Study N-200 December 10, 1997

First Supplement to Memorandum 97-80

Judicial Review of Agency Action: Report on SB 209 Interim Study

Senate Bill 209 is set for hearing in the Senate Judiciary Committee on Tuesday, January 13, so this is our last chance to get the bill in shape before the hearing. We received three letters on SB 209 since the basic memo was sent out:

The staff plans to discuss only material below preceded by a bullet [•].

§ 1123.330. Judicial review of rulemaking

Mr. Lui suggests implementing a decision agreed on at the meeting in the State Capitol to make the requirement of exhaustion of administrative remedies inapplicable to preenforcement review of a state agency regulation on the ground that it is not authorized by or is facially inconsistent with statute. The staff recommended language in the basic memo to do this.

Mr. Lui would add language in Section 1123.330 to say "Notwithstanding any other provision of this chapter, a person may obtain judicial review . . . ." This is covered in Section 1123.310 which says a person may obtain judicial review only after exhausting administrative remedies "unless judicial review before that time is permitted by this article." If we add "notwithstanding" language to Section 1123.330, then we must also add it to Sections 1123.320, 1123.340, and 1123.350. The staff would not do this.

Mr. Lui suggests adding a sentence to the Comment to say emergency regulations are treated as final for the purpose of judicial review. In the basic memo, the staff did this in the Comment to Section 1123.120 (finality).

Mr. Lui suggests making clear in the Comment to Section 1123.110 that the ripeness doctrine "should rarely ever be used by a court to throw out a pre-enforcement challenge to regulations." **The staff recommends recasting this**

slightly, and adding it to the third paragraph of the Comment to Section 1123.330 as set out in the basic memo:

> **Comment.** . . . Subdivision (c) is new. Subdivision (c) states when exhaustion of administrative remedies is not required for judicial review of a state agency regulation adopted or amended under the Administrative Procedure Act. It does not deal with ripeness for review, which is left to court discretion as under case law. See the Comment to Section 1123.110. Courts often decline to apply the ripeness doctrine in facial challenges to regulations where the issues are purely legal. See, e.g, Planning & Conservation League v. Department of Fish & Game, 54 Cal. App. 4th 140, 62 Cal. Rptr. 2d 510, 513-14 (1997); Planning & Conservation League v. Department of Fish & Game, __ Cal. App. 4th __, 67 Cal. Rptr. 2d 650, 653-54 (1997). See also Gov't Code § 11342.2 (state agency regulation adopted under Administrative Procedure Act must be authorized by and consistent with statute).

§ 1123.410. Standards of review of agency action

In the basic memo, the staff recommends adding language to the Comment to address a suggestion made by Mr. Lui at the meeting in the State Capitol. His attached letter refines his suggestion. **The staff recommends substituting the following language for that recommended in the basic memo:**

> **Comment.** Section 1123.410 is drawn from 1981 Model State APA Section 5-116(a)(2). ~~The~~ It is the court's independent responsibility to choose and apply the section or sections of this article with the appropriate review standard ~~of this article to be applied by the court depends~~ , depending on the issue being considered. For example, in exercising discretion, an agency may be called upon to interpret a statute, to determine basic facts, and to make the discretionary decision. In reviewing this action, the court would use the standard of Section 1123.420 (independent judgment with appropriate deference) in reviewing the statutory interpretation, the standard of Section 1123.430 (substantial evidence) or 1123.440 (substantial evidence or independent judgment) in reviewing the determination of facts, and the standard of Section 1123.450 (abuse of discretion) in reviewing the exercise of discretion. Or, if judicial review is sought on the ground that the agency has failed to perform a statutorily-mandated duty, the court would use the standard of Section 1123.420 in determining whether or not a statutory duty exists. If the court determines the agency has discretion under the statute to act or not act, the court would use the standard of Section 1123.450 in determining whether the agency exercised its discretion properly.

