Study N-200 April 3, 1997

Memorandum 97-16

Judicial Review of Agency Action: Senate Bill 209

Attached are four letters opposing SB 209 (now set for hearing April 22):

The objections of CSEA to substantial evidence review of state agency factfinding, and of the Planning and Conservation League and Consumers Union to new restrictions on public interest standing, have been addressed by recent amendments to the bill that were approved by the Commission's Chair and Vice Chair. These are set out below under Sections 1123.230 and 1123.430.

The Office of Administrative Law is working on language to preserve existing law on judicial review of underground regulations (which the Commission has agreed in principle to do) and to deal with other concerns. We will supplement this memo when we have that language. Other unresolved issues are discussed below. The staff plans to discuss only material below preceded by a bullet [•].

§ 1121. Proceedings to which title does not apply

• The draft statute does not apply to an ordinance or regulation of a county board of supervisors or city council, or to a resolution of those bodies that is "legislative in nature." Section 1121. Should the draft statute apply to an ordinance or regulation that is of an administrative or executive character?

• Ordinances and resolutions may be used to exercise administrative or executive powers. Hopping v. Council of Richmond, 170 Cal. 605, 610, 150 Pac. 977 (1915); Valentine v. Town of Ross, 39 Cal. App. 3d 954, 957, 114 Cal. Rptr. 678 (1974). The name given to the enactment is of no consequence. 38 Cal. Jur. 3d *Initiative and Referendum* § 4, at 374. It may be hard to tell whether an enactment is an ordinance or a resolution. See Creighton v. Manson, 27 Cal. 613, 629 (1865) (ordinance need not be in usual form of an ordinance, nor say "be it ordained").

• The decision to exempt all local ordinances and regulations from the draft statute was based on the constitutional source of the power to enact them. Cal. Const. art. XI, § 7. But the draft statute does not distinguish between ordinances and regulations enacted under constitutional authority and those enacted under statutory authority. To make application of the draft statute turn on how the enactment is labeled elevates form over substance. It is better policy and simplifies the drafting to limit the exemption to ordinances and regulations that are legislative in nature, the same as for resolutions. **The staff recommends revising Section 1121(d) as follows:**

> 1121. This title does not apply to any of the following:
>
> . . . .
>
> (d) Judicial review of ~~either of the following~~ an ordinance, regulation, or resolution, enacted by a county board of supervisors or city council ~~:~~ ,
>
> ~~(1) An ordinance or regulation.~~
>
> ~~(2) A resolution~~ that is legislative in nature.

§ 1123.130. Judicial review of agency rule

• Section 1123.130(b) prohibits judicial review of an agency rule until it is applied by the agency. Section 1123.140 provides an exception by permitting judicial review of a rule that has not been applied by the agency if (1) it is likely the person can get review of the rule when it is applied, (2) the issue is fit for immediate review, and (3) postponement of review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit from postponement.

• The Comment says Section 1123.130 codifies the ripeness requirement for review of a rule in Pacific Legal Foundation v. California Coastal Commission, 33 Cal. 3d 158, 655 P.2d 306, 188 Cal. Rptr. 104 (1982). Professor Asimow thought it was unnecessary to codify the ripeness doctrine. He thought it would be sufficient to recognize the doctrine in a Comment.

• The Consumers Union says Section 1123.130 does not adequately codify case law, noting correctly that *Pacific Legal Foundation* applied a test balancing "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Professor Asimow recognized this discretion:

> The [California Supreme] Court indicated a preference for adjudicating such cases in the context of an actual set of facts so that the issues could be framed with enough definiteness to allow

> courts to dispose of the controversy. Yet it also indicated that courts would resolve such disputes if deferral would cause lingering uncertainty, especially where there is widespread public interest in the question.

• Section 1123.140 permits review of a rule that has not been applied by the agency if the three requirements of that section noted above are satisfied. The Consumers Union says these requirements are "unnecessary obstacles" and "go beyond existing law." The requirements that the issue be fit for immediate review and postponement would create harm disproportionate to the public benefit are similar to the language in *Pacific Legal Foundation* quoted above. And the requirement that the person can likely get review of the rule when applied is new, but seems reasonable. Nonetheless, the staff sees merit in the Consumers Union point that courts should be allowed some leeway in applying ripeness rules, particularly since they were judicially developed in the first place.

• **The staff recommends revising subdivision (b) to give the court broader discretion than it has under the exceptions in Section 1123.140:**

> 1123.130. (a) Notwithstanding any other provision of law, a court may not enjoin or otherwise prohibit an agency from adopting a rule.
>
> (b) ~~A~~ Unless there is an important public interest in having the rule reviewed immediately, a person may not obtain judicial review of an agency rule until the rule has been applied by the agency.

