

Regular Session, 2010

SENATE BILL NO. 248

BY SENATOR MCPHERSON

ADMINISTRATIVE PROCEDURE. Provides for the applicability of, and exemptions from, the Administrative Procedure Act. (gov sig)

1 AN ACT

2 To amend and reenact R.S. 49:951(7) and 967 and to enact R.S. 49:951(1.1), relative to the
3 Administrative Procedure Act; to provide for the applicability of, and exemptions
4 from, the Act; and to provide for related matters.

5 Be it enacted by the Legislature of Louisiana:

6 Section 1. R.S. 49:951(7) and 967 are hereby amended and reenacted and R.S.
7 49:951(1.1) is hereby enacted to read as follows:

8 §951. Definitions

9 As used in this Chapter:

10 * * *

11 **(1.1) "Adopt," "adopted," or "adoption," when pertaining to a fee in**
12 **this Chapter, shall include action proposed by an agency to adopt, apply, assess,**
13 **charge, implement, levy, or otherwise collect a fee pursuant to authorization by**
14 **law that the agency may adopt, apply, assess, charge, implement, levy or**
15 **otherwise collect such fee.**

16 * * *

17 (7) "Rulemaking" means the process employed by an agency for the

1 formulation of a rule. Except where the context clearly provides otherwise, the
 2 procedures for adoption of rules and of emergency rules as provided in R.S. 49:953
 3 shall also apply to adoption, increase, or decrease of fees. The fact that a statement
 4 of policy or an interpretation of a statute is made in the decision of a case or in an
 5 agency decision upon or disposition of a particular matter as applied to a specific set
 6 of facts involved does not render the same a rule within this definition or constitute
 7 specific adoption thereof by the agency so as to be required to be issued and filed as
 8 provided in this Subsection.

9 * * *

10 §967. Exemptions from provisions of Chapter

11 A.(1) The legislature recognizes that it is essential to the operation of a
 12 democratic government that prior to the adoption, amendment, or repeal of any
 13 rule or the adoption, increasing, or decreasing of any fee, that the provisions of
 14 this Chapter be followed.

15 (2) The legislature further recognizes that it is essential to the operation
 16 of a democratic government that the people be made aware of all exceptions,
 17 exemptions, and limitations to this Chapter. In order to foster the people's
 18 awareness, the legislature declares that all exceptions, exemptions, and
 19 limitations to this Chapter pertaining to the adoption, amendment, or repeal of
 20 any rule or the adoption, increasing, or decreasing of any fee shall be provided
 21 for in this Chapter or the Constitution of Louisiana. Any exception, exemption,
 22 or limitation to the laws pertaining to the adoption, amendment, or repeal of
 23 any rule or the adoption, increasing, or decreasing of any fee not provided for
 24 in this Chapter or in the Constitution of Louisiana shall have no effect.

25 B. The legislature further recognizes that there exist exceptions,
 26 exemptions, and limitations to the laws pertaining to the adoption, amendment,
 27 or repeal of any rule or the adoption, increasing, or decreasing of any fee
 28 throughout the revised statutes and codes of this state. Therefore, only the
 29 following exceptions, exemptions, and limitations are hereby continued in effect
 30 by incorporation into this Chapter by citation:

1 (1) Chapter 13 of Title 49 of the Louisiana Revised Statutes of 1950 shall not
2 be applicable to the Board of Tax Appeals, the Department of Revenue, with the
3 exception of the Louisiana Tax Commission that shall continue to be governed by
4 this Chapter in its entirety, unless otherwise specifically provided by law, and the
5 administrator of the Louisiana Employment Security Law; however, the provisions
6 of R.S. 49:951(2), (4), (5), (6), and (7), 952, 953, 954, 954.1, 968, 969, and 970 shall
7 be applicable to such board, department, and administrator.

8 ~~B-(1)~~(2)(a) The provisions of R.S. 49:968(F) and 970 shall not be applicable
9 to any rule promulgated by the State Civil Service Commission or the Public Service
10 Commission.

11 ~~(2)~~(b) The provisions of this Chapter shall not be applicable to entities
12 created as provided in Part V of Chapter 6 of Title 34 of the Louisiana Revised
13 Statutes of 1950.

14 ~~C-(3)~~ The provisions of R.S. 49:963, 964, and 965 shall not be applicable to
15 any rule, regulation, or order of any agency subject to a right of review under the
16 provisions of R.S. 30:12.