§ 1123.420. Review of agency interpretation of law

Section 1123.420(a) says the standard of review of agency interpretation of law is independent judgment with "deference to the determination of the agency appropriate to the circumstances of the agency action." Mr. Lui is concerned the Comment may color the statute by requiring the court to give greater deference to agency interpretation of law than does existing law, particularly the discussion of the "clearly erroneous" standard. This is not the intent of Section 1123.420.

The "clearly erroneous" discussion was added to the Comment at the request of Bernard McMonigle of the Public Employment Relations Board to address his belief that PERB enjoys a more deferential standard of review than other agencies. Later, PERB and the other two labor agencies — Agricultural Labor Relations Board and Workers' Compensation Appeals Board — were exempted from this section, so the discussion of the "clearly erroneous" standard is no longer necessary. **The staff recommends revising the first and third paragraphs of the Comment to Section 1123.420 as follows:**

> **Comment.** Section 1123.420 clarifies and codifies existing case law on judicial review of agency interpretation of law. It is not the intent of Section 1123.420 to require the courts to give greater deference to agency interpretation of law than under existing law.
>
> . . . .
>
> Under subdivision (a), the question of the appropriate degree of judicial deference to the agency interpretation of law is treated as "a continuum with nonreviewability at one end and independent judgment at the other." See Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 575-76, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 147-48 (1995). ~~Subdivision (a) is consistent with and continues the substance of cases saying courts must accept statutory interpretation by an agency within its expertise unless "clearly erroneous" as that standard was applied in Nipper v. California Auto. Assigned Risk Plan, 19 Cal. 3d 35, 45, 560 P.2d 743, 136 Cal. Rptr. 854 (1977) (courts respect "administrative interpretations of a law and, unless clearly erroneous, have deemed them significant factors in ascertaining statutory meaning and purpose"). The "clearly erroneous" standard was another way of requiring the courts in exercising independent judgment to give appropriate deference to the agency's interpretation of law. See Bodinson Mfg. Co. v. California Employment Comm'n, 17 Cal. 2d 321, 325-26, 109 P.2d 935 (1941).~~
>
> . . . .

§ 1123.430. Review of agency factfinding

• In the basic memo, the staff recommends deleting subdivision (c) from Section 1123.430. Subdivision (c) provides for independent judgment review of a determination of fact by an administrative law judge of the Office of Administrative Hearings that is changed by the agency head. The reason for deletion is that it is unnecessary if we return to existing law on the standard of review of factfinding, because virtually all determinations of fact by an OAH ALJ will be subject to independent judgment review.

• Mr. Pingel would keep subdivision (c), and expand it to apply to a changed determination of fact by an ALJ employed by any state agency. This would override existing substantial evidence review for state agencies where it now applies — corporate reorganizations approved by the Commissioner of Corporations, decision not to rehire a probationary teacher for cause (heard by OAH ALJs), revocation of an auto dealer franchise, rejected applicants for professional and occupational licenses, decisions of the State Personnel Board and Regents of the University of California, and decisions of the WCAB whether a worker is disabled. Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1172-76 (1995).

• Subdivision (c) was adopted as an intermediate position between those who wanted to keep independent judgment review and the Commission's inclination to abolish it. The Commission approved subdivision (c) after having rejected it on two previous occasions.

• The staff would like to accommodate the Consumer Attorneys to the extent possible. But the rationale for Section 1123.430 as revised in the basic memo is that we are merely continuing existing law with all its deficiencies, so thoroughly identified in Professor Asimow's study and the Commission's report. To expand independent judgment review would be contrary to the Commission's consistent policy view, and would defeat the argument that, although Section 1123.430 is not ideal, we are merely continuing existing law. **The staff continues to believe subdivision (c) should be deleted.** Expanding independent judgment review as suggested by Mr. Pingel could be proposed in legislation by some other sponsor, and the Commission would not oppose it. See Gov't Code § 8288.

