

FILED

In the office of the Secretary of State
of the State of California

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

APR 30 1986
At 5:00 o'clock P. M.
MARCH FONG EU, Secretary of State
By Marjorie Krahnberger
Deputy Secretary of State

In re:)	No. 85-003
Request for Regulatory)	
Determination filed by)	April 30, 1986
the Pacific Legal)	
Foundation, concerning)	Determination Pursuant to
the Statewide Interpretive)	Government Code Section
Guidelines and the Policy)	11347.5; Title 1, Cali-
Statements of the California)	ifornia Administrative
Coastal Commission/ <u>1</u>)	Code, Chapter 1, Article 2
)	

Determination by: LINDA STOCKDALE BREWER, Director

Herbert F. Bolz
Coordinating Attorney,
Rulemaking and Regulatory
Determinations Division

THE ISSUE PRESENTED/2

~~The Pacific Legal Foundation ("PLF") has requested the Office of Administrative Law ("OAL") to determine whether or not the eight Statewide Interpretive Guidelines 3 and the three Policy Statements 4 of the California Coastal Commission ("Commission") are "regulations" as defined in Government Code section 11342(b) and therefore invalid unless adopted as regulations and filed with the Secretary of State in accordance with the California Administrative Procedure Act ("APA"). 5~~

THE DECISION/6

The Office of Administrative Law finds that the above noted enactments (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and are therefore invalid and unenforceable unless adopted as regulations and filed with the Secretary of State in accordance with the APA.

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- II. Threshold Issues
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 - 1. Challenged rules are quasi-legislative because:
 - (a) Public Resources Code section 30620(b) revealed this was legislative intent;
 - (b) Challenged enactments are "regulations" under APA definition;
 - (c) California Supreme Court so held in analogous context.
 - 2. Commission argues that the enactments are not "quasi-legislative" because:

 - (a) Enactments are not "quasi-legislative" under federal law or under the law of other states;
 - (b) One California appellate opinion has in effect incorporated the federal definition of "quasi-legislative" into California law.
 - (c) "Quasi-legislative" enactments must be legally binding; enactments at issue are neither intended by the Commission to be legally binding, nor utilized as though they were legally binding, and thus, under analogous Federal law would not be deemed "quasi-legislative."

3. OAL rejects these three arguments:

- (a) Under the California APA, as construed in Armistead, enactments such as these are considered to be "quasi-legislative."
- (b) This interpretation of dictum in one California Court of Appeal case is hopelessly inconsistent with the APA as construed by the highest state court and with the subsequently expressed intent of the Legislature.
- (c) The enactments are legally binding within the meaning of controlling California law; to the regulated public, they appear to contain legal requirements; they create a significant procedural requirement--shifting the burden of proof to permit applicants on question of conditions under which permit will be granted.

B. Whether the Commission's enactments are generally subject to the APA.

~~1. Conclusion: Yes, the Coastal Act so provides.~~

C. Whether the enactments are "regulations" as defined in the APA.

- 1. Conclusion: Yes, they apply statewide to all permit applicants and serve not only to implement, interpret and make specific the Coastal Act, but also to govern the Commission's procedures.

III. Whether the enactments fall within any legally established exception to the APA.

A. Conclusion: No

- 1. Since they apply to a class of persons, they are not within the internal management exemption.
- 2. They are not exempt under the Coastal Act exemption for "interim guidelines" prepared by January 30, 1977, because they were issued

too late; according to the Coastal Act provision on "permanent guidelines", the enactments must be adopted pursuant to the APA.

- (a) OAL rejects the Commission argument that dictum in a 1982 California Supreme Court case requires OAL to find that the enactments are exempt under the Coastal Act because
- (1) The cited language appears in a footnote in a case which decided a different issue.
 - (2) The cited language refers to the statutory exemption for "interim" guidelines rather than the provision addressing "permanent" guidelines.
 - (3) The opinion does not address the 1979 amendments to the APA which terminated all prior exemptions not expressly renewed.
 - (4) ~~Government Code section 11347.5 -- which banned "guidelines" and other "underground regulations" -- became law after the Supreme Court decided the case and was not considered by the Court.~~
 - (5) The issue of complying with the APA was neither raised nor briefed by the parties.
 - (6) The exemption dictum has not been followed in any other published appellate case.
 - (7) The case fails to discuss the applicability of the landmark Armistead case.

3. The Coastal Act provisions authorizing adoption of permanent guidelines following a public hearing does not supplant APA requirements; read together, the two statutes simply require APA procedures plus a mandatory public hearing.

