

Memorandum 96-19

Administrative Adjudication: SB 794 — Followup Legislation

The administrative adjudication followup bill — SB 794 (Kopp) — has passed the Senate and is awaiting action in the Assembly. Meanwhile, a few additional matters have come to our attention that may be appropriate for inclusion in the bill. (This would require the bill to be returned to the Senate for concurrence following Assembly action on it.)

Implementing Regulations

Sections 11400.20 and 11400.21 of the bill make clear that an agency may adopt interim or permanent regulations for administrative adjudication under the new statute. However, where the Office of Administrative Hearings is required to conduct a hearing for an agency, that agency should not be allowed to adopt regulations that could affect the standard procedures followed by OAH. This needs to be made clear in the bill.

11400.20. Adoption of Regulations

(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). Nothing in this section authorizes an agency to adopt regulations to govern an adjudicative proceeding required to be conducted by an administrative law judge employed by the Office of Administrative Hearings except to the extent the regulations are otherwise authorized by statute.

Comment. Subdivision (a) makes clear that the authority of an agency to adopt regulations governing its hearings does not apply to hearings required to be conducted for it by the Office of Administrative Hearings, unless there is express statutory authority for the regulations. Examples of express statutory authority include:

- Section 11420.10 (alternative dispute resolution)
- Section 11425.50 (penalty guidelines)
- Section 11440.10 (administrative review)
- Section 11440.50 (intervention)
- Sections 11445.20 and 11445.50 (informal hearing procedure)
- Section 11460.20 (emergency decision)

Section 11518.5 (correction of mistakes and clerical errors in decision)

It should be noted that the provision of Section 11425.40(d) allowing an agency that conducts an adjudicative proceeding to provide by regulation for peremptory challenge of the presiding officer applies to the Office of Administrative Hearings and not the agency for which the Office of Administrative Hearings is conducting the proceeding. See Comment to Section 11425.40(d).

Nothing in subdivision (a) precludes regulations governing matters peripheral to administrative adjudication proceedings, such as a requirement that a person maintain an address with the agency for the purpose of notice.

[Same change to be made to Section 11400.21.]

Precedent Decisions

The new law permitting an agency to designate precedent decisions and requiring an index of decisions so designated is prospective in application. The law also allows an agency to designate former decisions as precedential, but the statute could be interpreted not to require indexing of the former decisions. This loophole should be closed by adding explicit language to the statute and Comment.

11425.60. Precedent decisions

(d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997.

Comment. Subdivision (b) of Section 11425.60 is amended to make clear that if an agency designates as precedential a decision issued before July 1, 1997, the decision must be indexed pursuant to subdivision (c).

OSPR Oil Spill Cleanup Regulations

The Office of Oil Spill Prevention and Response (OSPR) has asked if it could use the 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, and is unclear concerning a few details of the Administrator's authority in this area.

The staff has no problem with making the bill available as a vehicle for this purpose, provided it does not create any opposition for the bill. The following language has been worked out between OSPR and Marine Spill Response Corporation, sponsor of the 1995 legislation. We have been assured by both parties that these changes are noncontroversial and there should be no opposition to them:

SECTION 1. Section 8670.13.1 of the Government Code is amended to read:

8670.13.1. (a) The administrator shall license all oil spill cleanup agents, and shall adopt regulations for governing the expedited testing, licensing and use of oil spill cleanup agents. The administrator shall utilize toxicity and efficacy tests and other information from government and private agencies developed for each specific category of chemical countermeasure in determining the acceptability of an oil spill cleanup agent for license and use.

(b) Sorbents and other cleanup devices that do not employ the use of active chemical cleanup agents, or otherwise determined by the administrator not to cause aquatic toxicity for purposes of oil spill response, are not subject to subdivision (a).

(c) The administrator may charge applicants a fee for the costs of processing an application for a license for an oil spill cleanup agent, not to exceed one thousand dollars (\$1,000). The administrator may require renewal of a license every 5 years, and may charge a fee for the cost of processing the renewal of the license for an oil spill cleanup agent, not to exceed one hundred dollars (\$100). Only one license per cleanup agent shall be required statewide.

SEC. 2. Section 8670.13.2 is added to the Government Code, to read:

8670.13.2. 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 adopts new regulations pursuant to Section 8670.13.1.

[Note. Conforming technical bill changes would be made renumbering subsequent bill sections and adjusting the operative date provision.]

Based on this information, the staff recommends that we request Senator Kopp to add this material to the bill, if he thinks it is appropriate. Should problems arise concerning this matter, we would drop it from the bill.

Respectfully submitted,

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Executive Secretary