Study N-200 February 24, 1997

First Supplement to Memorandum 97-11

Judicial Review of Agency Action: Additional Comments

Attached are the following communications commenting on the draft statute:

At the meeting, the staff plans to discuss only the material below preceded by a bullet [•].

GENERAL COMMENT

Mr. Link says, "Overall, this is a very good bill."

SECTIONS IN DRAFT STATUTE

§ 1121. Proceedings to which title does not apply

• Lori Watson of the State Board of Equalization asked by telephone that we revise Section 1121(a)(2) as follows:

> 1121. This title does not apply to any of the following:
> (a) Judicial review of agency action provided by statute by any of the following means:
> (1) Trial de novo.
> (2) Action for refund of taxes or fees under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.
> . . . .

• The taxes and fees referred to in subdivision (a)(2) are all by trial de novo, so this provision is a special application of subdivision (a)(1). **The staff recommends this change.**

• Ms. Watson also suggested paragraphs (1) and (2) be consolidated to read: "Trial de novo, including an action for refund of taxes or fees [etc.]" The staff prefers the present draft, but does not feel strongly about it.

§ 1123.130. Judicial review of agency rule
§ 1123.140. Exceptions to finality and ripeness requirements

Section 1123.130(b) says a person "may not obtain judicial review of an agency rule until the rule has been applied by the agency." Mr. Link suggests that facial challenges to a rule should be permitted under certain conditions. Section 1123.140 provides an exception to Section 1123.130 by permitting judicial review of a rule that has not been applied if (1) it appears likely the person will be able to obtain judicial review when the rule is applied, (2) the issue is fit for immediate review, and (3) postponement of review would result in an inadequate remedy or harm disproportionate to the public benefit of postponing resolution of the matter. The Comment notes that an issue is "fit for immediate judicial review if it is primarily legal rather than factual in nature and can be adequately reviewed in the absence of concrete application by the agency." These two sections codify case law, and preserve the existing flexibility of the courts to permit facial challenges to a rule in an appropriate case. The staff discussed this with Mr. Link, and he is satisfied that these sections are adequate.

§ 1123.430. Review of agency fact finding

Section 1123.430 provides substantial evidence review of state agency factfinding. By conforming revision to Insurance Code Section 1858.6, judicial review of insurance ratemaking is made subject to the draft statute, thus changing independent judgment review to substantial evidence review. This also indirectly affects judicial review of insurance ratemaking under Proposition 103, because judicial review under Proposition 103 is "in accordance with Section 1858.6." Ins. Code § 1861.09. Mr. Link is concerned that the attempted indirect amendment of Proposition 103 may be unconstitutional under Amwest Surety Ins. Co. v. Wilson, 11 Cal. 4th 1243, 906 P.2d 1112, 48 Cal. Rptr. 2d 12 (1995). Unless the requirements for amending Proposition 103 are satisfied, he believes courts would likely construe Proposition 103 to incorporate Section 1858.6 as it read at the time of voter approval of Proposition 103, and not to pick up future amendments to Section 1858.6.

Proposition 103 may be amended only "to further its purposes" by a two-thirds vote of each house of the Legislature, or by a statute approved by the electorate. 1988 Cal. Stat. at A-290. The purpose of Proposition 103 was "to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance

Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians." *Id.* at A-276. The *Amwest* case held that an attempted statutory exemption of surety insurers from the rate rollback and rate approval provisions of Proposition 103 was unconstitutional because it did not further the purposes of the proposition. Whether a statute furthers the purposes of a proposition is likely to be a debatable question without a clear answer. However, the Legislature may include findings in the bill that the amendment furthers the purposes of the proposition, and such findings are given great weight by the courts. See *Amwest*, *supra*, at 16-26. For example, in the Commission's 1996 administrative adjudication cleanup legislation, we amended Proposition 103 with a finding that the amendments "would further the purposes of Proposition 103." 1996 Cal. Stat. ch. 390.

We could add a provision to the conforming revisions bill to say the "Legislature finds and declares that the amendment made by this act to Section 1858.6 of the Insurance Code furthers the purposes of Proposition 103." Mr. Link believes such a recital is not very useful, because it will have little effect on the courts. Or we could leave to the courts the question of whether the amendments to Section 1858.6 further the purposes of Proposition 103, in which case the standard of review of factfinding under Proposition 103 would be changed to substantial evidence, or do not further its purposes, in which case the standard of review would remain independent judgment. **The staff recommends no further action on this.**

§ 1123.830. Preparation of record

• Under Section 1123.830, the agency must deliver the administrative record within 30 days after the request and payment of the fee in an adjudicative proceeding involving an evidentiary hearing of 10 days or less, and within 60 days after the request and payment of the fee in a nonadjudicative proceeding or in an adjudicative proceeding involving an evidentiary hearing of more than 10 days. These time limits may be extended by the court for good cause.