IV. Overall Conclusion: The enactments (1) are generally subject to APA requirements, (2) are "regulations" as defined in the APA, and thus, are invalid and unenforceable unless adopted pursuant to the APA.

What is "quasi-legislative" power? The term "quasi-legislative" is not defined in the Act; thus, we turn to general principles of law. According to the California Court of Appeal:

"the term 'quasi' used as a prefix means 'analogous to' (Black's Law Dictionary (4th ed.)); or as 'having some resemblance (as in function, effect or status) to a given thing.' (Webster's Third New Internat. Dict.) Webster defines the term 'quasi-legislative' as 'having a partly legislative character by possession of the right to make rules and regulations having the force of law'.... (Webster's Third New Internat. Dict.)" (Emphasis added.) /11 /12

I. AGENCY AND AUTHORITY

The California Coastal Zone Conservation Commission was established by the California Coastal Zone Conservation Act, /7 an initiative statute approved by the voters in 1972. /8 This Commission was charged by that Act with overseeing the orderly process of planning for the future development of the California coastline. Before the 1972 Act expired according to its terms at the beginning of 1977, the Legislature enacted the California Coastal Act of 1976 ("the Coastal Act"). /9

The Coastal Act created the California Coastal Commission (hereinafter referred to as the "Commission") to succeed the California Coastal Zone Conservation Commission. The Coastal Act expressly granted rulemaking power to the Coastal Commission:

"...the commission may adopt or amend...rules and regulations to carry out the purposes and provisions of this division [the Coastal Act, Public Resources Code sections 30000 - 30900], and to govern procedures of the commission.

Except as provided in...paragraph (3) of Subdivision (a) of section 30620, these rules and regulations shall be adopted in accordance with the provisions of [the Administrative Procedure Act]." [Public Resources Code (Pub. Res. C.) section 30333] (Emphasis added.)

The language emphasized above created an express exemption from the requirement that Commission regulations be adopted pursuant to the APA. One issue in this Request for Determination is whether or not the challenged guidelines and policy statements (hereinafter collectively referred to as "challenged enactments") are exempt under Pub. Res. C. section 30620(a)(3). This issue is discussed below in Part III.

II. THRESHOLD ISSUES

There are three threshold inquiries before us: /10

- (1) Whether the issuance and enforcement of the informal rules constitute an exercise of quasi-legislative power by the enforcing agency.
- (2) Whether the informal rules are generally subject to the requirements of the APA.
- (3) Whether the informal rules are "regulations" within the meaning of Government Code section 11342.

FIRST, WE INQUIRE WHETHER THE "RULES" ARE A RESULT OF THE EXERCISE OF THE COMMISSION'S QUASI-LEGISLATIVE POWERS.

The basic scope of the APA is defined in Government Code section 11346, which provides:

"It is the purpose of this article [Article 5 of Chapter 3.5] to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. ~~Except as provided in section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted,~~ but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly."
(Emphasis added.)

What is "quasi-legislative" power? The term "quasi-legislative" is not defined in the APA; thus, we turn to general principles of law. According to the California Court of Appeal:

"the term 'quasi' used as a prefix means 'analogous to' (Black's Law Dictionary (4th ed.)); or as 'having some resemblance (as in function, effect or status) to a given thing.' (Webster's Third New Internat. Dict.) Webster defines the term 'quasi-legislative' as 'having a partly legislative character by possession of the right to make rules and regulations having the force of law'....(Webster's Third New Internat. Dict.)" (Emphasis added.) /11 /12

We conclude that both guidelines and policy statements reflect the exercise of the Commission's quasi-legislative power. We arrive at this conclusion for three reasons: (1) the legislative intent reflected in Public Resources Code section 30620(b); (2) the fact that the challenged enactments are regulations under Government Code section 11342(b); and (3) the similar conclusion of the California Supreme Court in an analogous context. We reject Commission arguments that (1) the enactments are not quasi-legislative under California law because they would not be deemed quasi-legislative under federal law or under the law of certain states; (2) that the wording of the holding in one California appellate case has in effect incorporated the federal distinction between quasi-legislative and non-legislative rules into California law; and (3) that the enactments are not quasi-legislative in nature because they are not intended by the Commission to be legally binding and would not be deemed legally binding under federal law.