§ 1123.460. Review of agency procedure

• As revised at the last meeting, Section 1123.460 provides:

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 or unfair procedure or decisionmaking process, or has failed to follow prescribed procedure.

(b) Whether the agency has engaged in an unfair procedure or decisionmaking process. This subdivision does not apply to judicial review of either of the following:

(1) A state agency regulation adopted, amended, or repealed under the rulemaking portion 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.

(2) Adjudication under the formal adjudication provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(c) Whether the persons taking the agency action were improperly constituted as a decisionmaking body or subject to disqualification.

• Mr. Lui objects to requiring the court to give any deference at all to the agency's determination of its procedures. He says this does not correctly state California law. He would delete the deference language from the section. The staff has trouble with this suggestion. Professor Asimow made a strong case in his study for some judicial deference on procedural issues:

> While courts have the power to substitute judgment on procedural issues, they should normally accord considerable deference to agency decisions about how to implement procedural provisions in general or particular statutes. Agencies are often in a better position than are courts to adapt general statutory procedural norms to their own processes and resource constraints. Their expertise may be no less relevant in establishing appropriate procedure than in finding facts and determining or applying law and policy. A court that oversees the work of a particular agency only on an episodic basis may be much less qualified than the agency to determine what procedures make sense in applying a particular statute.
>
> Thus, in deciding whether a procedure meets statutory or constitutional requirements, weak deference is usually in order. Of course, the normal weak deference protocols apply here. Greater deference is due to agency procedural determinations that have been maintained consistently, and are carefully considered and justified, and can plausibly be connected to the agency's experience,

> expertise, and specialization. Obviously, an agency's procedural choices under a general statute applicable to a variety of agencies (like the APA) is entitled to less deference than a choice made under a statute unique to the particular agency.

Asimow, *supra*, 42 UCLA L. Rev. at 1246-47.

• Mr. Lui's letter implies it might be enough to make clear courts must use a "weak" deference standard. **The staff agrees, and recommends revising the Comment to Section 1123.460 as follows:**

> **Comment.** Section 1123.460 is consistent with existing law concerning the independent judgment of the court on questions of a legal character, including whether the administrative proceedings have been fair. See Bekiaris v. Board of Educ., 6 Cal. 3d 575, 587, 493 P.2d 480, 100 Cal. Rptr. 16 (1972). *Cf.* 5 U.S.C. § 706(2)(d) (federal APA); Mathews v. Eldridge, 424 U.S. 319 (1976). Section 1123.460 is drawn from 1981 Model State APA Section 5-116(c)(5)-(6). It continues a portion of former Section 1094.5(b) (inquiry of the court extends to questions whether there has been a fair trial or the agency has not proceeded in the manner required by law). One example of an agency's failure to follow prescribed procedure is the agency's failure to act within the prescribed time upon a matter submitted to the agency.
>
> ~~As used in subdivision (a), "unfair" procedures are not limited to those that offend due process or violate a statute. This rejects the rule of Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) (courts may not require agencies engaged in rulemaking to take procedural steps not required by constitution or statute).~~ [Deleted because "unfair" was moved out of subdivision (a).]
>
> The degree of deference to be given to the agency's determination under Section 1123.460 is for the court to determine. The deference is not absolute. Ultimately, the court must still use its judgment on the issue. The court should defer to the agency's determination only where it finds that deference is appropriate (sometimes called "weak" deference). The court is not required to uphold an agency's determination that the court believes is extremely unwise (sometimes called "strong" deference). See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1194-95 (195).
>
> For a special rule for judicial review of state agency rulemaking, see Gov't Code § 11350.

• The staff tried to reach Mr. Lui to see if this solution is acceptable, but he is away until after the Commission meeting. He did say in his letter that this is one

of the two most important points to the Consumers Union and that, if it is not resolved satisfactorily, he will ask the Senate Judiciary Committee to delete the deference language from this section. **Does the Commission wish to authorize the staff to agree at the Senate Judiciary Committee hearing to delete the deference language from Section 1123.460 if necessary to get the bill?**

§ 1123.710. Applicability of rules of practice for civil actions

• Mr. Pingel suggests language to make clear discovery is more freely available when the closed record requirement of Section 1123.810 does not apply. The staff thinks Mr. Pingel's point is well-taken, although the staff would draft it differently as set out below.