• Mr. Siegel notes these time limits are significantly shorter than the existing 190-day period for local agencies to deliver the record. See Code Civ. Proc. § 1094.6(c). The 190-day provision was adopted by the Legislature only recently: In 1993, the time limit for local agencies was increased to 190 days from 90 days. Presumably, therefore, the short time limits in the judicial review bill will be controversial.

• Mr. Siegel believes the 30 and 60 day time limits of the draft statute are not realistic. He cites a California Coastal Commission case where the hearing was short but the record consisted of more than 100 volumes of documentary evidence. He makes three useful suggestions to address this problem. The first is to allow agencies to make the initial determination whether good cause exists to extend the time for delivering the record. This seems like a good suggestion if it excludes formal adjudication under the Administrative Procedure Act. This exclusion appears necessary because the Commission has been told that the greatest need for prompt delivery of the record is in occupational licensing cases where a long time period may permit a disciplined licensee to delay a license suspension or revocation. This suggestion may be implemented as follows:

> (c) The time limits provided in subdivision (b) may be extended ~~by the court~~ for good cause shown by either or both of the following:
>
> (1) By the court.
>
> (2) By the agency for a period not exceeding 190 days after the request and payment of the fee provided in Section 1123.910. This paragraph does not apply to review of an adjudicative proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

• Or, Mr. Siegel suggests a narrower provision with a longer time period limited to environmental agencies, where the problem of a massive documentary record appears most severe — California Coastal Commission, San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, State Water Resources Control Board, and regional water quality control boards. Probably also proceedings under the California Environmental Quality Act should be included. This may be implemented by the following provision, to go in Government Code Sections 66639 and 66641.7 and Public Resources Code Sections 29602 and 29603 (BCDC), Government Code Section 66802 (Tahoe Regional Planning Agency), Public Resources Code Section 21168 (CEQA), Public Resources Code Section 29772 (Delta Protection Commission), Public Resources Code Section 30801 (Coastal Commission), and Water Code Sections 1126, 9266, 13330, 36391, and 44961 (State Water Board and regional water quality control boards):

> Notwithstanding Section 1123.850 of the Code of Civil Procedure, the administrative record shall be delivered to the

petitioner within 190 days after the request and payment of the fee provided in Section 1123.910 of the Code of Civil Procedure.

• Lastly, Mr. Siegel suggests a longer time period where the transcript exceeds a specified number of pages. The staff has two concerns with this suggestion. First, the Coastal Commission example involved documentary evidence, not a transcript. Second, it may be hard accurately to estimate the transcript length before it is prepared. The ten-day/30-day dichotomy in the draft statute is intended to address this by assuming the transcript is likely to be longer when the hearing is lengthy.

§ 1123.850. New evidence on judicial review

• Mr. Siegel wants to delete the exception in subdivision (c) that permits open record review if review is sought solely on the ground that agency action was taken pursuant to a statute that is unconstitutional. This provision was suggested by the Commission at the November meeting and approved at the December meeting. Mr. Siegel says the provision is undesirable because:

• (1) It will allow parties to engage in "sandbagging" by withholding evidence at the administrative phase and presenting it in the judicial phase. This will burden the court, which will have to conduct a trial instead of a brief, appellate-type review of the administrative record.

• (2) It will undermine the requirement of exhaustion of administrative remedies, encouraging ill-informed agency decisions. The constitutional issue should be presented to the agency before the it makes its decision, thus promoting good government.

• (3) It is unnecessary because it is already covered: Open record review applies "in an adjudicative proceeding and the evidence relates to an issue for which the standard of review is the independent judgment of the court." Section 1123.850(b)(2). The Comment says this provision "applies to judicial review of agency interpretation of law or application of law to facts under Section 1123.420, and to factfinding in local agency proceedings to which the independent judgment standard applies under Section 1123.440." Presumably this will encompass most, if not all, constitutional questions.

