

Study N-200

April 9, 1997

First Supplement to Memorandum 97-16

Judicial Review of Agency Action: Additional Comments on SB 209

Attached are four more letters commenting on SB 209:

	<i>Exhibit pp.</i>
1. Larry Doyle, State Bar	1-5
2. Herb Bolz, Office of Administrative Law, March 28, 1997	6-15
3. Char Mathias & Herb Bolz, OAL, April 7, 1997	16-22
4. Professor Michael Asimow	23-27

Original Proceedings in Supreme Court or Court of Appeal

Section 1123.510 provides superior court jurisdiction for judicial review. Subdivision (b) says nothing in the section “prevents the Supreme Court or courts of appeal from exercising original jurisdiction” under the California Constitution.” The State Bar Committee on Appellate Courts would add a sentence to say the draft statute does not apply to these original proceedings. The staff prefers to give the Judicial Council discretion to apply by rule all or part of the draft statute to these proceedings. **The staff recommends adding a new subdivision (c) to Section 1121 as set out below.**

State Agency Regulations

The Office of Administrative Law has “serious concerns” with many key provisions of the draft statute, including Sections 1121.240 (“agency action” defined), 1121.290 (“rule” defined), 1123.120 (finality), 1123.130(b) (ripeness), 1123.140 (exceptions to finality and ripeness), 1123.310 (exhaustion of administrative remedies), 1123.340 (exceptions to exhaustion of administrative remedies), 1123.420 (standard of review of agency interpretation of law), 1123.460 (standard of review of agency procedure), and 1123.470 (burden of persuasion on party asserting invalidity of agency action). OAL tried to draft language for various sections in the draft statute to address its concerns, but this proved impractical given the time constraints.

OAL concludes that judicial review of a state agency regulation before commencement of an administrative adjudication to enforce the regulation

should be exempt from the draft statute, and should continue to be governed by the rulemaking provisions of the Administrative Procedure Act — declaratory relief, injunctive relief, and traditional mandamus. Once an administrative adjudication to enforce the regulation is commenced, judicial review of the regulation would be under the draft statute. Thus it would not be necessary to split out and litigate separately such issues as whether the regulation on which the enforcement proceeding is based was an underground regulation or is invalid because in conflict with statute. OAL's April 7 communication provides statutory language and Comments to do this.

Alternatives include:

(1) Accept Professor Asimow's view that the draft statute already addresses OAL concerns, and that these concerns are therefore misplaced.

(2) Continue working with OAL to revise the many sections in the draft statute to address specific concerns. This may not be promising in light of OAL's thus far unsuccessful efforts to do this.

(3) Accept OAL's view that preenforcement review of state agency regulations should be exempt from the draft statute, using OAL's April 7 draft as a starting point. Professor Asimow strongly opposes this.

The staff is not enthusiastic about exempting preenforcement review of state agency regulations from the draft statute. However, OAL's request could be implemented by revising four sections in the draft statute as follows:

1121. (a) This title does not apply to any of the following:

(a) (1) Judicial review of agency action by any of the following means:

(1) (A) Where a statute provides for trial de novo.

(2) (B) Action for refund of taxes or fees under Section 5140 or 5148 of the Revenue and Taxation Code, or under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.

(3) (C) Action under Division 3.6 (commencing with Section 810) of the Government Code, relating to claims and actions against public entities and public employees.

(b) (2) 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.

(c) (3) Judicial review of a decision of a court.

(d) (4) ~~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.~~
- ~~(e) (5) Judicial review of agency proceedings pursuant to a reference to the agency ordered by the court.~~
- (b) This title applies to judicial review of the validity of a state agency regulation at issue in an adjudicative proceeding. Except as provided in this subdivision, this title does not apply to judicial review of a state agency regulation.
- (c) This title applies to an original proceeding in the Supreme Court or court of appeal under Section 10 of Article VI of the California Constitution only to the extent provided by rules of court adopted by the Judicial Council.

1121.110. (a) A statute applicable to a particular entity or a particular agency action prevails over a conflicting or inconsistent provision of this title.

(b) Nothing in this title impliedly repeals the rulemaking provisions of the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

1123.330. (a) A person may obtain judicial review of rulemaking notwithstanding the person's failure to do either of the following:

~~(1) (a) Participate in the rulemaking proceeding on which the rule is based.~~

~~(2) (b) Petition the agency promulgating the rule for, or otherwise to seek, amendment, repeal, or reconsideration of the rule after it has become final.~~

~~(b) A person may obtain judicial review of an agency's failure to adopt a rule under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, notwithstanding the person's failure to request or obtain a determination from the Office of Administrative Law under Section 11340.5 of the Government Code.~~

1123.820. (a)

(b) The administrative record for judicial review of state agency rulemaking under Chapter 3.5 (commencing with Section 113450) of Part 1 of Division 3 of Title 2 of the Government Code to which this title applies is the file of the rulemaking proceeding prescribed by Section 11347.3 of the Government Code.

The APA provisions on judicial review of state agency regulations would then be revised along the lines of the OAL draft to apply only prior to an

administrative enforcement proceeding. The following revisions are to the sections in the latest version of the bills, not to the existing Government Code:

11350. (a) ~~Except as provided in subdivisions (d) and (e), a~~ An interested person may , prior to an enforcement action against that person for violating a regulation, obtain a judicial declaration as to relief concerning the validity of any regulation under the regulation by bringing a proceeding in the superior court in accordance with the Code of Civil Procedure, except that Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to the proceeding. The right to judicial relief is not affected by the failure either to petition, or to seek reconsideration of a petition, pursuant to Section 11340.7 before the agency promulgating the regulation. The regulation may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order to repeal, upon the ground that the facts recited in the statement do not constitute an emergency within the provisions of Section 11346.1.

(b) In addition to any other ground that may exist, a regulation may be declared invalid and other appropriate relief ordered if either of the following exists:

(1) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

(2) The agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5 is in conflict with substantial evidence in the record.

(c) The approval of a regulation by the office or the Governor's overruling of a decision of the office disapproving a regulation shall not be considered by a court in a proceeding for judicial review of relief concerning a regulation.

