#N-201

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Memorandum 93-22

Subject: Study N-201 - Judicial Review of Agency Action--Standing and Timing (Draft of Initial Decisions)

The Commission has made initial policy decisions concerning standing and timing issues in judicial review of agency action. Attached to this memorandum is a staff draft to implement the initial decisions. We will proceed through the draft at the Commission meeting on a section by section basis.

Respectfully submitted,

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Executive Secretary

ADMINISTRATIVE PROCEDURE ACT

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ADMINISTRATIVE PROCEDURE ACT

PART 5. JUDICIAL REVIEW AND CIVIL ENFORCEMENT

CHAPTER 1. PRIMARY JURISDICTION

§ 651.010. Application of chapter

651.010. This chapter applies if a civil action is pending and the court determines that an agency has exclusive or concurrent jurisdiction over the subject matter of the action or an issue in the action.

Comment. Section 651.010 makes clear that the provisions governing primary jurisdiction come into play only when there is exclusive or concurrent jurisdiction in an agency over a matter that is the subject of a pending court action. This chapter deals with original jurisdiction over a matter, rather than with judicial review of previous agency action on the matter. If the matter has previously been the subject of agency action and is currently the subject of judicial review, the governing provisions relating to the court's jurisdiction are found in Chapter 2 (commencing with Section 652.110) (judicial review) rather than in this chapter.

§ 651.020. Exclusive agency jurisdiction

651.020. If an agency has exclusive jurisdiction over the subject matter of an action or an issue in the action, the court shall decline to exercise jurisdiction over the subject matter or the issue.

Comment. Section 651.020 requires the court to yield primary jurisdiction to an agency in the case of a legislative scheme to vest the determination in the agency. The court may dismiss the case or retain jurisdiction pending agency action on the matter or issue. Adverse agency action is subject to review by the court. Section 651.040 (judicial review following agency action).

§ 651.030. Concurrent agency jurisdiction

651.030. (a) If an agency has concurrent jurisdiction over the subject matter of the action or an issue in the action, the court shall exercise jurisdiction over the subject matter or issue unless the court in its discretion refers the matter or issue for agency action.

(b) The court shall not exercise its discretion to refer the matter or issue for agency action unless the court determines the reference is clearly appropriate taking into consideration all relevant factors including, but not limited to, the following:

(1) Whether agency expertise is important for proper resolution of a highly technical matter or issue.

(2) Whether the area is so pervasively regulated by the agency that the regulatory scheme should not be subject to judicial interference.

(3) Whether there is a need for uniformity that would be jeopardized by the possibility of conflicting judicial decisions.

(4) The costs to the parties of additional administrative proceedings.

(5) Whether there is a need for immediate resolution of the matter, and any delay that would be caused by referral for agency action.

(6) Whether agency remedies are adequate and whether any delay for agency action would limit judicial remedies, whether practically or due to running of statutes of limitation or otherwise.

(7) Any legislative intent to prefer cumulative remedies or to prefer administrative resolution.

Comment. Section 651.030 codifies the case law preference for judicial rather than administrative action in the case of concurrent jurisdiction, subject to court discretion in appropriate circumstances. See discussion in Asimow, Judicial Review: Standing and Timing 65-82 (September 1992).

Court retention of jurisdiction does not preclude agency involvement. For example, the court in its discretion may request that the agency file an amicus brief setting forth its views on the matter as an alternative to actually referring the matter to the agency.

If the matter is referred to the agency, the agency action remains subject to review by the court. Section 651.040 (judicial review following agency action).

§ 651.040. Judicial review following agency action

651.040. If an agency has exclusive or concurrent jurisdiction over the subject matter of the action or an issue in the action, agency action on the matter or issue is subject to judicial review to the extent provided in Chapter 2 (commencing with Section 652.110).

Comment. Section 651.040 makes clear that judicial review principles apply to agency action even though an agency has exclusive jurisdiction or the court refers a matter of concurrent jurisdiction to the agency for action under this chapter.

CHAPTER 2. JUDICIAL REVIEW

Article 1. General Provisions

§ 652.130. Finality

652.130. A person may not obtain judicial review of agency action unless the agency action is final. Agency action is not final if the agency intends or is reasonably believed to intend that the action is preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency.