• Under existing administrative mandamus, evidence outside the administrative record may be introduced only if it could not have been produced at or was improperly excluded from the administrative hearing. Post-administrative discovery is correspondingly limited: It must be reasonably calculated to lead to the discovery of evidence admissible under this restrictive provision. California Administrative Mandamus § 11.7, at 365 (2d ed., Cal. Cont. Ed. Bar 1989). Section 1123.710(c)(1) generally continues this rule.

• In traditional mandamus, the closed record rule is not so strictly applied. For ministerial or informal agency action, there is often little or no administrative record, justifying a more relaxed rule on admission of extra-record evidence: "[W]e will continue to allow admission of extra-record evidence in traditional mandamus actions challenging ministerial or informal administrative actions if the facts are in dispute." Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 576, 888 P.2d 1268, 1277, 38 Cal. Rptr. 2d 139, 148 (1995). Section 1123.810 essentially codifies this rule by applying the closed record rule only if the "agency gave interested persons notice and an opportunity to submit oral or written comment" and "maintained a record or file of its proceedings." The discovery provision should match the admissibility provision. To the extent extra-record evidence is more freely admissible for judicial review of ministerial or informal action, so should discovery be more freely available.

• Under existing law, the discovery provisions apply to all actions and special proceedings of a civil nature. Code Civ. Proc. §§ 2016, 2017; 2 B. Witkin, California Evidence *Discovery and Production of Evidence* § 1427, at 283 (3d ed., Supp. 1997). Mandamus is a special proceeding. 3 B. Witkin, California Procedure *Actions* § 14, at 67 (4th ed. 1996). Mandamus has been held to be

"undoubtedly" a special proceeding within the scope of the former discovery statute. Kummeth v. Atkisson, 23 Cal. App. 401, 402, 138 P. 116 (1913). The "two major differences" between mandamus and other civil actions concern service and summons, not discovery. See California Civil Writ Practice § 9.6, at 296 (3d ed., Cal. Cont. Ed. Bar, May 1997 Update). So Mr. Pingel is merely asking us to codify existing law on discovery in traditional mandamus to review ministerial or informal action, and the staff would do so.

• The staff also discussed with Nini Redway, staff attorney for the Judicial Council, the provision in subdivision (d) allowing Judicial Council rules for judicial review proceedings in the Supreme Court and courts of appeal to be inconsistent with the draft statute. In view of Professor Kelso's opinion that the Judicial Council should not have authority to vary substantive rules, the staff would revise subdivision (d) to require rules for these proceedings to be not inconsistent with the draft statute.

• **The staff recommends revising subdivisions (c) and (d) of Section 1123.710 and Comment as follows:**

> 1123.710. . . .
>
> (c) ~~A~~ In a proceeding under this title, a party may obtain discovery ~~in a proceeding under this title~~ under Article 3 (commencing with Section 2017) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure only of the following:
>
> (1) Matters reasonably calculated to lead to the discovery of evidence admissible under Section 1123.810 or 1123.850.
>
> (2) Matters in possession of the agency for the purpose of determining the accuracy of the affidavit of the agency official who compiled the administrative record for judicial review.
>
> (d) The Judicial Council may adopt rules of court not inconsistent with this title governing proceedings in the Supreme Court and courts of appeal for judicial review of agency action~~, which may be inconsistent with this title~~.
>
> **Comment.** . . . Subdivision (c)(1) codifies City of Fairfield v. Superior Court, 14 Cal. 3d 768, 774-75, 537 P.2d 375, 122 Cal. Rptr. 543 (1975). If the closed record rule of Section 1123.810 does not apply because the agency did not give interested persons notice and an opportunity to submit oral or written comment or did not maintain a record or file of its proceedings, a party may obtain discovery to the same extent as in a civil action generally. See Section 2017 (party may obtain discovery of matter that "either is itself admissible in evidence or appears reasonably calculated to

lead to the discovery of admissible evidence"). The affidavit referred to in subdivision (c)(2) is provided for in Section 1123.820.

