

## Memorandum 95-74

### **Administrative Adjudication by State Agencies: Followup Legislation**

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Attached as Exhibit pp. 1-5 is a draft of the provisions we have accumulated to date for followup legislation on administrative adjudication by state agencies. This memorandum presents a couple of additional matters for possible inclusion in the legislation, suggested in the letter of the Office of Oil Spill Prevention and Response (OSPR). See Exhibit pp. 6-7.

#### **Interim Regulations**

The administrative adjudication legislation provides a simplified procedure for adoption of interim regulations for agencies to implement the new provisions. See Gov't Code § 11400.20. OSPR points out that the simplified procedure is too narrowly drawn; it is limited to regulations designed to implement new Chapter 4.5 (commencing with Section 11400), whereas some agencies may need to adopt regulations in light of revised Chapter 5 (commencing with Section 11500) as well. **The staff believes this point is well-taken, and would expand Section 11400.20 as suggested by OSPR:**

#### **Gov't Code § 11400.20 (amended). Adoption of regulations**

11400.20. (a) Before, on, or after July 1, 1997, an agency may adopt interim or permanent regulations to govern an adjudicative proceeding under this chapter or Chapter 5 (commencing with Section 11500).

(b) Except as provided in Section 11351:

(1) Interim regulations need not comply with Article 5 (commencing with Section 11346) or Article 6 (commencing with Section 11349) of Chapter 3.5, but are governed by Chapter 3.5 (commencing with Section 11340) in all other respects.

(2) Interim regulations expire on December 31, 1998, unless earlier terminated or replaced by or readopted as permanent regulations under paragraph (3). If on December 31, 1998, an agency has completed proceedings to replace or readopt interim regulations and has submitted permanent regulations for review by the Office of Administrative Law, but permanent regulations have not yet been filed with the Secretary of State, the interim regulations are extended until the date permanent regulations are

filed with the Secretary of State or March 31, 1999, whichever is earlier.

(3) Permanent regulations are subject to all the provisions of Chapter 3.5 (commencing with Section 11340), except that if by December 31, 1998, an agency has submitted the regulations for review by the Office of Administrative Law, the regulations are not subject to review for necessity under Section 11349.1 or 11350.

**Comment.** Subdivision (a) is amended to permit use of the procedure provided in this section for adoption of interim or permanent regulations under the formal hearing procedure, Chapter 5 (commencing with Section 11500).

### **OSPR Oil Spill Cleanup Regulations**

OSPR has asked if it could use our administrative adjudication followup bill as a vehicle to correct an oversight in legislation enacted last session affecting oil spill cleanup regulations. Specifically, SB 1083 (Beverly), enacted as 1995 Cal. Stat. ch. 265, transfers authority to enact regulations governing licensing and use of oil spill cleanup agents from the Water Resources Control Board (WRCB) to the Administrator for Oil Spill Response, effective January 1, 1996. The legislation fails to continue existing WRCB regulations in effect until the Administrator has an opportunity to review and revise them.

The staff has no problem with making our bill available as a vehicle for the purpose of keeping existing regulations in effect temporarily, provided this does not create any opposition for our bill. There is some indication, however, that the existing regulations may be obsolete. Moreover, the OSPR draft goes beyond continuation of existing regulations; it also transfers former WRCB enforcement authority to OSPR, which may be beyond the intended scope of the 1995 legislation. The OSPR draft takes the following approach (as revised to reflect Office of Administrative Law style):

#### **Gov't Code § 8670.13.2 (added). Regulations on licensing and use of oil spill cleanup agents**

8670.13.2. (a) Regulations set forth in Title 23, California Code of Regulations, Sections 2304 through 2336 shall be deemed to be regulations adopted by the administrator pursuant to Section 8670.13.1. These regulations shall remain in effect until repealed or amended by the administrator.

(b) The administrator shall license oil spill cleanup agents in accordance with Title 23, California Code of Regulations, Sections 2304 through 2336 and shall assume all duties, authorities and responsibilities previously provided to the Water Resources

Control Board affecting the licensing and regulation of use of oil spill cleanup agents.

