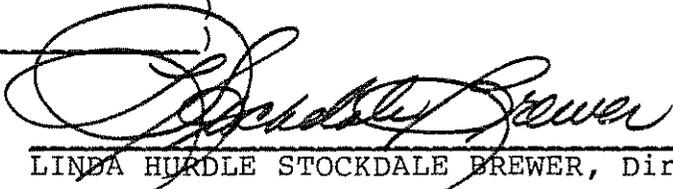


CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

At 4:40 o'clock P.M.
MARCH FONG EU, Secretary of State

In re:) 1986 OAL Determination No. 6
Request for Regulatory)
Determination filed by) [Docket No. 86-002]
the Bay Planning)
Coalition concerning) September 3, 1986
the Study "Diked Histor-)
ical Baylands of the) Determination Pursuant to
San Francisco Bay: Find-) Government Code section
ings, Policies and Maps") 11347.5; Title 1, California
issued by the San) Administrative Code, Chapter
Francisco Bay Conservation) 1, Article 2
and Development)
Commission/1)

Determination by:


LINDA HURDLE STOCKDALE BREWER, Director

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

THE ISSUE PRESENTED/2

The Bay Planning Coalition ("Coalition" or "BPC") has requested the Office of Administrative Law (OAL) to determine whether or not the study titled "Diked Historical Baylands of the San Francisco Bay: Findings, Policies and Maps" ("Study") issued by the San Francisco Bay Conservation and Development Commission ("Commission" or "BCDC"), is a regulation defined in Government Code section 11342(b) and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the California Administrative Procedure Act (APA)./3

THE DECISION/4

- I. The Office of Administrative Law finds that the last two paragraphs/5 on page 6 of the Study (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.
- II. The Office of Administrative Law finds that the remainder of the Study (1) is not a regulation as defined in the APA, and (2) is not subject to the requirements of the APA./6

OUTLINE

I. Agency and Authority; Background

Two statutes expressly grant rulemaking power to the Commission: (1) Government Code section 66632(f) and (2) Public Resources Code section 29201. The Commission is also authorized to issue advisory comments.

II. Preliminary Issues

A. Whether adoption of a mitigation provision in the San Francisco Bay Plan has mooted the Study's reference to mitigation within BCDC's jurisdiction.

Conclusion: The adoption of a mitigation provision in the Bay Plan has not mooted the Study's reference to mitigation within BCDC's jurisdiction because:

- (a) Nothing in either the Study or the submitted Bay Plan amendment states that the amendment language supersedes the Study's internal mitigation provisions;
- (b) Several portions of the internal mitigation provisions do not appear to be duplicated in the amendment.

III. Dispositive Issues

A. Whether the issuance of the challenged rule constitutes an exercise of quasi-legislative power by the Commission.

Extraterritorial Development Context

Conclusion No. 1: The Study is not an exercise of quasi-legislative power by the Commission because:

- (a) The Study is not a general policy intended to govern future permit decisions of the issuing agency;
- (b) The Study falls neither in the quasi-judicial nor the quasi-legislative category;
- (c) BCDC comments referring to or incorporating portions of the Study constitute part of the

administrative record of the Corps' permitting process.

Conclusion No. 2: BCDC has not been granted "pertinent quasi-legislative power" because:

- (a) the Legislature authorized the Commission to do all things necessary to carry out the purposes of the statutes [McAteer-Petris Act and the Suisun Marsh Preservation Act] including making "studies" and "reports";
- (b) grants of quasi-legislative power to the Commission have limited territorial scope within which the powers may be exercised;
- (c) the Legislature intended that the Commission issue pronouncements lacking regulatory effect;
- (d) the Legislature's choice of statutory language is significant: "advisory only"; "recommendations"; and "designed to encourage."

Conclusion No. 3: The Study does not meet the basic definition of "regulation" set out in Government Code section 11342 because:

- (a) the Study has no regulatory effect or impact on the public.

