

Memorandum 96-51

Judicial Review of Agency Action: Conforming Revisions

Conforming revisions required by the proposed law on judicial review of agency action are so voluminous that they are summarized here without being reproduced in full. A table of contents for conforming revisions is attached, showing affected agencies and sections to be conformed. A few conforming revisions with policy implications are included in the Commission's Revised Tentative Recommendation on *Judicial Review of Agency Action* (May 1996), rather than in the comprehensive conforming revisions document.

The text of conforming revisions may be obtained at the Commission's web site on the Internet at <<http://www.clrc.ca.gov>>. Follow the "Public Comment" link and look for "TR-JudRevConf." These may be downloaded from an associated FTP directory. A hard copy of conforming revisions, or relevant portions, may be obtained by interested persons on request.

SECTIONS TO BE CONFORMED

Sections Referring to Code of Civil Procedure Section 1094.5 or 1094.6

Many statutes refer to Code of Civil Procedure Section 1094.5 or 1094.6 (administrative mandamus). Sections 1094.5 and 1094.6 will be repealed by the proposed law. References to these sections are revised to refer instead to the new statute, as in the following example:

Bus. & Prof. Code § 809.8 (amended). Judicial review, discovery, and testimony

809.8. Nothing in Sections 809 to 809.7, inclusive, shall affect the availability of judicial review under Section—1094.5 Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure nor the provisions relating to discovery and testimony in Section 1157 of the Evidence Code or Sections 1370 and 1370.1 of the Health and Safety Code.

Similar revisions are made in: Bus. & Prof. Code §§ 125.7, 125.8, 494, 2087, 2337, 4875.6, 7502.4, 8662, 8698.3, 12015.3, 17550.18, 19813; Civ. Code § 1812.203; Code Civ. Proc. § 706.075 (90-day time limit preserved); Educ. Code § 87611; Fish

& Game Code § 2076; Food & Agric. Code §§ 5311, 11512.5, 12648, 12999.4, 12999.5, 14009, 15071.5, 19447, 21051.3, 21051.4, 24007, 43003, 46007; Gov't Code §§ 8670.68, 8670.69.6, 11529, 12987.1, 17559, 51286, 54740.6, 65584, 65590, 66639 (30-day time limit preserved for BCDC), 66641.7 (same); Health & Safety Code §§ 1428, 1550.5, 1793.15, 2280.1, 2861.5, 17980.8, 25202.7, 25231, 25233, 25234, 25398.10, 25514.6, 35823, 40864, 42316, 44011.6, 108900, 110915, 111855, 111940, 121270, 123340, 127275, 128775; Ins. Code §§ 791.18, 1780.63, 11754.5; Lab. Code § 1964; Pub. Res. Code §§ 2774.2, 2774.4, 3236.5, 21168, 25534.2, 25901, 29602, 29603, 29772, 30801, 30802, 41721.5, 42854, 45802, 50000; Pub. Util. Code §§ 13575.7, 21675.2; Veh. Code § 1840; Water Code § 13330; Water Code Appendix § 65-4.8; Welf. & Inst. Code §§ 10605, 10605.2, 10744, 10962, 11468.5, 11468.6, 14105.405, 14171, 19709.

Sections Referring to Code of Civil Procedure Section 1085

Sections that permit judicial review of agency action by traditional mandamus under Code of Civil Procedure Section 1085 are made subject to the draft statute, as in the following example:

Gov't Code § 65751 (amended). Action challenging general plan

65751. Any action to challenge a general plan or any element thereof on the grounds that such plan or element does not substantially comply with the requirements of Article 5 (commencing with Section 65300) shall be brought pursuant to Section 1085 under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Similar revisions are made in: Code Civ. Proc. § 1245.255; Educ. Code § 94323; Food & Agric. Code §§ 5509, 35928; Health & Safety Code §§ 1550.5, 25356.1, 25356.8; Ins. Code §§ 728, 1748.5; Welf. & Inst. Code § 14087.27.

Sections Referring to Government Code Section 800

Sections that refer to Government Code Section 800 (attorneys' fees), to be recodified in the proposed law as Code of Civil Procedure Section 1123.950, are conformed as in the following example:

Gov't Code § 20126 (technical amendment). Refusal to admit liability

20126. Refusal by this system to admit liability pursuant to any provision of this part shall not be considered arbitrary or capricious action or conduct within the meaning of Section 800 1123.950 of the Code of Civil Procedure, or any other provision of law.