~~(d) Notwithstanding Sections 1123.820 and 1123.850 of the Code of Civil Procedure, on judicial review:~~

~~(1) The court may not require the agency to add to the administrative record an explanation of the reasons for a regulation.~~

~~(2) No evidence is admissible that was not in existence at the time of the agency proceeding under this chapter.~~

~~(e) Section 1123.460 of the Code of Civil Procedure does not apply to a proceeding under this section.~~

11350.3. Any interested person may, prior to an enforcement action against that person for violation of the regulation, obtain a judicial declaration as to relief concerning the validity of a

regulation which the office has disapproved or ordered repealed pursuant to Section 11349.3, 11349.6, or 11349.7 by ~~filing a petition for judicial review under Title 2 (commencing with Section 1120) of Part 3 of bringing an action in the superior court in accordance with the Code of Civil Procedure, except that Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to the proceeding.~~ The court may declare ~~find~~ the regulation valid if it determines that the regulation meets the standards set forth in Section 11349.1 and that the agency has complied with this chapter. If the court so determines, it may order the office to immediately file the regulation with the Secretary of State.

These revisions will result in the draft statute applying to review of state agency regulations at issue in an adjudicative proceeding, and to review of local regulations of agencies other than a county board of supervisors or city council.

The revisions above eliminate references to “declaratory relief” because OAL wants the court to have a broad choice of remedies, consistent with existing law.

The OAL draft amended Section 11350 to limit its application to judicial review of duly adopted regulations, and added a new Section 11350.1 for review of underground regulations. The staff draft above omits Section 11350.1, and revises Section 11350 to apply to preenforcement review of regulations whether duly adopted or underground, in keeping with the staff’s desire to tinker with existing law as little as possible pending completion of the rulemaking study. OAL also provided Comments for these sections. The staff will work with OAL on Comment language if these revisions are adopted.

If the Commission exempts preenforcement review of state agency regulations, we would expand the study of administrative rulemaking to include judicial review.

Ordinances, Regulations, and Resolutions of Cities and Counties

The revision to the local agency provision (Section 1121(a)(5) above) is recommended in the basic memo. The local agency working group has no objection to this revision.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

**THE STATE BAR
OF CALIFORNIA****OFFICE OF GOVERNMENTAL AFFAIRS**

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April 7, 1997

Law Revision Commission
RECEIVED**APR 07 1997**

The Honorable Quentin Kopp
Member of the Senate, 8th District
State Capitol, Room 2057
Sacramento, CA 95814

File: _____

SB 209, as amended 4/2/97: TECHNICAL
COMMENTS & PROPOSED AMENDMENT
Committee on Appellate Courts

Dear Senator Kopp,

The Committee on Appellate Courts of the State Bar of California, composed of experts in appellate court operation and appellate practice, respectfully submits the attached comments on and proposed amendment to (see page 4 of the report) your SB 209 for your consideration. The Committee on Appellate Courts takes no official position on the measure, but hopes the comments made in its report will add to the dialogue surrounding the bill's consideration. If you would like more information, please contact the author of the attached report.

THIS POSITION IS ONLY THAT OF THE COMMITTEE ON APPELLATE COURTS OF THE STATE BAR. IT HAS NOT BEEN APPROVED BY THE STATE BAR'S BOARD OF GOVERNORS OR OVERALL MEMBERSHIP, AND IS NOT TO BE CONSTRUED AS REPRESENTING THE POSITION OF THE STATE BAR OF CALIFORNIA.

It is the policy of the State Bar to refer legislative proposals affecting specific legal questions or the practice of law to the appropriate State Bar Committee or Section for review and comment. If you would like to discuss this position further, please feel free to contact me.

Best Regards,



Larry Doyle
Chief Legislative Counsel

Enclosure

cc: Senate Committee on Judiciary
Susan A. Streble, Committee Legislative Chair
Dawn M. Schock, Member, Committee on Appellate Courts
Stan Ulrich, California Law Revision Commission
Andrew Guilford, Committee BCCI Liaison
Diane C. Yu, General Counsel, State Bar of California
David Long, Director, State Bar Office of Research
Heather Anderson, Committee Staff Liaison



THE COMMITTEE ON APPELLATE COURTS
THE STATE BAR OF CALIFORNIA

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MEMORANDUM

To: Larry Doyle, Chief Legislative Counsel
 From: Dawn M. Schock, Appellate Courts Committee
 Date: April 1, 1997
 Re: SB 209 (Kopp) as Amended in Senate, March 19, 1997

SECTION/COMMITTEE POSITION:

☒ Technical comments and/or recommended amendments only
☐ Support
☐ Support if Amended
☐ Oppose Unless Amended
☐ Oppose

Date position recommended: April 1, 1997

Executive Committee vote: Ayes: 8 Noes: N.V. 8

Subcommittee vote: Ayes: Noes: N.V.

ANALYSIS:

(1) Summary of Existing Law.

The current law is fragmented in regard to judicial review of agency actions. On-the-record, adjudicatory decisions of state and local governments are reviewed by the superior courts under the administrative mandamus provisions of Code of Civil Procedure section 1094.5.¹ Regulations adopted by state agencies are reviewed by superior courts through actions for declaratory relief. Other agency actions are reviewed by traditional mandamus under section 1085 or by declaratory judgment. Additionally, many individual statutes set forth specific

¹ All further statutory references are to the Code of Civil Procedure, unless otherwise noted.

procedures for the review of different agencies' actions. This state of the law makes difficult any decision regarding the proper procedure for judicial review of administrative agency actions.

(2) Changes to Existing Law Proposed by this Bill.

SB 209 proposes to offer a more uniform procedure for the review of agency actions. Under the proposed bill, common-law writs such as mandamus, certiorari, and prohibition, and equitable remedies, such as injunction and declaratory relief, would be replaced by the unified scheme set forth principally in Title 2 of SB 209. Title 2 provides that, "final state or local agency actions are reviewable by a court petition for review." The bill thus repeals section 1094.5, delineates between traditional mandamus (still at section 1085(a)) and administrative mandamus (Title 2) and codifies a number of principles currently contained in case law, such as those relating to standing and standards of review.