Comment. Section 652.130 codifies the finality requirement in language drawn from 1981 Model State APA Section 5-102. For an exception to the requirement of finality, see Section 652.150 (exception to finality and ripeness requirements).

The purpose of the "reasonably believed" language is illustrated by the following hypothetical facts. An agency takes action that the agency regards as final, but gives the misleading impression that causes a party reasonably to believe that the agency's action is non-final. The party makes no attempt, for the time being, to seek judicial review, since the party anticipates that a petition for review will be timely if filed within the proper time after the expected final agency action. When the party discovers that the agency regards the action already taken as being final, the party promptly seeks judicial review. The agency moves to dismiss the petition for judicial review as untimely, based on the time that has elapsed between the agency action and the filing of the petition for review. The agency's motion to dismiss must be denied, since the agency action is regarded as non-final for as long as the party reasonably believed it to be non-final. If the petition for judicial review is filed within the appropriate period after that time, the petition is timely.

Staff Note. The Commission has not yet considered issues relating to finality. This section is included primarily as a mock up or place holder for draft structure purposes.

§ 652.140. Ripeness

652.140. A person may not obtain judicial review of agency action until the agency action is ripe for judicial review. The agency action is not ripe for judicial review unless it directly and immediately affects the person.

Comment. Section 652.140 codifies the case law ripeness requirement. See, e.g., Pacific Legal Foundation v. Coastal Commission, 33 Cal. 3d 158, 188 Cal. Rptr. 104 (1982). For an exception to the requirement of ripeness, see Section 652.150 (exception to finality and ripeness requirements).

§ 652.150. Exception to finality and ripeness requirements

652.150. A person may obtain judicial review of agency action that is not final or ripe for judicial review if it appears likely that the person will be able to obtain judicial review of the agency action when it becomes final or ripe for judicial review and that postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

Comment. Section 652.150 codifies an exception to the finality and ripeness requirements in language drawn from 1981 Model State APA Section 5-103. Under this language the court must assess and balance the fitness of the issues for immediate judicial review against the hardship to the person from deferral of review. See, e.g., BKHN v. Dep't of Health Services, 3 Cal. App. 4th 301, 4 Cal. Rptr. 2d 188 (1992); cf. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

Article 2. Standing

§ 652.210. No standing unless authorized by statute

652.210. A person does not have standing to obtain judicial review of agency action unless standing is conferred by this article or otherwise expressly provided statute.

Comment. Section 652.210 states the intent of this article to override existing case law standing principles and to replace them with the statutory standards prescribed in this article. Other statutes conferring standing include [to be drafted].

This part provides a single type of judicial review of agency action. See Section [to be drafted] and Comment. The provisions on standing must therefore accommodate persons who seek judicial review of the entire range of agency actions, including rules, orders, and other types. See Section 610.210 ("agency action" defined).

§ 652.220. Party to state adjudicative proceeding

652.220. (a) A person has standing to obtain judicial review of a decision in an adjudicative proceeding under Part 4 (commencing with Section 641.110) if the person was a party to the proceeding.

(b) Notwithstanding any other provision of this article, this section provides the exclusive basis for standing to obtain judicial review of a decision in an adjudicative proceeding under Part 4 (commencing with Section 641.110).

Comment. Section 652.220 governs standing to challenge a decision in a state agency adjudication. A party to an adjudicative proceeding includes the person to whom the agency action is directed and any other person named as a party or allowed to intervene in the proceeding. Section 610.460 ("party" defined). This codifies existing law. See, e.g., Temescal Water Co. v. Dept. Public Works, 44 Cal. 2d 90, 279 P. 2d 963 (1955); Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 173 P. 2d 545 (1946). Under this test, a complainant or victim who is not made a party does not have standing.

This section is an exception to the general principles governing standing to obtain judicial review of agency action. Under general principles, each basis for standing is cumulative, and a person has standing to obtain judicial review if any basis exists. Under this section, however, a person must have been a party in order to obtain judicial review if the agency action complained of is a decision in a state adjudicative proceeding. A nonparty who might have public or private interest standing under other provisions of this article would not have standing in the case of a state adjudicative proceeding.

