Study N-200 April 24, 1997

Memorandum 97-26

Judicial Review of Agency Action: Senate Bill 209

Attached are the following communications on SB 209:

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OVERVIEW

Action of Senate Judiciary Committee

SB 209 was heard by the Senate Judiciary Committee on April 23. There was little support for the bill in Committee. The Committee decided to make it a two-year bill. Unless reconsideration is granted, the bill may not be heard again in the Judiciary Committee until January 1998.

The bill was opposed by a broad coalition of consumer, environmental, public employee, and labor groups — the Association of California State Attorneys and Administrative Law Judges, California State Employees Association, Consumer Attorneys of California, California Federation of Teachers, California Labor Federation, Planning and Conservation League, California Academy of Attorneys for Health Care Professionals, California Association of Professional Scientists, Professional Engineers in California Government, Consumers Union, California Affordable Housing Law Project, California State Pipe Trades Council,

Center for Law in the Public Interest, California Firefighters, and California Nurses Association.

The bill was supported by the Attorney General, California Judges Association, Judicial Council, and Southern California Edison.

Opposition to the bill centered on three areas of concern:

(1) Its size, scope, and complexity. The bill analysis by committee staff was nine single-spaced pages in length, and said the "proposal is so vast in its scope, that there remain implications of its passage which this analyst was unable to reach in this analysis."

(2) Replacing traditional mandamus under Code of Civil Procedure Section 1085. The California Labor Federation told the Committee that Section 1085 protects employee rights, is in good shape, and should not be tampered with. This appears to refer to Section 1085 challenges to state agency rulemaking. See Exhibit p. 20.

(3) Substantial evidence review of state agency factfinding. There appeared to be no support for this provision on the Senate Judiciary Committee.

Alternatives

The staff believes a substantial overhaul of the bill is necessary to have any hope of passage. Alternatives include:

(1) Restrict the bill to judicial review of state and local agency adjudication. Thus it would replace only the administrative mandamus statutes, Code Civ. Proc. §§ 1094.5, 1095.6. The staff does not favor this alternative, since we believe the major reform the bill would accomplish is to consolidate the various judicial review procedures.

(2) Exempt pre-enforcement review of underground regulations from the bill, and revisit that issue in the rulemaking study. (Post-enforcement review must remain in the bill, because a licensee or other respondent must have the right to a defensive challenge to the regulation on which the enforcement adjudication is based.) This would eliminate many concerns of the Office of Administrative Law and of opponents of the bill. We still must address OAL concerns about the effect of many provisions on pre-enforcement review of duly adopted regulations. The staff would do this in a separate memorandum for a future meeting.

(3) Delete from the bill the article on standards of review, leaving standards to case law as at present. The staff does not favor this alternative. We have resolved the concerns about the various review standards that have been raised in the

past, with the exception of review of state agency factfinding in adjudicative proceedings (see immediately below). A clear statutory statement of review standards is helpful.

(4) Eliminate substantial evidence review of state agency factfinding in adjudicative proceedings, and restore existing law on that issue — independent judgment review "in cases in which the court is authorized by law to exercise its independent judgment on the evidence". As currently construed by the courts that means the standard is independent judgment if a fundamental vested right is involved, otherwise substantial evidence. The Attorney General will undoubtedly renew his opposition to the bill with the independent judgment standard preserved.

(5) Ask Senator Kopp to request the Senate Rules Committee to assign the general subject of judicial review, including a revised version of SB 209, to the Senate Judiciary Committee for interim study. This would allow us to get some policy direction from the Committee.

The staff recommends amending the bill as suggested in alternatives 2 and 3, and making the additional revisions suggested below. We should also consider asking that the amended bill be referred to interim study as suggested in alternative 5, although the value of that procedure limited now that we have flushed out the opposition and have a reading from the Committee on the main point of opposition.

COMMENTS ON SPECIFIC SECTIONS

The attached communications concern sections discussed below. At the meeting, the staff plans to discuss only material below preceded by a bullet [•]. The staff will confirm with the concerned parties that any proposed language adequately addresses the concern, before amending the bill.

§ 1123.120. Finality
§ 1123.140. Exception to finality requirement

It may be better drafting to consolidate Sections 1123.120 (finality) and 1123.140 (exceptions to finality). Formerly Section 1123.140 had exceptions both to the finality requirement of Section 1123.120 and to the ripeness requirement of Section 1123.130. But the Commission deleted the ripeness requirement from Section 1123.130, so now Section 1123.140 qualifies only Section 1123.120 and not 1123.130. Sections 1123.120 and 1123.140 may be consolidated as follows:

1123.120. ~~A~~ (a) Except as provided in subdivision (b), a person may not obtain judicial review of agency action unless the agency action is final.

(b) A person may obtain judicial review of agency action that is not final if all of the following conditions are satisfied:

(1) It appears likely that the person will be able to obtain judicial review of the agency action when it becomes final.

(2) The issue is fit for immediate judicial review.

(3) Postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

~~1123.140. Notwithstanding Section 1123.120 and subject to 1123.130, a person may obtain judicial review of agency action that is not final if all of the following conditions are satisfied:~~

~~(a) It appears likely that the person will be able to obtain judicial review of the agency action when it becomes final.~~

~~(b) The issue is fit for immediate judicial review.~~

~~(c) Postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.~~

§ 1123.130. Agency may not be prohibited from adopting a rule

• Section 1123.130 prevents a court from enjoining or prohibiting an agency from adopting a rule. Mr. Rankin of California Labor Federation, AFL-CIO objects to this, saying it "reverses decades of case law and is burdensome and unnecessary."

• This provision was suggested by the Department of Industrial Relations (First Supplement to Memorandum 96-4). DIR was concerned that the exceptions in Section 1123.140 to finality and ripeness might create a problematic loophole for rulemaking, allowing judicial review of a proposed regulation before it had gone through the adoption process.