• The staff thinks these points are persuasive. **The staff recommends deleting the provision for open record review where review is sought solely on the ground that agency action was taken pursuant to a statute or ordinance that is unconstitutional.**

(c) Whether or not the evidence is described in subdivision (a), the court may receive evidence in addition to that contained in the administrative record for judicial review without remanding the case ~~in either of the following circumstances~~:

~~(1) No~~ if no hearing was held by the agency, and the court finds that remand to the agency would be unlikely to result in a better record for review and the interests of economy and efficiency would be served by receiving the evidence itself. This ~~paragraph~~ subdivision does not apply to judicial review of rulemaking.

~~(2) Judicial review is sought solely on the ground that agency action was taken pursuant to a statute or ordinance that is unconstitutional.~~

§ 1123.920. Recovery of costs of suit

Section 1123.920 provides that, except as provided by court rule, the prevailing party is entitled to recover costs of suit. This continues a portion of Code of Civil Procedure Section 1094.5(a) (if the expense of preparing the record is borne by the prevailing party, it is taxable as costs) and of Government Code Section 11523 (costs of preparing record shall be assessed against petitioner when agency prevails; if petitioner prevails, agency shall reimburse petitioner for costs of preparing transcript and compiling and certifying record). Mr. Link would provide an exception exempting nonprofit public interest organizations from having costs of suit assessed against them when they do not prevail on judicial review. The staff is concerned that such a special provision would be controversial, would be vigorously opposed by public agencies, and would be a departure from existing law that would be hard to justify to the Legislature. **The staff would not exempt public interest organizations from the costs provision.**

SELECTED CONFORMING REVISIONS

Health & Safety Code §§ 1339.62-1339.64. Private hospital boards

These sections provide for judicial review under the draft statute of adjudication of a "private hospital board." This continues Code of Civil Procedure Section 1094.5(d), which applies to "cases arising from private hospital boards." Mr. Link asks whether "private hospital board" includes a peer review body, saying that, if it does, it might cause some problems. See generally Bus. & Prof. Code §§ 805-809.9. He is concerned about protecting the confidentiality of peer review records under Evidence Code Section 1157.

It seems fairly clear that "private hospital board" refers to the hospital governing board, not to subordinate committees. See, e.g., Hay v. Scripps Memorial Hosp., 183 Cal. App. 3d 753, 756, 228 Cal. Rptr. 413 (1986). However, in some cases, a peer review body may take final action affecting a physician, such as suspending clinical privileges. Bus. & Prof. Code § 809.5. The draft statute would permit judicial review if the peer review proceeding is "an adjudicative proceeding required by law, is quasi-public in nature, and affects fundamental vested rights, and the proceeding is of a kind likely to result in a record sufficient for judicial review." Section 1120. Moreover, Business and Professions Code Section 809.8 provides that the peer review provisions do not affect the availability of judicial review under Code of Civil Procedure Section 1094.5. The staff discussed this with Mr. Link. He has given it further thought, and now thinks these provisions are satisfactory.

Respectfully submitted,

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February 19, 1997

VIA FACSIMILE AND U.S. MAIL

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

RE: Judicial Review of Agency Actions

Dear Mr. Murphy:

This letter is to raise two specific concerns about the Commission's Judicial Review of Agency Action Recommendation. The first involves the weakening of the closed record requirement of current law. The second involves the shortening of the time to prepare an administrative record.

1. Closed Record

Although the proposal generally follows current law in limiting judicial review of hearing decisions to the administrative record, it creates a new exception where: "Judicial review is sought solely on the ground that agency action was taken pursuant to a statute or ordinance that is unconstitutional." (See proposed Code Civ. Proc. §1123.850, subd. (c)(2).) This exception is troubling. It will enable parties to effectively circumvent the administrative hearing process by casting their claim in constitutional terms. (A party can often allege that a statute, as it was applied to that party, constituted a denial of substantive or procedural due process, a denial of equal protection, or a denial of other state or federal constitutional rights.)

The change is unnecessary, since parties are already protected. Under current law, where evidence could not have been produced or was improperly excluded in the agency proceedings, it may be admitted by the court if the court is exercising its independent judgment (as it does in considering constitutional questions). (Code Civ. Proc., §1094.5, subd. (e).) This right is retained in the Commission's proposal. (See proposed Code Civ. Proc. §1123.850, subd. (b)(2).)