Internal Mitigation Context

Conclusion No. 4: The internal mitigation provisions of the Study reflect the exercise of the Commission's quasi-legislative powers because:

- (a) the mitigation provisions are obviously intended to govern future permit decisions;
- (b) the Commission has been granted pertinent quasi-legislative power: the McAteer-Petris Act, notably Government Code sections 66653 and 66632(f);
- (c) the mitigation provisions are standards of general application; the provisions interpret

and make specific the McAteer-Petris Act which empowered the Commission to condition the issuance of permits.

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

Conclusion: The Commission's quasi-legislative enactments are generally subject to the APA because:

- (a) the APA applies to all state agencies except those in the judicial or legislative department;
- (b) the Commission is neither in the judicial nor the legislative department.

- C. Whether the internal mitigation provisions of the Study constitute a "regulation" within the meaning of the key provision of the Government Code section 11342.

Conclusion: The internal mitigation provisions of the Study constitute a "regulation" within the meaning of Government Code section 11342. (See A., Conclusion No. 4(c) above.)

- D. Whether the internal mitigation provisions fall within any legally established exception to APA requirements.

Conclusion: None of the available statutory or judicial exceptions apply to the internal mitigation provisions.

IV. Conclusion

- A. The Office of Administrative Law finds that the last two paragraphs on page 6 of the Study (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.
- B. The Office of Administrative Law finds that the

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remainder of the Study (1) is not a regulation as defined in the APA, and (2) is not subject to the requirements of the APA.

I. AGENCY AND AUTHORITY; BACKGROUND

The San Francisco Bay Conservation and Development Commission (hereinafter "Commission" or "BCDC") was created by the Legislature in 1965./7 The Commission is charged with regulating land and water uses in and around San Francisco Bay/8 and in the Suisun Marsh/9, a wetland area just east of the Bay. The Commission thus has jurisdiction over a very limited territory--basically the Bay/10, a narrow strip of Bay shoreline/11, and the Suisun Marsh./12, 13

Persons planning developments (such as marinas) within the Commission's jurisdiction must obtain a permit from the Commission.

Two statutes expressly grant rulemaking power to the Commission.

Government Code section 66632(f) provides in part that the

"Commission may . . . adopt after public hearing such . . . regulations as it deems reasonable and necessary to enable it to carry out its functions [concerning the Bay] efficiently and equitably. . . ."

Public Resources Code section 29201 provides in part:

"In carrying out its responsibilities under this division [the Suisun Marsh Act] . . . , the Commission may do all of the following:

* * *

(e) Adopt regulations consistent with this division."

The following facts and circumstances have given rise to the present Determination.

In passing upon permit applications for projects within its territorial jurisdiction, the Commission applies criteria found in its two enabling statutes, in the San Francisco Bay Plan, and in the Suisun Marsh Plan./14 The Commission's activities are not, however, limited to reviewing applications for BCDC permits. The Commission also plays a role with regard to development applications involving projects outside its territorial jurisdiction.

The Commission--at the request of the U.S. Army Corps of Engineers--routinely comments upon permit applications

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pending before that federal agency. A large part of the Bay Area outside the territorial jurisdiction of BCDC is nonetheless within the permit jurisdiction of the Corps. Further, the Commission routinely comments upon environmental impact reports prepared concerning various Bay Area projects, such as shopping centers located on territory outside the Commission's jurisdiction.

The Legislature has expressly authorized such "extra territorial" comments and has made clear that they are purely advisory in nature. Government Code section 66653 provides:

If a function or activity is within the area of the Commission's jurisdiction and requires the securing of a permit, the Commission shall exercise its power to grant or deny a permit in conformity with the provisions of this title and with any provisions of the plan pertaining to placing of fill, extraction of materials, construction methods and use or change of use of water areas, land or structures. If a function or activity is outside the area of the Commission's jurisdiction . . . , any provisions of the plan pertaining thereto are advisory only. [Emphasis added.]