• The Comment cites State Water Resources Control Bd. v. Office of Admin. Law, 12 Cal. App. 4th 697, 707-08, 16 Cal. Rptr. 2d 25, 31-32 (1993). But this appears to be a ripeness case, and did not say that in no case may an agency be enjoined from adopting a rule. The case said the ripeness doctrine

> is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way.

• The Commission decided to delete the statutory provision on ripeness from the bill, and to rely instead on case law. Case law includes the *State Water Resources* case. **Section 1123.130 appears to go beyond case law, and should be deleted**:

> ~~1123.130. Notwithstanding any other provision of law, a court may not enjoin or otherwise prohibit an agency from adopting a rule.~~

• The staff would cite the *State Water Resources* case in the Comment to Section 1123.110, where the ripeness doctrine is mentioned.

§ 1123.160. Condition of relief

• Section 1123.160(b) says the court may grant relief "from procedural error only if the error was prejudicial." Ms. Sutherland of California Nurses Association objects to this in the context of judicial review of rulemaking as "contrary to public policy." Office of Administrative Law shares Ms. Sutherland's concern.

This provision was added at the suggestion of the local agency working group. It is drawn from the Planning and Zoning Law (Gov't Code § 65010), and appears to reflect existing law. E.g., Neto v. Conselho Amor da Sociedade No. 41, 18 Cal. App. 234, 239, 122 Pac. 973 (1912) (writ of mandate "is not issued on mere technical grounds," but is to "prevent substantial injury"); California Administrative Mandamus § 4.119, at 170 (Cal. Cont. Ed. Bar, 2d ed. 1989) (court should take evidence if error "prejudicial to the petitioner" is not shown in the record).

The harmless error rule is consistent with other well-established rules of existing law codified in the draft statute: The burden of showing invalidity of agency action or entitlement to relief is on the party asserting it. Section 1123.470. This is a specific application of the presumption that official duty has been legally performed. Evid. Code § 664; California Administrative Mandamus, *supra*, § 4.157, at 203. And no one will have standing to challenge agency action unless someone suffered harm (private interest standing) or an important right affecting the public interest is affected (public interest standing). Sections 1123.220, 1123.230.

In any event, removal of pre-enforcement underground regulations from the scope of the judicial review statute should largely eliminate the concern

expressed. **We would deal with the harmless error issue as it relates to underground regulations in the context of that study.**

§ 1123.230. Public interest standing
§ 1123.310. Exhaustion required
§ 1123.340. Exceptions to exhaustion of administrative remedies

There were objections to each of these sections that relate to exhaustion of remedies — to what extent should a person be required to serve a demand on an agency before judicial review is available, should the exhaustion requirement apply if there are no prescribed administrative procedures, can a regulation be attacked in court as facially invalid without first resorting to administrative challenges? These concerns are interrelated. The staff will prepare material dealing with them for a future meeting.

§ 1123.450. Review of agency exercise of discretion

Mr. Livingston wants to delete from the Comment the sentence that says, "Often, the determination of such [i.e., legislative] facts requires specialized expertise and the fact findings involve guesswork or prophecy." He says it is never appropriate for an agency to engage in guesswork or prophecy which implies the absence of evidence and responsible projection. The staff has no objection:

> . . . . Legislative facts are general in nature and are necessary for making law or policy (as opposed to adjudicative facts which are specific to the conduct of particular parties). Legislative facts are often scientific, technical, or economic in nature. ~~Often, the determination of such facts requires specialized expertise and the factfindings involve guesswork or prophecy~~. A reviewing court must be appropriately deferential to agency findings of legislative fact and should not demand that such facts be proved with certainty. Nevertheless, a court can still legitimately review the rationality of legislative factfinding in light of the evidence in the whole record.

§ 1123.460. Review of agency procedure

Section 1123.460 provides independent judgment review of an agency's determination of whether it "has engaged in an unlawful procedure or decisionmaking process, or has failed to follow prescribed procedure." Mr. Pingel and Mr. Casey of Consumer Attorneys of California say the section should apply to "unfair" as well as "unlawful" procedure.

The quoted language in Section 1123.460 comes from the Model State Administrative Procedure Act. The Comment notes that the section continues part of the administrative mandamus statute, which says the court's inquiry includes whether the agency "has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law . . . ." Code Civ. Proc. § 1094.5(b).

Whether agency procedures are "fair" may be determined under common law or constitutional due process principles, which are generally coextensive. California Administrative Mandamus, *supra*, § 3.18, at 88-89. The common law right of fair procedure includes adequate notice and a reasonable opportunity to respond. Ezekial v. Winkley, 20 Cal. 3d 267, 272, 572 P.2d 32, 142 Cal. Rptr. 418 (1977). Thus Mr. Pingel's suggestion is merely to codify existing law. **Accordingly, the staff recommends revising Section 1123.460 as follows:**

> 1123.460. The standard for judicial review of the following issues is the independent judgment of the court, giving appropriate deference to the agency's determination of its procedures:
>
> (a) Whether the agency has engaged in an unlawful <u>or unfair</u> procedure or decisionmaking process, or has failed to follow prescribed procedure.
>
> (b) Whether the persons taking the agency action were improperly constituted as a decisionmaking body or subject to disqualification.

• Mr. Livingston has the same concern Office of Administrative Law has expressed that Section 1123.460 may require the court to give deference to an agency's determination of whether it has complied with the rulemaking portion of the APA, thus overruling Grier v. Kizer, 219 Cal. App. 3d 422, 434, 268 Cal. Rptr. 244 (1990) (deference to interpretation of APA by OAL, no deference to interpretation of APA by Department of Health Services). *Grier* is cited in the Comment to Section 1123.420, but it may be desirable also to add the following to the Comment to Section 1123.460:

> Section 1123.460 does not address the relative deference to be given to a conflicting interpretation of an agency and of the Office of Administrative Law whether in adopting a regulation the agency has complied with the rulemaking portion of the Administrative Procedure Act. See, e.g., Grier v. Kizer, 219 Cal. App. 3d 422, 434, 268 Cal. Rptr. 244 (1990). *Cf.* Tidewater Marine Western, Inc. v.