17 ~~D-(1)~~(4)(a) The provisions of R.S. 49:968 shall not apply to any rule or
18 regulation promulgated by the Department of Wildlife and Fisheries or the Wildlife
19 and Fisheries Commission relative to hunting seasons, trapping seasons, alligator
20 seasons, shrimp seasons, oyster seasons, finfish seasons and size limits, and all rules
21 and regulations pursuant thereto. The Department of Wildlife and Fisheries and the
22 Wildlife and Fisheries Commission may employ the provisions of R.S. 49:953(B)
23 in promulgating rules and regulations relative to hunting seasons, trapping seasons,
24 alligator seasons, shrimp seasons, oyster seasons, and finfish seasons and size limits,
25 and all rules and regulations pursuant thereto.

26 ~~(2)~~(b) Those rules adopted annually pursuant to this Subsection by the
27 Department of Wildlife and Fisheries which open and close the offshore and fall
28 shrimp seasons, the oyster season, the marine finfish seasons, the webless migratory
29 game bird hunting season, and the trapping season shall be effective for a period of
30 time equal to the length of the respective season.

1 (5) R.S. 6:121.1(A).

2 (6) R.S. 9:3561(D)(2).

3 (7) R.S. 18:1511.2(B).

4 (8) R.S. 22:1260.10(B)

5 (9) R.S. 29:788(C).

6 (10) R.S. 30:4(I)(5), 918(B), and 925(A)(2) and (D).

7 (11) R.S. 37:3012(B)(1).

8 (12) R.S. 40:5.3(B), 406(B)(1), and 600.6(A)(4)(b).

9 (13) R.S. 47:820.5.2(F)(5) and 820.5.4(F)(5).

10 (14) R.S. 49:258(1).

11 (15) R.S. 51:1285(A), 1929.1(A), 2389.1(A), and 3090.

12 (16) R.S. 56:319(D), and 2014.

13 C. The legislature further recognizes that there exist provisions of law
 14 which authorize an agency to adopt, increase, or decrease a fee without
 15 specifically providing that such action shall be taken in accordance with this
 16 Chapter. Any action taken pursuant to such authorization shall be in
 17 accordance with this Chapter, unless it is specifically otherwise provided for in
 18 the Constitution of Louisiana or in law and the citation of such law appears in
 19 Subsection B.

20 Section 2. The provisions of this Act shall be retroactive and shall apply to the
 21 adoption, increase, or decrease of any fee on and after March 8, 2010 contrary to the
 22 provisions of this Act. Any such fee adopted or increased which is collected shall be
 23 refunded to the person who paid the fee in the amount of such adoption or increase no later
 24 than September 1, 2010.

25 Section 3. This Act shall become effective upon signature by the governor or, if not
 26 signed by the governor, upon expiration of the time for bills to become law without signature
 27 by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If
 28 vetoed by the governor and subsequently approved by the legislature, this Act shall become
 29 effective on the day following such approval.

The original instrument was prepared by Jerry J. Guillot. The following digest, which does not constitute a part of the legislative instrument, was prepared by Jeanne C. Johnston.

DIGEST

McPherson (SB 248)

Present law provides for definitions for purposes of the Administrative Procedure Act (APA).

Proposed law adds a definition to those already provided in the APA and provides that "Adopt", "adopted", or "adoption", when pertaining to a fee, shall include action proposed by an agency to adopt, apply, assess, charge, implement, levy, or otherwise collect a fee pursuant to authorization by law that the agency may adopt, apply, assess, charge, implement, levy or otherwise collect such fee.

Present law defines "Rulemaking" as the process employed by an agency for the formulation of a rule. Further provides that except where the context clearly provides otherwise, the procedures for adoption of rules and of emergency rules as provided in R.S. 49:953 shall also apply to adoption of fees. Provides that the fact that a statement of policy or an interpretation of a statute is made in the decision of a case or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts involved does not render the same a rule within this definition or constitute specific adoption thereof by the agency so as to be required to be issued and filed as provided in present law.

Proposed law retains present law and additionally provides that the APA applies to the increase or decrease of fees, as well as the adoption of fees.