Permit applications pending before the Corps of Engineers have often involved one particular type of Bay Area land--termed by the Commission "diked historical baylands". According to the Commission:

"Diked historical baylands are lowlying areas that were historically part of San Francisco Bay, but were diked off, have not been filled or urbanized, and are not salt ponds or managed wetlands Although diked historic baylands are outside BCDC's permit jurisdiction, BCDC is properly concerned with the fate of such lands because of their wildlife, agricultural, and open space value, and because activities on such lands affect resource values of San Francisco Bay."/15

In order to more effectively respond to Corps comment requests involving diked historic baylands projects, the Commission conducted a study of the lands in question over a period of several years. Several technical reports were prepared; a staff report was drafted, which concluded that--in light of the technical reports--certain policies should be

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pursued in regard to projects proposed for diked historic baylands. This final staff report, adopted by the Commission on October 21, 1982, is the document alleged by the Coalition to be an "underground regulation."

The great bulk of this report (generally referred to herein as the "Study") concerns recommended criteria for developments outside the Commission's jurisdiction. Two particular provisions of the Study, however, explicitly apply certain policies to projects within the Commission's jurisdiction.

These provisions are headed "Policies on Diked Baylands Partly Within the Commission's Jurisdiction" (emphasis added). The provisions state:

- "1. Development within priority use areas as shown on [San Francisco] Bay Plan maps should be permitted provided the development is consistent with the applicable Bay Plan policies. All wildlife values lost or threatened by development within priority use areas should be fully mitigated in accordance with Policies 2.c. and 2.d.

2. Development on those portions of diked baylands that are within the Commission's jurisdiction as defined by the McAteer-Petris Act should be permitted provided the development is consistent with the applicable policies of the Bay Plan. All wildlife values lost or threatened by development in such areas should be fully mitigated in accordance with policies 2.c. and 2.d."
[Emphasis added.]

Policies 2.c. and 2.d. are part of a section headed "General Policies on Diked Historic Baylands." This section provides in part:

2. If some diked historic baylands cannot be retained in their existing uses, any development should meet the following criteria:

* * *

- c. In all cases, mitigation should be provided whenever there is significant, unavoidable impact on the environment, such as by filling or excavating baylands.

Mitigation should fully offset lost or adversely affected wildlife values. Projects should be designed and sited to buffer and protect any adjacent wildlife. Any areas provided as mitigation should be permanently preserved. Once mitigation has been provided for a project, repeated or cyclical losses of recovered vegetation or other values due to maintenance of the project should not require additional mitigation.

- d. Mitigation should consist of the following: (1) acquisition, restoration, preservation and dedication of non-wetlands that can feasibly be restored to provide wetland values; or (2) acquisition, preservation, dedication, and, where necessary, restoration, of suitable diked historic baylands or other mudflats or marshes which will result in improved management practices enhancing the wildlife value of the area."

[Emphasis added.]

We will refer to the above quoted policies as "internal mitigation provisions." These internal mitigation provisions will be analyzed apart from the remainder of the Study. The remainder of the Study applies solely to "extraterritorial development proposals", by which we mean developments proposed outside the Commission's jurisdiction.

II. PRELIMINARY ISSUES

WHETHER ADOPTION OF A MITIGATION PROVISION IN THE SAN FRANCISCO BAY PLAN HAS MOOTED THE STUDY'S REFERENCE TO MITIGATION WITHIN BCDC'S JURISDICTION.

The Commission implicitly recognizes that including in the Study criteria which BCDC permit applicants must (or "should") meet poses legal problems. The Commission attempts to avoid these difficulties by arguing that adoption of an amendment to the San Francisco Bay Plan has mooted the Study's reference to mitigation within BCDC's jurisdiction. (These internal mitigation provisions are set out in Part I.) The Commission asserts:

"[s]ince the Bay Plan now includes specific policies for mitigation, in Exhibit I, any reference in the Diked Historical Baylands Study to mitigation within BCDC's jurisdiction is moot and has been completely superseded by the controlling mitigation policies in the Bay Plan." /16 [Emphasis added.]