The staff is seeking input on these matters from interested persons, including the author and sponsors of the 1995 legislation, the regulated industry, and the Office of Administrative Law. There is enough uncertainty about this, in the staff's opinion, that for now we would not include it in our followup legislation. **If we can get agreement on the provision and its phrasing from the interested parties in a timely fashion, we would add it to the bill later.**

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

Exhibit

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**ADMINISTRATIVE ADJUDICATION FOLLOW-UP LEGISLATION**

**Gov't Code § 11019.6 (amended). Principal state agency**

SEC. . Section 11019.6 of the Government Code is amended to read:

11019.6. (a) Notwithstanding any other provision of state law, and to the extent not in conflict with federal law, if a principal agency is not designated by statute, a principal state agency shall be designated by the Governor for the coordination of procedures, forms, and deadlines in every area of regulatory activity under the state's jurisdiction, as determined by the Governor. All other state agencies shall defer to the principal agency in the performance of their duties in a particular regulatory area, or upon a particular project, with respect to procedures, forms, and deadlines, but not with respect to any other areas of authority.

(b) This section shall not apply to the processing of any permit pursuant to Division 34 (commencing with Section 71000) of the Public Resources Code.

(c) No part of this section shall be construed to limit the authority of any agency to hold public hearings on any matter within the jurisdiction of that agency.

(d) No part of this section shall be construed to authorize any state agency to adopt or implement procedures, forms, or deadlines in conflict with those explicitly specified in statute or in conflict with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500)).

(e) Nothing in this section shall be construed to confer upon any state agency decisionmaking authority over substantive matters within another agency's jurisdiction, including any informational and public hearing requirements needed to make regulatory and permitting decisions.

(f) As used in this section, "agency" and "principal agency" shall not mean a court or any office of the judicial branch of government.

**Comment.** Section 11019.6 is amended to add a reference to the general provisions on administrative adjudication in the Administrative Procedure Act.

**Gov't Code § 11415.60 (amended). Settlement**

SEC. . Section 11415.60 of the Government Code is amended to read:

11415.60. (a) An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding. Subject to subdivision (c), the settlement may be on any terms the parties determine are appropriate. Notwithstanding any other provision of law, no evidence of an offer of compromise or settlement made in settlement negotiations is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose, and no evidence of conduct or statements made in settlement negotiations is admissible to prove liability for any loss or damage except to the extent provided in Section 1152 of the Evidence Code.

(b) A settlement may be made before or after issuance of an agency pleading, except that in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned, a settlement may not be made before issuance of the agency pleading. A settlement may be made before, during, or after the hearing.

(c) A settlement is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement. The terms of a settlement may not be contrary to statute or regulation, except that the settlement may include sanctions the agency would otherwise lack power to impose.

**Comment.** Section 11415.60 is amended to protect conduct and statements made in settlement negotiations from admissibility, parallel to the protection provided in Section 1152 of the Evidence Code. This provision supplements the existing protection from admissibility of evidence of an offer of compromise or settlement (as opposed to evidence of conduct or statements made in settlement negotiations).

**Gov't Code § 11435.15 (amended). Application of article**

SEC. . Section 11435.15 of the Government Code is amended to read:

11435.15. (a) The following state agencies shall provide language assistance in adjudicative proceedings to the extent provided in this article:

Agricultural Labor Relations Board  
Department of Alcohol and Drug Abuse  
State Athletic Commission ~~California~~  
California Unemployment Insurance Appeals Board  
Board of Prison Terms  
State Board of Barbering and Cosmetology  
State Department of Developmental Services  
Public Employment Relations Board  
Franchise Tax Board  
State Department of Health Services  
Department of Housing and Community Development  
Department of Industrial Relations  
State Department of Mental Health  
Department of Motor Vehicles  
Notary Public Section, Office of the Secretary of State  
Public Utilities Commission  
Office of Statewide Health Planning and Development  
State Department of Social Services  
Workers' Compensation Appeals Board  
Department of the Youth Authority  
Youthful Offender Parole Board  
Bureau of Employment Agencies  
Department of Insurance  
State Personnel Board  
California Board of Podiatric Medicine  
Board of Psychology

(b) Nothing in this section prevents an agency other than an agency listed in subdivision (a) from electing to adopt any of the procedures in this article, provided that any selection of an interpreter is subject to Section 11435.30.