Similar revisions are made in: Code Civ. Proc. § 1028.5; Rev. & Tax. Code § 1611.6.

Sections Referring to Government Code Section 11523 or APA

Sections that refer to the judicial review section in the Administrative Procedure Act (Government Code Section 11523) or to judicial review under the APA as a whole, are revised to refer instead to the appropriate provision in the new law, as in the following example:

Code Civ. Proc. § 1089.5 (amended). Answer to petition for writ of mandate
1089.5. Where a petition for writ of mandate is filed in the trial court pursuant to Section 1088.5, and where a record of the proceedings to be reviewed has been filed with the petition or where no record of a proceeding is required, the respondent shall answer or otherwise respond within 30 days after service of the petition. However, where a record of the proceeding to be reviewed has been requested pursuant to ~~Section 11523 of the Government Code, or otherwise,~~ and has not been filed with the petition, the party upon whom the petition has been served, including any real party in interest, shall answer or otherwise respond within 30 days following receipt of a copy of the record.

Similar revisions are made in: Bus. & Prof. Code §§ 494, 7071.11; Food & Agric. Code § 18931; Gov't Code § 11517; Harb. & Nav. Code § 737; Health & Safety Code §§ 18024.4, 25149, 25187, 115155; Ins. Code § 728; Penal Code § 11126; Pub. Res. Code § 14591.5; Pub. Util. Code § 24252; Veh. Code § 22851.3.

Sections Referring to Review by “Mandamus” or “Mandate”

Revisions to change review by “mandamus” or “mandate” to refer to the draft statute are made as in the following example:

Gov't Code § 942 (amended). Judicial review
942. Nothing in this division shall be construed to deprive a claimant of the right to resort to ~~writ of mandate or other a proceeding under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure~~ against the public entity or the board or any employee of the public entity to compel payment of a claim when and to the extent that it has been allowed and is required by this division to be paid.

Similar revisions are made in: Bus. & Prof. Code § 10471.5; Educ. Code §§ 17886, 35145, 69932, 72121, 81960, 90072, 92491, 94148; Elec. Code §§ 9190,

9295, 13313; Gov't Code §§ 970.2, 7911, 11130, 11130.3, 13969.1, 15444, 26370, 26470, 31725, 50770, 51154, 51294, 53595.35, 54642, 54702.8, 54960, 54960.1, 67620, 91537, 92308; Harb. & Nav. Code Appendix 1, § 66; Harb. & Nav. Code Appendix 2, § 66; Health & Safety Code §§ 33660, 33781, 34362, 37646, 37936, 44554, 52033, 112615, 116625, 116700; Ins. Code § 1104.9; Mil. & Vet. Code §§ 489, 1005.1; Penal Code § 4011.8; Pub. Res. Code §§ 3333, 26034, 32205; Pub. Util. Code §§ 13106, 30981, 100492, 102602, 103602, 120702; Pub. Util. Code Appendix 2, § 10.1; Sts. & Hy. Code §§ 5302.5, 6467, 6468, 30238, 31171, 33400, 35417, 35468; Water Code §§ 1055.1, 1730, 6357.4, 6461, 9266, 11708, 13325, 36391, 44961; Water Code Appendix §§ 59-33, 119-406, 128-504, 129-421, 133-510, 134-604, 135-421; Welf. & Inst. Code § 5655.

Some of these sections provide for enforcement of revenue bonds “at law or in equity, by suit, action, mandamus, or other proceedings.” Educ. §§ 17886, 69932, 94148; Gov't Code §§ 15444, 53595.35, 54702.8, 67620, 92308; Health & Safety Code §§ 33781, 37646, 37936, 44554; Pub. Res. Code §§ 26034, 32205; Pub. Util. Code §§ 30981, 100492, 102602, 103602, 120702; see also Gov't Code §§ 54642, 91537; Harb. & Nav. Code Appendix 1, § 66; Harb. & Nav. Code Appendix 2, § 66; Health & Safety Code §§ 34362, 52033; Pub. Util. Code § 13106; Sts. & Hy. Code § 35417; Water Code Appendix §§ 133-510, 134-604. Only the mandamus language is conformed, to preserve the rule that generally the holder of a matured public bond may maintain an action at law against the issuer to recover the amount due. 52 Cal. Jur. 3d *Public Securities and Obligations* § 60 (1979).