Bradshaw, 14 Cal. 4th 557, 927 P.2d 310, 59 Cal. Rptr. 2d 186, 198 (1996).

§ 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

• The draft statute continues and generalizes a provision in existing law requiring a local agency in an adjudicative proceeding to give notice to parties "that the time within which judicial review must be sought is governed by this section." Code Civ. Proc. § 1094.6(f).

• **Local agency notice (§ 1123.640).** The draft statute requires a more informative notice than existing law. For state agency adjudication, the notice must specify the last calendar date for judicial review. For local agency adjudication, the notice does not specify the date, but rather says the last day for review "may be as early as 90 days after the decision is announced, or in the case of a decision pursuant to environmental law, as early as 30 days after the time begins to run." California School Employees Ass'n wants the local agency notice to specify the date of the last day for review, the same as the state agency provision. This may be done by revising Section 1123.640(d) as follows:

> (d) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision ~~may be as early as 90 days after the decision is announced, or in the case of a decision pursuant to environmental law, as early as 30 days after the time begins to run~~ <u>is [date] unless the time is extended as provided by law</u>."
>
> **Comment.** . . . Section 1123.640 does not override special limitations periods applicable to particular proceedings, such as for cancellation by a city or county of a contract limiting use of agricultural land under the Williamson Act (180 days, Gov't Code § 51286), decision of a local legislative body adopting or amending a general or specific plan, zoning ordinance, regulation attached to a specific plan, or development agreement (90 days, Gov't Code § 65009), or a cease and desist order of the San Francisco Bay Conservation and Development Commission and complaint by BCDC for administrative civil liability (30 days, Gov't Code §§ 66639, 66641.7). See Section 1121.110 (conflicting or inconsistent statute controls). Section 1123.640 does not apply to proceedings

> under the California Environmental Quality Act. Pub. Res. Code § 21168(b).

• **State agency notice (§ 1123.630).** The qualification in the state agency notice, "unless another statute provides a longer period," appears superfluous. Variant state agency limitations periods are provided for review of an administratively-issued withholding order for taxes (90 days, Code Civ. Proc. § 706.075), notice of deficiency of an assessment due from a producer under a commodity marketing program (30 days after notice, Food & Agric. Code §§ 59234.5, 60016), State Personnel Board (Gov't Code § 19630), Department of Personnel Administration (90 days, Gov't Code § 19815.8), Unemployment Insurance Appeals Board (6 months, Unemp. Ins. Code § 410, or 90 days, *id.* § 1243), certain driver's license orders (90 days, Veh. Code § 14401(a)), or welfare decisions of the Department of Social Services (one year, Welf. & Inst. Code § 10962). The state agency giving the notice should know from the nature of the proceeding if one of these longer limitation periods applies. Thus, Section 1123.630(e) should be revised as follows:

> (e) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision is [date] unless ~~another statute provides a longer period or~~ the time is extended as provided by law."

California Environmental Quality Act. CEQA limitations periods do not affect the notice, because SB 209 amends Public Resources Code Section 21168 to say the limitation periods of the draft statute do not apply to judicial review of CEQA proceedings.

Claims periods under California Tort Claims Act. Mr. Pingel and Mr. Casey are concerned about how the short limitations period of the draft statute interacts with the longer limitations period of the Tort Claims Act, when applicable. The draft statute preserves existing law in this respect. See discussion below under Section 1123.730.

§ 1123.710. Applicability of rules of practice for civil actions

Mr. Low of California School Employees Ass'n says Section 1123.710 eliminates the right to discovery, most crucial where there has been no administrative hearing. The section does not do that. It permits discovery of matters "reasonably calculated to lead to the discovery of evidence admissible under Section 1123.850." Section 1123.850 generally permits extra-record evidence only if it could not in the exercise of reasonable diligence have been produced in the agency proceedings. But Section 1123.850 has an important exception allowing extra-record evidence if no hearing was held by the agency. **The staff believes this is satisfactory.**

§ 1123.730. Type of relief

Section 1123.730(b) says:

> (b) The court may award damages or compensation, subject to any of the following that are applicable:
> (1) Division 3.6 (commencing with Section 810) of the Government Code.
> (2) The procedure for a claim against a local agency prescribed in a charter, ordinance, or regulation adopted pursuant to Section 935 of the Government Code.
> (3) Other express statute.

Mr. Pingel would strike everything after "compensation" in the first line. He says paragraphs (1)-(3) of subdivision (b) create the possibility of a conflict between the short limitations period of the draft statute and the longer time limits of the California Tort Claims Act. Under existing law, the normal way to deal with this problem "is to file the petition for administrative mandamus within the statute of limitations period, allege the pending claim, and then amend the petition when the claim is rejected to allege that fact." California Administrative Mandamus, *supra*, § 1.13, at 13. This seems satisfactory. **The staff would refer to this practice by adding the following to the Comment to Sections 1123.630 and 1123.640:**

> If the petition for review includes a claim for damages subject to the claims requirements of the California Tort Claims Act (see Section 1123.730(b) and Comment), a petition for review alleging the pending claim should be filed within the time provided in this section, and later amended when the claim is rejected to allege that

fact. This continues existing practice. Cf. California Administrative Mandamus § 1.13, at 13 (Cal. Cont. Ed. Bar, 2d ed. 1989).