(3) Analysis of Proposed Changes and Recommended Amendments.

Under the scheme espoused by SB 209, primary jurisdiction for the judicial review of agency actions will be in the superior courts. The Committee approves that jurisdictional scheme. Placing primary jurisdiction in the superior courts means that petitions for review of agency actions will originate in the appellate courts only in two narrowly prescribed circumstances:

- (a) First, although proposed section 1123.510(a) identifies the superior court as the primary jurisdiction for administrative mandamus, a new subsection (b) nevertheless reiterates that under section 10 of Article VI of the California Constitution, nothing can prevent the Supreme Court or courts of appeal from exercising original jurisdiction over administrative mandamus matters. As a practical matter, however, the exercise of original jurisdiction by an appellate court pursuant to this constitutional power will be extremely rare.
- (b) Second, jurisdiction may originate in the appellate courts if specific statutes so provide. There are four such statutes identified in SB 209, including the review of actions by the Alcoholic Beverage Control Appeals Board (Bus. & Prof. Code §§ 23090-23090.7); decisions made pursuant to the State Employer-Employee Relations Act (Gov. Code §§ 3520, 3542, and 3564); decisions of the Agricultural Labor Relations Board (Lab. Code § 1160.8); and decisions

of the Workers' Compensation Appeals Board (Lab. Code § 5950, et al.). Original jurisdiction for the review of these decisions currently lies with the appellate courts, and SB 209 does not make any change to the jurisdictional aspects of these provisions.

SB 209 draws the division between traditional mandamus and the review of agency actions through a proposed amendment to Code of Civil Procedure section 1085. While subsection (a) of 1085 will remain substantively unchanged (defining a "writ of mandate" as issuing from a court to an inferior tribunal), proposed new subsection (b) states:

Judicial review of agency action to which Title 2 (commencing with section 1120) applies shall be under that title, and not under this chapter.

Title 2, in turn, is the center-piece of the bill, providing for a codified procedure for the review of agency actions. Title 2 is generally limited only to proceedings in the superior court:

1123.510.(a) Except as otherwise provided by statute, jurisdiction for judicial review under this chapter is in the superior court.
(Title 2, Art. 5).

Title 2 does not restrict current rules regarding original jurisdiction in the appellate courts:

1123.510 (b) Nothing in this section prevents the Supreme Court or courts of appeal from exercising original jurisdiction under Section 10 of Article VI of the California Constitution.
(Title 2, Art. 5)

Because Title 2 by its terms applies only in the superior courts (unless otherwise provided by statute) and because judicial review according to the dictates of Title 2 is mandated only in those cases "to which Title 2 applies," review by mandamus in the appellate courts would, presumably, occur under the "traditional mandamus" provisions of Code Civ. Proc. § 1085(a). Bob Murphy of the California Law Review Commission has confirmed that Title 2 is

not meant to apply in nonstatutory administrative mandamus proceedings that originate in the courts of appeal. The Committee believes, however, that should be made explicit with the following amendment:

1123.510 (b) Nothing in this section prevents the Supreme Court or courts of appeal from exercising original jurisdiction under section 10 of Article VI of the California Constitution. Proceedings invoking such original jurisdiction shall not be governed by Title 2 of Part 3 of this Code.

Although proceedings in the appellate courts to review the four types of decisions outlined above (decisions of Alcoholic Beverage Control Appeals Board, Agricultural Labor Relations Board and Workers' Compensation Appeals Board and pursuant to State Employer-Employee Relations Act) will take place under the new scheme proposed by Title 2 of SB 209, this Committee does not take a position on the effect of the new procedures on the review of the listed decisions as those substantive areas fall outside the Committee's expertise.

(4) Germaneness.

SB 209 will generally have little effect on the appellate courts. That effect, however, will be to standardize procedures to the benefit of litigants, practitioners and the courts.

(TE2\MEN\415296)

March 28, 1997

California Law Revision Commission
Att'n: Nat Sterling
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: **Judicial Review of Agency Action**--Provisional
Final Recommendation as downloaded Feb 21, 1997

Commission Meeting of Thursday, April 10, 1997, 9:00
a.m.- 5:00 p.m., State Capitol Room 2040, Sacramento--
Agenda Item 3 on tentative agenda dated 3-4-97:

1997 Legislative Program

SB 209-- *Judicial Review of Agency Action*
(Study N-200)
Memorandum 97-16 (RM) (to be sent)

Dear Mr. Sterling:

The Office of Administrative Law ("OAL") submitted a letter dated February 26, 1997, concerning the Commission's recommended comprehensive revision of statutes pertaining to judicial review of agency action. This letter was attached (as exhibit pages 2 through 6) to the minutes of the Commission meeting of February 27, 1997.

The stimulus for the letter was the December 1996 suggestion of one of your academic consultants that the recommendation be revised to codify a "holding" in *Tidewater v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198. According to the consultant's interpretation, the court held that the *only* judicial sanction available when a state agency was found to have adopted an "underground regulation" (see Gov. Code section 11340.5; *State Water Resources Control Board v. Office of*

Administrative Law (1993) 12 Cal.App.4th 697, 16 Cal.Rptr.2d 25) was that the court would "not defer to" an invalid agency rule. OAL rejects the consultant's interpretation of the *Tidewater* opinion.

In concrete terms, we understood the consultant's December 1996 interpretation to mean that the court could not enjoin a state agency from utilizing an underground regulation until and unless it was properly adopted after public notice and comment, etc., pursuant to the Administrative Procedure Act. This understanding is consistent with the consultant's March 4 letter to the Commission. In this March 4 letter (the part headed "Proposal for an interpretive statement exception to the rulemaking provisions of the California APA"), it is suggested that courts be precluded from enjoining "interpretive statements" issued by state agencies until and unless they have been properly adopted after public notice and comment, etc., pursuant to the Administrative Procedure Act--so long as specified labeling, filing, review, and publication requirements are satisfied.