Present law, relative to the Administrative Procedure Act, provides the following exceptions:

- (1) The Board of Tax Appeals, the Department of Revenue, with the exception of the La. Tax Commission that shall continue to be governed by the Act, unless otherwise specifically provided by law, and the administrator of the La. Employment Security Law; however, R.S. 49:951(2), (4), (5), (6), and (7), 952, 953, 954, 954.1, 968, 969, and 970 shall be applicable to such board, department, and administrator.
- (2) (a) R.S. 49:968(F) and 970 shall not be applicable to any rule promulgated by the State Civil Service Commission or the Public Service Commission.

(b) Entities created as provided in Part V of Chapter 6 of Title 34 of the LRS (pilottage fee commission).
- (3) R.S. 49:963, 964, and 965 shall not be applicable to any rule, regulation, or order of any agency subject to a right of review under R.S. 30:12 (office of conservation).
- (4) R.S. 49:968 shall not apply to any rule or regulation promulgated by the Department of Wildlife and Fisheries or the Wildlife and Fisheries Commission relative to hunting seasons, trapping seasons, alligator seasons, shrimp seasons, oyster seasons, finfish seasons and size limits, and all rules and regulations pursuant thereto. The department and the commission may employ the provisions of R.S. 49:953(B) in promulgating rules and regulations relative to hunting seasons, trapping seasons, alligator seasons, shrimp seasons, oyster seasons, and finfish seasons and size limits, and all rules and regulations pursuant thereto. Such rules adopted annually by the department which open and close the offshore and fall shrimp seasons, the oyster seasons, the marine finfish seasons, the webless migratory game bird hunting season, and the trapping season shall be effective for a period of time equal to the length of the respective season.

Proposed law retains present law and requires that all exceptions, exemptions, and limitations to Administrative Procedure Act pertaining to the adoption, amendment, or repeal of any rule or the adoption, increasing, or decreasing of any fee be provided for in the provisions of the Act or the constitution. Proposed law further provides that any exception, exemption, and limitation to the Administrative Procedure Act pertaining to the adoption, amendment, or repeal of any rule or the adoption, increasing, or decreasing of any fee not provided for within the provisions of the Administrative Procedure Act or in the constitution shall have no effect.

Present law provides that if the commissioner of financial institutions determines that a public hearing is necessary to protect the public interest in enforcing the La. Banking Law and the regulations adopted pursuant to the law, the confidentiality provisions of the La. Banking Law and the APA do not apply. (R.S. 6:121.1(A))

Present law, relative to the La. Consumer Credit Law, provides that for the purpose of determining the single place of business of a licensee, a person acquires or controls the licensee when the person directly or acting through one or more other persons owns a majority interest in the licensee, or exercises a controlling influence over the management or the policies of the licensee as determined by the commissioner of financial institutions after notice and an opportunity for an informal meeting, not subject to the APA, regardless of whether the acquisition or control occurs incrementally over a period of time or as one transaction. (R.S. 9:3561(D)(2))

Present law provides that the Board of Ethics as the Supervisory Committee on Campaign Finance Disclosure, may render an advisory opinion concerning the application of a general provision of the Campaign Finance Disclosure Act, or a general provision prescribed as a rule or regulation. Authorizes the board to render an opinion in response to a request by any public official, any candidate for public office, any political committee, or the board on its own initiative. Provides that the opinion will not constitute a rule under the APA and the board shall not be subject to APA in carrying out this provision. (R.S. 18:1511.2(B))

Present law, relative to the La. Discount Medical Plan Act, authorizes the commissioner of insurance to seek injunctive relief in certain circumstances which action is not conditioned on having conducted any proceeding pursuant to the APA. (R.S. 22:1260.10(B))

Present law, relative to the Uniform Emergency Volunteer Health Practitioners Act, authorizes the Department of Health and Hospitals, or a state licensing authority, to modify or restrict the health services that volunteer health practitioners may provide pursuant to the Act. Further such an order may take effect immediately, without prior notice or comment, and is not a rule within the meaning of the APA. (R.S. 29:788(C))

Present law provides for the jurisdiction, powers, and duties of the commissioner of conservation. Provides that the commissioner shall make, after notice and public hearing as provided in present law, any reasonable rules, regulations, and orders necessary to control the offsite disposal at commercial facilities of drilling mud, saltwater and other related nonhazardous wastes generated by the drilling and production of oil and gas wells. Provides that the public hearing will not be subject to the procedural requirements of the APA relative to rule making or adjudication, provided that the office of conservation will allow any interested person to present testimony, facts or evidence related to the application, and shall make a record of the hearing. (R.S. 30:4(I)(5))

