Study N-301 March 11, 1998

First Supplement to Memorandum 98-10

Advisory Interpretations: Staff Draft Tentative Recommendation

We have received three letters in response to Memorandum 98-10. These letters are attached as exhibits, as follows:

Mr. Landay writes to express his support for the tentative recommendation. He believes that the use of advisory interpretations will ease the burden on agencies "by providing an alternative to the host of individual replies that are now rendered in response to a multitude of inquiries." He also believes that advisory interpretations will benefit members of the regulated public by providing interpretive information on which a person can safely rely.

Ms. Broadwell and Mr. Livingston raise a number of specific objections to the proposed law. Their concerns are discussed below.

CEQA GUIDELINES

On July 18, 1997, Ms. Erin Mahaney, writing on behalf of the Pipe Trades Council, argued that the advisory interpretation procedure should not be used to adopt California Environmental Quality Act (CEQA) Guidelines. See Memorandum 97-68, Exhibit pp. 1-2. As she noted, it is not clear whether CEQA guidelines are binding, or are merely advisory. If CEQA guidelines are merely advisory, then they might be subject to adoption under the advisory interpretation procedure. This seems contrary to the legislative intent of Public Resources Code Sections 21083 and 21087, which expressly require that CEQA guidelines be adopted and amended pursuant to the APA rulemaking procedures.

At the October 1997 meeting, the Commission agreed that CEQA guidelines should not be subject to adoption under the advisory interpretation procedure. Furthermore, the advisory interpretation procedure should not be used to take

any action that is expressly required by statute to be taken pursuant to APA rulemaking procedures. The staff was instructed to draft language to this effect. Proposed Section 11360.010(b) provides:

> 11360.010. …
> …
> (b) This article does not provide an alternative means of adopting binding regulations. An agency statement that is required by statute to be adopted as a regulation may not be adopted as an advisory interpretation.
> …
> **Comment.** …
> Subdivision (b) makes clear that an agency statement that is required by statute to be adopted as a regulation may not be adopted as an advisory interpretation. Thus, an agency statement that is required to be adopted pursuant to Article 5 of this chapter or pursuant to non-APA rulemaking procedures may not be adopted as an advisory interpretation. For example, a California Environmental Quality Act (CEQA) guideline must be adopted pursuant to specified provisions of Article 5. See Pub. Res. Code §§ 21083, 20187. Therefore, the Resources Agency may not adopt a CEQA guideline under this article. As another example, there are special procedural requirements governing the adoption of regulations by the Department of Personnel Administration (DPA). See Gov't Code §§ 19817-19817.20. A DPA statement that is subject to those procedures may not be adopted under this article.

Ms. Broadwell now writes to express her concern that this language is inadequate to achieve its intended effect. Because the language refers to a requirement that a statement be adopted "as a regulation," it isn't clear how it would apply to statements that must be adopted under APA rulemaking procedure but are arguably not regulations. She proposes alternative language that replaces the reference to adoption "as a regulation" with a reference to adoption "pursuant to Chapter 3.5 of the Government Code." See Exhibit pp. 2-3.

The staff has no objection to Ms. Broadwell's suggestion, and recommends that it be implemented as follows:

> 11360.010. …
> …
> (b) This article does not provide an alternative means of adopting binding regulations.
> (c) Where a statute or other provision of law requires an agency to act pursuant to this chapter or pursuant to other specified

procedures, the agency shall not act pursuant to this article unless the statute or other provision of law expressly requires or authorizes the agency to act pursuant to this article.

…

Comment. …

Subdivision (c) makes clear that an agency statement that is required by statute or other provision of law to be adopted pursuant to this chapter or by other specified procedures may not be adopted as an advisory interpretation. For example, a California Environmental Quality Act (CEQA) guideline must be adopted pursuant to specified provisions of Article 5 (commencing with Section 11346). See Pub. Res. Code §§ 21083, 20187. Therefore, a CEQA guideline may not be adopted as an advisory interpretation under this article. As another example, there are special procedures governing the adoption of certain regulations by the Department of Personnel Administration. See Gov't Code §§ 19817-19817.20. A regulation that is subject to those procedures may not be adopted as an advisory interpretation under this article.