This is in sharp contrast to the federal practice in which an agency rule labelled an "interpretive guideline" may nonetheless be struck down in court on procedural grounds if the court concludes it does not substantively fall within the interpretive guideline exception, even if so labelled. For instance, *National Family Planning v. Sullivan* (D.C. Cir. 1992) 979 F.2d 227 (construing federal APA, court held that federal agency could not utilize the allegedly exempt "interpretive guideline" until and unless it was adopted after notice and comment).

Much ink has been spilled over the issue over whether or not California should adopt one or more of the broad federal statutory exemptions from notice and comment, such as the statutory exemption for "interpretive guidelines."

However, it would be extremely undesirable for the Commission to propose legislation in the judicial review area which has the effect of not only prejudicing the just-begun study of the area of Administrative Rulemaking but also undermining longstanding public rights to go to

court to enforce the notice and comment requirements of the APA.

We have reviewed the minutes of your February meeting, the March 4 letter of Professor Michael Asimow, and the judicial review proposal, including official comments. We still have serious concerns about the proposal. The concern discussed in detail in OAL's letter of Feb. 26 focused on judicial review of state agency *underground* regulations. Review of the proposal and of some of the existing case law has intensified this concern. Moreover, during our review a second concern has emerged. This second concern focuses on judicial review of *duly adopted* state regulations (regulations which have been properly adopted after public notice and comment, etc., and printed in the California Code of Regulations).

The thrust of the proposal, again, is to make it substantially more difficult for members of the public to get their day in court, whether the citizen's concern is a duly adopted or an underground regulation. **It is important to remain focused on the underlying public policy issue: how to construct rules of judicial review which come to grips with what Justice Friedman called "deep-seated problems of agency accountability and responsiveness."** *California Optometric Association v. Lackner* (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751. The proposal contains numerous statutory "preconditions" (see proposed Code of Civil Procedure ("CCP") sec. 1123.110) to obtaining judicial review. As will be shown below in discussing the ripeness issue (section 1123.130), some of these preconditions seem substantially more stringent than existing law.

We have invested many hours in attempting to develop specific language which would definitively fix the various problems. This has not proven practical. There are too many complex and interrelated problems, and too little time. Instead, we propose the following concepts as a way of addressing the problems.

- (1) The overall objective is to preserve the existing law of the past twenty years in the areas of judicial review of state agencies' (a) duly adopted regulations and (b) underground regulations. By "underground regulations," we mean state agency rules which should have been, but were not, adopted pursuant to the APA. See, e.g., *City of San Marcos v. California Highway Commission, Department of Transportation* (1976) 60 Cal. App.3d 383, 415 (court overruled state agency decision to deny highway construction funds to city because agency decision was based on procedural rule which should have been, but was not, adopted as "a valid rule or regulation"); 60 Ops.Cal.Atty.Gen. 174, 176 (1977) (state agency policy permitting part-time faculty to vote in academic senate despite duly adopted regulation limiting voting to fulltime teachers violated APA; policy may be implemented "only by means of amending the existing regulations").

Much of this existing law is in appellate opinions, many of them interpreting statutes, such as Code of Civil Procedure section 1085. See, e.g., *Johnston v. Department of Personnel Administration* (1987) 191 Cal.App.3d 1218, 236 Cal.Rptr. 853 (section 1085 writ of mandate action to enforce statutory right to hearing). We are uncertain how best to preserve this law, especially in the light of the fact that the Commission's proposal amends or repeals some of the statutes which have been interpreted in the court opinions. It seems best to cite to specific cases and to articulate the principle that is intended to be preserved.

- (2) The Commission's proposal (hereafter "Article 2") should not apply to **preenforcement** judicial review of state agencies' duly adopted or underground regulations. These two matters will be covered in the rulemaking part of the APA (Government Code sections 11340-11359), in Article 8 "Judicial Review," the current location of Government Code section 11350 (declaratory relief concerning regulations). In current legal practice, preenforcement requests for declaratory relief under Government Code section 11350

are often "coupled with a petition for injunction and/or writ of mandate."¹ Article 2 would continue to apply to all challenges to local agency regulations, both in the preenforcement and postenforcement contexts.

- (3) Article 2 will apply only to **postenforcement** court challenges to state agencies' duly adopted and underground regulations. New language will provide guidance to courts confronted with the allegation that a state agency action should be reversed because it is based on an underground regulation. See *Conroy v. Wolff* (1950) 34 Cal.2d 745 (government agency required to rescind administrative action, where action had been based on invalidly adopted rule); *Boreta Enterprises, Inc. v. Department of Alcohol Beverage Control* (1970) 2 Cal.3d 85, 106-107 (reversing license revocation which had been based upon policy statement forbidding employment of topless waitresses; noting lack of "any duly issued rule or regulation," court declined to "pronounce a rule in an area in which the Department itself is reluctant to adopt one"). Similarly, our initial research indicates that "the usual remedy when an agency rule has been invalidated" by a federal court for failure to undergo the notice and comment process is an order reversing any agency decisions based upon the invalidated rule. See, for instance, *National Treasury Employees Union v. Newman* (D.D.C. 1991) 768 F.Supp. 8, 13 (since neither party desired return to *status quo ante*, court ordered notice and comment to proceed, but did not undo agency decisions based upon the invalidated rules).
- (4) Section 1123.460 may be appropriate insofar as it applies to determinations by particular adjudicatory agencies of appropriate duly adopted *quasi-judicial* procedures. It is appropriate for the courts to give deference to determinations of particular agencies when the agency is dealing with rules contained in duly adopted law which applies solely to that agency. Here, the agency would be interpreting the laws it is charged with enforcing.

However, it should be made clear that if the issue is whether or not the agency has complied with the rulemaking procedures mandated by statute for use by all executive branch agencies (Government Code sections 11340--11359), then the correct standard of review to be used by the courts is independent judgment, giving no deference to the particular agency's views on the question of whether or not it has violated Government Code section 11340.5. *Engelmann v. State Board of Education* (1992) 2 Cal.App.4th 47, 57 & 59, 3 Cal.Rptr.2d 264, 270 & 272, review denied.

If OAL has issued a determination pursuant to Government Code section 11340.5 on the issue of whether or the particular rulemaking agency in question had violated section 11340.5, then that OAL determination should be given deference by the courts, on the ground that OAL is the agency charged with enforcement of the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 434, 268 Cal.Rptr. 244, review denied.