§ 1123.810. Administrative record exclusive basis for judicial review

In the basic memo, the staff recommended language for the Comment to address a concern of Mr. Pingel. **In response to his letter, the staff would replace that language with the following in underscore:**

> **Comment.** . . . The closed record rule of subdivision (a) is limited to cases where the agency gave notice and an opportunity to submit oral or written comment, and maintained a record or file of its proceedings. These requirements will generally be satisfied in most administrative adjudication and quasi-legislative action. In other cases, subdivision (b) makes clear the court may either receive evidence itself or may remand to the agency to receive the evidence. This will apply to most ministerial and informal action. These rules are generally consistent with Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995). If the closed record rule of subdivision (a) does not apply and the court receives evidence itself under subdivision (b), general rules of civil practice apply to the proceeding. See Section 1123.710. In such cases, the court may receive testimonial and documentary evidence as in civil actions generally.

§ 1123.950. Attorney fees in action to review administrative proceeding

• Mr. Pingel suggests a new section to say "Notwithstanding any other provision of this title, attorney fees for petitioners who successfully prosecute petitions for review under this title are recoverable to the same extent as before the enactment of this statute." This is our intent, but the staff has a problem with this language because it appears permanently to lock in whatever attorney fee provisions may apply on the operative date of the draft statute, without regard to future amendments of those provisions.

• Section 1123.950 is not a necessary addition to our statute. It merely recodifies an existing provision in Government Code Section 800. The staff prefers to delete Section 1123.950 from the draft statute and leave its substance in Government Code Section 800. Mr. Pingel says this is satisfactory. **The staff recommends deleting Section 1123.950 from the draft statute, and leaving Government Code Section 800 in its present form.** The staff would also say in an appropriate Comment that the draft statute does not affect existing law on attorneys' fees in judicial review of agency action, with a reference to

Government Code Section 800 and Code of Civil Procedure Section 1021.5 (private attorney general).

Uncodified. Application of new law

• When SB 209 was heard in the Senate Judiciary Committee last April, there was concern that, because of the bill's scope and complexity, extensive cleanup legislation might be necessary after its enactment. If this concern arises again, perhaps it could be partly addressed by delaying the operative date for a year. The Commission may wish to authorize staff to agree at the hearing to a delayed operative date, if that appears necessary to get Committee approval of the bill:

> SEC. 57. (a) This act applies to a proceeding commenced on or after January 1, ~~1999~~, 2000, for judicial review of agency action.
>
> (b) The applicable law in effect before January 1, ~~1999~~, 2000, continues to apply to a proceeding for judicial review of agency action pending on January 1, ~~1999~~ 2000.
>
> (c) On and after January 1, 1999, the Judicial Council may adopt any rules of court necessary so that this act may become operative on January 1, 2000.

• **Does the Commission wish to authorize the staff to do this if necessary?**

Respectfully submitted,

Robert J. Murphy
Staff Counsel

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December 5, 1997

SENT BY U.S. MAIL & FACSIMILE

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

Re: SB 209

Dear Bob:

Here are my recommended amendments of SB 209 and the Comments pursuant to our discussion at the meeting on December 3, 1997.

1123.430

We believe that subsection (c) should be left in with the following changes.

(c) .... the standard for judicial review of a determination of fact made by an administrative law judge employed by the State ~~Office of Administrative Hearings~~ that is changed by the agency head or by the board or commission responsible for making the final administrative determination or ruling is the independent judgment of the court whether the agency's determination of that fact is supported by the weight of the evidence.