LIMIT SCOPE OF PROPOSAL

Mr. Livingston is generally skeptical of the proposed law, fearing that it will disrupt public participation in agency rulemaking. He suggests that it be implemented as a pilot project, subject to a two year sunset provision and applicable only to a few selected agencies. The staff believes that this suggestion is premature, given that the proposed law has not yet been circulated for comment as a tentative recommendation. However, limitation of the proposal's scope may turn out to be a good option if many of the comments received in response to the tentative recommendation express the same concern. Note that this suggestion is also discussed in Memorandum 98-10.

CONSISTENCY REVIEW

Mr. Livingston objects to proposed Section 11360.090(e), which provides the standard to be applied by OAL when reviewing whether an advisory interpretation is consistent with the law it interprets. Under that provision, "an advisory interpretation is consistent with the law it interprets if it states a rational interpretation of that law." Mr. Livingston is concerned that this standard may introduce confusion because it is different from that applied in reviewing proposed regulations. See Exhibit, pp. 4-5.

The standard in question was developed from language suggested by OAL. In fact, OAL has suggested that a similar standard be added to the procedures governing OAL review of proposed regulations. See letter of John D. Smith, Memorandum 96-38, Exhibit pp. 28-29:

> A new subdivision (c) should be added to Section 11349.1, to read:
>
> The office shall approve a regulation as consistent with other law if the proposed regulation is any one of several reasonable interpretations of a statute, court decision or other provision of law.

According to Mr. Smith, such a rule would codify existing OAL practice and relevant case law and would be consistent with the current subdivision (c) of Section 11349.1, which prohibits OAL from substituting its judgment for that of the rulemaking agency concerning the substantive content of a proposed regulation.

The staff recommends replacing the standard provided in proposed Section 11360.090 with the language suggested by Mr. Smith, thus:

> 11360.090. …
>
> …
>
> (e) For the purposes of this section, an advisory interpretation is consistent with the provision of law that it interprets if it is any one of several reasonable interpretations of that provision of law.

When we reach the OAL review phase of the administrative rulemaking study, we can then implement Mr. Smith's suggestion regarding review of regulations. The consistency standard will then be the same for review of regulations and advisory interpretations.

DEFINITION OF "REGULATION"

The current draft of the proposed law provides that a properly adopted advisory interpretation is not a "regulation" as defined in Section 11342(g). The purpose of this exception is to make clear that a properly adopted advisory interpretation is not subject to APA requirements that govern regulations. Mr. Livingston believes that this exception to the definition of "regulation" is unnecessary and inappropriate. See Exhibit p. 5.

An alternative approach would be to drop the change to the definition of "regulation" and add a substantive provision along these lines:

> Except as otherwise provided in this article, an advisory interpretation adopted pursuant to Article 10 is not subject to the requirements of other articles in this chapter.

This would make clear that an advisory interpretation is not subject to APA requirements that apply to regulations. The question of whether an advisory interpretation is a regulation would then be irrelevant.

GOVERNOR'S REVIEW

Mr. Livingston objects to review by the Governor's office of an OAL decision to disapprove an advisory interpretation, for two reasons: (1) the cost of the procedure is not justified, and (2) the delay caused by the procedure can extend the harmful effect of an improper advisory interpretation.

Cost of Procedure.

Mr. Livingston believes that advisory interpretations are not sufficiently important to justify the expenditure of resources by the Governor's office to review an OAL disapproval decision. This may be so. It should be noted, however, that the APA provides for Gubernatorial review of OAL regulatory disapproval in all other contexts. See Sections 11349.5, 11349.7, 11349.9. The staff recommends that review by the Governor's office be preserved for the purpose of the tentative recommendation. The question of its cost effectiveness can be revisited after more public comment has been received.

Harm Exacerbated by Delay

Under the current draft of the proposed law, disapproval of an advisory interpretation by OAL does not become final and effective until the time limit for requesting review by the Governor's office has expired, or the Governor's office has reviewed the tentative disapproval decision and upheld it. See proposed Section 11360.090(d). This prolongs the effect of an advisory interpretation that is disapproved by OAL. Mr. Livingston believes that this prolonged effect can potentially harm the regulated community: "Often, the harm of an unlawful advisory interpretation can occur in a few days, and the appeal process exacerbates that potential harm."

The staff believes that the harm resulting from an invalid advisory interpretation would be relatively limited. The only legal effect of an advisory interpretation is to bind the promulgating agency in an enforcement action.