It seems to us that numerous parts of the proposal change existing law in such a way as to make it harder to hold state agencies accountable for failure for carry out statutory rulemaking duties: for example, proposed CCP sections 1123.120 (finality), 1123.130(b) (very narrow interpretation of ripeness), and 1123.140 (narrow exception to ripeness and finality). These same provisions would also make it harder to get a hearing in the preenforcement context on an allegation that a duly adopted regulation is inconsistent with a statute.

This is a partial list of sections that could cause serious problems. We could also mention sections 1121.240 (definition of agency action), 1121.290 (definition of rule), 1123.310 (exhaustion of administrative remedies), 1123.340 (narrowing futility exception), 1123. 420 (review of agency interpretation), and 1123.470 (burden of persuasion), as well as the proposed revisions to Government Code section 11350.

The proposal is so lengthy, complex, and sweeping as to defy easy analysis. The draft recommendation, not including two supporting studies, is 226 pages in length. If you add in the two supporting studies, the page count goes up to 438 pages. And, this is not counting the third supporting study, which is currently only available as a 93 page law review article. Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA Law Review 1157. It is essential that persons evaluating the proposal read each one of the official comments prepared by the Commission. These comments often contain very important case citations and explanations; the comments will be printed in the annotated codes that lawyers use, and will be given great weight by courts interpreting the text of the code sections. The comments also contain numerous references to particular pages of the 93 page law review article.

As an example of our concerns, we will proceed to discuss one particular issue.

Ripeness

Proposed CCP section 1123.130(b) states unequivocally that "a person may not obtain judicial review of an agency rule until the rule has been applied by the agency." (Emphasis added.) The Commission's proposal would also apply this precondition to actions brought under Government Code section 11350. See p. 40, line 32 of SB 209 as introduced; Recommendation as downloaded from Commission's website (www.clrc.ca.gov) on March 25, 1997, p. 134.

Though there is some support for the above noted approach in existing law (such as *BKHN, Inc. v. Department of Health Services* (1992) 3 Cal.App.4th 301, 4 Cal.Rptr. 2d 188, cited in the comment to proposed CCP section 1123.140), most authorities support a quite different approach.

According to Witkin's *California Procedure* (1997), which acknowledges the *BKHN* case, the better view, in interpreting Government Code section 11350 (declaratory relief concerning regulations) is to allow the benefits of the statute to "a person in doubt as to the legality of

contemplated action, or his right to take that action"--event though this person "may not be able to show that anyone so far has actually challenged it." (Section 818, "Probable Future Controversy.)

According to Witkin, it "seems desirable to allow the action even in the absence of a showing of present controversy, when the likelihood of future controversy clearly appears in the complaint." Witkin goes on to quote *Chas.L. Harney v. Contractors' State License Bd.* (1952) 39 Cal.2d 561:

"The Legislature, by the enactment of section 11440 [now 11350], must have intended to permit persons affected by an administrative regulation to test its validity without having to enter into contracts with third persons in violation of its terms or to subject themselves to prosecution or disciplinary proceedings." (39 Cal.2d at 564.)

True, the Commission's proposal contains in proposed CCP section 1123.140 an exception to "finality and ripeness requirements." Plaintiffs must satisfy all elements of a three-part test. The cases cited in the comment suggest that the exception will be narrowly construed. It doesn't seem to us that this is enough. The basic problem is the substance of 1123.130(b).² In the case of actions for declaratory relief under Government Code section 11350, the proposed "wait until it's applied" rule in section 1123.130(b) seems too narrow and too strict. Input from private practitioners experienced in administrative litigation would be extremely helpful here, in evaluating the real world impact of the proposal.

Our feeling is that structuring the rule in this way, as a strong presumption that judicial review is precluded, does not really reflect the full range of case law--and is not good public policy. We disagree with the consultant's view that an agency rule can be challenged before it is applied "only in unusual circumstances." Letter of March 4, p. 3 of attachment. As a matter of good public policy, a *preenforcement*³ remedy should be readily available:

"A person wishing to challenge a regulation may wait until the agency brings an action to enforce the regulation and then raise invalidity of the regulation as a defense. It is less risky, however, for a person, such as licensee, to challenge a regulation *before it is specifically applied* to that person in an enforcement proceeding. Using an enforcement proceeding to challenge a regulation subjects the person to possible disciplinary action, such as denial or suspension of a license or even criminal prosecution. [*Chas. L. Harney, Inc. v. Contractors' Bd.* (1952) 39 Cal.2d 561, 564 . . .] Ogden, *California Public Agency Practice* (Matthew Bender, 1996), section 22.02[2][c] (Emphasis added.).

Conclusion

We have labored to produce language for you that would satisfy our objectives, but have been unable to do so. We will continue to work. We want you to be aware, however, that because of the complexity of the project, we may request more revisions to any part of the bill, including language we submit, as more light is brought to bear on the interrelationship of the parts of SB 209 and the consequences, intended and unintended, of its provisions. We appreciate the good working relationship between the Commission and OAL and look forward to further collaboration on SB 209 and on the rulemaking part of the APA.

Sincerely,

Herbert F. Bolz

i:\sb209

¹Ogden, California Public Agency Practice, sec. 22.02[1].

²We like section 1123.130(a). A duly adopted regulation should not be deemed ripe for review until it is actually adopted.

³California Public Agency Practice, sec. 22.02 [1]

State of California

Office of Administrative Law

Memorandum

To : Bob Murphy

Date : April 7, 1997

File No.:

Law Revision Commission
RECEIVEDTelephone: ATSS ()
()

APR 07 1997

From : Char Mathias/Herb Bolz

File: _____

Subject : SB 209, SB 261

Bob, here is our language to put all preenforcement judicial review of regulations into the rulemaking part of the APA. Please note that the amendments to Government Code sections 11350 (SB 209) and 11350.3 (SB 261) are to existing law, not to the bills.

Our next step with respect to Title 2 is to develop language to preserve existing law in postenforcement actions where an alleged underground regulation is raised as a defense (see OAL letter of March 28, 1997). We are proceeding to work on this immediately.