Section 1123.730(d) says the "court may award attorney's fees or witness fees only to the extent expressly authorized by statute." This provision comes from Model State Administrative Procedure Act Section 5-117(c) (court may award fees expressly authorized by "other law"). Mr. Casey objects, saying it would prohibit attorneys' fees under the equitable theory of Serrano v. Priest, 20 Cal. 3d 25, 35, 569 P.2d 1303, 141 Cal. Rptr. 315, 318 (1977). See generally California Attorney Fee Awards § 7.4 (Cal. Cont. Ed. Bar, Sept. 1996). *Serrano* was not a mandamus case. It was a class action for declaratory and injunctive relief under the equal protection clause of the U. S. Constitution and the parallel provision of the California Constitution. The draft statute cannot constitutionally apply to such an action. But there may be non-constitutional applications of equitable attorneys' fees, and these may occasionally apply in mandamus cases. See California Attorney Fee Awards, *supra*, § 7.8. This may be a defect in Section 1123.730. The staff needs to do more research, and will either supplement this memorandum or will include it in a memorandum for a future meeting.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

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April 11, 1997

SENT BY U.S. MAIL & FACSIMILE

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

Attn: Bob Murphy

Re: SB 209

Dear Bob:

I received your message this morning to the effect that the Commission is changing its most recent position and will return to advocating the utilization of the substantial evidence standard of review for state agency adjudicative proceedings. As you know, this will be vigorously opposed by Consumer Attorneys of California (CAOC) and labor. I again urge the Commission to abandon this attempt to eliminate an important right of public employees who seek judicial relief from wrongful administrative decisionmaking.

Without further reference to the change of position by the Commission, let me share some concerns I have about SB 209, as amended on April 2, 1997. I was hoping to have these resolved before I make a further recommendation to Consumer Attorneys of California and others.

While I appreciate the effort that has been made thus far (at least prior to the Commission's apparent change of position), the bill still presents problems in the following respects. Too much deference is given to administrative agencies. The bill eliminates the right to have an "unfair" administrative hearing reviewed. It conflicts with the Government Tort Claims Act. I believe the following amendments are still required.

(1) Section 1123.460 [Page 16, line 12];

Following the word "deference", insert:

"if appropriate, under all the circumstances,".

The amended section would then read:

"The standard for judicial review of the following issues is the independent judgment of the court giving deference, if appropriate under all the circumstances, to the agency's determination of appropriate procedures."

As I have previously told the Commission, some decisionmaking, particularly at the local agency level, is just downright odious. Since the petitioner already has the burden of proving that the agency's action was invalid (Section 1123.470), it is unfair to require the judge (the purportedly independent decision maker) to give unfettered deference to the agency.

(2) Section 1123.460 (a) [Page 16, lines 14-15]:

Following the word "unlawful", insert: "or unfair"

The amended section would then read:

"(a) Whether the agency has engaged in an unlawful or unfair procedure or decisionmaking process, or has failed to follow prescribed procedure."

Present law permits judicial review of whether there was a "fair trial" in the administrative hearing. Since the Commission's meeting in January, 1996, I have consistently opposed efforts to water down the remedies presently provided by administrative mandate especially where fundamental vested rights are involved, such as in adjudication of employee disciplinary or disability retirement rights. Judicial review under the independent judgment standard allows for an independent decision maker to review the facts and make an independent decision.

CCP Section 1094.5 (b) provides in pertinent part:

"The inquiry in such case shall extend to the questions of whether the respondent has proceeded without, or in excess of jurisdiction; *whether there was a fair trial*[1]; and whether there was any prejudicial abuse of discretion. *Abuse of discretion is established if* the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

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[1] In its present form, the bill eliminates this fundamental component of administrative review; i.e., inquiry into whether the affected party had a "fair trial". I doubt that any Commission members or consultants have suffered through the type of "Kangaroo Court" administrative hearings many public employees have had to undergo. Perhaps that is why the Commission's proposal left this important right out.

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(3) Section 1123.730 (b) [Page 21, lines 37]:

Delete everything after the word "compensation".

The amended section would then read, simply:

"The court may award damages or compensation."

This bill (and the Commission's original concept) is designed to standardize certain aspects of judicial review of administrative action, including "time limits". (Article 6, page 17, line 11, through page 20, line 2) In certain cases, the time period within which to file a Petition for Review, for both state and local agencies, is as short as 30 days. (page 18, lines 1-9)

Trying to overlay the Tort Claims Act time limits (e.g. 6 months to file a claim for money damages; a required 45-day wait before filing an action for damages after filing the government tort claim) on time limits for petitions for review will be a source of considerable confusion and unnecessary litigation.

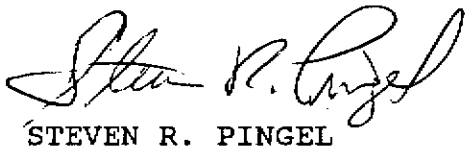
Moreover, public agencies who would be the respondents in petition for review proceedings would already have complete notice of the nature and the details of the petitioner's claim as well as reasonable knowledge of the amount of potential damages. After all, the agency is either a party or an adjudicator in the administrative proceeding and has heard the petitioner's evidence. It is simply unfair to those affected by wrongful government administrative action to force them through so many procedural hoops.

Section 112.430 (b), regarding credibility determinations, is acceptable as long as it continues to apply to "state" agency adjudicative proceedings.

Please give me a call if you would like to discuss this.

Thanks.

Very truly yours,



STEVEN R. PINGEL

SRP/ccg

cc: Senate Judiciary Committee
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April 11, 1997

The Honorable Quentin L. Kopp
California State Senate
P.O. Box 942848
Sacramento, CA 94248-0001

Dear Senator Kopp:

The California School Employees Association respectfully urges you to amend **SB 209**, relating to judicial review of government agency actions.

The amendment we are requesting is in Section 1123.640 (d) dealing with the timeline for filing a petition with a court for review of a decision. Previously, in Section 1123.630 (e) a specific date is required to be provided to the parties, notifying them of the deadline for filing a petition.