We assume for the purposes of this Determination that the Bay Plan amendment in question /17 was properly adopted and that the Bay Plan has the force and effect of the law. We note, however, that nothing in either the Study or the submitted Bay Plan amendment states that the amendment language supersedes the Study's internal mitigation provisions.

Further, we conclude, after reviewing the text of the amendment (set out in note 17), that several portions of the internal mitigation provisions do not appear to be duplicated in the amendment:

- (1) 2.c.'s reference to "excavating baylands";
- (2) 2.c.'s reference to "additional mitigation."

For the above noted reasons, we conclude that adoption of a mitigation provision in the Bay Plan has not mooted the Study's reference to mitigation within BCDC's jurisdiction.

III. DISPOSITIVE ISSUES

There are four main issues before us: /18

- (1) WHETHER THE ISSUANCE OF THE CHALLENGED RULE CONSTITUTES AN EXERCISE OF QUASI-LEGISLATIVE POWER BY THE COMMISSION.
- (2) WHETHER THE COMMISSION'S QUASI-LEGISLATIVE ENACTMENTS ARE GENERALLY SUBJECT TO THE REQUIREMENTS OF THE APA.
- (3) WHETHER THE INTERNAL MITIGATION PROVISIONS OF THE CHALLENGED RULE CONSTITUTE A REGULATION WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (4) WHETHER THE INTERNAL MITIGATION PROVISIONS OF THE CHALLENGED RULE FALL WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A RESULT OF THE EXERCISE OF THE COMMISSION'S QUASI-LEGISLATIVE POWERS. /19

The term "quasi-legislative" is not defined in the APA. In determining whether a rule is the result of the exercise of quasi-legislative power we consider three elements:

- 1) Whether the issuance of the challenged rule constitutes an exercise of "quasi-legislative" power as that term has been judicially defined;
- 2) Whether the state agency in question has been granted pertinent quasi-legislative powers; and
- 3) Whether the rule in question meets the basic definition of "regulation" set out in Government Code section 11342.

Whether the issuance of the challenged rule constitutes an exercise of "quasi-legislative" power as that term has been judicially defined.

According to the California Supreme Court, a quasi-legislative rule is one formulating a general policy oriented toward future decisions, rather than the application of a rule to the peculiar facts of an individual case./20

In Pacific Legal Foundation v. California Coastal Commission,/21 the California Supreme Court stated:

"[T]he [Coastal Commission's public access] 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.]

Comments Concerning Extraterritorial Development Proposals/22

In the matter at hand, we are concerned with BCDC furnishing advisory comments to the Corps of Engineers. The Corps then uses these comments in deciding whether or not to grant development permits it is empowered to issue under federal law. The Corps' permit-granting process itself is a quasi-judicial administrative procedure. Rules generally applicable to future permit decisions are quasi-legislative in nature./23

In the extraterritorial development context, the Diked Historical Baylands Study, however, falls neither in the quasi-judicial nor the quasi-legislative category. The Study is in the nature of advisory comments authorized by the Legislature to be used in the permitting process administered

by another government entity. BCDC comments concerning Corps projects which refer to or incorporate portions of the Study constitute part of the administrative record of the Corps' permitting process. If the Corps were a California state agency, and if the Corps issued the Study and relied upon it in denying or conditioning permits, there is little doubt but that the Study would constitute an underground regulation./24 We earlier found comparable Coastal Commission documents to violate Government Code section 11347.5./25

One critical fact, however, distinguishes the BCDC Study from the Coastal Commission documents--the Study is not a general policy intended to govern future permit decisions of the issuing agency.

Whether the state agency in question has been granted pertinent quasi-legislative power.

As discussed above in Part I, the Legislature has granted the Commission the power to adopt regulations deemed necessary to carry out the functions mandated by the McAteer-Petris Act (regulating Bay development) and the Suisun Marsh Act (regulating Marsh development). The critical feature of both of these grants of quasi-legislative power is the limited territorial scope within which the powers may be exercised.