Our next steps with respect to the APA are to:

- 1) Determine if there are aspects of Title 2 that need to be added to the APA sections;
- 2) Develop language to preserve existing law with respect to preenforcement actions, much of which is in appellate opinions interpreting statutes such as CCP 1085, citing specific cases and articulating the principles intended to be preserved.

Post-It® Fax Note	7671	Date	4-7-97	# of pages	2
To	Bob Murphy	From	Herb Bolz		
Co./Dept.		Co.			
Phone #		Phone #	323-6814		
Fax #	415 444-1827	Fax #			

CONCEPTS/SUBSTANCE OF ADDITIONAL AMENDMENTS TO SB 209

1) New subdivision (f) of section 1121

(f) Action for relief brought pursuant to article 8 of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

2) New section in Article 1 of Title 2

This title shall not be interpreted to create any conflict with or exceptions to the rulemaking part of the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

Comment: This comment would make clear that nothing in Title 2 or in material cited in the comments to its various sections creates any conflict with or exceptions to the provisions of the rulemaking part of the APA. For example, nothing in Title 2 in any way diminishes the duty of state agencies to comply with the strict prohibition of Government Code section 11340.5. Similarly, nothing in Title 2 should be interpreted as creating an exception from statutory rulemaking requirements for agency rules that would be categorized in the federal Administrative Procedure Act as interpretive guidelines. *Armistead v State Personnel Board* (1978) 2 Cal. 3d 200, (Coverage of California APA intended to be much broader than coverage of federal APA) *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 59 Cal.Rptr. 2d 186 (Legislature would not have included "interpretive regulations" in statutory definition of agency rules subject to the APA if intent had been to exempt interpretive regulations from the APA).

Section 11350. Duly Adopted Regulations: Declaratory Judicial Relief; Grounds for Declaration of Invalidity Relief

(a) Any interested person, prior to any enforcement action against that person, may obtain a judicial ~~declaration as to relief concerning~~ the validity of any regulation adopted pursuant to this chapter by bringing an action for ~~declaratory~~ relief in the superior court in accordance with the Code of Civil Procedure, except that Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure shall not apply to the proceeding. The right to judicial determination shall not be affected by the failure either to petition or to seek reconsideration of a petition filed pursuant to Section 11340.7 before the agency promulgating the regulations. The regulation may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order to repeal, upon the ground that the facts recited in the statement do not constitute an emergency within the provisions of Section 11346.1.

(b) In addition to any other ground that may exist, a regulation may be declared invalid and other appropriate relief ordered if either of the following exists:

(1) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

(2) The agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5 is in conflict with substantial evidence in the record.

For purposes of this section, the record shall be deemed to consist of all material maintained in the file of the rulemaking proceeding as defined in Section 11347.3.

(c) The approval of a regulation by the office or the Governor's overruling of a decision of the office disapproving a regulation shall not be considered by a court in any action for ~~declaratory~~ relief brought with respect to a regulation.

Comment: Section 11350 applies to a challenge to a duly adopted regulation where no enforcement action has been brought against the interested person challenging the regulation. The public policy and purpose of Government Code section 11350 is to provide quick and easy judicial review on the merits, keeping procedural barriers, such as ripeness, to an absolute minimum in a preenforcement action challenging a duly adopted regulation on grounds, for instance, that the regulation is inconsistent with a statute.

"A person wishing to challenge a regulation may wait until the agency brings an action to enforce the regulation and then raise invalidity of the regulation as a defense. It is less risky, however, for a person, such as licensee, to challenge a regulation *before it is specifically applied* to that person in an enforcement proceeding. Using an enforcement proceeding to challenge a regulation subjects the person to possible disciplinary action, such as denial or suspension of a license or even criminal prosecution. [*Chas. L. Harney, Inc. v. Contractors' Bd.* (1952) 39 Cal.2d 561, 564 . . .] Ogden, *California Public Agency Practice* (Matthew Bender, 1996), section 22.02[2][c] (Emphasis added.).

-MORE-

Section 11350 (con't)

The amendment to section 11350 preserves existing law concerning preconditions to judicial review. See *Environmental Protection Information Center v. Department of Forestry*, (1996) 43 Cal.App. 4th 1011, 1017-1018, 50 CR 2nd 892, 896 (party may be interested person for purposes of Government Code section 11350 if either it or its members is or may well be impacted by a challenged regulation).

The intent of the section is to continue current legal practice in which preenforcement requests for declaratory relief are often "coupled with a petition for injunction and/or writ of mandate." Ogden, *California Public Agency Practice* (Matthew Bender, 1996), section 22.02[1].

New Section 11350.1 Regulation challenged as a violation of section 11340.5: Judicial Relief; Grounds for Relief

Any interested person, prior to an enforcement action against that person for violation of a regulation, may obtain judicial relief concerning the validity of the regulation regarding:

- (1) whether or not the state agency regulation violates Government Code section 11340.5 and is thus invalid and unenforceable;
- (2) whether or not the issuing agency should be enjoined from utilizing the regulation issued in violation of section 11340.5 unless and until it is adopted pursuant to this chapter; and
- (3) whether or not other appropriate relief should be granted..

The proceeding shall be brought in the superior court in accordance with the Code of Civil Procedure, except that Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure shall not apply to the proceeding.