Therefore, the only legal effect of deferring disapproval of an advisory interpretation is to extend the period during which the agency is subject to this "safe harbor" rule. Note that disapproval of an advisory interpretation does not preclude an agency from asserting the same interpretation by other authorized means, on its own merits. See proposed Section 11360.090, Comment.

As a practical matter, a regulated person may voluntarily comply with an invalid advisory interpretation and this compliance may harm the person in some way. However, expediting the review process would not do much to alleviate this harm. Even if an advisory interpretation is disapproved, an agency may continue to interpret the law in the way expressed in the advisory interpretation, despite its disapproval by OAL. Therefore, a person might well continue to conform to an interpretation expressed in a disapproved advisory interpretation. In such a case, expedited disapproval only expedites termination of the safe harbor protection.

There is one situation where procedural delay might conceivably exacerbate harm resulting from an invalid advisory interpretation. Where an agency adopts an advisory interpretation that leads it to a position of nonenforcement in certain circumstances, the safe harbor provision effectively prohibits the agency from enforcing in those circumstances. A person who is injured because the law is not enforced in those circumstances, and who successfully challenges the validity of the advisory interpretation, might be further injured by procedural delays in terminating the safe harbor effect.

JUDICIAL REVIEW

Mr. Livingston raises two objections to the judicial review procedure provided in proposed Section 11360.110: (1) exhaustion of administrative remedies is an unnecessary burden on challengers, (2) the section implies that other forms of judicial review are unavailable.

Exhaustion

Mr. Livingston correctly notes that availability of judicial review of an advisory interpretation under proposed Section 11360.110 is conditioned on exhaustion of the OAL review procedure set out in proposed Section 11360.090. He also notes that judicial review of a regulation is not conditioned on exhaustion of any OAL review procedure. This is technically correct. However, every regulation is subject to OAL review before it can be formally adopted. Therefore,

as a practical matter, every regulation is subject to OAL review before it can be challenged judicially. This is somewhat analogous to the effect of the exhaustion requirement in the proposed law. In each case, judicial resources are conserved because the regulation or advisory interpretation is reviewed by OAL before it can be challenged in court.

Mr. Livingston's principal objection to requiring exhaustion of the OAL review procedure is the delay involved, and the potential for that delay to exacerbate any harm that results from the invalid advisory interpretation. The potential for procedural delay to exacerbate the harm resulting from an invalid advisory interpretation is discussed above.

Note, however that a person who voluntarily conforms to an invalid advisory interpretation would benefit from a speedy judicial declaration that the agency's interpretation is inconsistent with the law it purports to interpret. In such a case, the person could stop conforming without worrying that the agency will enforce the disapproved interpretation. In this situation, a person does have an interest in seeking judicial review without first exhausting the OAL review procedure.

Implied Exclusivity

Mr. Livingston believes that the drafting of Section 11360.110 implies that declaratory relief under that section is the exclusive form of judicial review of an advisory interpretation. He notes that advisory interpretations, like regulations, should also be subject to challenge by mandamus and injunction.

The staff never intended that proposed Section 11360.110 be an exclusive means of review. The comment to that section reads, in part:

> Review under this section is not the exclusive means by which a court may review an advisory interpretation. For example, where the validity of an advisory interpretation arises in an agency adjudication, the advisory interpretation may be subject to review by administrative mandamus. See Code Civ. Proc. § 1094.5.

If this comment is not sufficiently clear, it can be amended to further clarify the availability of other forms of judicial review. Alternatively, the first sentence of the comment could be added as a subdivision of proposed Section 11360.110.

NOTICE PERIOD

Mr. Livingston objects to the proposed 30-day period for public comment. He notes that 45 days is provided for public response to a regulation and that there is

no reason to believe that less time will be required to respond to a proposed advisory interpretation. See Exhibit p. 6.

The 30-day notice period was intended to streamline the public comment procedure without compromising the public's opportunity to comment. If 30 days is too little time for a meaningful public response, then the period should be lengthened. Based on Mr. Livingston's comment, the staff recommends switching to a 45-day comment period.

NOTICE CONTENTS

Section 11360.060(b) requires that public notice of a proposed advisory interpretation include "a clear overview explaining the proposed action." Mr. Livingston suggests that the "clear overview" is essentially the same as the "informative digest" required in notice of a proposed regulation. Use of different terms to describe similar notice requirements might lead to confusion. See Exhibit p. 6.