Any doubt as to the narrow scope of these quasi-legislative powers is removed by Government Code section 66653 (quoted above in Part I.) Whatever may be the legal effect of the Commission's San Francisco Bay and Suisun Marsh Protection Plans, Government Code section 66653 makes clear that the writ of the Commission does not run outside its territorial jurisdiction. As the Coalition itself recognizes, ". . . nothing in its creating legislation authorizes BCDC to attempt to regulate land use beyond the geographic boundaries of its jurisdiction." /26 [Emphasis added.]

The Legislature, however, clearly envisioned the Commission giving advice to other agencies./27 For instance, Public Resources Code section 29304(a) provides:

"The commission may periodically submit to any state agencies recommendations designed to encourage such agency to carry out its functions in a manner consistent with the policies of the [Suisun Marsh] protection plan." [Emphasis added.]

The Legislature's choice of language is significant:

- o "advisory only";/28
- o "recommendations";
- o "designed to encourage."

Further, the Legislature has authorized the Commission to do all things necessary to carry out the purposes of the statute,/29 including making "studies"/30 and "reports."/31

Thus, we conclude that BCDC has not been granted "pertinent quasi-legislative power." On the contrary, the Legislature intended that the Commission issue on occasion pronouncements lacking regulatory effect.

Whether the challenged rule meets the basic definition of a "regulation" set out in 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 part:

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

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?

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- (b) does the rule being enforced either (i) implement, interpret, or make specific the law enforced or administered by the Board or (ii) govern the Board's procedure?

But before proceeding with the standard analysis, we will discuss a Coalition contention concerning the scope of Government Code sections 11342 and 11347.5. The Coalition argues:

"Both of these statutes reveal a legislative intent to include within the purview of 'regulation' virtually any written statement of a state agency designed to guide, influence, instruct, or control on a long-term basis persons and matters with which the agency is concerned."³² [Emphasis added.]

We reject this interpretation of the statutes as both overbroad and underinclusive.

To address the simpler deficiency first, we note that "underground regulations" need not be written. A regulatory policy could conceivably be communicated solely in telephone or personal conversations. Thus, the above interpretation is underinclusive in that it fails to include oral communications.

Second, the above interpretation is overbroad. It would outlaw a wide variety of written communications prepared by state agencies and would thus materially impede the Executive Branch in the performance of its duties. The following "written statements" would apparently be outlawed:

- o state agency comments on proposed state or federal regulations (such as (1) comments by the Department of Personnel Administration on proposed State Personnel Board rules and (2) comments by the Department of Health Services on proposed Environmental Protection Agency rules);
- o state agency comments on permit applications pending before other governmental agencies (such as comments by the State Lands Commission concerning offshore oil drilling applications pending before the Secretary of the Interior);
- o state agency pleadings submitted to quasi-judicial administrative tribunals;

- o state agency pleadings submitted to courts;
- o state agency proposals for statutory or constitutional changes; and
- o state agency comments on environmental impact reports.

A specific statutory provision should be construed with reference to the entire statutory scheme of which it is a part./33 In interpreting a statute it is proper to consider the consequences that would flow from a particular interpretation./34

The fundamental purpose of the APA is to place certain conditions upon governmental exercise of coercive legal power. That is, before a state agency can compel citizens to conform to a particular agency-created legal requirement, the agency must follow prescribed procedures, such as publishing notice of the intended rule.

Whether or not an agency action is "regulatory" hinges on the effect and impact on the public--not on the agency's characterization of the action./35 In this regard, the Commission states:

"BCDC's Diked Historic Baylands Study is not quasi-legislative because it obviously does not have, and was not intended to have, the force and effect of law. The Study is solely used for, and in substance represents, BCDC's advisory comments to the Corps and other agencies on diked baylands permit applications. The Study is not binding on the Corps or other agencies; it does not affect the rights, liabilities or duties of any diked baylands permit applicant; the Corps and other agencies are free to disregard BCDC's comments; and BCDC has no power to enforce or ensure mandatory compliance with its comments. It is the Corps' statutes and regulations which have the force and effect of law, not BCDC's advisory comments. The fact that the Corps has received and acted contrary to some of BCDC's diked baylands comments plainly shows that neither the comments, nor the Diked Baylands Study upon which they are based, have the force and effect of the law.