Reasons for Conclusion

First, in Public Resources Code section 30620(b), the Legislature empowered the Commission to adopt "guidelines." This is a specific grant of quasi-legislative power. The Commission exercised ~~this delegated quasi-legislative power by issuing the guidelines and policy statements.~~

Second, as discussed below in the third threshold inquiry, the challenged enactments are "regulations" as defined in Government Code section 11342(b). The leading case in this area suggests that enactments which meet the statutory definition of regulation are ordinarily quasi-legislative in nature. /13

Third, in discussing whether or not one particular Commission guideline was quasi-legislative for procedural purposes, the California Supreme Court stated in Pacific Legal Foundation v. California Coastal Commission ("PLF v. CCC"):

"The action under consideration--adoption of guidelines interpreting the Coastal Act's access provisions-- unquestionably falls within the category of quasi-legislative agency action, as opposed to quasi-judicial or adjudicatory proceedings. The guidelines are the formulation of a general policy intended to govern future permit decisions, rather than the application of rules to the peculiar facts of an individual case." (emphasis added; citations omitted.) /14

Arguments Based on Federal Law Rejected

First, the Federal Administrative Procedure Act exempts "interpretive rules" and "policy statements" from that Act's procedural requirements./15

Under the Federal Act, interpretive rules are not deemed to be quasi-legislative in nature and thus not legally binding. The California Act is intended by contrast to cover not only "legislative" but also "interpretive" rules. /16

The Commission argues at some length that the "guidelines and policy statements are exempt from APA regulation promulgation requirements under established principles of administrative law and clear case authority." The above argument may well be true under federal law and under the law of many states whose statutes exempt "interpretive guidelines" or "policy statements" from procedural rulemaking requirements. The governing law here, however, is the California Administrative Procedure Act, which has a notably more expansive definition of "regulation."

Second, the Commission argues that the Federal legislative/interpretive distinction is now part of California law.

The Commission was able to cite only one California case which purportedly held that interpretive rules need not comply with the California APA. The Commission argued:

"California courts have also recognized a similar distinction between legislative rules or regulations, and agency interpretive statements that need not be adopted in compliance with regulation--promulgation requirements. In Skyline Homes Inc. v. Department of Industrial Relations, 165 Cal.App.3d 239 (1985), it was claimed that certain enforcement policies and interpretations in the Division of Labor Standards Enforcement (DLSE) were "regulations" that had to be adopted under the APA. The DLSE enforcement policies construed and were used in applying a certain wage order. While the Court found that the wage order was a regulation, it rejected the claim that the enforcement policy interpreting the wage order was a regulation. The Court stated that DLSE is charged with enforcing the wage orders, to do so, it must first interpret them. The enforcement policy is precisely that -- an interpretation -- and need not comply with the APA. 165 Cal.app.3d at 254 (emphasis

added). The Skyline Homes holding is based on the distinction between legislative and interpretive rules. Thus, PLF's notion that anything that interprets or explains the Coastal Act necessarily becomes a regulation is simplistic and erroneous. Agencies can have interpretive statements (like the enforcement policy in Skyline Homes) that are not regulations and that need not be adopted in compliance with the APA. The relationship between guidelines/policy statements and the Coastal Act is analogous to the relationship between DLSE's enforcement policy statement and the underlying wage rule in Skyline Homes. The wage rule (and the Coastal Act) are the source of the mandatory rules having the force and effect of law, not the DLSE enforcement policy (or Coastal Commission guidelines/policy statements). Therefore, the latter type of administrative enactment -- which merely interprets or explains the former rule -- is not subject to APA requirements." /17

We reject this interpretation of the Skyline case. As pointed out in the Board of Chiropractic Examiners Determination, /18 the Skyline court upheld the agency order that the company pay overtime pursuant to the agency's Operations and Procedures Manual's interpretation of a wage regulation. The Skyline court held that the interpretation was permissible despite lack of compliance with the APA in light of the agency's duty to enforce the regulation and considering that the only alternative interpretation of the regulation was legally untenable.

Noteworthy by its absence in Skyline was any reference to the statutory definition of "regulation" contained in Government Code section 11342(b), which provides in part:

"Regulation" means every rule...or the amendment, supplement, or revision of any such rule,...adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it." (Emphasis added.)

We therefore reject the Skyline dictum that "interpretations" of regulations need not comply with the California APA. The Skyline decision is based on an earlier California Supreme Court decision which characterized the agency treatment of the regulation in question as "application" rather than "interpretation." /19 In rulemaking, an agency is often free to interpret a statute or another regulation in such a way as to impose an additional requirement on the regulated public. By contrast, in applying a statute or regulation, an agency has much less latitude. In the

interest of clarity, it would have been preferable had the Skyline Court avoided the term "interpretation" when the term "application" would have more closely reflected the intended meaning.

The Commission's interpretation of Skyline is clearly inconsistent with governing California statutory and decisional law.