§ 1123.230. Public interest standing

• Section 1123.230 (public interest standing) and Section 1123.430 (standard of review of state agency factfinding) drew the strongest objections from environmental, public employee, and consumer organizations. The responsible consultant to the Senate Judiciary Committee thought the bill would have a better chance of passage if these two sections were amended to restore existing law. With the consent of Senator Kopp and the Commission's Chair and Vice Chair, we amended Section 1123.230 to delete two of the three requirements for public interest standing not in existing law — (1) that petitioner reside or conduct business in the jurisdiction of the agency, and (2) that petitioner will adequately protect the public interest. The amendments do not delete the requirement of a request to the agency to correct its action, since that is generally consistent with existing law which requires a public interest petitioner to exhaust administrative remedies. As revised, Section 1123.230 looks as follows:

1123.230. Whether or not a person has standing under Section 1123.220~~, a~~ :

(a) 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 person resides or conducts business in the jurisdiction of the agency or is an organization that has a member that resides or conducts business in the jurisdiction of the agency and the agency action is germane to the purposes of the organization.~~

~~(b) The person will adequately protect the public interest.~~

~~(c) The~~ the person has previously requested the agency to correct the agency action and the agency has not, within a reasonable time, done so. The request shall be in writing unless made orally on the record in the agency proceeding. The agency may by rule require the request to be directed to the proper agency official. As used in this subdivision, a reasonable time shall not be less than 30 days unless the request shows that a shorter period is required to avoid irreparable harm. ~~This subdivision does not apply to judicial review of an agency rule.~~

(b) Notwithstanding subdivision (a), a person has standing to obtain judicial review of a regulation adopted pursuant to the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, if the regulation concerns an important right affecting the public interest.

• These revisions do not address the objection of ACSA, CAPS & PEGC to the required request to the agency to correct its action. They say it is unnecessary because of the general requirement of exhaustion of administrative remedies, and say it will "slow down the process of putting a stop to an improper governmental activity and frustrates the original purpose of the Law Revision Commission." **Does the Commission wish to reconsider this?**

§ 1123.430. Review of agency factfinding

• The amendments to the bill revised Section 1123.430 to restore existing law on standard of review of state agency factfinding — independent judgment in an adjudication involving a fundamental vested right, otherwise substantial evidence. This was necessary to remove objections of CSEA (Exhibit pp. 3-4), ACSA, and others:

1123.430. (a) ~~Except as provided in Section 1123.440, the~~ The standard for judicial review of whether agency action is based on an erroneous determination of fact made or implied by the agency

is ~~whether the agency's determination is supported by substantial evidence in the light of the whole record.~~ :

(1) In cases in which the court is authorized by law to exercise its independent judgment on the evidence in an adjudicative proceeding, the independent judgment of the court whether the determination is supported by the weight of the evidence.

(2) In all other cases, whether the determination is supported by substantial evidence in light of the whole record.

(b) If the factual basis for a decision in a state agency ~~adjudication~~ adjudicative proceeding includes a determination of the presiding officer based substantially on the credibility of a witness, the court shall give great weight to the determination to the extent that the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

(c) Notwithstanding any other provision of this section, the standard for judicial review of a determination of fact made by an administrative law judge employed by the Office of Administrative Hearings that is changed by the agency head is the independent judgment of the court whether the agency's determination of that fact is supported by the weight of the evidence.

The amendments delete Section 1123.440 (local agency factfinding), since the local agency rule will be subsumed under the general rule in Section 1123.430. References to Section 1123.440 should be deleted from Comments to Sections 1123.410, 1123.450, and 1123.850. The Comment to Section 1123.430 should be revised as follows:

Comment. ~~Section 1123.430 supersedes former Section 1094.5(b)-(c) (abuse of discretion if decision not supported by findings or findings not supported by evidence).~~

Subdivision (a) ~~eliminates for state agencies the rule of former Section 1094.5(c), providing for independent judgment review in cases where "authorized by law." The former standard was interpreted to provide for independent judgment review where a fundamental vested right is involved.~~ of Section 1123.430 continues the substance of former Section 1094.5(c). Thus whether the court applies independent judgment or substantial evidence review of factfinding continues to be determined by case law. See, e.g., Bixby v. Pierno, 4 Cal. 3d 130, 144, 481 P.2d 242, 93 Cal. Rptr. 234 (1971) (state agency); Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 32, 520 P.2d 29, 112, Cal. Rptr. 805 (1974) (local agency); see generally Asimow, *The Scope of Judicial Review of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1161-76 (1995).