Staff Note. The Commission requested presentation of appropriate issues concerning whether nonparty "participants" such as witnesses, objectors, and persons who filed amicus briefs should have standing, and whether other nonparties such as persons entitled to notice but didn't receive it or persons who sought to intervene as parties but were denied intervention should have standing under this section. Rather than get too involved on this point, the staff suggests we simply extend "jus tertii" standing to state adjudicative proceedings. See Section 652.260 (third party standing). Thus a nonparty would have standing where the nonparty's interest is dependent on and not adverse to the interest of a party that is not seeking judicial review.

§ 652.230. Participant in administrative proceeding

652.230. A person has standing to obtain judicial review of an agency action if the person was a participant in the agency proceedings that led to the action.

Comment. Section 652.230 applies to participants in agency proceedings other than state agency adjudications. See Section 652.220(b). Participation may include appearing and testifying, submitting written comments, or other appropriate activity that indicates a direct involvement in the agency action.

This section supplements the general rules governing standing to obtain judicial review of agency action, either on a private interest or public interest basis. A person who seeks to challenge a regulation or other nonadjudicative agency action need not have participated in the rulemaking or other proceeding upon which the regulation or action

is based, or have petitioned for its amendment or repeal, if the person satisfies either private interest or public interest standing requirements under Sections 652.240 (private interest standing) and 652.250 (public interest standing).

§ 652.240. Private interest standing

652.240. (a) A person has standing to obtain judicial review of agency action if the action has prejudiced, or is likely to prejudice, the person.

(b) An organization that does not otherwise have standing under subdivision (a) has standing if the person prejudiced is a member of the organization, or a nonmember the organization is required to represent, and the agency action is germane to the purposes of the organization.

Comment. Section 652.240 provides a rule of standing for judicial review of agency action other than state agency adjudications. See Section 652.220.

The requirement of prejudice for standing is comparable to standards formerly found in the law governing judicial review of agency action. See, e.g., Code Civ. Proc. §§ 1060 (interested person may see declaratory relief), 1069 (party beneficially interested may seek writ of review), 1086 (party beneficially interested may seek writ of mandate); cf. Code Civ. Proc. § 902 (appeal by party aggrieved).

Subdivision (a) codifies case law that a person must suffer some harm from the agency action in order to have standing to obtain judicial review of the action. See, e.g., Sperry & Hutchinson v. State Board of Pharmacy, 241 Cal. App. 2d 229, 50 Cal. Rptr. 489 (1965); Silva v. City of Cypress, 204 Cal. App. 2d 374, 43 Cal. Rptr. 270 (1965). In the case of a regulation a person whose interest is adversely affected by the regulation would have standing under this section.

Subdivision (b) codifies the case law giving an incorporated or unincorporated association such as a trade union or neighborhood association standing to seek judicial review on behalf of its members. See, e.g., Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 384 P. 2d 158 (1963); Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973). This principle extends as well to standing of the organization to seek judicial review where a nonmember is prejudiced, in a case where a trade union is required to represent the interests of nonmembers. For an organization to have standing under this subdivision, there must be prejudice to an actual member or other represented person; discovery would be appropriate to ascertain this fact.

It should be noted that the standing of a person to obtain judicial review under this section is not limited to private persons, but extends to public entities, whether state or local, as well. See Section 610.520 ("person" includes governmental subdivision). This reverses a contrary case law implication. See Star-Kist Foods, Inc. v.

County of Los Angeles, 42 Cal. 3d 1, 227 Cal. Rptr. 391 (1986); cf. County of Contra Costa v. Social Welfare Bd., 199 Cal. App. 2d 468, 18 Cal. Rptr. 573 (1962).

Participation in a rulemaking proceeding is not necessary in order to have standing to challenge the resulting regulation. See Section 652.230 and Comment (participant in administrative proceeding). This changes the basic case law rule, but consolidates existing exceptions to the rule. See Friends of Mammoth v. Bd. of Supervisors, 8 Cal. 3d 247, 104 Cal. Rptr. 761 (1972); see also discussion in Asimow, Judicial Review: Standing and Timing 10-12 (September 1992).

§ 652.250. Public interest standing

652.250. A person has standing to obtain judicial review of agency action that concerns an important right affecting the public interest if all of the following conditions are satisfied:

(a) The person resides or conducts business, or is an organization that has a member that resides or conducts business, in the jurisdiction of the agency.

(b) The person is a proper representative of the public and will adequately protect the public interest.

(c) The person has previously served on the agency a written request to correct the agency action and the agency has not, within a reasonable time, done so.