Neither the BPC in this proceeding, nor OAL in any of its regulatory determinations, has ever cited

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any California case authority (or any other authority) which holds that a nonbinding advisory administrative enactment that lacks the force and effect of law--let alone one that was used for making comments to another agency--was either 'quasi-legislative' or a 'regulation.'"/36
[Emphasis added.] [Footnote omitted.]

We agree that--as applied to extraterritorial development proposals--the Study has no regulatory impact on the public.

We reject, however, the Commission's underlying contention that in order for an enactment to constitute an underground regulation it must (1) be intended to have and (2) have the force and effect of law. The proper test of whether or not an agency enactment is regulatory in nature is the nature of the effect and impact on the public--not the agency's characterization of the enactment./37

Of course, if the agency states that it intends the enactment to be legally binding, this may be dispositive on the question of whether the enactment violates Government Code section 11347.5. However, examining the agency's characterization of the enactment is not the end of the inquiry. We must also review the text of the challenged rule. Even if the enacting agency expressly disavows any regulatory intent, analysis of the text of the enactment may compel the conclusion that it is regulatory in nature, that it fits the APA's definition of "regulation."/38

We note that Government Code section 11347.5 forbids state agencies not only from "enforcing" but also from "issuing" bulletins, etc. If, despite this statutory prohibition, a state agency nonetheless informally issues a document that is regulatory in content, it goes without saying that such a document is legally unenforceable. On five prior occasions this year, OAL has determined that challenged documents were "invalid and unenforceable."/39 Confronted with the allegation that an enactment is an underground regulation, it is no defense for an agency to assert that the enactment is not "legally binding."/40 If the enactment has been informally issued, it is almost certainly not of its own force "legally binding." The pertinent question is whether the enactment under review violates Government Code section 11347.5.

Internal Mitigation Provisions

We now turn to the question of whether the Study's internal mitigation provisions reflect the exercise of the Commission's quasi-legislative powers.

After analyzing these provisions in light of the three above-noted factors, we conclude that the internal mitigation provisions are quasi-legislative in nature:

- (1) the mitigation provisions are obviously intended to govern future permit decisions.
- (2) the Commission has been granted pertinent quasi-legislative power: the McAteer-Petris Act, notably Government Code sections 66653 and 66632(f) (quoted above in Part I).
- (3) the mitigation provisions are standards of general application (applying to all BCDC permit applicants); the provisions interpret and make specific the McAteer-Petris Act, which empowered the Commission to condition the issuance of permits/41 for bay fill projects so as to protect "irreplaceable feeding and breeding grounds of fish and wildlife."42

In our earlier Determination concerning the Coastal Commission, we held that documents listing conditions presumptively applicable to permits had the regulatory effect of allocating burdens of persuasion or creating rebuttable presumptions./43 That is, permit applicants were expected to conform unless they could persuade the permitting agency that the requirement should not apply in their particular case. In the matter at hand, the Study's internal mitigation "provisions" are worded very similarly to the Coastal Commission's "guidelines."

SECOND, WE INQUIRE WHETHER THE COMMISSION'S QUASI-LEGISLATIVE ENACTMENTS ARE GENERALLY SUBJECT TO THE APA.

The APA applies to all state agencies, except those "in the judicial or legislative department."44 Since the Commission is in neither the judicial nor the legislative "department," there can be no doubt that APA rulemaking requirements generally apply to the Commission./45

THIRD, WE INQUIRE WHETHER THE INTERNAL MITIGATION PROVISIONS OF THE CHALLENGED RULE ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

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As discussed above in Part III(3), we conclude that the internal mitigation provisions of the Study are "regulations."