Sections Referring to Review by “Declaratory Relief” or by “Action”

Revisions to change review by “declaratory relief” or “action” to review under the draft statute are made as in the following example:

Gov't Code § 17612 (amended). Local government claims bills; judicial review

17612. (a) Immediately upon receipt of the report submitted by the commission pursuant to Section 17600, a local government claims bill shall be introduced in the Legislature. The local government claims bill, at the time of its introduction, shall provide for an appropriation sufficient to pay the estimated costs of these mandates except where the costs have been or will be paid pursuant to Section 17610.

(b) The Legislature may amend, modify, or supplement the parameters and guidelines for mandates contained in the local government claims bill. If the Legislature amends, modifies, or supplements the parameters and guidelines, it shall make a

declaration in the local government claims bill specifying the basis for the amendment, modification, or supplement.

(c) If the Legislature deletes from a local government claims bill funding for a mandate, the local agency or school district may file in petition the Superior Court of the County of Sacramento an action in declaratory relief for judicial review to declare the mandate unenforceable and enjoin its enforcement under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Similar revisions are made in: Gov't Code § 51294.2.

Sections With Special Standards of Review or Other Special Provisions

Some sections permit judicial review (1) in the same manner as a decision of an administrative law judge under the formal adjudication provisions of the APA, (2) “in accordance with law,” (3) in “any court of competent jurisdiction,” (4) in “the appropriate court,” or (5) without express reference to the administrative mandamus provisions. To the extent these sections have special standards of review, special limitations periods, or some other departure from the proposed law, they are made subject to the draft statute, and the special provisions in these sections are conformed as in the following example:

Bus. & Prof. Code § 19463 (amended). Finality of action

19463. The action of the board in suspending or revoking a license issued under this chapter is final, except that the propriety of the action of suspending or revoking a license or of any other final administrative action of the board is subject to review by any court of competent jurisdiction if the action is commenced in the court within 30 days of the board's action under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The action of the board shall stand unless and until reversed by a court. No Except as provided in Section 1123.640 of the Code of Civil Procedure, no action may be commenced in a court to attack, review, set aside, void, or annul any final action of the board unless it is commenced within 30 days of the board's action.

Similar revisions are made in: Bus. & Prof. Code § 22461; Educ. Code § 87682; Fin. Code § 8055; Food & Agric. Code §§ 59234.5, 60016, 61899, 62665; Gov't Code § 16278; Harb. & Nav. Code § 1183; Health & Safety Code § 113220 (findings “unsupported by the evidence”); Ins. Code §§ 1065.4, 1858.6, 12414.19; Veh. Code §§ 3058, 3068.

Ambiguous Provisions

Health and Safety Code Section 112275 provides for “judicial review pursuant to this chapter,” but the chapter provides only for proceedings the Attorney General, district attorney, or city attorney, and not for judicial review by a private party. Accordingly, Section 112275 is made subject to the draft statute:

Health & Safety Code § 112275 (amended). Judicial review

112275. A person who has exhausted all administrative remedies available within the department and who is aggrieved by a final decision or order is entitled to judicial review pursuant to this chapter under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Review Under Tahoe Regional Planning Compact

The Tahoe Regional Planning Compact between the States of California and Nevada creates the Tahoe Regional Planning Agency, and authorizes “legal actions” alleging noncompliance with the compact. Gov’t Code § 66801. These actions are for ordinary mandamus, declaratory or injunctive relief, or inverse condemnation. *People ex rel. Younger v. County of El Dorado*, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971) (mandamus); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 105 Cal. App. 3d 394, 396, 164 Cal. Rptr. 357 (1980) (mandamus, injunctive relief); *Viso v. State of California*, 92 Cal. App. 3d 15, 154 Cal. Rptr. 580 (1979) (declaratory and injunctive relief, inverse condemnation); *Sierra Tereno v. Tahoe Regional Planning Agency*, 79 Cal. App. 3d 439, 144 Cal. Rptr. 776 (1978) (inverse condemnation). Except for inverse condemnation, these are the kinds of actions to be replaced by the draft statute. A new Section 66802 is added to the Government Code to make this clear:

Gov’t Code § 66802 (added). Judicial review

66802. An action filed in a California court alleging noncompliance with the provisions of this compact or with an ordinance or regulation of the agency shall be by petition for review under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

The Comment notes that the draft statute cannot replace actions for inverse condemnation, which are of constitutional origin. It is unclear whether Section 1120(d) in the draft statute, which exempts “litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim,” applies to

inverse condemnation. Although the claim filing requirements of the California Tort Claims Act do not apply to inverse condemnation claims, if an inverse condemnation claim is voluntarily filed, the public entity shall process the claim in accordance with the normal claims procedures that would otherwise apply. Gov't Code § 905.1; California Government Tort Liability Practice § 2.98, at 185, § 6.26, at 670 (Cal. Cont. Ed. Bar, 3d ed. 1992). Moreover, the requirement of exhaustion of administrative remedies applies to inverse condemnation claims. See *Hensler v. City of Glendale*, 8 Cal. 4th 1, 13, 876 P.2d 1043, 32 Cal. Rptr. 2d 244, 252, (1994). The draft statute (Section 1121.120 and Comment) preserves existing law that an action for inverse condemnation may be joined with a proceeding for administrative mandamus.

SECTIONS LEFT UNCHANGED

Sections With Short Limitations Periods That Should Be Preserved

Two Government Code sections provide short limitations periods for judicial review of quasi-legislative action. Gov't Code §§ 7910 (45-day limit to attack action of local governing body establishing appropriations limit under California Constitution), 16279 (90-day limit to contest determination of county board of supervisors or city council distributing funds to special district). If made subject to the draft statute, the period would be three or four years. This seems unacceptably long in view of the policy of these sections.

Proceedings Exempt From the Draft Statute

The draft statute does not apply where a statute provides for trial de novo, to an action for refund of taxes under Division 2 of the Revenue and Taxation Code, or to a validating proceeding under Code of Civil Procedure Sections 860-870 (declaratory relief to validate bonds, warrants, contracts, assessments, ordinances, or formation of a special district). Section 1120. The draft statute also makes clear it does not limit use of the writ of habeas corpus. Section 1121.120. Thus sections that provide for these proceedings are not conformed:

Trial de novo: Lab. Code §§ 98.2, 1543; Veh. Code § 40230; Water Code §§ 1813 (court shall consider “all relevant evidence”), 60350.

Refund of taxes: Rev. & Tax. Code § 19084.

Validating proceedings: Gov't Code §§ 25210.77g, 50069.5, 50077.5, 50078.17, 53979, 66013, 66014, 66016, 66022; Water Code Appendix §§ 52-39, 63-30.5, 64-64, 101-27.1, 103-26.1, 123-83, 125-83, 126-83, 127-51, 132-803, 136-23..

Habeas corpus: Penal Code § 1610; Welf. & Inst. Code §§ 4801, 5254.1, 5276, 5358.7, 5530, 7250.

Sections Providing for Judicial Review “In Accordance With Law”

Some sections provide for judicial review “in accordance with law,” as “made available by law,” or as “afforded by law.” In most of these, no other substantive revision is needed, so they are omitted to avoid adding unnecessary bulk: Corp. Code §§ 29563, 31501; Fin. Code §§ 18315, 18367, 22718, 31103, 33201; Gov’t Code § 12612 (special rule on admissibility of evidence); Health & Safety Code § 1397; Ins. Code §§ 1065.2, 10718.5; Lab. Code § 5207.

Sections Providing for Judicial Review On Petition to the “Appropriate Superior Court” or to a “Court of Competent Jurisdiction”

Some sections provide for judicial review on petition to the “appropriate superior court” or to a “court of competent jurisdiction.” These sections may be omitted from the conforming revisions to avoid adding unnecessary bulk: Bus. & Prof. Code § 22461; Food & Agric. Code §§ 61478, 67112, 68112, 69092, 72112, 73302, 74172, 74672, 74791, 74972, 75152, 75642, 76162, 76362, 77172, 77352, 77492, 77642, 77862, 77996, 78296; Ins. Code §§ 1067.10, 11112, 12940.