~~The substantial evidence test of subdivision (a) is not a toothless standard which calls for the court merely to rubber stamp an agency's finding if there is any evidence to support it: the court must examine the evidence in the record both supporting and opposing the agency's findings. Bixby v. Pierno, *supra*. If a reasonable person could have made the agency's findings, the court must sustain them. But if the agency head comes to a different conclusion about credibility than the administrative law judge, the substantiality of the evidence supporting the agency's decision is called into question~~.

Subdivision (b) continues the substance of language formerly found in Government Code Section 11425.50(b). The requirement that the presiding officer identify specific evidence of observed demeanor, manner, or attitude of the witness in credibility cases is in that section.

Under subdivision (c), independent judgment review of a changed determination of fact is limited to that fact. All other factual determinations are reviewed using the standard of subdivision (a) ~~— substantial evidence in light of the whole record~~.

§ 1123.460. Review of agency procedure

• Section 1123.460 provides independent judgment review with "deference" to the agency's determination of appropriate procedures. The Consumers Union says requiring "deference" to the agency's determination goes too far in interfering with the court's independent judgment. Exhibit p. 9. **The staff recommends adding the word "appropriate" in Section 1123.460 to make it parallel Section 1123.420 (review of questions of law):**

1123.460. The standard for judicial review of the following issues is the independent judgment of the court, giving <u>appropriate</u> deference to the agency's determination of ~~appropriate~~ <u>its</u> procedures:

[unlawful procedure, etc.]

This is supported by language now in the Comment: "The degree of deference to be given to the agency's determination under Section 1123.460 is for the court to determine."

The Consumers Union is concerned about the impact of Section 1123.460 on judicial review of underground regulations. The Commission has agreed to preserve existing law on this, and we expect language from OAL. **No action is necessary now.**

§ 1123.630. Time for filing petition for review in adjudication of agency other than local agency and formal adjudication of local agency

§ 1123.640. Time for filing petition for review in other adjudicative proceedings

Sections 1123.630 and 1123.640 provide time limits for judicial review of adjudication. The Consumers Union fears it may not be clear these sections do not affect time limits for nonadjudicative action. But these sections are expressly limited to a decision "in an adjudicative proceeding." Moreover, the Comment to Section 1123.630 says the section provides time limits for "review of specified agency adjudicative decisions. . . . This preserves the distinction in existing law between limitation of judicial review of quasi-legislative and quasi-judicial agency actions. Other types of agency action may be subject to other limitation periods, or to equitable doctrines such as laches." **The staff believes this is satisfactory.**

§ 1123.720. Stay of agency action

• Section 1123.720 permits the court to stay agency action before judgment if (1) petitioner is likely to prevail on the merits, (2) without a stay petitioner will suffer irreparable injury, (3) a stay will not cause substantial harm to others, and (4) a stay will not substantially threaten public health, safety, or welfare. The Consumers Union says these conditions make it "much more difficult for parties to obtain a stay of agency action." The Planning and Conservation League objects to the requirement that the court may stay agency action only if it will not cause substantial harm to others. The PCL says this takes away the court's existing authority to balance the need for a stay against possible harm to others, and to grant a stay despite possible harm to others if the need is compelling.

• The four conditions for a stay come from Model Administrative Procedure Act Section 5-111. But the Model Act conditions only apply when the agency determines not to stay its action because its action prevents a substantial threat to public health, safety, or welfare. Section 1123.720 is broader than the Model Act because the conditions in Section 1123.720 apply in every case.

• The four conditions of Section 1123.720 have parallels in existing California law. The portion of the administrative mandamus statute applicable to review of formal adjudication under the Administrative Procedure Act requires that petitioner be likely to prevail on the merits and that a stay will not cause the public interest to suffer. Code Civ. Proc. § 1094.5(h)(1). The requirements that without a stay petitioner will suffer irreparable injury and that a stay will not

cause substantial harm to others resemble the requirements for a preliminary injunction in civil practice. A preliminary injunction requires balancing "the interim harm that the plaintiff is likely to sustain, if the injunction is not issued, against the interim harm defendant is likely to suffer, if it is issued." 2 California Civil Procedure Before Trial § 39.19 (Cal. Cont. Ed. Bar, 3d ed. June 1994). A preliminary injunction is more likely to be granted if the moving party shows a threat of "irreparable" injury, although the term "irreparable" is sometimes loosely applied to mean any wrong of a repeated and continuing character. *Id.*