Comment. Section 652.250 codifies the California case law doctrine that a member of the public may seek judicial review of agency action (or inaction) to implement the public right to enforce a public duty. See, e.g., Green v. Obledo, 29 Cal. 3d 126, 172 Cal. Rptr. 206 (1981); Hollman v. Warren, 32 Cal. 2d 351, 196 P. 2d 562 (1948); Board of Social Welfare v. County of Los Angeles, 27 Cal. 2d 98, 162 P. 2d 627 (1945); American Friends Service Committee v. Procunier, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973); Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975). The language of Section 652.250 is drawn from Code of Civil Procedure Section 1021.5 (attorney fees in public interest litigation).

Section 652.250 supersedes the first portion of Code of Civil Procedure Section 526a (taxpayer actions). Under this section a person, whether or not a taxpayer within the jurisdiction, has standing to obtain judicial review, including restraining and preventing illegal expenditure, waste, or injury by an officer, agent, or other person acting on behalf of a entity, provided the general public interest requirements of this section are satisfied.

Section 652.250 applies to all types of relief sought, whether pecuniary or nonpecuniary, injunctive or declaratory, or otherwise. The test of standing under this section is whether there is a duty owed to the general public or a large class of persons. A person may have standing under the section, regardless of any private interest or personal prejudice, in order to have the law enforced in the public

interest. It should be noted that standing under this section is available only for agency action other than state agency adjudications. See Section 652.220 (party to state adjudicative proceeding); see also Section 610.210 ("agency action" defined).

The limitations in subdivisions (a)-(c) are drawn loosely from other provisions of state and federal law. See, e.g., first portion of Code Civ. Proc. § 526a (taxpayer within jurisdiction); Fed. R. Civ. Proc. 23(a) (representative must fairly and adequately protect interests of class); Corp. Code § 800(b)(2) (allegation in shareholder derivative action of efforts to secure action from board).

Staff Note. The Commission requested the staff to explore possible means of screening out inappropriate plaintiffs. The staff has included in this draft the requirements in subdivisions (a)-(c), after rejecting such alternatives as (1) bond for costs (too great a deterrent for some types of proper litigants, no deterrent at all for some types of improper litigants), (2) prior request for attorney general or district attorney to bring action (too political, and no resources in any case), (3) preliminary court determination of probable cause (wasteful of public and private resources except in case of injunctive relief where existing rules apply).

§ 652.260. Third party standing

652.260. A person that does not otherwise have standing to obtain judicial review of agency action under this article nonetheless has standing if the person's interest is dependent on and not adverse to the interest of another person that would have standing to obtain judicial review of the agency action but does not seek to do so.

Comment. Section 652.260 codifies the case law doctrine of "jus tertii"--the standing of a third person indirectly affected by agency action to obtain judicial review in the right of another person that is directly affected but does not seek judicial review. See, e.g., Board of Social Welfare v. County of Los Angeles, 27 Cal. 2d 98, 162 P. 2d 627 (1945); Selinger v. City Council of Redlands, 216 Cal. App. 3d 271, 264 Cal. Rptr. 499 (1989); Camp Meeker System, Inc. v. PUC, 51 Cal. 3d 845, 274 Cal. Rptr. 678 (1990).

Article 3. Exhaustion of Administrative Remedies

§ 652.310. Exhaustion required

652.310. A person may obtain judicial review of agency action under this part only after exhausting all administrative remedies available within the agency whose action is being reviewed and within any other agency authorized to exercise administrative review, unless judicial review before that time is permitted by this article or otherwise expressly provided by statute.

Comment. Section 652.310 codifies the exhaustion of remedies doctrine of existing law. See, e.g., Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 102 P. 2d 329 (1941) (exhaustion requirement jurisdictional). Exceptions to the exhaustion requirement are stated in the other provisions of this article.

This division does not provide an exception from the exhaustion requirement for judicial review of an administrative law judge's denial of a continuance. Cf. former Section 11524(c). Nor does it provide an exception for discovery decisions. Cf. Shively v. Stewart, 65 Cal. 2d 475, 55 Cal. Rptr. 217 (1965). This division does not continue the exemption found in the cases for a local tax assessment alleged to be a nullity. Cf. Stenocord Corp. v. City and County of San Francisco, 2 Cal. 3d 984, 88 Cal. Rptr. 165 (1970). Judicial review of such matters should not occur until conclusion of the administrative proceedings. But see Section 652.350 (interim review of prehearing determination).