1123.710

(c) A party may obtain discovery in a proceeding under this title ~~only~~ of the following:
(1) Items and information otherwise subject to the provisions of Article 3 of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure where the requirements in Section 1123.810(a) for limitation of judicial review to the administrative record are not satisfied.
(2) ****
(3) ****

1123.810 (a) Comment.

The closed record rule of subdivision (a) does not apply to actions in the nature of ordinary mandamus where the requirements of subdivision (a) are not satisfied. In such cases, review of agency action or inaction may require the court to review testimonial and documentary evidence developed through discovery and/or at trial.

1123.960 Attorney fees

Notwithstanding any other provision of this title, attorney fees for petitioners who successfully prosecute petitions for review under this title are recoverable to the same extent as before the enactment of this statute.

COMMENT. To the extent attorney fees were recoverable in proceedings under Code of Civil Procedure Sections 1085 or 1094.5 prior to the enactment of this legislation, they are recoverable under this title.

Please give me a call if you have any questions. Thanks.

Very truly yours,

STEVEN R. PINGEL

SRP/ccg

cc: Dana Mitchell, Senate Judiciary Committee
Consumer Attorneys Of California
California Employment Lawyers Association
Robert Bezemek, Esq.

Consumers Union
Publisher of Consumer Reports

December 7, 1997

Ms. Christine Byrd
Chairperson
Mr. Robert Murphy
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4000 Middlefield Road, Room D-1
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Re: **Judicial Review of Agency Action Study**

Dear Chairperson Byrd, Mr. Murphy and Members of the Law Revision Commission:

Consumers Union, the nonprofit publisher of *Consumer Reports* magazine, wishes to offer the following comments based on the meeting in Sacramento on December 3 hosted by the Senate Judiciary Committee staff. I raised a number of issues at that meeting, and was invited by Mr. Murphy to send in suggestions and language for consideration by the Commission and its staff. I would be willing to further discuss drafting issues with the staff at a later date.

References to the bill are to the September 11, 1997 version. References to the Comments are to the Revised Comments dated November 25, 1997, which were distributed at the December 3 meeting.

1. Comment to § 1123.420. Review of agency interpretation of law.

(a) I expressed concern that by codifying the language about "giving deference. . ." contained in p. 15, lines 1-3 of the bill, that courts may interpret that to mean they should give greater deference to agency interpretations of law than under existing law. Both Professor Asimow and Mr. Murphy indicated this was not the intent of this section. It was suggested a comment could make this intent clearer. Here is my suggestion:

"Subdivision (a) does not change existing law regarding the amount of deference courts should give to an agency's interpretation of law."

(b) I have a second concern about the comment to this section, which I did not raise at the meeting. The comments state that "courts must accept statutory interpretation by an agency within its expertise unless 'clearly erroneous' . . . ." I am concerned that this comment may tilt the balance in favor of the agency, rather than accurately restate existing law. This concern is heightened because the comments also differ significantly from Professor Asimow's Recommendation to the Commission's study regarding deference. *See Judicial Review of Agency Action*, 27 Cal. L. Revision Comm'n Reports at

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29-32 (1997) ("Recommendation"). The Recommendation, citing numerous cases, states that deference depends on a number of factors, including: (1) if the "agency has a comparative interpretative advantage over the courts" and (2) the agency's "interpretation in question is probably correct". The Recommendation explains in further detail what factors constitute "interpretative advantage" and probable correctness. The Revised Comments, however, do not mirror the Recommendation's thorough discussion of these issues. Instead, the comment cites only the *Nipper* case for the proposition that a "clearly erroneous" standard is the law in California.