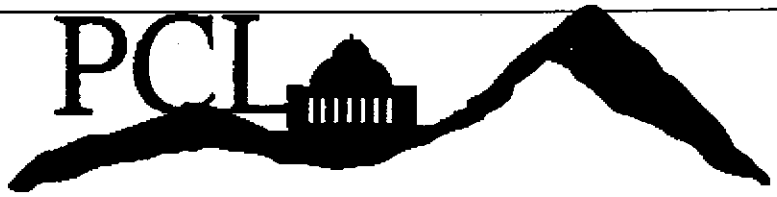
• The four conditions for a stay in Section 1123.720 do appear too restrictive. **The staff recommends revising the section more closely to approximate conditions for a preliminary injunction:**

> 1123.720. (a) The filing of a petition for review under this title does not of itself stay or suspend the operation of any agency action.
>
> (b) Subject to subdivision (g) [no stay to prevent collection of a tax], the reviewing court may grant a stay of the agency action pending the judgment of the court if it finds that all of the following conditions are satisfied:
>
> (1) The petitioner is likely to prevail ultimately on the merits.
>
> (2) ~~Without a stay the petitioner will suffer irreparable injury.~~
>
> ~~(3) The grant of a stay to the petitioner will not cause substantial harm~~ <u>The harm petitioner will suffer without a stay outweighs the possible harm a stay will cause</u> to other parties to the proceeding.
>
> ~~(4)~~ <u>(3)</u> The grant of a stay to the petitioner will not substantially threaten the public health, safety, or welfare.
>
> . . . .

• In response to PCL objections, the staff revised paragraph (3) of subdivision (b) in the bill to change "substantial harm to others" to "substantial harm to other parties to the proceeding," consistent with the Model Act.

Respectfully submitted,

Robert J. Murphy
Staff Counsel



PLANNING AND CONSERVATION LEAGUE

March 4, 1997

The Honorable John Burton
Chair, Senate Judiciary Committee
State Capitol Room #4074
Sacramento, CA 95814

RE: Senate Bill 209 and Senate Bill 261 (Kopp)—Strongly Oppose

Dear Chairman Burton:

We urge your "NO" vote on Senate Bill 209 and Senate Bill 261, which are companion measures. We understand that these bills are currently set for a hearing in the Senate Judiciary Committee on April 8, 1997.

Senate Bills 209 and 261 would radically change existing law with respect to the ability of ordinary citizens to challenge governmental decisions that they believe are illegal or improper, and would tilt the tables very strongly in favor of the government, making citizen challenges more difficult, and in some cases impossible.

It is critically important, in our system of government, for ordinary citizens to be able to mount effective challenges to potentially illegal or improper governmental actions. Unfortunately, the proposed changes in our system of judicial review that SB 209 and SB 261 would enact would significantly disadvantage citizens who wish to challenge the government, and thus more effectively insulate government agencies, at every level, from having to respond to claims of illegality or impropriety.

While the admittedly complex interactions between CCP 1094.5 and CCP 1085 can be confusing, these provisions, and the court cases that have interpreted them, provide a very significant body of law that would simply be wiped out if SB 209 and SB 261 were enacted. That body of law has protected the right of citizens to bring challenges against potentially illegal or improper governmental action.

Simple is not always better. We believe that if SB 209 and SB 261 were enacted, judicial review of agency decisions would indeed be made simpler, but only because it would be much easier for the government simply to do what it wants, without the need to worry that citizens could effectively challenge its decisions. As one example, SB 209 provides that a "stay" of a governmental action can only be granted when "the grant of a stay to the petitioner will not cause substantial harm to others (Page 28, lines 25-26)." Current law allows a court to "balance"

926 J Street, Room 612, Sacramento, CA 95814 916-444-8726 FAX 916-448-1789

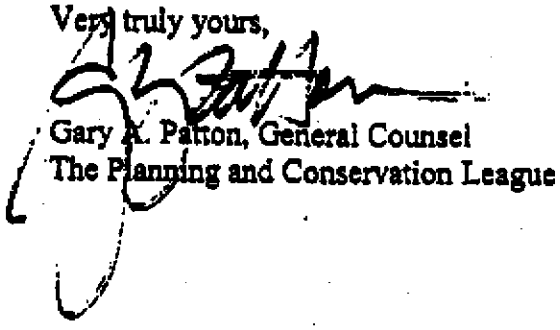
the burdens and benefits as between the parties, when deciding whether or not to grant a stay. As a practical matter, SB 209 would make it almost impossible for a citizen challenging an improper government action ever to get a stay, while the merits of his or her claim is being adjudicated. This means that erroneous and illegal decisions will be implemented (because no stay will be available), and we think this is wrong.