However, in 1123.640 (d) no specific date is required. Instead, relatively vague and confusing language provides that "The last day to file a petition with a court for review of the decision may be as early as 90 days after the decision is announced, or in the case of a decision pursuant to environmental laws, as early as 30 days after the time begins to run."

For many people who cannot afford an attorney, this timeline is very difficult to decipher. We recommend that this section be amended to provide a specific date, similar to Section 1123.630 (e).

This amendment will give the parties a clear deadline for filing a petition with the court.

Please contact us if you have any questions regarding the above amendments.

Sincerely,

Dave Low

Dave Low, Assistant Director
Governmental Relations

DL:fs

c: Bill Heath, Deputy Chief Counsel

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April 18, 1997

The Honorable Quentin L. Kopp
California State Senate
P.O. Box 942848
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Dear Senator Kopp:

On April 11 we submitted a letter regarding SB 209 (Kopp) requesting amendments (attached). After further review and recent amendments we have additional concerns regarding the bill.

The April 2 amendments to SB 209 in sections 1123.430 and 1123.440 provided for use of the independent judgement standard for all state agency and local agency cases. We support this amendment. However, we have been advised that the bill will be amended again to provide for the independent judgement standard for local agencies under section 1123.440, but in state agencies covered in section 1123.430 the substantial evidence standard will apply. We would encourage you to maintain the independent judgement standard for both state and local agencies. We believe this standard provides a much better and more fair opportunity for full review and a fair hearing.

We have two other concerns regarding SB 209. First, SB 209 eliminates the right to discovery in sections 1123.710(c) and 1123.850(b). There are cases in which a hearing at the administrative level may not occur. Therefore, there is no hearing record and no way to adequately develop a record without discovery. Second, SB 209 virtually eliminates attorney's fees by allowing the court to award attorney's fees only to the extent expressly authorized by statute (section 1123.730(d)). This eliminates access to attorney's fees through the common fund.

We urge you to consider retaining the current language (as amended in Senate April 2, 1997) regarding sections 1123.430 and 1123.440, and maintaining current law regarding discovery and attorney's fees.

Please contact me if you have any questions regarding these issues.

Sincerely,

Dave Low

Dave Low, Assistant Director
Governmental Relations

attachment DL:lb/12972/811497

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April 14, 1997

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Re: Judicial Review of Agency Actions - SB 209 (Kopp)

Dear Mr. Murphy:

I appreciate the Commission allowing me to participate in its meeting on April 9, 1997. The changes to sections 1123.130 and 1123.140 address the ripeness problem.

I understand that you plan to address the definition of agency action in section 1123.240 to conform with the changes in sections 1123.120 and 1123.130. In addition, I would like to bring three other issues to your attention.

The first of the three is in section 1123.240. This section deals with exceptions to the exhaustion of administrative remedies' requirement. I propose amending subdivision (f) of that section to include judicial review on the ground that a regulation is invalid. An agency, in an adjudicatory proceeding, cannot declare its regulations to be invalid. To do so would be equivalent to repealing the regulation, and the Administrative Procedures Act imposes a process for that. Accordingly, challenging the validity of a regulation in an adjudicatory proceeding is futile, and for that reason should be added to this section.

The second of the three issues is in section 1123.450. To say that it's in the section is not totally accurate. The section appears to me, without conducting research, to be an accurate statement of the law. However, the comment to that section contains one sentence that is troubling. The comment on page 52 of the November 22, 1996 staff draft states, "Often, the determination of such facts requires specialized expertise and the fact findings involve guesswork or prophecy." I think it's appropriate for an agency to project possible outcomes or consequences based on substantial evidence. It is never appropriate for an agency to engage in guesswork or prophecy which inherently imply the absence of evidence and responsible projection. Accordingly, I would urge that the entire sentence be struck. The phrase "specialized expertise," while appropriate, is redundant in view of the preceding sentence.

The third of the three points involves section 1123.460. I agree with Herb Bolz's comment that the court should not defer to the agency's determination of procedures involved in rulemaking. While I have some concern whether it's an appropriate provision with respect to adjudication because it seems to encourage variations from one agency to the other as to what the adjudicatory provisions of the APA mean and require, it is totally inappropriate with respect to the rulemaking portion of the APA. The provisions of the rulemaking portion of the APA have been interpreted by the Office of Administrative Law, which is the agency responsible for implementing that law. Courts have recognized OAL's expertise and have deferred to its interpretations of the APA.

Thank you for considering these points. If you have any questions or would like to discuss any of these issues further, please feel free to call me.

Sincerely,

GENE LIVINGSTON
GL:pj
i:\gl\murp0414.l97

Art Carter
Legislative Advocate

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(916) 446-3413
FAX: (916) 446-4805

Debbie Norton
Administrative Assistant

April 16, 1997

The Honorable Quentin Kopp
Member, California State Senate
State Capitol, Room 2057
Sacramento, CA 95814

SUBJECT: SB 209 and SB 261

Dear Senator Kopp:

The California State Pipe Trades Council opposes portions of SB 209 and its companion bill, SB 261, and has serious reservations regarding other portions. The Pipe Trades believes that these bills should be defeated or sent to interim study so that interested parties can thoroughly evaluate them.

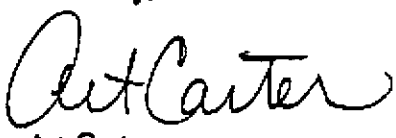
Certain provisions in SB 209 stand out as being particularly problematic. For example, Section 1123.720 imposes a stringent four-part test that would make it nearly impossible to obtain a stay of agency action pending the outcome of the litigation, even if the agency would cause irreparable injury to the public interest. In comparison, existing law allows a court to grant a stay in most circumstances as long as the stay is not against the public interest. (Code of Civil Procedure § 1094.5.) Other areas of concern include provisions regarding exhaustion of administrative remedies and the standard of review of agency rulemaking.

