other records properly authenticated, (d) Properly authenticated copies of hospital records..., (e) All publications of the Division of Industrial Accidents, (f) All official publications of state and United States governments, (g) Excerpts from expert testimony received by the appeals board...."

Labor Code §5704 states that "...matters added to the record, otherwise than during the course of an open hearing, shall be served upon the parties to the proceeding, and an opportunity shall be given to produce evidence in explanation or rebuttal thereof before decision is rendered." See also WCAB Rules providing right to cross-examine a physician and allowing continuance of hearing for rebuttal testimony where medical testimony is allowed at hearing. Title 8, California Code of Regulations §§10606, 10610.

Section 633.030(a)(7) requires the decision to be in writing, based on the record, and include a statement of the factual and legal basis of the decision. Labor Code §5313 states that "the appeals board or the workers' compensation judge shall...make and file findings upon all facts involved in t he controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision order, or award there shall be served ... a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made."

Section 633.030(a)(8) states that a decision may not be relied on as precedent unless the agency designates and indexes the decision as precedent. Although the agency itself does not designate and index precedent decisions, Matthew Bender publishes a case reporter, California Compensation Cases, that includes significant WCAB decisions. The existence of this reporter is universally known to workers' compensation practitioners. The California Compensation Cases would be available to the general public at law libraries. The expense to the agency of generating and maintaining an index does not appear justified when such a service is presently available to the public through commercial sources.

The structure of the DWC and WCAB already substantially complies with the proposed separation of functions prerequisites for adoption of special hearing procedures. Thus, application of those prerequisites serves no useful purpose. The DWC and WCAB would likely adopt the existing regulations as the special hearing procedures. Inclusion of DWC and WCAB within the APA will just lead to confusion and possible litigation over the applicable procedures.

CONCLUSION

Workers' compensation is a specialized and insular body of law which has developed its own procedures over time. The constitutional directive to create a complete system of workers' compensation is best carried out by exempting the DWC and WCAB from the APA. The legislature should maintain maximum flexibility to reform the workers' compensation system by exempting the DWC and WCAB from the APA provisions of the Government Code. DWC suggests the following revisions to the proposed APA:

§612.110

"(d) This division does not apply to the Division of Workers' Compensation or the Workers' Compensation Appeals Board."

§648.230

"(a) The following state agencies shall provide language assistance in adjudicative proceedings to the extent provided in this article:

[***]

Department of Industrial Relations (Except the Workers' Compensation Appeals Board and the Division of Workers' Compensation)

[***]

~~Workers' Compensation Appeals Board~~

[***]"

§648.245

"~~(c) Notwithstanding any other provision of this section, in a hearing before the Workers' Compensation Appeals Board or the Division of Workers' Compensation relating to workers' compensation claims, the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the Workers' Compensation Appeals Board or the Administrative Director of the Division of Worker' Compensation, as appropriate.~~"

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.

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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,

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November 27, 1995

California Law Revision Commission
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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,

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