The staff has no objection to replacing "clear overview" with the term "informative digest." However, use of that term will imply that the informative digest required when proposing an advisory interpretation is the same document required when proposing a regulatory action. If this is our intent, it should be made express. Thus, proposed Section 11360.050(b) would read:

> 11360.050. …
> …
> (b) Notice of the proposed action shall include both of the following:
> (1) An informative digest, pursuant to paragraph (3) of subdivision (a) of Section 11346.5.
> (2) Instructions on how to obtain a copy of the preliminary text of the proposed action and how to submit a written comment relating to the proposed action. The instructions shall specify the deadline for submission of written comment.

Respectfully submitted,

Brian Hebert
Staff Counsel

Date: Sun, 15 Feb 1998 18:17:46 -0800
To: nsterling@clrc.ca.gov
From: alanday@westworld.com (Andrew Landay)
Subject: advisory interpretations

I strongly favor the tentative recommendation on this subject dated March 1998.

I disagree with the Department of Consumer Affairs' lawyer's objection.

The proposed legislation does not impose extra burdens on agencies. It actually eases their burdens by providing an alternative to the host of individual replies that are now rendered in response to a multitude of inquiries.

Many of these inquiries probably relate to the same problem. An advisory interpretation provides both an answer to such inquiries and a safe harbor for the inquirer, who can reasonably rely on the advisory interpretation and thus stay out of trouble.

If the advisory interpretation doesn't solve the problem, then the agency knows it must consider a change in regulations. If the advisory interpretation is satisfactory, the agency saves itself both time and trouble.

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February 17, 1998

California Law Revision Commission
4000 Middlefield Road, Room D-1
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Attn: Brian Hebert

Re: Advisory Interpretations

Dear Commissioners:

I have received and reviewed Memorandum 98-10 relating to Advisory Interpretations and I am concerned about one section of the proposal.

Proposed Government Code section 11360.101(b) provides, "This article does not provide an alternative means of adopting binding regulations. An agency statement that is required by statute to be adopted as a regulation may not be adopted as an advisory interpretation." The proposed comment states that the intention of this subsection is to make it clear that CEQA Guidelines could not be adopted as advisory interpretations.

My concern is that subsection (b) does not actually make it clear that the CEQA Guidelines cannot be adopted as an advisory interpretation. There is no clear law stating that the CEQA Guidelines are "binding regulations." CEQA itself states that "The Secretary of the Resources Agency shall certify and adopt the guidelines pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, which shall become effective upon the filing thereof." (Pub. Res. Code § 21083.) As you can see, CEQA does not refer to the guidelines as regulations.

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The Secretary of the Resources Agency has followed the procedures of the Administrative Procedure Act in adopting the CEQA Guidelines, as intended by the Legislature, and it is important that the proposal on advisory interpretations not be applied to alter this requirement.

I suggest that the following be added to subsection (b):

"Where a statute or other provision of law requires an agency to act pursuant to Chapter 3.5 of the Government Code, the agency shall not act pursuant to Article 10 of Chapter 3.5 of the Government unless the statute or other provision of law expressly requires or authorizes the agency to act pursuant to Article 10 of Chapter 3.5 of the Government Code."

I believe this language would make it clear that the CEQA Guidelines cannot be adopted pursuant to Article 10, as stated by the proposed comment.

Thank you for your consideration of this comment.

Very truly yours,

Ann Broadwell

Ann Broadwell

AB/end

c1131-002

LIVINGSTON & MATTESICH

GENE LIVINGSTON
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March 5, 1998

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Re: **Advisory Interpretations**

Dear Mr. Hebert:

I am submitting comments to the February 2, 1998 proposed tentative recommendations relating to the proposed advisory interpretation law change.

I'm sure you appreciate that given my background and my clients' interests, I remain skeptical of the advisory interpretation proposal. Part of that concern occurs because of specific provisions described below. The balance occurs because of the unrestricted breadth of the proposal. Clearly a sunsetted, pilot project involving only two or three agencies would make the proposal less troubling.

As written, the proposal threatens to disrupt an open regulatory process that enables interested persons to participate and influence the rules that they are bound to follow. Limiting the proposal to a few agencies certainly diminishes the threat to the current process, a process that the regulated community supports. The threat would be further diminished if the advisory interpretation provisions were to sunset in two years. Two years would be sufficient time to determine whether the process promotes the Commission's goals and the extent to which the process is abused. It's a few agencies and not the regulated community who are pushing for advisory interpretations. Accordingly, the obligation should be on the agencies to promote the extension of the advisory interpretation process if it works, rather than on the regulated community to bear the burden of repealing it if it doesn't.