Present law provides that the commissioner of conservation may levy a civil penalty for violation of a permit condition or other applicable provision of law only after the person charged with a violation has been given an opportunity for a public hearing. Provides that the hearing will be subject to the APA, except where the provisions of the APA conflict with present law and the regulations issued by the commissioner pursuant to present law. (R.S. 30:918(B))

Present law, relative to the La. Surface Mining and Reclamation Act, authorizes the

commissioner of conservation to levy a civil penalty for violations of a permit condition or any other provision of the Act after a hearing subject to the APA except where the provisions of the APA conflict with the Act and the regulations issued by the commissioner pursuant to the Act. (R.S. 30:925(A)(2) Further provides that following the issuance of an order to show cause as to why a permit should not be suspended or revoked, the commissioner will hold a public hearing after giving written notice of the time, place, and date thereof. Requires that the hearing be subject to APA, except where the provisions of the APA conflict with the provisions of the Act and the regulations issued by the commissioner pursuant to the Act. (R.S. 30:925(D))

Present law, relative to the La. Occupational Therapy Practice Act of 1979, provides that the La. State Board of Medical Examiners will establish criteria on continuing education requirements for the retention or renewal of licenses in accordance with the APA; except that the report shall be submitted to the Senate and House health and welfare committees for review purposes notwithstanding the provisions of R.S. 49:968(B). (R.S. 37:2012(B)(1))

Present law, relative to molluscan shellfish sanitation, provides that notwithstanding the provisions of state Sanitary Code, the provisions of APA, except R.S. 49:951, 952, 954.1, 963, and 965, will not apply to procedures and proceedings to close from molluscan shellfish harvesting any molluscan shellfish growing area affected by a public health danger, nor to procedures and proceedings for subsequent opening of any such molluscan shellfish growing areas when the Department of Health and Hospitals and the Department of Wildlife and Fisheries jointly determine that the protection of the public health mandates or warrants such closure or opening, nor to procedures and proceedings for such determination. (R.S. 40:5.3(B))

Present law provides the APA does not apply to a local housing authority unless the legislation imposing such requirements is expressly and specifically applicable to local housing authorities or the local housing authority expressly elects to be governed by such legislation or regulations. (R.S. 40:406(B)(1))

Present law, relative to the La. Housing Finance Act, provides the APA will not apply to the La. Housing Finance Agency with respect to:

- (i) The sale of bonds, notes, or other obligations of the agency, or programs of the agency funded with the proceeds thereof, when such sale occurs after reasonable public notice and public hearing.
- (ii) The administration and allocation of low-income housing tax credits under Section 42 of the federal IRC of 1986, as amended, except that upon adoption of rules and regulations relative to such administration and allocation, the agency shall submit these rules and regulations to the Joint Legislative Committee on the Budget for review.
- (iii) The Home Program, except that upon adoption of any rules and regulations relative to such program, the agency will submit such rules and regulations to the Joint Legislative Committee on the Budget for review.
- (iv) The Risk Sharing Program, except that upon adoption of any rules and regulations relative to such program, the agency will submit such rules and regulations to the Joint Legislative Committee on the Budget for review.
- (v) The Mark to Market Program, except that upon adoption of any rules and regulations relative to such program, the agency will submit such rules and regulations to the Joint Legislative Committee on the Budget for review.
- (vi) The Louisiana Housing Trust Fund, except that upon adoption of rules and regulations relative to the fund, the agency will submit such rules and regulations to the Joint Legislative Committee on the Budget for review.

- (vii) The Low Income Housing Energy Assistance Program (LIHEAP), except that upon adoption of rules and regulations relative to such program, the agency will submit these rules and regulations to the Joint Legislative Committee on the Budget for review.
- (viii) The Weatherization Program (WAP), except that upon adoption of any rules and regulations relative to such program, the agency will submit such rules and regulations to the Joint Legislative Committee on the Budget for review.
- (ix) The Section 8 Contract Administration Program, except that upon adoption of any rules and regulations relative to such program, the agency will submit such rules and regulations to the Joint Legislative Committee on the Budget for review.
- (x) The Louisiana Habitat for Humanity Loan Purchase Program Act, except that upon adoption of rules and regulations relative to the program as further provided in Chapter 3-D of Title 40 of the Louisiana Revised Statutes of 1950, the agency will submit such rules and regulations to the Joint Legislative Committee on the Budget for review.