§ 652.320. Administrative review of final decision

652.320. If the agency action being challenged is a decision in an adjudicative proceeding, all administrative remedies available within an agency are deemed exhausted for the purpose of Section 652.310 on issuance of a final decision by the agency, whether or not reconsideration, rehearing, or other administrative review of a final decision is available within that agency, unless a statute or regulation requires reconsideration, rehearing, or other administrative review.

Comment. Section 652.320 restates the existing California rule that further administrative review is not a prerequisite to judicial review once a final decision in an adjudicative proceeding is issued. See former Section 11523; Gov't Code § 19588 (State Personnel Board). This overrules any contrary statutory or case law implication. Cf. former Code Civ. Proc. § 1094.6(b); Alexander v. State Personnel Board, 22 Cal. 2d 198, 137 P. 2d 433 (1943).

A statute may require further administrative review before judicial review is permitted. See, e.g., Pub. Util. Code § 1756 Public Utilities Commission). An agency may by regulation require further administrative review of a final agency decision. Section 649.210(b) (availability and scope of administrative review).

It should be noted that administrative remedies are deemed exhausted under this section only when no further review is required within the agency issuing the decision, either at the same or a higher level. This does not excuse any requirement of further administrative review by another agency such as an appeals board.

§ 652.330. Inadequate remedy and irreparable harm exceptions

652.330. The requirement of exhaustion of administrative remedies is jurisdictional and the court may not relieve a person of the requirement unless the administrative remedies are inadequate or unless requiring their exhaustion would result in irreparable harm disproportionate to the public and private benefit derived from requiring exhaustion.

Comment. Section 652.330 authorizes the reviewing court to relieve the petitioner of the exhaustion requirement in limited circumstances; this enables the court to exercise some discretion. This section may not be used as a means to avoid compliance with other requirements for judicial review, however, such as the exact issue rule. See Section 652.510.

The exception to the exhaustion of remedies requirement where the administrative remedies are inadequate consolidates and codifies a number of existing case law exceptions, including:

Futility. The exhaustion requirement is excused if it is certain, not merely probable, that the agency would deny the requested relief. See discussion in Asimow, Judicial Review: Standing and Timing 39-41 (September 1992).

Inadequate remedies. Administrative remedies need not be exhausted if the available administrative review procedure, or the relief available through administrative review, is insufficient. See discussion in Asimow, Judicial Review: Standing and Timing 42-45 (September 1992).

Constitutional issues. Administrative remedies need not be exhausted for a challenge to a statute, regulation, or procedure as unconstitutional on its face; there is no exception for a challenge to a provision as applied, even though phrased in constitutional terms. See discussion in Asimow, Judicial Review: Standing and Timing 42-49 (September 1992).

Lack of notice. Lack of sufficient or timely notice of availability of an administrative remedy is an excuse. See discussion in Asimow, Judicial Review: Standing and Timing 49-50 (September 1992).

This section also provides an exception to the exhaustion of remedies requirement where exhaustion would result in irreparable harm disproportionate to the public and private benefit derived from requiring exhaustion. The codification broadens the existing narrow case law exception. The standard in the section is drawn from 1981 Model State APA § 5-107(3), but expands the factors to be considered to include private as well as public benefit. Considerations might include the cost of exhausting remedies and the particular litigant's ability to bear the costs, as well as such harms as business disruption, delay, and bad publicity. Factors against which the harm should be weighed include the benefits of requiring exhaustion, both in terms of judicial efficiency and separation of powers.

§ 652.340. Statutory excuse

652.340. Notwithstanding any other provision of this article, a petitioner for judicial review need not exhaust administrative remedies to the extent this division or another statute provides that exhaustion is not required.

Comment. Section 652.340 is drawn from 1981 Model State APA § 5-107(2).

Staff Note. This section is included pending review of the other state statutes. It may prove to be unnecessary.

§ 652.350. Interim review of prehearing determination

652.350. (a) Section 652.310 does not apply to an order in an adjudicative proceeding under Part 4 (commencing with Section 641.110) that denies a continuance or affects discovery or other pre-hearing activity.