Unfortunately, the background materials for these bills, which encompasses nearly 450 pages, have been made available for only a few weeks. It is unrealistic to expect legislators and interested members of the public to make an informed decision regarding the merits of this legislation in the short time frame available.

These comments are based on a preliminary review of SB 209 and SB 261. Because of the broad scope of this legislation, the California State Pipe Trades Council is concerned that other provisions may be included in the bills that would be detrimental to the ability of individuals and organizations to seek judicial review of government agency actions.

There is no urgent need to act on these bills immediately. The substantial risk of unintended consequences dictates a cautious approach. The bills should be sent to interim study to allow both the legislature and the public adequate time to analyze their impact.

Sincerely,



Art Carter

cc: Members, Senate Judiciary Committee

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

Dear Senator Kopp:

On behalf of our client, the Association of California State Attorneys and Administrative Law Judges, the California Association of Professional Scientists and the Professional Engineers in California Government, I would like to update you on the status of their opposition to your SB 209. SB 209 is a comprehensive rewrite of the state's judicial review process.

We understand that you intend to amend the provision relating to standing for taxpayer lawsuits. However, we also understand that the provision requiring a person to request the agency correct the action will be retained. Our clients do not know why this subdivision is necessary. We understand that this provision 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 additional input on this matter. If you were to remove this provision, our clients would remove their opposition. If you or your staff have any questions, please do not hesitate to call.

Sincerely,

Steve Baker
Legislative Advocate

dlw/S178

cc: Senate Judiciary Committee Staff

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STATE OF CALIFORNIA

PETE WILSON, Governor

OFFICE OF ADMINISTRATIVE LAW
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SACRAMENTO, CA 95814
(916) 323-6225

April 17, 1997

The Honorable Quentin L. Kopp
California State Senate
State Capitol
Sacramento, California 95814

Dear Senator Kopp:

RE: SB 209

The Office of Administrative Law (OAL) has no approved position on SB 209 at this time; however, we wish to be on the record as having serious concerns regarding numerous provisions of the bill as they affect judicial review of regulations.

OAL has been active in the proceedings of the Law Revision Commission in its development of the bill. We have attempted to cooperate with the commission as it seeks a unified, integrated statute for judicial review of agency actions, including both adjudications and rulemaking.

As we have continued to study SB 209, it has become apparent to us that the bill has been developed with primarily judicial review of *adjudication* in mind. There are a number of provisions of the bill that are not appropriate in the rulemaking context and cosmetic attempts to fix the problems have not been successful. New language needs to be drafted to address issues arising in judicial review of both duly adopted and "underground" regulations.

For example, proposed California Code of Civil Procedure (CCP) section 1123.420 contains the default judicial review standard. The section states that in reviewing an agency interpretation of law, the court shall exercise independent judgment giving deference to the determination of the agency appropriate under the circumstances. Another provision, proposed section 1123.460, specifically prescribes the standard of review where an allegation is made that an agency has engaged in an unlawful procedure or has failed to follow prescribed procedure, for example, the rulemaking procedure required by the Administrative Procedure Act (APA).

In response to OAL's objection that proposed section 1123.460 drastically changes existing case law (*Engelmann v. State Board of Education* (1992) 2 Cal. App.4th 47, 57 & 59) which says that *no* deference is to be given to an agency's determination that the APA does not apply, the commission revised Government Code section 11350 (declaratory relief concerning the validity of a regulation) to state that proposed CCP 1123.460 does not apply to proceedings under section 11350.

This brings us back to the default standard of review in proposed CCP section 1123.420, which gives "appropriate" deference to the agency's determination of interpretation of law. In the rulemaking context, this means that an agency's determination that it is or is not subject to the rulemaking requirements of the APA would be given appropriate deference. This is not current law, nor do we believe that it is good public policy which promotes agency accountability.

At the last commission meeting, OAL agreed to cooperate with the commission in developing language to better accommodate judicial review of state agency regulations. The policy priority is 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.

Nat Sterling, executive director of the commission, represented to us that the commission will attempt to address OAL's concerns prior to an Assembly policy committee hearing.

We appreciate your efforts and the commission's efforts to craft a streamlined and integrated statute for judicial review of agency actions. SB 209 is complex. We look forward to working with the commission to better integrate judicial review of agency regulations and rulemaking.

Sincerely,

Char Mathias, Assistant Chief Counsel

Copy to: Dana Mitchell, Counsel, Senate Judiciary Committee

CENTER FOR LAW
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ADMINISTRATIVE ASSISTANT
Gayl Martin

The Honorable Quentin Kopp
California State Senate
State Capitol
Sacramento, California 95814

Re: SB 209

Dear Senator Kopp:

The Center for Law in the Public Interest writes to express its serious concerns regarding the California Law Revision Commission's proposal for sweeping changes in judicial review of regulatory agency actions.

The Center is a 25-year old public interest legal organization representing clients in wide variety or areas, including civil rights, environmental and consumer issues. We frequently rely upon the APA and administrative mandamus to ensure full public participation in the process of crafting the rules under which California individuals and businesses live and work.

The proposed sweeping changes regarding how generally binding regulations are challenged in California will have an impact upon every business and interest imaginable in this State. *Nevertheless, almost nobody who will have to do business or live under this new statutory regime has been consulted about the changes this Committee will consider on Tuesday.* Apparently, participation has been essentially limited to academics and regulatory agencies. Here is just a partial list of some of the groups that have not participated in the process of completely re-drafting the means by which businesses and consumers would seek relief from secret, burdensome, or otherwise unlawful regulations issued by California departments:

- California Chamber of Commerce;
- California Manufacturer's Association;
- Association of California Insurance Companies;

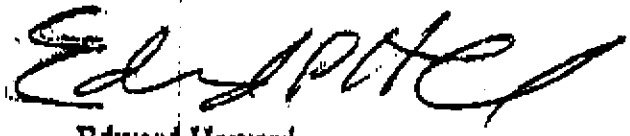
- California Bankers Association;
- Congress of California Seniors;
- California Taxpayers Association;
- Sierra Club; and
- California Foresters Association.