Comment: This section applies to actions alleging that a state agency has violated Government Code 11340.5 and, for instance, seeking an injunction forbidding the agency from utilizing the challenged rule unless and until the agency complies with the requirements of the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. See, e.g., *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 737 (state agency required to follow APA notice and comment procedures before it could utilize new substantive rules implementing its enabling act); *Armistead v. State Personnel Board* (1978) 2 Cal. 3d 200. (challenged rule invalid because not properly adopted, could be made valid for future cases if agency adopts rule in compliance with chapter 4.5 [now 3.5] of APA); *City of San Marcos v. California Highway Commission, Department of Transportation* (1976) 60 Cal. App.3d 383, 415 (court overruled state agency decision to deny highway construction funds to city because agency decision was based on procedural rule which should have been, but was not, adopted as "a valid rule or regulation"); 60 Ops.Cal.Atty.Gen. 174, 176 (1977) (state agency policy permitting part-time faculty to vote in academic senate despite regulation limiting voting to fulltime teachers violated APA; policy may be implemented "only by means of amending the existing regulations"). See also *National Family Planning v. Sullivan* (D.C. Cir. 1992) 979 F.2d 227 (construing federal APA, court held that federal agency could not utilize challenged policy until and unless it was adopted after notice and comment); *Conroy v. Wolff* (1950) 34 Cal.2d 745 (government agency required to rescind administrative action, where action had been based on invalidly adopted rule). Cf. *Boreta Enterprises, Inc. v. Department of Alcohol Beverage Control* (1970) 2 Cal.3d 85, 106-107 (reversing license revocation which had been based upon policy statement

-MORE-

New Section 11350.1 (con't)

forbidding employment of topless waitresses; noting lack of "any duly issued rule or regulation," court declined to "pronounce a rule in an area in which the Department itself is reluctant to adopt one").

Section 11350 applies to a challenge to a regulation where no enforcement action has been brought against the interested person and the challenge is based on a violation of Government Code section 11340.5. The public policy and purpose of Government Code section 11350.1 is to provide quick and easy judicial review on the merits keeping procedural barriers, such as ripeness, to an absolute minimum in a preenforcement action challenging a duly adopted regulation.

"A person wishing to challenge a regulation may wait until the agency brings an action to enforce the regulation and then raise invalidity of the regulation as a defense. It is less risky, however, for a person, such as licensee, to challenge a regulation *before it is specifically applied* to that person in an enforcement proceeding. Using an enforcement proceeding to challenge a regulation subjects the person to possible disciplinary action, such as denial or suspension of a license or even criminal prosecution. [*Chas. L. Harney, Inc. v. Contractors' Bd.* (1952) 39 Cal.2d 561, 564 . . .] Ogden, *California Public Agency Practice* (Matthew Bender, 1996), section 22.02[2][c] (Emphasis added.).

Section 11350.1 preserves existing law concerning preconditions to preenforcement judicial review of challenged regulations. See *Environmental Protection Information Center v. Department of Forestry*, (1996) 43 Cal.App. 4th 1011, 1017-1018, 50 CR 2nd 892, 896. (Party may be interested person for purposes of Government Code section 11350 if either it or its members is or may well be impacted by a challenged regulation.)

Section 11350.3. Judicial Relief: Declaration as to Validity of Regulation Disapproved or Ordered Repealed-~~Action for Declaratory Relief~~

Any interested person may obtain a ~~judicial declaration as to relief~~ concerning the validity of a regulation which the office has disapproved or ordered repealed pursuant to Section 11349.3, 11349.6, or 11349.7 by bringing an ~~action for declaratory relief~~ in the superior court in accordance with the Code of Civil Procedure, ~~except that Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure shall not apply to the proceeding.~~ The court may ~~declare~~ find the regulation valid if it determines that the regulation meets the standards set forth in Section 11349.1 and that the agency has complied with this chapter. If the court so determines, it may order the office to immediately file the regulation with the Secretary of State.

Comment: The amendment to section 11350.3 preserves existing law concerning preconditions to judicial review. See *Environmental Protection Information Center v. Department of Forestry*, (1996) 43 Cal.App. 4th 1011, 1017-1018, 50 CR 2nd 892, 896. (Party may be interested person for purposes of Government Code section 11350 if either it or its members is or may well be impacted by a challenged regulation.) A plaintiff bringing an action under section 11350.3 may be either a state agency or other party interested in having the disapproved regulation take effect. The purpose of Government Code section 11350.3 is to provide quick and easy judicial review on the merits of OAL disapproval decisions, keeping procedural barriers, such as ripeness, to an absolute minimum.

In an action brought under this section, the ripeness requirement shall be deemed to be satisfied if OAL has disapproved the proposed regulation or ordered its repeal.



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Law Revision Commission
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APR 07 1997

File: _____

April 5, 1997

Nat Sterling
Calif. Law Revision Commission
FAX (415) 494-1827

Dear Nat,

Herb Bolz's March 28 9-page letter to the Commission appears to be an attempt to interject confusion into the Commission's efforts to bring SB 209 before the legislature. It sounds like OAL would like to pull the Bill from the legislature and start all over again.

After the Commission has toiled on this proposal over a period of many years (with constant participation by Herb Bolz and other OAL personnel), and expended massive staff and volunteer resources in the effort, it seems strange indeed for OAL to be complaining about the uncertainty in a long list of sections of the Bill. After all, OAL has gotten just about everything it asked for (such as §§1123.130(a) and 1123.460(b)). And it hardly seems consistent with Bolz's desire for a "good working relationship" with the Commission (p. 9) to attempt to derail a laboriously considered legislative proposal with this sort of last-minute maneuver.

OAL's efforts here might be motivated by i) its distress about language in the Supreme Court's opinion in the Tidewater case, so that OAL is trying to win from the Commission what it lost from the Court, and ii) its attempts to influence the forthcoming study of rulemaking. The reality is that despite the tone of OAL's long and confusing letter, SB 209 does not change, but only codifies, existing California law concerning judicial review of agency regulations. No changes are needed in the text of the Bill.

It seems clear that the judicial review bill should cover challenges to all sorts of agency action--whether in the form of rulemaking, adjudication, or any other form. OAL's suggestion (p. 4 of Bolz letter) that the bill should not cover pre-enforcement judicial review of regulations should be rejected out of hand. What possible justification could there be for hacking out from the present comprehensive draft one important area of judicial review of agency action and postponing it until consideration of a different bill which will relate to agency rulemaking procedures rather than to judicial review?

After all of the attempts to create confusion are put aside (such as the paragraph at the bottom of p. 6 that suggests you can't evaluate the "lengthy, complex and sweeping" proposal without reading about 800 pages of studies), OAL's letter comes down to a complaint about the ripeness provision of the statute which, it asserts, radically changes existing California law. Quite the contrary. The bill codifies existing law.