(c) Nothing in this section prohibits an agency from providing an interpreter during a proceeding to which this chapter does not apply, including an informal factfinding or informal investigatory hearing.

(d) This article applies to an agency listed in subdivision (a) notwithstanding a general provision that this chapter does not apply to some or all of an agency's adjudicative proceedings.

**Comment.** Section 11435.15 is amended to correct a printing error.

**Ins. Code § 1861.08 (amended). Conduct of hearings**

SEC. . Section 1861.08 of the Insurance Code is amended to read:

1861.08. Hearings shall be conducted pursuant to ~~Sections 11500 through 11528~~ Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, except that: ~~(a) hearings~~

(a) Hearings shall be conducted by administrative law judges for purposes of Sections 11512 and 11517, chosen under Section 11502 or appointed by the commissioner; ~~(b) hearings .~~

(b) Hearings are commenced by a filing of a Notice in lieu of Sections 11503 and 11504; ~~(c) the .~~

(c) The commissioner shall adopt, amend or reject a decision only under Section 11517 ~~(e) (b), (c), and (e) and solely on the basis of the record; (d) Section 11513.5 shall apply to the commissioner; (e) discovery~~ Section 11518.5.

(d) Notwithstanding Section 11501, Section 11430.30 and subdivision (b) of Section 11430.70 shall not apply in these hearings.

(e) Discovery shall be liberally construed and ~~disputes determined by the administrative law judge.~~

**Comment.** Section 1861.08 is amended to reflect revision of the Administrative Procedure Act by 1995 Cal. Stat. ch 938.

The introductory portion of the section is amended to refer to the entire formal hearing chapter. That chapter is supplemented by Chapter 4.5 (commencing with Section 11400) of the same part, containing general provisions on administrative adjudication applicable to all state agency hearings. See Gov't Code § 11410.10 (application of chapter).

Subdivision (c) is amended to add a reference to Section 11517(b), which includes expanded procedures for agency adoption of a proposed administrative law judge decision. The reference in subdivision (c) to the procedure for adoption, amendment, or rejection of a decision is supplemented by a reference to the new procedure for correction of mistakes and clerical errors in the decision. See Gov't Code § 11518.5. The reference to a decision "solely on the basis of the record" in subdivision (c) is deleted as surplus. All decisions under the Administrative Procedure Act must be based exclusively on the record. Gov't Code § 11425.50 (decision).

The reference in subdivision (d) to former Government Code Section 11513.5 is deleted as obsolete. That section is superseded by Government Code Sections 11430.10-11430.80 (ex parte communications), which apply to all hearings under the Administrative Procedure Act. However, subdivision (d) makes clear that Government Code Sections 11430.30 (permissible ex parte communications from agency personnel) and 11430.70(b) (ex parte communications in individualized

ratemaking proceeding) do not apply in hearings under this article; this preserves the effect of existing law under former Government Code Section 11513.5.

The reference in subdivision (e) to determination of discovery disputes by the administrative law judge is deleted as surplus. All discovery disputes under the formal hearing procedure are now determined by the administrative law judge. Gov't Code § 11507.7.

**1995 Cal. Stat. ch. 938, § 98 (amended). Operative date**

SEC. . Section 98 of Chapter 938 of the Statutes of 1995 is amended to read:

SEC. 98. (a) Except as provided in subdivision (b), this act shall be operative on July 1, 1997.

(b) (1) Sections 9, 9.2, 9.4, 9.6, 15, 15.1, 15.3, 15.5, 15.6, 15.7, 15.8, 24, 57, 58, 64, 64.4, 65, 65.4, 71, 72, 72.4, 78, 82, 95.5, 97.1, and 97.2 shall be operative on January 1, 1996.

(2) Section 97 shall be operative on January 1, 1997.

(3) If Section 443.37 of the Health and Safety Code is repealed before July 1, 1997, then Section 59 of this act shall not become operative.

(4) Notwithstanding Section 11400.10 of the Government Code, Section 11400.20 of the Government Code shall be operative immediately.

**Operative Date**

SEC. . (a) Except as provided in subdivision (b), this act shall be operative on July 1, 1997.