(b) An order described in subdivision (a) is subject to immediate judicial review by the appropriate writ under Title 1 (commencing with Section 1063) of Part 3 of the Code of Civil Procedure.

Comment. Section 652.350 continues the provision of former Section 11524(c) for judicial review of an administrative law judge's denial of a continuance, and extends it to all prehearing decisions in proceedings of all agencies under the Administrative Procedure Act.

Staff Note. The Commission has not approved this section. The Commission requests input on this section from agencies not now subject to Government Code Section 11524(c).

Article 4. Review Procedure

§ 652.410. Statute of limitations for review

652.410. (a) This section applies to agency action that is a decision in an adjudicative proceeding, including a failure to issue a decision, but does not apply to other agency action.

(b) Except as otherwise provided in this section, judicial review of a decision may be initiated not later than 60 days after the decision is effective.

(c) The agency shall in the decision or otherwise notify the parties of the expiration date of the period for initiating judicial review. If the agency does not notify a party of the expiration date before the decision is effective, the party may initiate judicial review not later than the earlier of the following times:

(1) Sixty days after the agency notifies the party of the expiration date.

(2) One hundred eighty days after the decision is effective.

(d) If a party orders a transcript or other record of the proceedings used by the agency within 30 days after the decision is effective, the period provided in this section is tolled until delivery of the transcript or other record to the party.

(e) Section 613.230 (extension of time) does not extend the time within which a party may initiate judicial review under this section.

Comment. Section 652.410 provides a limitation period for initiating judicial review of agency action. Subdivision (a) limits the section to review of agency adjudicative decisions. See Section 610.310 ("decision" defined). Other types of agency action may be subject to other or no limitation periods, or to equitable doctrines such as laches.

Included in the coverage of Section 652.410 is failure of an agency to issue a required decision. Cf. Sections 641.110 (when adjudicative proceeding required) and 642.230 (agency action on application). In such a case the review period may extend to 180 days if the agency fails to inform the party of the review period for its decision not to conduct a required adjudicative proceeding. Subdivision (c). This overrules the 3-year limitations period applicable under existing law. Ragan v. City of Hawthorne, 212 Cal. App. 3d 1368, 261 Cal. Rptr. 219 (1989).

Subdivision (b) supersedes former Section 11523 (30 days) and former Code of Civil Procedure Section 1094.6 (90 days). It also unifies the review periods of various special statutes. See, e.g., former Section [to be drafted]. The provision does not override special limitations periods supported by policy reasons, such as Section 3542 (30-day PERB review limitation) and Labor Code Section 1160.8 (30-day ALRB review limitation).

The time within which judicial review must be initiated under subdivision (b) begins to run from the date the decision is effective. A decision generally is effective 30 days after it becomes final, unless the agency head makes it effective sooner or stays its effective date. See Section 650.110. Judicial review may only be had of a final decision. Section 652.130 (finality).

Nothing in this section should be construed to override standard restrictions on application of statutes of limitations, such as estoppel to plead the statute (see, e.g., Ginns v. Savage, 61 Cal. 2d 520, 39 Cal. Rptr. 377 (1964)), correction of technical defects (see, e.g., United Farm Workers of America v. ALRB, 37 Cal. 3d 912, 21 Cal.

Rptr. 453 (1985)), computation of time (see Sections 6800 et seq.), and application of due process principles to notice of decision (see, e.g., State Farm Fire & Casualty v. Workers' Compensation Appeals Bd., 119 Cal. App. 3d 193, 173 Cal. Rptr. 778 (1981)).

Subdivision (c) extends the judicial review period to ensure that affected parties receive notice of it. The notification requirement is generalized from former Code of Civil Procedure Section 1094.6(f) (review of local agency decision); see also Veh. Code § 14401(b) and Unemp. Ins. Code § 410. Cf. Section 649.120 (form and contents of decision).

Subdivision (d) supersedes the eighth sentence of former Section 11523 and former Code Civ. Proc. § 1094.6(d).

Subdivision (e) continues the last sentence of former Code Civ. Proc. § 1094.6(b). See also Tielsch v. City of Anaheim, 160 Cal. App. 3d 576, 206 Cal. Rptr. 740 (1984).