(R.S. 40:600.6(A)(4)(b))

Present law, relative to the Crescent City Connection, provides that the APA will not apply in the collection of tolls, fees, hearings, and judicial review. (R.S. 47:820.5.2(F)(5))

Present law, relative to the LA 1 Project, provides that the APA will not apply in the collection of tolls, fees, hearings, and judicial review. (R.S. 47:820.5.4(F)(5))

Present law, relative to the appointment of private legal counsel to represent the state or a state agency by the attorney general with the concurrence of the commissioner of administration, provides a procedure for the establishment of minimum qualifications and provides the exercise of the authority is not subject to the APA. (R.S. 49:258(1))

Present law, relative to the La. Tourism Promotion District Act, provides that the district will exercise its rights and powers subject to the APA, to the extent not otherwise in conflict the Act. (R.S. 51:1285(A))

Present law, relative to the La. Capital Companies Tax Credit Program, provides that advisory opinions and interpretations of the commissioner of financial institutions will not be considered rules requiring compliance with the rulemaking process under the APA. (R.S. 51:1929.1(A))

Present law, relative to the La. BATCH Act, provides that advisory opinions and interpretations of the office of financial institutions will not be considered rules requiring compliance with the rulemaking process under APA. (R.S. 51:2389.1(A))

Present law, relative to the La. Community Development Financial Institution Act, provides that advisory opinions and interpretations of the commissioner of financial institutions will not be considered rules requiring compliance with the rulemaking process under the APA. (R.S. 51:3090)

Present law, relative to exotic fish, provides that neither the permits issued under present law nor the conditions and requirements thereof, are required to be adopted pursuant to the APA. (R.S. 56:319(D))

Present law provides that the issuance of an emergency cease and desist order by the secretary of the Department of Wildlife and Fisheries to stop the unlicensed dredging of fill sand or fill material will not be subject to the limitations and formalities relating to notice and hearings imposed with regard to adjudications under the APA. (R.S. 56:2014)

Proposed law provides that these exceptions, exemptions, and limitations to the laws pertaining to the adoption, amendment, or repeal of any rule or the adoption, increasing, or decreasing of any fee throughout the revised statutes and codes of the state contained in present law are continued in effect by proposed law.

Proposed law recognizes that there are provisions of existing law which authorize an agency to adopt, increase, or decrease a fee without specifically providing that such action be taken in accordance with the APA. Proposed law provides that any action taken pursuant to such prior authorization shall be in accordance with the APA, unless it is specifically otherwise provided for in the state constitution or in law and the citation such of law appears in the APA.

Provides that proposed law shall be retroactive and shall apply to the adoption, increase, or decrease of any fee on and after March 8, 2010 that is contrary to the provisions of proposed law. Provides that any such fee adopted or increased which is collected shall be refunded to the person who paid the fee in the amount of such adoption or increase no later than September 1, 2010.

Effective upon signature of the governor or lapse of time for gubernatorial action.

(Amends R.S. 49:951(7) and 967; adds R.S. 49:951(1.1))

Summary of Amendments Adopted by Senate

Committee Amendments Proposed by Senate Committee on Senate and Governmental Affairs to the original bill.

1. Adds additional statutory cites to the list of exceptions, exemptions, and limitations to the laws pertaining to the adoption, amendment, or repeal of any rule or the adoption, increasing, or decreasing of any fee throughout the revised statutes and codes of the state, which are continued in effect by proposed law.

Senate Floor Amendments to engrossed bill.

1. Adds definition of "Adopt," "adopted," or "adoption," when pertaining to a fee.
2. Amends definition of "Rulemaking" to include the increase of decrease of a fee as well as adoption of a fee.
3. Provides that any action to exercise authorization to adopt, increase, or decrease of a fee provided for in existing provisions of law must comply with the APA unless specifically provided for in the state constitution or is cited in the APA.
4. Makes proposed law retroactive and applicable to the adoption, increase, or decrease of any fee on or after 3/8/10 that is contrary to proposed law. Requires that any such fee collected shall be refunded to the person who paid the fee not later than 9/1/10.
5. Makes effective upon signature of the governor.