SB 209 would also significantly narrow the "standing" requirements in public interest litigation, restricting access to the courts in public interest cases. It would modify the "exhaustion of administrative remedies" rules, again to the apparent detriment of citizens who seek to challenge governmental actions, and would severely limit the circumstances under which an individual may bring a facial challenge to an agency rule.

Because SB 209 and its companion measure, SB 261, could have such a damaging effect on the ability of citizens to challenge inappropriate or illegal governmental actions, we must respectfully oppose both of these bills.

We strongly urge your "NO" vote on SB 209 and SB 261.

Very truly yours,



Gary A. Patton, General Counsel
The Planning and Conservation League

cc: Senator Kopp

CALIFORNIA STATE EMPLOYEES ASSOCIATION

REPRESENTING
the people who serve the people

SHERRIE GOLDEN
Legislative Affairs
1108 'O' Street, Suite 350
Sacramento, CA 95814
(916) 442-0250
Fax (916) 552-5540

March 17, 1997

Gene Wong
Consultant
State Capitol, Room 2205
Sacramento, CA 95814

RE: Senate Bill 209 (Kopp)

Dear Gene:

This is to advise you of the California State Employees' Association opposition to SB 209, which will be heard in the Senate Judiciary Committee on April 8, 1997.

Currently, there are two primary standards of review for state agency actions: independent judgment and the deferential substantial evidence test.

The substantial evidence test only requires that the court determine whether a reasonable person could have reached the agency's decision. Thus, the court will uphold the agency's action even if the court would have resolved the issue differently. This deferential test is employed in three different situations. First it applies to court review of "constitutional " administrative agencies, i.e., those agencies authorized by the California Constitution to exercise adjudicatory powers (SPB). Second it applies when nonconstitutional agencies adjudicated rights other than those which are recognized as "fundamental vested rights." lastly, the substantial evidence test applies when a nonconstitutional agency adjudicated fundamental vested rights, but the legislature has mandated the application of the substantial evidence standard of review (e.g., ALRB decisions).

The independent judgement test authorizes the court to exercise its independent judgment on the evidence to determine whether the findings are supported by the weight of the evidence and an abuse of discretion has occurred. In other words, the reviewing court evaluates the hearing record de novo, with little, if any, deference to the agency.

Independent judgment is applied when a nonconstitutional agency adjudicates fundamental vested rights and the Legislature has not specifically authorized substantial evidence review.

Decisions affecting permanent employment as well as all fundamental vested rights, must be subject to scrutiny to protect individuals from arbitrary, capricious and erroneous agency decisions.

Furthermore, due process and adjudicatory functions and rights within an agency should be mandated by statute, not merely by self-regulation that can be altered at the agency's whim. Although a particular agency may possess expertise in its area of administration, this expertise does not usually extend to constitutional rights, due process and adjudication.

Taxpayer Standing

Pursuant to Civil code section 526a, anyone who paid state taxes could bring an action to prevent the illegal expenditure of waste of, or injury to state funds or property. CSEA often utilizes taxpayer standing to prevent agencies from implementing contracts and programs.

SB 209 would eliminate taxpayer standing. Instead, standing in actions for preventing illegal expenditures and waste f taxpayer monies would require "public interest" standing. Public interest standing requires that the person: 1) reside or conduct business in the agency's jurisdiction, or is an organization with members in the agency's jurisdiction and the agency action is germane to the purposes of the organization; 2) adequately protect the public interest; and 3) has previously made either a written request or an oral request on the record to correct the agency record.

Proponents claim that taxpayer standing is incorporated within public interest standing. However, even on its face, public interest standing has additional requirements. Although requirement numbers 1 and 3 are fairly straight forward and are usually satisfied, the adequate protection of the public interest requirement is vague. Would preventing waste of taxpayer funds be "adequate" protection of the public interest? This standard is not only vague, but subjective. Furthermore, it appears that this change may also be unconstitutional. (If you would like me to pursue this argument, I will need more research.) The right of taxpayers to petition the government is an established basic right; the First Amendment guarantees the right to petition the government to redress grievance.

Other Concerns: Time Limits

In its present form, the bill exempts both SPB and DPA from the time limits for filing a petition for review (writ). However, this bill should be watched to ensure that this exemption remains. Otherwise, the time for filing a petition would be reduced form the current one year to 30 days.

Conclusion

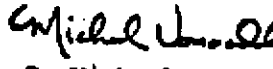
SB 209 attempts to simplify and standardize the review of agency actions, which is a laudable and ambitious endeavor. Many of the changes in SB 209 are justified.