These groups are just "off the top of the head." Assuredly, many more are affected.

As the Legislature observed in Government Code section 11340 (a), "There has been an unprecedented growth in the number of administrative regulations in recent years." This is not surprising, given that there are over 50 different State agencies regulating everything from architecture to vocational nursing.

The Center believes that, when such sweeping changes in the way individuals and businesses will be able to obtain relief from regulatory actions are proposed, a more concerted effort to involve the people affected by those changes should be made before such changes are presented to the Legislature. Despite its long record of involvement in such areas as environmental and insurance matters, the Center itself was not made aware of these changes until earlier this month. A modest amount of additional time to obtain the input of these and other affected groups is sensible and prudent, given their crucial importance to a wide variety of interests who must routinely grapple with administrative regulatory issues.

Sincerely,



Edward Howard,
Executive Director

CC: Dana Mitchell

April 18, 1997

The Honorable Quentin L. Kopp
California State Senate
State Capitol
Sacramento, CA 95814

RE: **Senate Bill 209 and Senate Bill 261-Strongly Oppose**

The California Nurses Association (CNA), who represents over 27,000 Registered Nurses statewide, is strongly opposed to SB 209 and its companion bill SB 261. If passed, these bills would drastically change existing law by severely limiting an essential ingredient in our present governmental system, the ability of private individuals and public interest organizations' to challenge governmental action.

SB 209 would give the court great deference in reviewing agency action, and would severely weaken the existing procedural safeguards by incorporating a "prejudicial" standard. Presently, we have the ability to challenge duly adopted regulations and underground regulations pursuant to the rules adopted under the APA. However, under the language of SB 209, the courts could uphold agency action despite procedural impropriety, if the court determines the party was not prejudiced. We believe this to be contrary to public policy.

The present system of reviewing agency action has proved effective in protecting the rights of the people for over 40 years. However, there is this apparent sense of urgency that fuels the passage of this bill. We suspect, based on our observations of the California Law Revision Commission (CLRC) and that of their consultant Professor Asimow, that the urgency reflects the interest of the industries that are regulated by state agencies, and not the interest of the regulated public. Thus, we recommend that the sections that relate directly or indirectly to review of regulations be broken out entirely from the bill, or in the alternative referred to interim study to allow more comprehensive review by the Senate Judiciary Committee and all stake holders.

Sincerely,

Shannon Sutherland

Shannon Sutherland, RN, JD
Regulatory Policy Specialist

cc: Dana Mitchell, Counsel, State Judiciary Committee

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Santa Clara • Fresno
Los Angeles • San Diego

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California Federation of Teachers
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Law Revision Commission
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April 18, 1997

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

Re: SB 209 Position: OPPOSE

Dear Senator Burton:

The California Federation of Teachers is opposed to Senate Bill 209 (Kopp), which amends the California Code of Civil Procedure and several other codes. SB 209 would destroy the ability of citizens to require governmental agencies to follow their rules and regulations and makes government unaccountable to individuals and groups. This bill is scheduled to be heard next in the Senate Judiciary Committee.

Presently, the petition for writ of ordinary mandate under Cal Code of Civil Procedure (C.C.P.), Section 1085 is an alternative to lengthy civil litigation and frequently is used to preserve retirement benefits, enforce some labor contracts, enforce pre-termination due process rights, challenge elimination of the 8-hour work day, maintain prevailing wages, protect free speech rights, and enforce safety standards. C.C.P. Section 1085 is only available when there is no plain and speedy remedy at law.

If SB 209 is adopted, the plain and speedy remedy under Section 1085 will be replaced with a cumbersome, expensive, slow, and convoluted process which favors employers and agencies over individuals. One goal of SB 209 is to discourage lawsuits traditionally brought as ordinary mandamus cases.

SB 209, in its present form, threatens the rights of all Californians. It will hurt school children teachers, labor unions, retirees and all public and private employees, taxpayers, consumers; in short, anyone regulated by a government agency.

The changes proposed by SB 209 will abridge the rights of individuals we represent. Therefore, we urge your "NO" vote.

Sincerely,

Judy Michaels

Judy Michaels
Legislative Director

cc: Members, Senate Judiciary Committee
Senator Kopp

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CONSUMER ATTORNEYS OF CALIFORNIA

David S. Casey, Jr. President | Rick Simons President-Elect | Donald C. Green Chief Legislative Advocate | Nancy Drabble Senior Legislative Counsel | Nancy Peverini Legislative Counsel | Lea-Ann Tratten Legal Counsel

April 18, 1997

The Honorable Quentin Kopp
State Capitol, Room 2057
Sacramento, CA 95814

Re: SB 209 (Kopp) and SB 261 OPPOSE as amended April 16

Dear Senator Kopp:

Consumer Attorneys of California opposes SB 209 and its companion bill SB 261, which are set for hearing in the Senate Judiciary Committee on April 21, 1997. CAOC appreciates the efforts of you and your staff to resolve concerns with the bill. At one point, we understood that significant amendments were being made to the bill which addressed most of our concerns. However, as now presented, SB 209 significantly affects an important right of consumers who seek judicial relief from wrongful administrative decision making.

SB 209 replaces current mandamus procedures with one statute that would govern actions seeking review of administrative decisions. In "clarifying and streamling" the procedures, unfortunately important protections for the review of such decisions is lost. Administrative tribunals many times reflect the positions of those agencies that they regulate, therefore it is essential that the current system which maintains a check on the administrative system remain in place.