I believe the Comment oversimplifies the law in this area. Therefore, I am still concerned that courts may interpret the Comments to require them to give further deference than the Commission and Professor Asimow intended. For example, the comments mention the "clearly erroneous" standard, whereas the Recommendation makes clear that a number of factors must be considered before a court must give deference. In fact, the Recommendation nowhere mentions a "clearly erroneous" standard. My understanding of the law is that where there is no interpretative advantage by an agency, a court may not need to give any deference at all. Such situations may arise when a statute presents a pure question of law, rather than an interpretation that requires the "expertise and technical knowledge" (Recommendation at 30) of an agency.

Thus, I would like to see the entire comment discussing subdivision (a) amended to more closely reflect the Recommendation's more thorough discussion at pp. 29-32. I believe the Recommendation discussion would be more helpful to courts than the present comment. In particular, the "clearly erroneous" standard seems too high a standard of review and should probably be deleted entirely, particularly since the Recommendation does not even mention this standard.

2. Possible confusion between standards of review in §§ 1123.420 and 1123.450.

Along with several other commentators at the meeting, I raised the possibility that courts may be confused as to which standard of review applied on a particular question. In particular, the independent judgment standard of 420 and the discretion standard of 450 seemed potentially confusing. One commentator at the meeting stated that courts, not the agency, must determine, as an initial matter, which standard of review in Article 4 applies. Professor Asimow and Mr. Murphy, I believe, agreed with that statement. Thus, one way to make this clear for courts would be to add the following statement, probably to Section 1123.410, at p. 14, line 38 after the word "article.":

In reviewing agency action, the court shall exercise its independent judgment in determining the proper standard of review for the action being challenged.

3. Revising the Comment to Section 1123.420 re preserving existing law regarding challenges to agency inaction.

At the meeting, I raised the concern that many public interest organizations bring mandamus actions to deal with agency failures to issue rules or decisions, or failures to perform a duty (the bill properly defines "agency action" in Section 1123.240 to include failures to act). I asked which standard of review would apply to such agency failures. Professor Asimow and Mr. Murphy stated there was no intention of changing existing law on this. Agency inaction, in the face of a mandatory duty would be considered an interpretation of law, therefore subject to the independent judgment standard of review in Section 1123.420, whereas a discretionary duty would be reviewed under the abuse of discretion standard. However, a court (or attorneys) may not understand that the statute intends "agency interpretation of law" to include cases where the agency has *not acted*; in other words, where the "agency interpretation" is *not* an affirmative act.

Therefore, I believe it would be helpful to courts to clarify the standards for petitions for review that challenge failures to act. The comment to Section 1123.420 could be amended to add language similar to the following:

The standard of review on a petition challenging an agency's failure to perform a duty, function or activity may either be: (1) independent judgment under Section 1123.420 if the alleged duty, function or activity is mandatory; or (2) abuse of discretion under Section 1123.450 if the alleged duty, function or activity is discretionary.

4. § 1123.460: Review of agency procedure

At the December 3 meeting, I expressed concern regarding the phrase "giving appropriate deference. . . ." at p. 16, lines 12-13 of the bill. I said that for questions of procedure, courts need not give deference to an agency's interpretation. I pointed out that the comment that I reviewed, cited no California law on the *need for deference on procedural issues*, but instead only federal law. Mr. Murphy, however, pointed out that the Revised Comments, which were then distributed to those attending the meeting, had cited a California case, *Bekiaris v. Board of Educ.*, 6 Cal. 3d 575, 587 (1972). That case, however, is silent as to any deference by courts on procedural issues. Rather, that case stands for the proposition it is cited for in the comment, that "courts use their independent judgment on questions of a legal character, including whether the administrative proceedings have been fair" (Revised Comments at 9).

Thus, the cited case does not support the inclusion in Section 1123.460 of the phrase "giving appropriate deference. . . ." Professor Asimow in his Recommendation also does not cite any California authority for why courts should defer on procedural issues (see Recommendation at 39 and nn. 113-114). On the contrary, Professor Asimow's Background Study article *The Scope of Judicial Review of Decisions of California Administrative Agencies* 42 U.C.L.A. L. Rev. 1157 (1995) states that only "weak

deference" is usually given to agency procedural decisions (see Recommendation at 398-399 (*Scope of Judicial Review* article is reprinted in the Recommendation)). Yet even in that article, Professor Asimow cites no California law for even the weak deference standard. Instead, only two law review articles are cited (Recommendation at 398, n. 341).