SB 209's "one-size fits all" approach to judicial review of agency actions is inequitable and unjustified. Each agency and the actions it takes differ significantly.

Only constitutional agencies and a few other legislatively exempt agencies have statutorily mandate constitutional safeguards to ensure due process before depriving persons of a fundamental vested rights.

We would of course be happy to meet with you to discuss this further at your convenience.

Sincerely,



P. Michael Varacalli
Legislative Advocate

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Consumers Union
Publisher of Consumer Reports

March 31, 1997

Law Revision Commission
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File:_____

The Honorable John Burton
California State Senate
P.O. Box 942848
Sacramento, CA 94248-0001

Re: **SB 209**, as amended March 19, **and SB 261** (Kopp): **OPPOSE**
Hearing: Tuesday, April 8, Senate Judiciary Committee

Dear Senator Burton:

Consumers Union, the nonprofit publisher of *Consumer Reports* magazine, urges you to oppose SB 209 (Kopp) and its companion bill, SB 261 (Kopp) when these bills are heard in the Senate Judiciary Committee. These bills would make a radical change by repealing existing law regarding the ability of private individuals and public interest organizations' ability to challenge government agency action and instead create a new procedure for judicial review of agency action.[1] Consumers Union has frequently challenged unlawful or improper agency actions and we believe the bills would make it more difficult to bring such challenges; therefore we must oppose.

Before presenting our specific comments, we have several general concerns with these bills, which are sponsored by the California Law Revision Commission ("CLRC"). First, there is no great need to enact these extremely complex bills this year. The CLRC's staff report identifies the need for the proposal as the complexity and "archaic" nature of existing law regarding mandamus and administrative mandamus to review agency actions. Despite the CLRC's commendable goal of creating a rational new "unified scheme" for review of agency action, however, there is no compelling or immediate harm under current law that requires the Legislature's action this year, as opposed to next year. The well-developed law of mandamus works well enough now to protect the rights of the public to challenge illegal government action.

For these reasons, the academic desire to "tidy up" the law should not be rushed when the proposed changes are on such a massive scale.[2] The Judiciary Committee should engage in a stringent review of every section of these bills to ensure they do not upset the balance in current law between agencies and those challenging agency actions *before* allowing these bills to move. Referring the bill to interim study to allow more

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[1] SB 209 is the substantive bill and SB 261 makes conforming changes in numerous other codes.

[2] The massiveness of this undertaking is readily apparent by looking at the great length of the two bills and the incredible number of different codes that are affected.

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deliberate review by the Committee and all interested parties may be more appropriate than moving the bill now.

Second, we are concerned about the apparent hostile attitude of the bills towards the ability of individuals and public interest organizations to challenge agency action. This attitude appears in the bills' structure, as well as in the commentary. The CLRC's consultant for its study, Professor Michael Asimow of UCLA Law School, has written several articles advocating that agencies need more freedom from judicial review.[3] Consumers Union disagrees. In our experience with agencies we have found more often than not that agency actions reflect the positions of the industries they regulate, rather than the interests of the public. Therefore, we view as unsound public policy any attempt to require more deference by courts to agency actions than under existing law.

We note that many of the new procedures contained in the bills are drawn from a 1981 Model State Administrative Procedure Act ("APA") and from the federal APA. We believe drawing on these sources may be problematic because Professor Asimow has previously stated that "California rulemaking procedure probably surpasses that of any other state, and far surpasses the federal government, in the number of steps required, the rigor with which the law is enforced, and in the breadth of regulation."[4] Thus, wherever Model Act or federal provisions are incorporated into the bills' provisions, they must be carefully reviewed to ensure that they do not weaken existing California law.

Third, and finally, many of the new procedures in the bills apply more appropriately to agency adjudication, rather than agency rulemaking. We are concerned that in the rush to create a single, "unified" framework for judicial review, the important distinctions between adjudication and rulemaking may not be adequately addressed. What works for one type of agency action may not work well for the other and thus a single rule may be unwise.

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[3] See, e.g., Michael Asimow, *California Underground Regulations* (1992) 44 Admin. L. Rev. 43 ("California regulation of bureaucratic behavior . . . is very costly to government and to the public but produces very little benefit for anyone"); Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies* (1995) 42 U.C.L.A. L. Rev. 1157, 1196 (agency failure to follow Administrative Procedure Act should not necessarily allow courts to invalidate agency action).

[4] Asimow, *supra*, 44 Admin. L. Rev. at 45.