Code of Civil Procedure § 1094.5 Administrative mandamus

Code of Civil Procedure § 1094.5 provides the standard of review in cases reviewing a decision of a state or local agency. The standard of review consists of a three step process: Whether the agency acted in excess of its jurisdiction, whether there was a fair trial and whether there was an abuse of discretion. In deciding whether there was an abuse of discretion in fact finding, the court employs one of two standards of review: substantial evidence or independent

Legislative Department

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judgment review. In cases that involve vested rights, the court exercises its independent judgment in deciding whether the findings are supported by the record. This standard of review is critical in protecting consumers' rights.

Independent judgment standard:

We oppose any effort to water down the remedies presently provided by administrative mandate. The standard outlined above is effective and is an important protection for consumers who must proceed through administrative review before disputes are heard in a civil court. We particularly oppose any cutbacks in the application of the independent judgment standard of review where fundamental vested rights are involved, such as in adjudication of employee disciplinary or disability retirement rights. This particular aspect of administrative litigation is not "broke" and does not need fixing. Judicial review under the independent judgment standard allows for an independent decision maker to review the facts and make an independent decision untainted by either actual bias or the appearance of bias.

Fair trial protection:

Present law permits judicial review of whether there was a "fair trial" in the administrative hearing. Under SB 209, too much deference is given to administrative agencies. The bill eliminates the right to have an "unfair" administrative hearing reviewed. Since the petitioner already has the burden of proving that the agency's action was invalid, it is unfair to require the judge (the purportedly independent decision maker) to give unfettered deference to the agency.

CCP § 1085 Ordinary Mandamus:

SB 209 severely curtails the procedure currently available by ordinary mandamus, which has broad evidentiary and discovery provisions. Under SB 209, limited discovery is at the discretion of a judge. Such limitation works a disadvantage to persons who are subject have administrative grievances.

Common fund doctrine:

SB 209 severely limits attorneys' fees, reversing Serrano v. Priest III. Under proposed § 1123.730(d) no one could afford to bring an ordinary mandate class action to vindicate constitutional rights because the common fund doctrine.

Time limits

SB 209 is designed to standardize certain aspects of judicial review of administrative action, including "time limits." In certain cases, the time period within which to file a Petition for Review, for both state and local agencies, is as short as 30 days. In doing so, SB 209 conflicts with the Government Tort Claims Act.

Trying to overlay the Tort Claims Act time limits (e.g. 6 months to file a claim for money damages; a required 45-day wait before filing an action for damages after filing the government tort claim) on time limits for petitions for review will be a source of considerable confusion and unnecessary litigation.

Moreover, public agencies who would be the respondents in petition for review proceedings would already have complete notice of the nature and the details of the petitioner's claim as well as reasonable knowledge of the amount of potential damages. After all, the agency is either a party or an adjudicator in the administrative proceeding and has heard the petitioner's evidence. It is simply unfair to those affected by wrongful government administrative action to force them through so many procedural hoops.

For these reasons, CAOC opposes SB 209. If you or a member of your staff would like to discuss this issue further, please contact me or one of our legislative representatives in Sacramento.

Sincerely,

David S. Casey, Jr.
President

cc: Senate Judiciary Committee

California Labor Federation, AFL-CIO

Headquarters: 417 Montgomery St., Suite 300, San Francisco, CA 94104-1109 • (415) 986-3585 • FAX (415) 392-8505
Legislative Office: 1127 11th St., Suite 425, Sacramento, CA 95814-3809 • (916) 444-3676 • FAX (916) 444-7693

ART PULASKI
Executive Secretary-Treasurer

TOM RANKIN
President

April 18, 1997

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

Dear Senator Burton:

The California Labor Federation, AFL-CIO, opposes SB 209 (Kopp), which would significantly alter certain provisions of the Code of Civil Procedure.

We object to the elimination of ordinary mandate, which allows immediate superior court review when a public agency violates its rules or acts unconstitutionally. SB 209 would require that agency to construct a record which would by the "exclusive basis" for judicial review. This would allow the agency to manufacture a record and justification AFTER hearing a petitioner's objection.

Additionally, the bill would prevent courts from enjoining or prohibiting an agency from adopting an unconstitutional or otherwise odious rule unless three new tests are met. This provision reverses decades of case law and is burdensome and unnecessary. We believe California's existing standards governing injunctions are appropriate and should be retained.

We urge you to vote "NO" on SB 209 when it comes before you in the Senate Judiciary Committee on April 23rd.

Sincerely,

Tom Rankin

Tom Rankin
President

TR:pw
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cc: committee members

CALIFORNIA
firefighters

Law Revision Commission
RECEIVED

APR 23 1997

File:_____

April 18, 1997

The Honorable John Burton
Senate Judiciary Committee
State Capitol Building
Sacramento, CA 95814

RE: SB 209 (Kopp) - Judicial review: governmental agency actions
(OPPOSE UNLESS AMENDED)

Dear Senator Burton:

The California Professional Firefighters must oppose unless amended SB 209 (Kopp), which will soon be heard by the Senate Judiciary Committee.

Among other things, this bill specifies that administrative remedies must be exhausted before judicial review of the agency action may be obtained. The bill does not state, however, what constitutes an administrative remedy. An administrative remedy should be one that is either prescribed in statute or prescribed in rules and regulations promulgated pursuant to the Administrative Procedures Act.

We therefore respectfully request your NO vote when the bill comes before you unless SB 209 were amended to contain a clear interpretation of the administrative remedies.

Sincerely,

Brian Hatch
Director of Governmental Affairs

BH/kw

cc: Senator Quentin Kopp
Committee Consultant

California Professional Firefighters
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Affiliated with International Association of Fire Fighters • California Labor Federation • COPE • AFL-CIO