In Government Code section 11342(b), the Legislature expressly states that the term "regulation" includes "every rule...adopted by any state agency to...interpret...the law...administered by it." In Armistead v. State Personnel Board, the California Supreme Court, citing section 11342(b), in substance, rejected the argument (based on the Federal Administrative Procedure Act) that "interpretive rules" and "policy statements" were not exercises of quasi-legislative power. /20

In Hillery v. Rushen, (1983) the state agency argued that where an administrative problem must be handled "flexibly or in minute detail," it was appropriate for the agency to utilize informal guidelines./21 The Hillery court rejected this argument, noting that no such exemption was provided by the California Act, and concluding that:

"'guidelines' after all, clearly constitute 'standard[s] of general application' within the meaning of California's definition of 'regulation.'" (Citation omitted) /22

In 1983, the Legislature codified the Armistead holding, declaring that in Government Code section 11347.5:

"No state agency shall issue [or] utilize any guideline, criterion, bulletin, manual, instruction, or other rule, which is a regulation as defined in subdivision (b) of section 11342 unless [adopted pursuant to the APA]." (Emphasis added.)

The California Court of Appeal, in the 1984 case of Stoneham v. Rushen (Stoneham II) characterized the list contained in section 11347.5 as "all-inclusive." /23

Thus, not only has the highest court construed the APA to not exempt interpretive guidelines and policy statements, but also the Legislature subsequently affirmed that judicial understanding of the APA by enacting Government Code section 11347.5.

Government Code section 11347.5 specifically includes "guidelines." Though the term "policy statement" does not speci-

fically appear in this statute, we conclude that policy statements are in substance covered by the terms "criterion, bulletin, manual, instruction...or other rule." Armistead specifically lists agency "policies" directed to the public "in the form of circulars or bulletins" as one means of improperly avoiding the APA's requirements. /24 Clearly, the Commission's Policy Statements are "circulars or bulletins" containing agency "policies."

Third, the Commission argues that the guidelines do not constitute the exercise of quasi-legislative power because they are not legally binding: that the Commission may in specific permit cases, elect not to require, for instance, the public access provision which the guidelines would indicate is otherwise generally expected. As authority for this argument, the Commission cites federal court cases holding that various federal agency rules are within the Federal Administrative Procedure Act exemption for interpretive guidelines or policy statements because, among other things, the rules were not legally binding.

We reject this argument because, in short, (1) the argument is inconsistent with controlling case law; (2) the enactments appear legally binding on their face; and (3) the enactments shift the burden of proof to the permit applicant as to why certain conditions should not be required in permit. These three grounds for rejecting the Commission's argument are discussed in more detail below:

Grounds for Rejecting Argument

- (1) If we accept the Commission's argument that only such rules as would be deemed "legally binding" under federal decisional law construing the Federal Administrative Procedure Act may be characterized as "quasi-legislative" under Government Code section 11346, we would necessarily reject a key Armistead holding -- that the California APA's definition of "quasi-legislative" is much broader than that derived from the federal statute. In federal decisional law, the conclusion that a given informal rule is not "legally binding" is inextricably intertwined with the categorization of the rule as either "legislative" or "interpretive" (i.e., not quasi-legislative). Any federal interpretive rule is by definition not legally binding. In California law, a much broader range of rules are deemed to be "legislative" and thus legally binding.

- (2) To members of the public who review Commission guidelines in the process of preparing permit applications, it appears that the listed requirements are legally binding; certainly the Public Access Guidelines read in part as legal requirements:

"The guidelines indicate when the public access provisions are applicable to a given project and the type...and amount...of access which should be provided." /25

Section III of the Public Access Guidelines is titled: "III. Where a project is a 'new development', what provisions for public access are required to find the project consistent with the [Coastal] Act?" (Emphasis added.) /26

- (3) PLF asserts, and the Commission does not deny, that when a policy statement has been adopted, the question before the Commission in reviewing a permit application shifts from whether "X" should be required, to why "X" should not be required pursuant to the adopted policy. /27
PLF describes this process as a shift in the burden of proof.

This description of the process is supported by the comments of the Center for Law in the Public Interest:

"applicants before the Coastal Commission are free to argue that the Interpretive Guidelines should not apply to them, or to persuade the Commission that a particular case warrants an approach different from that specified in the Guidelines.

....

As is explained in the Policy Statement on Oil Spill Response Measures:

'...Each project proponent will have the opportunity to present specific information relating to the particular proposal and its surrounding circumstances that might justify addressing oil spill clean up concerns in some other manner.'" (Emphasis added.)