Our more specific concerns on the provisions of SB 209 follow, based on a quick review of the bill. Due to its length and complexity, we may, in the future, have more comments when we have had more time to review the bill.

1. Timing of and Requirements for Judicial Review of Agency Rulemaking (p. 10, line 29, Code Civ. Proc. Sections 1123.130 and 1123.140[5]).

Proposed Section 1123.130(b) changes existing law by creating a general rule prohibiting judicial challenges to agency rules "until the rule as been applied by the agency." The commentary cites one case for this rule, however, that case does not stand for the black-letter rule stated in Section 1123.130(b).[6] Thus, there is no requirement that one must wait until the rule has been applied under existing law and such a rule is unwise public policy. Challenges to the validity of regulations, for example, often involve pure questions of law and need not wait until injury to a party occurs from agency application of a rule.

After creating this new general rule, proposed Section 1123.140 (which is borrowed from the Model APA) then purports to state an exception to the general rule of Section 1123.130(b). Section 1123.140(a)-(c) would require parties to meet three requirements in order to obtain review of a rule that has not yet been applied. These requirements place unnecessary obstacles to immediate review, and again go beyond existing law.[7] Again, current law allows "any interested person" to bring such an action, without requiring the "hoops" of subdivisions (a)-(c). *See* Gov't Code Sec. 11350. The structuring of Sections 1123.130 and 1123.140, with a new general rule and then grudging exceptions to the general rule, is one example of the hostility of SB 209 to obtaining review of agency action, as discussed above in our general comments.

2. Standing of Public Interest Groups to Challenge Agency Action (p. 11, Sections 1123.210-1123.240).

The commentary to Section 1123.210 notes that the intent of this Article is "to override existing case law standing principles and to replace them with the standards

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[5] Unless otherwise indicated "Section" refers to sections of the Code of Civil Procedure.

[6] *Pacific Legal Foundation v. California Coastal Comm'n* (1982) 33 Cal. 3d 158, 171, 188 Cal. Rptr. 104, 113. This case applied a test balancing "the fitness of the issues for judicial review and the hardship of the parties of withholding court consideration."

[7] *Compare* Section 1123.140's three-prong test with the language from *Pacific Legal Foundation*, supra, note 6 (the commentary to Section 1123.140 cites another state case, *BKI IN, Inc. v. Department of Health Services* (1992) 3 Cal. App. 4th 301, 4 Cal. Rptr. 2d 188 as authority, but this case merely uses the *Pacific Legal Foundation* test).

[herein]." Because this sweeping statement would destroy prior case law precedent on standing, it is critical that the new standing provisions of the bill are precisely drafted to avoid cutting back on existing standing principles. Currently, standing is broadly conferred; courts may issue writs of mandate in response to petitions by persons "beneficially interested" in the litigation. Code Civ. Proc. Sec. 1086. That section has generally been interpreted broadly by the courts, especially where public rights are concerned. *See Green v. Obledo* (1981) 29 Cal. 3d 126, 144, 172 Cal. Rptr. 206, 216.

Proposed Section 1123.230 would replace this broad standing and require persons seeking review to meet three new, vague and burdensome requirements. Section 1123.230(a) makes no sense for public interest organizations. It would be a huge stretch for Consumers Union, for example, to show that it "conduct[s] business in the jurisdiction" of the Department of Insurance, or Health Services, or any other agency whose actions we may challenge. This section obviously seems oriented towards business entities, not public interest groups. Subdivision (b) is vague and provides no guidance as to how an entity must show it will "protect the public interest." The commentary to Section 1123.230 cites various inappropriate and irrelevant state and federal authority for the three part test in Section 1123.230.

3. Standard of Review of Agency Rulemaking (p. 17, Section 1123.460).

Proposed Section 1123.460 would, without justification, require courts to give deference to an agency's determination of purely procedural issues -- such as whether the agency "engaged in an unlawful procedure or decisonmaking process." Courts must be able to use their independent judgment on agency compliance with procedural laws, such as the state APA, without regard to what an agency believes is "appropriate." One of our recent cases demonstrates this point. Last year, Consumers Union joined other public interest groups in challenging a notice of non-enforcement issued by the Insurance Commissioner.[8] This notice announced that the Commissioner would not enforce for one year a deadline for insurance companies to comply with a regulation designed to combat redlining. We prevailed and obtained a writ of mandate ordering the Commissioner to enforce the existing regulation. Enactment of proposed Section 1123.460, however, would have required the Superior Court to have given deference to the Commissioner's use of the notice, even though no such deference was deserved.