Section 1123.130(b) states that an agency rule can't be reviewed until it has been enforced, but the exception in §1123.140 opens the door to pre-enforcement judicial review of regulations whenever such review is really needed by private parties. This is exactly the approach taken toward other timing doctrines such as exhaustion of remedies and finality--state the rule, then state the exceptions. Therefore, pre-enforcement judicial review will often be available; and if it is, a court can in appropriate cases enjoin the agency from applying a regulation it finds was invalidly adopted or which is otherwise invalid. §1121.130.

Sections 1123.130(b) and .140 protect agencies and courts from a flood of harassing litigation over the validity of regulations before judicial review is needed or before the issue is fit for judicial review. Section 1123.140 allows review if the issue is fit for immediate judicial review (i.e. the record is such that review now is feasible) and postponement would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement. In effect, if there's serious hardship to a private party from delaying review, if the issues are fit for immediate review, and there is no overriding public policy reason to the contrary, then review is available.

Let me provide some further clarification of §1123.140 which may allay Mr. Bolz's concerns: Where a petitioner claims that an agency should have, but failed to, follow the procedural requirements of the APA in adopting a particular rule, the record would be complete and the issues would be fit for immediate judicial review. Further application of the rule by the agency would not clarify the question of whether the agency failed to follow appropriate procedures when it adopted the rule.

However, in such a case, a court should further ask whether immediate review is needed. As will be discussed below, if the regulation creates an immediate problem for the petitioner, immediate review would generally be available. For example, a regulation that has the force of law and requires someone to do something they don't want to do, or not do something they want to do, is generally appropriate for immediate review under the federal Abbott Labs test (which is explicitly part of current California law and is explicitly adopted by §1123.140). Whereas a provision in the agency's enforcement manual that lacks the force of law and might someday be applied to the petitioner might not create sufficient hardship to justify immediate review. But as federal cases show, even rules that do not have the force of law (such as an interpretive rules) may create such an immediate practical problem for petitioners that immediate review is justifiable. See, e.g., Better Gov't Ass'n v. Department of State, 780 F.2d 86 (D.C.Cir. 1986) (fee waiver guidelines); National Automatic Laundry & Dry Cleaning Council v. Schultz, 443 F.2d 689 (D.C.Cir. 1971). It's a matter of practical common sense. Bernard Schwartz, Administrative Law 574 (3d ed. 1991).

This codifies but does not change existing California law. Let's remember the discussion in Pacific Legal Foundation v. Calif. Coastal Commission, 33 C.3d 158, 169-74, 188 Cal. Rptr. 104, 111-15 (1982), which involved a pre-enforcement attack on the Commission's access guidelines. Note that Mr. Bolz's letter omitted to cite and discuss this case, which is the leading California decision on ripeness in the context of pre-enforcement judicial review of quasi-legislative action. Pacific Legal Foundation has been explicitly followed and applied in several later cases, including BKHN, Inc. v. Dep't of Health Services, 3 Cal.App.4th 301, 308-312, 4 Cal.Rptr.2d 188, 191-94 (1992); State Bd. of Educ. v. Honig, 16 Cal.Rptr.2d 727, 742 (1993). Indeed, the doctrine was even applied in a case involving OAL: State Water Res. Control Bd. v. OAL, 16 Cal.Rptr.2d 25, 31-32 (1993).

Pacific Legal Foundation explicitly adopted in California the federal approach to ripeness set forth in the leading federal Abbott Laboratories decision:

In any event, a basic prerequisite to judicial review of administrative acts is the existence of a ripe controversy...Therefore we must evaluate the question of ripeness in light of the fact that this proceeding is a facial challenge to the guidelines and nothing more. ...In order to reach the merits of plaintiffs' challenges to the guidelines, we must first determine that the issues raised are sufficiently concrete to allow judicial resolution even in the absence of a precise factual context

The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions...It is rooted in the fundamental

concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes. However, the ripeness doctrine is primarily bottomed on the recognition that judicial decision-making is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy. On the other hand, the requirements should not prevent courts from resolving concrete disputes if the consequences of a deferred decision will be lingering uncertainty in the law, especially when there is a widespread public interest in the answer to a particular legal question....

[The Court then cites various federal cases with approval, including the leading decision in Abbott Laboratories v. Gardner, which set forth the test used in §1123.140--evaluation of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. It decided that plaintiff's attack on the guidelines met neither prong of the Abbott Labs tests--fitness of issues for immediate decision or hardship to the parties of withholding court consideration]

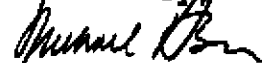
In support of his suggestion that §§1123.130(b) and .140 change the law, Mr. Bolz cites only a 1952 decision, Chas. L. Harney, Inc. v. Contractors State License Board, 39 Cal.2d 561, 247 P.2d 913. In the Harney case, the Court reviewed a regulation prohibiting general engineering contractors from bidding on specialty contracting work. The regulation was enforceable with criminal and administrative sanctions as well as the sanction of non-recovery of contract damages. The regulation also prohibited state agencies from accepting such bids. The Court allowed a general engineering contractor to obtain immediate judicial review of the regulation before it had been applied to the plaintiff. But the court explicitly considered the harm to the plaintiff from deferring review: plaintiff would not be able to submit any bids; if it did bid, it risked disciplinary sanctions or criminal prosecution and non-recovery of contract damages.

The Legislature, by enactment of section 11440 [predecessor to present §11350] must have intended to permit persons affected by an administrative regulation to test its validity without having to enter into contracts with third persons in violation of its terms or to subject themselves to prosecution or disciplinary proceedings. Id. at 564-65 (emphasis added).

Harney is the perfect, indeed the prototypical case in which pre-enforcement judicial review should be allowed. It is exactly like Abbott Labs. A regulation, which had the force of law, prohibited a private party from doing something it wanted to do. The private party is put to the choice of obeying the regulation and losing business or ignoring it and risking serious sanctions. Thus Harney is totally consistent with, and clearly supports, the approach taken in §1123.140.

I hope the foregoing makes clear that SB 209 is in good shape with respect to pre-enforcement review of regulations and simply codifies, rather than changes, existing California law.

Sincerely,



Michael Asimow

cc: Herb Bolz, FAX (916) 323-6826
file: bolz.4