Staff Note. As Professor Asimow points out, the effective date of a decision is tied to its "issuance" by the agency, a term that is nebulous. We have discussed this matter before without resolving it. By "issuance" we mean something like adoption of the decision by the agency head. But it does not help much to so define it. Code of Civil Procedure Section 1094.6 refers to the date a decision is "announced", without further elaboration. We could use announcement rather than issuance of a decision, if that would add anything. The point may not be important if the decision states its effective date and the review period.

The staff is reviewing the special limitations periods currently in the law, including the short CEQA limitations period, to ascertain whether they are supported by policy reasons.

The Commission has made no decisions concerning the type or contents of pleading sufficient to satisfy the statute of limitations for initiating judicial review.

The Commission has not yet considered provisions relating to the content or cost of transcripts or other records.

The Commission has not yet considered issues involving stays.

Article 5. Scope of Review

§ 652.510. Exact issue rule

652.510. (a) Except as provided in subdivision (b), a person may not obtain judicial review of an issue that was not raised before the agency either by the person seeking to obtain judicial review or by another person.

(b) The court may permit judicial review of an issue that was not raised before the agency to the same extent it may relieve a person of the failure to exhaust administrative remedies before the agency.

Comment. Subdivision (a) of Section 652.510 codifies the case law exact issue rule. See discussion in Asimow, Judicial Review: Standing and Timing 37-39 (September 1992). It limits the issues that may be

raised and considered in the reviewing court to those that were raised before the agency. The section makes clear that the person seeking judicial review need not have raised the issue in the administrative proceeding--the requirement is satisfied if the issue was raised for agency consideration at all in the proceeding.

Subdivision (b) applies the exhaustion of remedies exceptions to the exact issue rule. The exact issue rule is in a sense a variation of the exhaustion of remedies requirement--the agency must first have had an opportunity to determine the issue that is subject to judicial review. Under this provision the court may relieve a person of the exact issue requirement if administrative remedies are inadequate or adhering to the requirement would result in irreparable harm disproportionate to the public and private benefit derived from the requirement. See Section 652.330 and Comment (inadequate remedy and irreparable harm exceptions).

Circumstances where the exception provided in subdivision (b) might be relevant include:

(1) The agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue. The intent of the exact issue rule exception is to permit the court to consider issues that were not raised before the agency if the agency did not have jurisdiction to grant an adequate remedy based on a determination of these issues. Examples include: (A) issues as to the facial constitutionality of the statute that enables the agency to function to the extent state law prohibits the agency from passing on the validity of the statute; (B) issues as to the amount of compensation due as a result of an agency's breach of contract to the extent state law prohibits the agency from passing on this type of question.

(2) The person did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, facts giving rise to the issue. This would permit a party to raise new issues in the reviewing court if these issues arise from newly discovered facts that the party excusably did not know at the time of the agency proceedings.

(3) The agency action subject to judicial review is a decision in an adjudicative proceeding and the person was not notified of the adjudicative proceeding in substantial compliance with this division. This would permit a new issue to be raised in the reviewing court by a person who was not properly notified of the adjudicative proceeding which produced the challenged order.

(4) The interests of justice would be served by judicial resolution of an issue arising from a change in controlling law occurring after the agency action or agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency. This permits new issues to be raised in the reviewing court if the interests of justice would be served thereby and the new issues arise from a change in controlling law, or from agency action after the person exhausted the last opportunity for seeking relief from the agency. See Lindeleaf v. ALRB, 41 Cal. 3d 861, 226 Cal. Rptr. 119 (1986).

Staff Note. Professor Asimow suggests in the background study that the exact issue rule be combined with the exhaustion of administrative remedies requirement, since it is similar in character

and is subject to some of the same exceptions. We have drafted it separately here because we think it helps distinguish the different policies of the two concepts to have them stated separately, though we have incorporated by reference the exhaustion of remedies exception. Even this we are uneasy about and should probably state separately that the exact issue rule is subject to exception in case of inadequate remedies or irreparable harm. Cf. Section 652.150 (exception to finality and ripeness requirements).

Code Civ. Proc. § 526a (amended). Taxpayer actions

526a. ~~An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided that no~~ (a) No injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities.

(b) An action brought ~~pursuant to this section~~ to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

Comment. The first portion of Section 526a is superseded by Government Code Section 653.250 (public interest standing).