Sections Providing for Judicial Review Without Elaboration

Some sections provide for judicial review without reference to the administrative mandamus provisions and have no other provisions needing to be conformed. These are omitted from the conforming revisions: Gov’t Code §§ 11340.5 (30-day limit for review of OAL determination preserved), 83120, 83121, 87308; Food & Agric. Code §§ 65650.5, 66642; Health & Safety Code § 25357.5 (closed record requirement preserved); Ins. Code §§ 725, 769.86, 779.12, 779.24, 1063.10, 1077.5, 10096, 11069, 11108, 11620; Unemp. Ins. Code §§ 410 (six-month limitations period preserved), 1243 (90-day limitations period preserved); Water Code Appendix §§ 45-5.10 (120-day period to challenge ordinance preserved), 67-7 (20-day period to challenge resolution preserved).

Judicial Confirmation of Arbitration Award

Public Contracts Code Section 10240.12 provides for judicial confirmation of an arbitration award. This is not judicial review in the ordinary sense. Section 10240.12 is preserved.

Decisions of the Energy Commission

Decisions of the Energy Commission are “subject to judicial review in the same manner as the decisions of the Public Utilities Commission” relating to power plants. Pub. Res. Code § 25531. Whatever provision is ultimately adopted for these PUC decisions will apply to the Energy Commission because of this provision. No conforming revision is needed.

Judicial Review of Regional Centers for the Developmentally Disabled

Welfare and Institutions Code Section 4668 permits traditional mandamus to review certain actions of regional centers for the developmentally disabled. Regional centers are operated by private nonprofit community agencies under contract with the state. Welf. & Inst. Code §§ 4620-4621. Except as expressly provided by statute, the draft statute does not apply to a nongovernmental entity. Section 1120(g). In this respect, the draft statute continues the scheme of existing administrative mandamus which is used to review governmental action, and only occasionally to review nongovernmental action. Traditional mandamus, on the other hand, is used to review many kinds of nongovernmental action, such as by corporations or unions. California Civil Writ Practice §§ 5.4, 5.7-5.22 (Cal. Cont. Ed. Bar, 2d ed. 1987). Thus regional centers are not made subject to the draft statute, so traditional mandamus will continue to apply. The staff will revisit the question of the extent to which the draft statute should apply to nongovernmental entities generally when we take up the comments on the Revised Tentative Recommendation.

VARIANT LIMITATIONS PERIODS LEFT UNCHANGED

Limitations Period for Review of Quasi-Legislative Action

Short limitations periods for review of quasi-legislative action are left unchanged: Gov’t Code §§ 7910 (45 days to review appropriations limit set by local government), 16279 (90 days to review certain determinations of local governing body), Health & Safety Code § 25356.1 (30 days to review remedial action plan for hazardous waste); Water Code Appendix §§ 45-5.10 (120 days to review water ordinance), 67-7 (20 days to review resolution). These special limitations periods should not be deleted, because to do so would result in the general three or four year statute of limitations applying.

Limitations Period for Review of Adjudication

For the time being, special limitations periods for review of adjudication are preserved in: Code Civ. Proc. § 706.075 (90 days to review withholding order for taxes); Gov't Code §§ 66639 (30 days to review cease and desist order of BCDC), 66641.7 (30 days to review complaint by BCDC for administrative civil liability); Unemp. Ins. Code §§ 410 (six months to review CUIAB decision, previously approved by Commission), 1243 (90 days to review denial of protest). We will revisit this when we take up the comments on the Revised Tentative Recommendation.

Event From Which Limitations Period Commences to Run

Under the draft statute, the limitations period commences to run from the effective date of the decision or from notice of the applicable time period, whichever is later. Section 1123.640. Limitations periods that run from some other event are preserved: Food & Agric. Code §§ 59234.5 (time to review deficiency determination runs from notice of filing with the court), 60016 (same).

Health and Safety Code Section 18024.4, which measures the time from receipt of a citation, is conformed so the period will run from the effective date or the date notice is given, whichever is later:

Health & Safety Code § 18024.4 (amended). Citation final; judicial review

~~18024.4. If, within 30 days from receipt of the citation the time provided by Section 1123.640 of the Code of Civil Procedure, the person cited fails to notify the department that he or she intends to appeal the citation, the citation shall be deemed final. However, the person cited may obtain judicial review in accordance with Section 11523 of the Government Code under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The person cited shall receive court costs and attorney's fees if he or she prevails. The 30-day period time provided by Section 1123.640 of the Code of Civil Procedure may be extended by the department for good cause.~~

Respectfully submitted,

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