As stated above, Armistead noted that the Legislature had condemned agency avoidance of the APA's requirements by such means as labelling rules as "policies" and inserting them in circulars or bulletins which were directed to the public. Government Code section 11347.5 specifically forbids regulatory bulletins or criteria. Thus, California law would appear to preclude informal issuance of criteria to be used to guide the exercise of agency discretion in reviewing permit applications.

The Commission attempts to defend its use of burden-shifting "criteria" by citing a federal appellate decision which held that such a practice did not prevent a federal agency's policy statement from qualifying for inclusion in the policy statement exemption of the Federal APA./28 In response, we note again that, unlike federal law, California law does not exempt policy statements. Thus, the fact that a federal court sanctioned a particular use of an enactment exempt under federal law does not mean that we are thereby obliged to vindicate the Commission's use of a type of enactment that is generally illegal under California law. We view burden-shifting criteria as legally binding in that they significantly effect the proceeding in question in both procedural and substantive terms./29

NEXT, WE INQUIRE WHETHER THE COMMISSION'S ENACTMENTS ARE GENERALLY SUBJECT TO THE REQUIREMENTS OF THE APA.

This question is unequivocally answered in the affirmative by Public Resources Code section 30333. That section specifically makes Commission "rules and regulations" subject to the provisions of the Administrative Procedure Act.

Further, Public Resources Code section 30620(b) requires permanent guidelines to be adopted pursuant to the APA.

FINALLY, WE INQUIRE WHETHER THE INFORMAL RULE UNDER REVIEW IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342(b) defines "regulation" as:

"...every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any

such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure...." (Emphasis added.)

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in pertinent part:

"No state agency shall issue...any guideline, criterion, [or] bulletin...which is a regulation as defined in subdivision (b) of section 11342, unless the...guideline, criterion, [or] bulletin...has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter."

Applying the definition found in Government Code section 11342(b) involves a two-part inquiry:

- (a) is the informal rule either (i) a rule or order of general application or (ii) a modification or supplement to such a rule?
- (b) does the rule being enforced either (i) implement, ~~interpret or make specific the law enforced or administered by the Commission or~~ (ii) govern the Commission's procedure?

The answer to both parts of this inquiry is "yes."

First, in OAL's Board of Chiropractic Examiner's Determination (April 9, 1986), we concluded that to be deemed a rule "of general application," an informal rule need only apply to all members of a class of persons. The challenged enactments are rules of general application; they apply statewide to all persons seeking Commission permits. The guidelines -- formally termed "Statewide Interpretive Guidelines" (emphasis added) -- declare as their title page that they are intended to "assist in applying various Coastal Act policies to permit decisions...." (Emphasis added.) The Commission has conceded that the challenged Policy Statements are the equivalent of and nothing more than interpretive guidelines.

Second, the challenged enactments "assist in applying" statutory requirements to individual permit decisions. The enactments state that certain measures are "required" to satisfy Coastal Act requirements. At a minimum, the enactments concededly create pre-

sumptions that certain criteria must be met before permits can be obtained. (This point is discussed at length above in Part II, first threshold inquiry.) In light of these considerations, it is clear that the challenged enactments not only implement the Coastal Act, but also interpret it and make it specific -- as well as in substance governing key aspects of the Commission's procedure.

We conclude therefore that (1) the issuance and enforcement of the above noted enactments constitute an exercise of quasi-legislative power by the Commission; (2) these enactments are subject to the requirements of the Administrative Procedure Act; and (3) these enactments are "regulations" within the meaning of Government Code section 11342.

III. DO THE COMMISSION'S ENACTMENTS FALL WITHIN ANY LEGALLY ESTABLISHED EXCEPTION?

Disposing of the above threshold questions does not end our analysis, however. We note that rules concerning certain activities of state agencies are not subject to the requirements of the APA. /30 Pertinent here is the exception for rules relating "only to the internal management of the state agency." Government Code section 11342(b).

The Internal Management Exception--Government Code section 11342(b)

We concluded in our Determination of April 9, 1986 (Board of Chiropractic Examiners) that policies which effect a group of persons other than employees of the originating agency do not fall into the internal management exemption. The challenged Commission enactments affect at a minimum all persons contemplating any sort of development on coastal zone property. Thus, the enactments do not fall within the internal management exemption.

The Coastal Act Exemption for Interim Guidelines prepared by January 30, 1977 - Public Resources Code sections 30333 and 30620(a)(3)

In exploring the scope of this statutory exemption, /31 we shall first set out the complete text of the Coastal Act provision which directed the Commission to prepare a set of interim guidelines explaining its interpretation of the provisions of the

Coastal Act pertinent to review of coastal development permit applications.