(b) Section \_\_ of this act, amending Section 98 of Chapter 938 of the Statutes of 1995, shall be operative immediately.

**Urgency Clause**

SEC. . This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

Chapter 938 of the Statutes of 1995 revises administrative hearing procedures of state agencies and permits state agencies to adopt implementing regulations before, on, or after the July 1, 1997, operative date of Chapter 938. To allow sufficient time for state agencies to adopt implementing regulations before July 1, 1997, it is necessary that the provision permitting state agencies to adopt implementing regulations become operative immediately.



**M e m o r a n d u m**

To : Mr. Nathaniel Sterling  
Law Review Commission  
4000 Middlefield Road, Suite 2  
Palo Alto, California 94303-4739

Date : November 29, 1995

Law Revision Commission  
RECEIVED

From : Department of Fish and Game

DEC 4 1995

File: \_\_\_\_\_

Subject: Enactment of the Kopp Bill (SB 523)

It was a pleasure speaking with you recently regarding the enactment of the Kopp bill (SB 523). Briefly, here is our problem:

The Office of Oil Spill Prevention and Response (OSPR) was created pursuant to the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act of 1990 (Act). This legislation enabled OSPR to impose civil penalties upon persons who violate certain provisions of the Act, and specified hearing procedures set forth in Government Code sections 11507 through 11517, inclusive.

We were well into the process of adopting regulations for our hearing procedures when SB 523 was signed into law. While we welcome the greater flexibility allowed to state agencies under the new Administrative Procedure Act (APA) and accordingly have already incorporated most of the new provisions contained in Chapter 4.5 (Government Code section 11400 et seq.) into our regulations, we must now adopt our procedures as interim regulations, in accordance with the new Government Code, section 11400.20.

However, we are now confronted with implementing regulations based upon the existing Chapter 5 (Government Code section 11500 et seq.) which will be substantially amended or repealed in July 1997. Unlike other state agencies, we cannot utilize the simplified rulemaking methods available under 1 California Code of Regulations Section 100, since we do not have existing hearing procedures in place.

As we discussed earlier, the California Law Revision Commission will be sponsoring emergency legislation to clear up technical matters related to SB 523. We ask that the Commission consider the following language so that OSPR can avoid drafting additional regulations and experiencing additional costs associated with the rulemaking process:

11400.20. (a) Before, on, or after July 1, 1997, and agency may adopt interim or permanent regulations to govern an adjudicative proceeding under this chapter and Chapter 5 (commencing with Section 11500).

Mr. Nathaniel Sterling  
November 29, 1995  
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Lastly I mentioned an additional error made by the Legislature in transferring authority to OSPR for the licensing of oil spill cleanup agents. The licensing regulations currently used by the Water Resources Control Board will expire on January 1, 1996. The Legislature neglected to allow OSPR to administer licensing regulations for a transitional period, until the Administrator could issue new licensing regulations under his new authority.

Following your suggestion, I contacted Ms. Charlene Mathias at the Office of Administrative Law (OAL) concerning the possibility of OAL carrying a cleanup bill. She informed me that OAL does not plan, at this time, to sponsor legislation for the upcoming legislative session. For this reason, we would like to avail ourselves of your offer to assist, possibly in the urgency measure mentioned above. The following language would allow us to assume our new statutory duties with little disruption to the regulated community:

Section 8670.13.2 is added to the Government Code to read:

8670.13.2 (a) Regulations affecting the licensing and use of oil spill cleanup agents as set forth in Chapter 10, Title 23 of the California Code of Regulations shall remain in effect for a period of two years from the date of enactment of this legislation, or until the administrator amends or modifies such regulations pursuant to Section 8670.13.1

(b) The administrator shall license oil spill cleanup agents in accordance with provisions of Chapter 10, Title 23 of the California Code of Regulations, and shall assume all duties, authorities and responsibilities previously provided to the Water Resources Control Board affecting the licensing and regulation of use of oil spill cleanup agents.

If you have any questions, or are in need of additional detail please contact me at telephone number (916) 327-9938.

Thank you for your time and consideration in this matter.



Carlton D. Moore  
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Regulations Unit