Thus, I believe the phrase "giving appropriate deference. . ." in Section 1123.460 should be deleted entirely because the Commission fails to cite any California authority for this deference. Courts should use independent judgment in reviewing agency procedures. In any event, the Revised Comments do not even correctly restate the "weak deference" standard used in the Background Study article. Thus, it appears to be an inadvertent restatement of the law, which once again would have the effect of requiring courts to give more deference than is warranted under existing law.

[**NOTE**: the following points were made by others at the meeting; I'm including them in my letter because I agree with them and for the convenience of the Commission staff in making revisions to the statute and comments]

5. Exhaustion of administrative remedies for pre-enforcement challenge to regulations.

There appeared to be a consensus that there is **no** need to require exhaustion when a party seeks pre-enforcement review of agency action. I have a suggestion to help clarify this point. Section 1123.330 could be amended to insert the following language at p. 13, line 5, after (a):

Notwithstanding any other provision of this chapter, [*note: or "Title"?*],

This would make it clear that the usual exhaustion requirement does not apply to Section 1123.330 challenges.

6. Revising Comment to Section 1123.330 re emergency regulations.

There appeared to be a consensus that emergency regulations which are technically considered "interim" agency actions, should be treated as a "final" action, for purposes of this Title. **The comment to Section 1123.330 should include a sentence to this effect.**

7. Ripeness of pre-enforcement challenges to regulations.

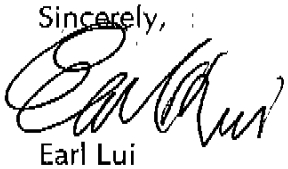
There appeared to be a consensus that ripeness should rarely ever be used by a court to throw out a pre-enforcement challenge to regulations. **The comments to Section 1123.110 should reflect this point.**

In conclusion, Consumers Union respects the enormous work involved in Commission's effort in this area. Because of the massive scope of the proposal, it is easy for certain points to be overlooked. Our comments are intended to be helpful in this regard. Nevertheless, we are concerned about all of the above points we have raised.

In particular, we are troubled by the approach taken on the issues raised in our points 1(b) and 4 above. In both instances, it appears the statute and/or comments do more than restate existing California law. Instead, they both appear to stretch the law in favor of the agency, to the detriment of those challenging agency action. As we have stated before, we object to changing existing law in this way.

We hope the Commission will consider our concerns in its further deliberations. If the above points are not resolved satisfactorily in our opinion, Consumers Union will request the Senate Judiciary Committee to make those changes when the bill is taken up again in the Committee.

Sincerely,



Earl Lui
Staff Attorney

cc: Dana Mitchell, Counsel, Senate Judiciary Committee

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CLIENT ADMINISTRATOR
KATE BURMAN

December 8, 1997

SENT BY U.S. MAIL & FACSIMILE

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

Re: SB 209

Dear Bob:

This will confirm that I concur with your suggestion of leaving Government Code Section 800 in its present location and including a Comment that existing law as to attorney fees in review of administrative action or inaction is unchanged.

In addition, I have had the opportunity to review the letter to the Commission from Consumers Union regarding their concerns and suggestions. I concur with all of CU's seven requests with the following suggestions.

1. Comment to Section 1123.420.

I would insert the words "if any" as follows:

"Subdivision (a) does not change existing law regarding the amount of deference, if any, courts should give to an agency's interpretation of law."

Please give me a call if you have any questions. Thanks.

Very truly yours,

STEVEN R. PINGEL

SRP/ccg

cc: Dana Mitchell, Senate Judiciary Committee
Consumer Attorneys Of California
California Employment Lawyers Association
Robert Bezemek, Esq.