Code Civ. Proc. § 1094.6 (repealed). Review of local agency decision

Comment. Subdivision (b) of former Section 1094.6 is superseded by Section 652.410 (statute of limitations for judicial review). Cf. 663.320 (administrative review of final decision).

Gov't Code § 610.210 (added). Agency action

610.210. "Agency action" means:

(a) The whole or a part of a regulation or decision.

(b) The failure to issue a regulation or decision.

(c) An agency's performance of, or failure to perform, any other duty, function, or activity, discretionary or otherwise.

Comment. Section 610.210 is drawn from 1981 Model State APA § 1-102(2). The term is used in Part 5 (commencing with Section 651.010), relating to judicial review of agency action.

The term "agency action" defined in this section expressly includes a regulation and a decision and an agency's failure to issue a regulation or decision. It goes much further, however. Subdivision (c) makes clear that agency action includes everything and anything

else that an agency does or does not do, whether its action or inaction is discretionary or otherwise. There are no exclusions from that all encompassing definition. As a consequence, there is a category of agency action that is neither a decision nor a regulation because it neither establishes the legal rights of any particular person nor establishes law or policy of general applicability. The principal effect of the very broad definition of agency action is that everything an agency does or does not do is subject to judicial review. Success on the merits in such cases, however, is another thing. In this statute, the limited scope of review utilized by the courts in judicial review proceedings, is relied on to discourage frivolous litigation, rather than the preclusion of judicial review entirely in whole classes of potential cases.

Gov't Code § 612.120 (amended). Application of division to local agencies

612.120. (a) This division does not apply to a local agency except to the extent this division is made applicable by statute.

(b) This division applies to an agency created or appointed by joint or concerted action of the state and one or more local agencies.

(c) Part 5 (commencing with Section 651.010) applies to a local agency.

Comment. Section 612.120 is drawn from 1981 Model State APA § 1-102(1). See also Section 610.370 ("local agency" defined). Local agencies are excluded because of the very different circumstances of local government units when compared to state agencies. The section explicitly includes joint state and local bodies, so as to effect the broadest possible coverage.

This division is made applicable by statute to local agencies in a number of instances, including:

> Suspension or dismissal of permanent employee by school district. Ed. Code § 44944.
>
> Nonreemployment of probationary employee by school district. Ed. Code § 44948.5.
>
> Evaluation, dismissal, and imposition of penalties on certificated personnel by community college district. Ed. Code § 87679.
>
> Judicial review of agency action. Part 5 (commencing with Section 651.010) of this division.

Gov't Code § 613.200 (added). Written notice

613.200. If this division requires that notice be given to a person, the notice shall be in writing unless the provision provides otherwise.

Comment. Section 613.200 is new.

Staff Note. *Professor Asimow suggests that notice to a party of the period for initiating judicial review should be in writing. This raises the question whether all notices should be in writing. Certainly for protection of the person giving the notice a writing is desirable, as well as for the benefit of the person receiving the notice. We offer here a general provision for notices.*

Gov't Code § 649.120 (amended). Form and contents of decision

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649.120. (a) A proposed decision or final decision shall be in writing and shall include a statement of the factual and legal basis and reasons for the decision as to each of the principal controverted issues.

(b) The statement of the factual basis for the proposed or final decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the proposed or final decision. If the factual basis for the proposed or final decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination.

(c) The statement of the factual basis for the proposed or final decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. Evidence of record may include facts known to the presiding officer and supplements to the record that are made after the hearing, provided the evidence is made a part of the record and that all parties are given an opportunity to comment on it. The presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence.

(d) The decision shall state its effective date, and shall include a notice of the expiration date of the period for initiating judicial review.

(e) Nothing in this section limits the information that may be contained in a proposed or final decision, including a summary of evidence relied on.

Comment. Subdivision (d) is new. Failure to include the required notice extends the judicial review period until 180 days after the effective date. Section 652.410 (statute of limitations for judicial review).

Gov't Code § 11523 (repealed). Judicial review

11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner, within 30 days after a request therefor by him or her, upon the payment of the fee specified in Section 69950 as now or hereinafter amended for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision

following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.

Comment. The second sentence of former Section 11523 is superseded by Section 652.410 (statute of limitations for judicial review). The third sentence is continued in Section 652.320 (administrative review of final decision).

The eighth sentence is superseded by Section 652.410 (statute of limitations for judicial review).