Public Resources Code section 30620 provides:

"(a) By January 30, 1977, the commission shall, consistent with the provisions of this chapter, prepare interim procedures for the submission, review, and appeal of coastal development permit applications and of claims of exemption. Such procedures shall include, but are not limited to, the following:

- (1) Application and appeal forms.
 - (2) Reasonable provisions for notification to the regional commission, and other interested persons of any action taken by a local government pursuant to this chapter, in sufficient detail to assure that a preliminary review of such action for conformity with the provisions of this chapter can be made.
 - (3) Interpretive guidelines designed to assist local governments, the regional commissions, the commission, and persons subject to the provisions of this chapter in determining how the policies of this division shall be applied in the coastal zone provided however, that such guidelines shall not supersede, enlarge or diminish the powers or authority of any regional commission, the commission or any other public agency.
- (b) Not later than May 1, 1977, the commission shall, after public hearing, adopt permanent procedures that include the components specified in subdivision (a) and shall transmit a copy of such procedures to each local government within the coastal zone and shall make them readily available to the public. The commission may thereafter, from time to time, and, except in cases of emergency, after public hearing, modify or adopt additional procedures or guidelines as it deems necessary to better carry out the provisions of this division.
- (c) The commission may require a reasonable filing fee and the reimbursement of expenses for the processing by the regional commission or the commission of any application

for a coastal development permit under this division. The funds received under this subdivision shall be expended by the commission only when appropriated by the Legislature." (Emphasis added.)

The basic thrust of the statutory exemption from the APA's requirements is clear. The predecessor Coastal Zone Commission went out of existence on December 31, 1976. The newly established Coastal Commission was created effective January 1, 1977. The new Commission was allowed a brief grace period during which guidelines prepared in accordance with section 30620(a) would be in effect--without having been adopted pursuant to the APA. The Legislature directed the Commission to prepare interim procedures, including interim interpretive guidelines "by January 30, 1977." "Not later than May 1, 1977,..." the Commission was to "adopt permanent procedures" (emphasis added) including interpretive guidelines. It seems clear that the interim guidelines were to be effective only until May 1, 1977.

- (3) Section 30620(b) uses the term "public hearing." Use of this term clearly refers to the APA; public hearings were not required for interim interpretive guidelines under 30620(b) because these enactments were to be exempt from APA's requirements. Where ~~per-~~manent guidelines were concerned, the Legislature made public hearings mandatory, thus modifying the California APA's optional public hearing provision.
- (4) Section 30620(b) indicates that after May 1, 1977, the Commission may "except in cases of emergency, after public hearing, modify or adopt additional procedures or guidelines...." (Emphasis added.) This emphasized reference clearly is to the provisions of the APA which, in cases of emergency, permit state agencies to adopt regulations prior to the public hearing.
- (5) Under section 30620(b), the Commission may adopt or modify "guidelines" but must do so pursuant to the APA.

The Commission issued the Statewide Interpretive Guidelines between May 3, 1977, and December 16, 1981. The first page of the guidelines document states that the guidelines were adopted pursuant to Pub. Res. C. section 30620(b).

Clearly, in light of the fact that the guidelines were not "prepared" prior to January 30, 1977, the statutory exemption for

interim guidelines does not apply. The guidelines also failed to meet the May 1, 1977, deadline for adoption of permanent procedures. Missing this deadline does not, however, mean that the Commission is indefinitely precluded from adopting guidelines or other needed enactments--it simply underscores the fact that all such subsequent guidelines must be adopted pursuant to the APA.

The Commission states that the exemption contained in Pub. Res. C. section 30620(a)(3) covers the three policy statements as well as the eight interpretive guidelines; that

"...policy statements are the equivalent of and nothing more than interpretive guideline....The policy statements serve the same guideline or heuristic function as interpretive guidelines, and therefore they are indistinguishable from guidelines in terms of functions and purpose."/32

The Commission contends that the California Supreme Court has interpreted Pub. Res. C. section 30620(a)(3) exemption as extending to permanent guidelines. PLF v. CCC. We reject this contention for the following reasons: /33

- ~~(1) The cited language is dictum, appearing in a footnote, in a case which held that an action challenging the access guidelines must be dismissed for lack of ripeness.~~
- (2) The cited language refers solely to 30620(a)(3) (interim guidelines) rather than to 30620(b) (permanent guidelines);
- (3) The issue of compliance with the APA was neither raised by the parties nor briefed in the Supreme Court proceeding;
- (4) PLF v CCC does not discuss the fact that the APA was substantially modified in 1979, with the intent of terminating all prior exemptions not expressly set out in the APA. /34
- (5) After PLF v. CCC was decided, Government Code section 11347.5 became law; this section expressly stated that:

"No state agency shall issue, utilize, enforce or attempt to enforce any guideline...which is a regu-

lation as defined in subdivision (b) of section 11342, unless the guideline...has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]."