Under the proposed new exception, however, parties raising constitutional challenges will be able to present new evidence at trial even where they could have produced that evidence at the agency hearing. This is unwise. It would encourage private parties to engage in "sandbagging;" i.e., withholding evidence at the administrative phase and presenting it at the judicial phase. (See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies* (1995) 42 UCLA L. Rev. 1157, 1236.) It would also impose a significant burden on the judiciary, which would be required to conduct a lengthy trial instead of a brief, appellate-type review of the administrative record. (*Ibid.*)

Moreover, the proposed exception would significantly undermine the exhaustion of administrative remedies requirement. Exhaustion is meant to ensure that a dispute is initially decided by the agency with the technical expertise and practical experience regarding the particular subject matter. By allowing parties to withhold evidence from administrative agencies, the proposed exception promotes ill-informed agency decisions and can reduce the exhaustion requirement to a hollow formality.

Finally, if an agency's action may be unconstitutional, that fact, and the evidence which supports it, should be brought to the agency's attention before the agency reaches a final decision. This promotes good government by enabling the agency to avoid reaching a decision which is unconstitutional.

2. Time to Prepare Administrative Record

For evidentiary hearings of 10 days or less, the Recommendation would require agencies to prepare administrative records within 30 days after a request. (Proposed Code Civ. Proc. §1123.830, subd. (2)(b)(1).) This is similar to current law as to some agencies. (See Gov. Code §11523 - 30 days to prepare record in formal Administrative Procedure Act hearings.) For other agencies, however, it dramatically reduces the time allowed to prepare records. The Legislature, for example, recently lengthened from 90 days to 190 days the time that local entities have to prepare records. (See Code Civ. Proc. §1094.6, subd. (c).)

It is my understanding that, at least as to some State agencies, the 30 day time limit is not realistic. Some California Coastal Commission records, for example, involve hearings which are conducted in one day or less, yet consist of dozens of volumes (well over 100 volumes in one recent case), including transcripts, planning documents and correspondence (which are referenced in staff recommendations but which are generally not transported to the hearing) plus exhibits presented at the hearing. Given current budgets and the number of record requests, these agencies cannot gather these documents in a central location, organize them by category and chronology, and have tape recorded hearings transcribed within this time frame.

I suggest that the Commission contact agencies to determine which would not be able to meet this new time limit. (My limited inquiries indicate that most agencies are probably not aware of this proposed new requirement.) Modifications can then be developed which prevent unreasonable delays while addressing legitimate agency concerns. One possible modification is to have agencies, rather than courts, make the initial determination (but subject to judicial review) that there is good cause to extend a deadline in a particular case. (Cf. Gov. Code §11157, subd. (d), which allows agencies to extend the period which they have to decide whether to adopt a proposed decision.) Another modification is to extend the deadline for specified agencies.[1/] A third is to extend the deadline where transcripts exceed a specified number of pages.

Please note that this letter is only intended to convey the above specific concerns. It is not meant to indicate any change in the overall concerns about the Recommendation which the Attorney General has expressed in a number of letters to the Commission.

Thank you for considering this input. Please do not hesitate to contact me if you have any questions.

Sincerely,

DANIEL E. LUNGREN
Attorney General

Daniel L. Siegel

DANIEL L. SIEGEL
Deputy Attorney General

1. It might be that the practical problems in meeting this timeline are generally limited to the same land use/environmental agencies which are covered by subdivision (c)(2) of Government Code section 11430.30 (i.e., San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.)

MEMO

TO: Mark
FROM: David
DATE: February 3, 1997
RE: SB 209 (Kopp) -- Judicial review of agency decisions

Overall, this is a very good bill. As we discussed, it solves a number of procedural problems that currently exist for review of agency decisions.

I had a couple of thoughts regarding some possible problems that might be solved fairly easily.

1. Section 1123.130 (b) and 1123.40 provide that, unless a number of conditions are met, a party may not obtain judicial review of an agency rule until it has been applied. This seems to preclude ordinary rules permitting a facial challenge to an obviously bad rule. Unless there's a solid reason behind this, it should be amended to permit facial challenges, perhaps under certain conditions.

2. Section 1123.430 (a) provides that fact determinations will be reviewed under the substantial evidence test. This is a much more deferential standard than the independent review standard applicable to legal questions. Prop. 103 adopts the independent review standard for all matters, legal or factual. For better or worse, this provision is in conflict with that rule.

3. Section 1123.920 provides that the prevailing party in a suit is entitled to recover costs. There is an exception for indigents, but no one else. This provides a disincentive for public interest organizations, which are nonprofits, to file challenges if they would have to pay the costs to a government agency. With a clear enough definition (exempt under federal and state tax laws, for example) nonprofits should be exempt from this provision, too.

4. Section 1339.62 relates to judicial review of decisions by private hospital boards. I'm not sure whether private hospital boards include Peer Review Organizations. My guess is it wouldn't, but if it does, this might cause some problems.