Consistent With The Law

A major potentially disruptive provision in the advisory interpretation proposal is found in section 11360.090(e). That subdivision provides that an advisory interpretation is consistent with the law it interprets if it states a "rational interpretation" of that law. That provision introduces new language that will simply confuse an already well-established judicial interpretation of consistency. It appears that the section is designed to allow an agency to chose any of several competing rational interpretations. It does not direct agencies to put emphasis on the plain meaning of statutes or to ferret out legislative intent, using standard rules of statutory construction or admissible legislative history. Why should we have a different

standard for determining consistency of advisory interpretations than we have for determining consistency of formally adopted regulations? Certainly, we should not have a more liberal definition; if anything, it should be more rigorous. The best solution is simply to eliminate subdivision (e).

Definition of Regulation

Equally troubling is the proposed amendment to existing Government Code section 11342. Subdivision (g) of that section defines "regulation." The proposal seeks to add an exception to that definition for advisory interpretations. That statutory exception is inappropriate and unnecessary. Section 11360.020 defines an advisory interpretation as a statement that expresses the agency's opinion. In contrast, section 11342 defines regulation to mean every rule or standard of general application. The clear import of the definition of regulation is that it is a standard that is applied generally. Whereas, an opinion simply advises; it is not applied generally. The interpretation of regulation clearly contemplates an enforceable or binding standard. Again, by definition, an advisory interpretation has no binding effect. *See* Government Code section 11360.030. The proposed exception to the definition in section 11342 is unnecessary because an advisory interpretation does not have a regulatory effect. It is inappropriate because its potential is to invite substantial abuse by agencies adopting standards as advisory interpretations and the agencies seeking to apply generally those interpretations.

Governor's Review

The provisions in the proposal providing that OAL shall "tentatively" disapprove an advisory interpretation subject to review by the Governor is also inappropriate for two reasons. First, it makes no sense to involve the Governor's Office in determining whether OAL has appropriately applied the law in disapproving an advisory interpretation. Advisory interpretations are not deserving of that kind of attention and commitment of Governor Office resources. Second, an agency can prolong the time an advisory interpretation is effective to the detriment of the regulated community by asking the Governor to review an OAL disapproval. Often, the harm of an unlawful advisory interpretation can occur in a few days, and the appeal process exacerbates that potential harm.

Judicial Review

It is equally inappropriate to require an interested person to exhaust an administrative remedy to challenge an advisory interpretation. No such burden is imposed on interested persons to challenge a formally adopted regulation. Moreover, as noted above, the harm of an advisory interpretation can occur in a short period of time. Requiring an interested person to wait until the Office of Administrative Law has reviewed or declined to review an advisory interpretation can result in substantial harm before an interested person could seek judicial review.

In addition, the judicial review section implies that the only way to challenge an advisory interpretation is by bringing an action for declaratory relief. Formally adopted regulations can be challenged by an action seeking mandamus and injunctive relief as well as by declaratory relief. The implication of this section is that those other legal remedies are not available for challenging an advisory interpretation.

The judicial review section should be amended as follows:

> 11360.110. (a) Any interested person may obtain a judicial ~~declaration~~ *review* as to the validity or invalidity of an advisory interpretation ~~that the office has reviewed or declined to review~~ *whether a request is made to the office to review the advisory interpretation* under Section 11360.090, by bringing an action ~~for declaratory relief~~ in the superior court in accordance with the Code of Civil Procedure.

Notice Period

Section 11360.050 provides for a 30-day comment period. Years ago, the Legislature determined that 30 days was an inadequate time to respond to a formally noticed regulation. No reason exists to believe less time would be required to respond to an advisory interpretation. Accordingly, the 30 days should be changed to 45 days.

Clear Overview

Subdivision (b) of section 11360.060 provides that the notice of the proposed action shall include "a clear overview" explaining the proposed action. Again, this language introduces confusion into the process. The portion of the Administrative Procedure Act relating to formally adopted regulations requires an agency to provide an "informative digest." *See* Government Code section 11346.5. No reason exists for imposing a different obligation on agencies adopting advisory interpretations than is imposed when they are formally adopting regulations. I urge you to use the "informative digest" language.

Sincerely,

GENE LIVINGSTON

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