This code section lists no exemptions to this prohibition. PLF v. CCC does not mention Government Code section 11347.5.

- (6) No subsequent published appellate decisions have followed the exemption dictum.
- (7) PLF v. CCC fails to discuss the applicability of Armistead v. State Personnel Board, the landmark case concerning "underground regulations."

The Commission cites an unpublished 1983 San Francisco Superior Court decision which held that the above noted language in PLF v. CCC required the conclusion that guidelines were exempt from the APA. Though we have considered this decision as pertinent persuasive authority,^{/35} we must reject its conclusion for the reasons listed above.

Do the procedures for enactment of guidelines in Public Resources Code section 30620(b) supersede and displace the APA's procedural requirements?

The Commission argues that the procedures for enactment of guidelines in Pub. Res. C. section 30620(b) supersede and displace the Act's procedural requirements.

We reject this contention. As noted immediately above, we read section 30620(b) to impose an additional requirement for Commission rulemaking (mandatory public hearings) -- which otherwise remains subject to the APA. Pub. Res. C. section 30333.

When one statute deals generally with a particular subject while the other statute deals more specifically with the same subject, the two statutes should be reconciled and construed so as to uphold both of them if it is reasonably possible to do so. Natural Resources Defense Council, Inc. v. Arcata National Corporation/³⁶ Government Code section 11346 (quoted above) makes clear that the APA's requirements are in addition to those imposed by other statutes.

We conclude, therefore, that none of the available statutory or judicial exemptions apply to the Commission's enactments.

IV. CONCLUSION

For the reasons set forth above, the Office of Administrative Law finds that the above noted enactments (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and are therefore invalid and unenforceable unless adopted as regulations and filed with the Secretary of State in accord with the APA.

NOTES

- /1 In this proceeding, the Pacific Legal Foundation was represented by Fred A. Slimp II. The Commission was represented by Deputy Attorney General Linus Masouredis and Staff Counsel Judith W. Allen.
- /2 The legal background of the regulatory determination process is discussed at length in note 2 to the first Determination issued by the Office of Administrative Law (85-001), published in the California Administrative Notice Register 16-Z, April 18, 1986, pp. B-10--B-18.
- /3 Public Access (Shoreline); Definitions; Geologic Stability of Blufftop Development; View Protection; Public Trust Lands; Siting New Development; Wetlands and other Wet Environmentally Sensitive Habitat Areas; and Archeological Guidelines.
- /4 Policy Statement on Oil Spill Response Measures; General Policy Statement on the Ocean Disposal of Drilling Muds and Cuttings; General Policy Statement on Conflict Between the Commercial Fishing and Oil and Gas Industries.
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- /5 We refer to the portion of the APA which concerns rule-making by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code. (Sections 11340 through 11356, Chapters 4 and 5, also part of the APA, do not concern rulemaking.)
- /6 In a comment submitted to OAL, Robert C. Faber requests that OAL immediately review the challenged enactments for substantive compliance with the APA. This premature request must be denied. Such a review is authorized neither by the APA nor by OAL's regulations.
- /7 Former Public Resources Code (Pub. Res. C. sections 27000-27650.
- /8 See Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal.3d 158, 188 Cal.Rptr. 104.
- /9 Public Resources Code sections 30000-30900. Statutes of 1976, Chap. 1330, section 1.