Section 1123.460 would make it more difficult for those challenging agency use of "underground regulations." Broadly defined, "underground regulations" are any regulation used by an agency without being adopted in compliance with the notice and comment procedures of the APA. Again, Section 1123.460 would apparently require

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[8] *Southern Christian Leadership Conference v. Quackenbush* (San Fran. Sup. Ct. No. 976629, filed March 7, 1996).

courts to give deference to an agency's use of underground regulations. California law has a long-standing prohibition against use of underground regulations (Gov't Code Sec. 11347.5(a)). We see no need to change this policy. Courts must retain the authority to enjoin agency from using underground regulations and to order agencies to undo or redo decisions made on the basis of such regulations.

4. Time Limits for Challenging Agency Rulemaking (pp. 17-18, Sections 1123.610-1123.640).

Sections 1123.610-1123.640 contain time limits only for review of agency adjudicatory determinations, and not agency rulemaking, or other types of agency action. We assume there is no intent to change existing law allowing actions for mandamus or declaratory relief to be brought at any time, subject to equitable principles.[9] If so, the bill should probably clarify that intent in this Article.

5. Obtaining Stays of Agency Action (p. 21, Section 1123.720).

Proposed Section 1123.720 appears to make it much more difficult for parties to obtain a stay of agency action. The bill would require parties to meet a four part test. that in practice, would be enormously difficult to meet.

For all of the above reasons, Consumers Union strongly urges your "No" vote on SB 209 and SB 261. In the alternative, Consumers Union recommends the bill be sent to interim study to allow the Committee and all other interested parties a complete opportunity to review the bills.

Very truly yours,

Earl Lui
Staff Attorney

cc: Senator Kopp
Dana Mitchell, Counsel, Senate Judiciary Committee

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[9] For example, under current law, some courts have held that, in the absence of a specific statute, general statute of limitations apply, such as the three-year statute.

Aaron Read
& Associates

LEGISLATIVE AND
GOVERNMENTAL REPRESENTATION

March 27, 1997

Honorable Quentin Kopp
California State Senate
State Capitol, Room 2057
Sacramento, CA 95184

RE: SB 209 -- OPPOSE-UNLESS-AMENDED
Senate Judiciary Committee Hearing 4/8/97

Dear Senator Kopp:

On behalf of our client, the Association of California State Attorneys and Administrative Law Judges (ACSA), the California Association of Professional Scientists (CAPS) and the Professional Engineers in California Government (PECG), I regret to inform you of their opposition to your SB 209 unless the bill is amended. SB 209 is a comprehensive rewrite of the state's judicial review process.

Our clients have been discussing this matter with the Law Revision Commission for the past two years. There are several outstanding issues that our clients have been unable to resolve with the Law Revision Commission. We are respectfully requesting you to amend SB 209 to resolve one of those issues. SB 209 codifies current law regarding standing, with the exception of taxpayer suits, to restrain illegal or wasteful expenditures. SB 209 imposes new requirements on individuals bringing taxpayer actions by limiting standing unless three conditions are satisfied. One of those conditions is that the person will adequately protect public interest. Another is that the person must request the agency to correct its action and to show that the agency has not done so within a reasonable time.

Our clients are concerned that the proposed Section 1123.230 of the Code of Civil Procedures, Subdivision (b) which requires a person to adequately protect public interest, is unnecessary and may work to bar access to the courts, thus removing an avenue of challenging governmental action. If Subdivision (b) does not bar access to the courts in some cases where an individual would have standing under the current law, then it is unnecessary. If it does bar access, it is unwanted for the public policy reason that improper governmental activities should be challenged. Our clients question is, what does it mean to "adequately protect the public interest?"

ELEVENTH & L BUILDING ■ 1127 - 11TH STREET, SUITE 350, SACRAMENTO, CALIFORNIA 95814
TEL: 916/448-3444 FAX: 916/448-0430 E-MAIL: aaronread@cwo.com

Subdivision (c) requires a person to request the agency correct the action. The Commission's comments do not make reference to why this subdivision is necessary. The comments do state that the requirement of notice does not excuse the exhaustion of administrative remedies. If an individual organization has an administrative remedy, they will exhaust that remedy. Otherwise, any requirement of making a request that an agency correct an action only works to slow down the process of putting a stop to an improper governmental activity and frustrates the original purpose of the Law Revision Commission.

Thank you for the opportunity of providing our input on this matter. If you or your staff have any questions, please do not hesitate to call.

Sincerely,

Steve

Steve Baker
Legislative Advocate

dlw/8140

cc: Senate Judiciary Committee Members
Senate Judiciary Committee Staff