- /10 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 234 (points 1 & 2); cases cited in note 2 to Determination of April 9, 1986. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
- /11 Hubbs v. California Department of Public Works (1974) 36 Cal.App.3d 1005, 1009, 112 Cal.Rptr. 172, 174.
- /12 Certain agency rules or policies are clearly not quasi-legislative in character; for instance, when a rule applies a statutory or regulatory requirement that has only one legally viable "interpretation." See Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 199 Cal.Rptr. 546.
- /13 See Text.
- /14 See text Supra note 8, 33 Cal.3d at 168. This comment was made in the process of deciding whether administrative mandamus, which is not available to review quasi-legislative actions of administrative agencies, was applicable to the case at hand. We leave open the question of whether judicial decisions deciding whether a given action was quasi-legislative or quasi-judicial for purposes of determining which judicial review procedure was available are fully applicable to the separate question of whether a given action was or was not "quasi-legislative" within the meaning of Government Code section 11346.
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- /15 5 U.S.C section 552(a)(1)(D) and (a)(2)(B); also section 553(b)(A) onlegislative Rulemaking and Regulatory Reform, Duke L.J. 381 (1985). "Interpretive rules" and "policy statements" are described as non-legislative, while rules which must meet federal rulemaking procedural requirements are described as "legislative." The legislative/nonlegislative distinction is described by federal appellate courts as "fuzzy" (Avoyelles Sportsmen's League Inc. v. Marsh, 715 F.2d 897, 909 (5th Cir. 1983); Pacific Gas and Electric Co. v. Federal Power Commission, 506 F.2d. 33,37 (D.C. Cir 1974), and by a leading commentator as "difficult to apply in practice...the subject of constant litigation." (Asimow, at p. 382.)
- /16 See Armistead, 149 Cal.Rptr. at 2, supra note 13 (citing Government Code sections 11346 and 11342); Asimow, supra, note 15.
- /17 Memorandum, pp. 29-30.

- /18 85-001; April 9, 1986, supra note 2.
- /19 Bendix Forest Products Corp. v. Division of Occupational Safety and Health (1979) 25 Cal.3d. 465, 158 Cal.Rptr. 882.
- /20 supra note 13, 22 Cal.3d at 202-204, 149 Cal.Rptr. at 2-3.
- /21 720 F.2d 1132, 1135-1136 (9th Cir. 1983). The reasoning of Hillery was adopted by Faunce v. Denton (1985) 167 Cal.App. 191, 197, 213 Cal.Rptr. 122, 125.
- /22 Supra note 21, 720 F.2d at 1135-1136
- /23 156 Cal.App. 308,310,203 Cal.Rptr. 20, 25.
- /24 Noted in Hillery v. Rushen, supra note 21, 720 F.2d. at 1136.
- /25 Public Access (Shoreline) Guidelines at p.1
- /26 One of the Commentors argues that an OAL decision invalidating the guidelines "will create uncertainty among permit applicants, local governments and the public." (Natural Resources Defense Council letter of March 14, 1986.) The premise of this argument is that the challenged enactments do in fact create a degree of "certainty" among the regulated public about the conditions under which permits may be obtained. This is the problem.
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- /27 The Commission stresses that it applies the guidelines/statements very flexibly, often not requiring literal adherence to apparent requirements articulated in the enactment.
- This line of argument suggests that whereas permit review criteria formally adopted as regulations would be uniformly followed, that the criteria appearing in the challenged enactments may be applied in an unpredictable fashion. One great advantage to the public of the requirement that agency rules be formally adopted as regulations is that not only the regulated public but also the agency is bound to follow them. Unconfined agency discretion may lead to inconsistency and other problems. See Asimow, supra note 15, 287-388.
- /28 Pacific Gas & Electric Co. v. Federal Power Commission, supra note 15, 506 F.2d at 43; Commission Memorandum, p.33.
- /29 Allocating burdens of proof and creating presumptions are critically important methods of structuring legal

proceedings. Government Code sections 11343.6, 11344.6, & 11513(j); Fisher v. City of Berkeley (1984) 37 Cal.3d 572, 209 Cal.Rptr. 682. C. 5 U.S.C. section 556(d); U.S. Steel Corp. v. Train (7th Cir. 1977) 556 F.2d 822, 834 (EPA regulation putting burden of proof on permit applications)

28 U.S.C. section 2254(d); Francis v. Franklin (1985) 105 sct. 1965.

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The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:

- a. Rules directed to a specifically named person or group of persons which do not apply generally throughout the state. Government Code section 11343(a)(3).
- b. Rules that "establish[] or fix[] rates, prices or tariffs". Government Code section 11343(a)(1).
- c. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. Government Code section 11342(b);
- d. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. Government Code section 11342(b).
- e. Contractual provisions previously agreed to by the complaining party.

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The exemption appears in Pub. Res. C. section 30333, which appears in Section I of this Determination.

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Memorandum, pp.16-17;

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We also reject the Commission's argument that the failure of the Legislature to pass two bills specifically requiring guidelines to be adopted pursuant to the APA is significant. Why pass a bill when the Coastal Act already contained the requirement in question?

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See Government Code section 11346.

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(1976) 59 Cal.App. 3d 959, 965, 131 Cal.Rptr. 172
(California Environmental Quality Act and Forest
Practice Act).