FOURTH, WE INQUIRE WHETHER THE INTERNAL MITIGATION PROVISIONS FALL WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA./46 We conclude that none of the available statutory or judicial exceptions (set out in note 46) apply to the internal mitigation provisions./47

IV. CONCLUSION

For the reasons set forth above, OAL finds that:

First, the last two paragraphs on page 6 of the Study (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.

Second, the remainder of the Study (1) is not a regulation as defined in the APA, and (2) is not subject to the requirements of the APA.

T4:D6.1-11

HFB:twm

NOTES

1. In this proceeding, the Bay Planning Coalition was represented by John Briscoe and Sean McCarthy of Washburn & Kemp, as well as by Coalition Executive Director, Ellen Johnck. The Bay Conservation and Development Commission was represented by Deputy Attorney General Linus Masouredis and Staff Counsel Jonathan Smith.
2. The legal background of the regulatory determination process --including a detailed survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.
3. We refer to the portion of the APA which concerns rulemaking 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, concern administrative adjudication rather than rulemaking.
4. As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 130 Cal.Rptr. 321. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office's determination shall be published in the California Administrative Notice Register and be made available to . . . the courts." (Emphasis added.) Implementing this directive, this and other determinations are presently being mailed to the clerks of all state and federal courts in California.
5. San Francisco Bay Conservation and Development Commission, Diked Historic Baylands of San Francisco Bay: Findings, Policies and Maps (Adopted October 21, 1982) page 6, last two paragraphs.
6. The key factual premise of this part of the determination is that the above-noted Study is never used in reviewing appli-

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cations for BCDC permits, i.e., applications involving proposed developments within the Commission's territorial jurisdiction. See BCDC's Response to Request for Determination, pp. 1, 4, 5, 7, 13 and 14. Were the Study so used, serious questions would arise concerning the legality of this procedure under Government Code section 11347.5. See 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, pp. B-36--B-37 and notes 28 & 29; typewritten version, pp. 12-13 and notes 28 & 29 (California law precludes informal issuance of criteria to be used to guide exercise of agency discretion in reviewing permit applications).

7. The McAteer-Petris Act, title 7.2 of the Government Code, sections 66000-66661).
8. Id.
9. The Suisun Marsh Preservation Act of 1977, division 19 of the Public Resources Code, sections 29000-29612.
10. Government Code section 66610.
11. Id.
12. Public Resources Code sections 29101-29103.
13. "Saltponds" and "managed wetlands," as defined in Government Code section 66610(d), are also within the Commission's jurisdiction.
14. According to Government Code sections 66651 and 66652, the San Francisco Bay Plan (inter alia) governs Bay permitting decisions. According to Public Resources Code sections 29004, 29008, 29113, and 29202, the Suisun Marsh Plan (inter alia) governs Marsh permitting decisions.
15. BCDC's Response to Request for Determination, p. 2.
16. BCDC's Response to Request for Determination, p. 15.
17. San Francisco Bay Plan Policy Amendment No. 5-84 (adopted by Commission on March 7, 1985, adding new paragraph "h. Mitigation" to the San Francisco Bay Plan), pp. 2-3:

"h. Mitigation. Mitigation for the unavoidable adverse environmental impacts of any Bay fill should be considered by the Commission in

determining whether the public benefits of a fill project clearly exceed the public detriment from the loss of water areas due to the fill and whenever mitigation is necessary for the Commission to comply with the provisions of the California Environmental Quality Act. Whenever mitigation is needed the mitigation program should be provided as part of the project. Mitigation should consist of measures to compensate for the adverse impacts of the fill to the natural resources of the Bay, such as to water surface, volume or circulation, fish and wildlife habitat or marshes or mudflats. Mitigation is not a substitute for meeting the other requirements of the McAteer-Petris Act concerning fill. When mitigation is necessary to offset the unavoidable adverse impacts of approvable fill, the mitigation program should assure:

- (1) That benefits from the mitigation would be commensurate with the adverse impacts on the resources of the Bay and consist of providing area and enhancement resulting in characteristics and values similar to the characteristics and values adversely affected;
- (2) That the mitigation would be at the fill project site, or if the Commission determines that on-site mitigation is not feasible, as close as possible;
- (3) That the mitigation measures would be carefully planned, reviewed, and approved by or on behalf of the Commission, and subject to reasonable controls to ensure success, permanence, and long-term maintenance;
- (4) That the mitigation would, to the extent possible, be provided concurrently with those parts of the project causing adverse impacts; and
- (5) That the mitigation measures are coordinated with all affected local, state, and federal agencies having jurisdiction or mitigation expertise to ensure, to the

maximum practicable extent, a single mitigation program that satisfies the policies of all the affected agencies.

If more than one mitigation program is proposed that satisfies all five factors above, the Commission should consider the cost of the alternatives in determining the appropriate program.

To encourage cost effective and comprehensive mitigation programs, the Commission should extend credit for certain fill removal and encourage land banking provided that any credit or land bank is recognized pursuant to written agreement executed by the Commission. In considering credit or land bank agreements, the Commission should assure that the five factors listed above will be met."

The above document was attached as Exhibit I to the Commission's Response to the Request for Determination.

18. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (points 1 and 3); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1, 3 and 4); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
19. See 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.]
20. Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal.3d 158, 168, 188 Cal.Rptr. 104; as cited in

1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, p. B-34 and n. 14; typewritten version, p. 7 and n. 14.

21. Id.

22. We refer to planned developments outside BCDC's jurisdiction as "extraterritorial development proposals." We use the term "internal mitigation provisions" to refer to the last two paragraphs on page 6 of the Study.

23. See 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, pp. B-31--B-43.

24. The term "underground regulations" refers to the enactments outlawed in Government Code section 11347.5: agency rules of a regulatory nature which have been issued or enforced absent compliance with APA requirements.

25. See note 23, supra, (Statewide Interpretive Guidelines and Policy Statements).

26. Request for Determination, p. 10.

27. Government Code section 66653 provides:

"If a function or activity is within the area of the commission's jurisdiction and requires the securing of a permit, the commission shall exercise its power to grant or deny a permit in conformity with the provisions of this title and with any provisions of the plan pertaining to placing of fill, extraction of materials, construction methods and use or change of use of water areas, land or structures. If a function or activity is outside the area of the commission's jurisdiction or does not require the issuance of a permit, any provisions of the plan pertaining thereto are advisory only." [Emphasis added.]

28. Id.

29. Government Code section 66633(e) provides:

"The Commission may:

* * * * *

(e) Do any and all other things necessary to carry out the purposes of this title."

30. Government Code section 66658 provides:

"Until the termination of the existence of the commission, it shall have all powers and duties prescribed by Chapters 1 (commencing with Section 66600) to 4 (commencing with Section 66630), inclusive, of this title including, without limitation, the power to continue or make further studies authorized thereby." [Emphasis added.]

31. Government Code section 66660 provides:

"The commission shall make a supplemental report or reports, containing all of the following:

(a) The results of any continued or further studies made by the commission;

(b) Such other information and recommendations as the commission deems desirable." [Emphasis added.]

32. Request for Determination, pp. 3-4.

33. Bowland v. Municipal Court (1976) 18 Cal.3d 479, 489, 134 Cal.Rptr. 630.

34. Fig Garden Park v. Local Agency Formation (1984) 162 Cal.App.3d 336, 343, 208 Cal.Rptr. 474, 478.

35. Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744.

36. BCDC's Response to Request for Determination, pp. 10-11.

37. Winzler & Kelly, supra, note 35.

38. 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No 24-Z, June 13, 1986, p. B-23, typewritten version, p. 10.

39. (1) 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-10--B-18.

- (2) 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, pp. B-31--B-43.
 - (3) 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, pp. B-18--B-34.
 - (4) 1986 OAL Determination No. 4 (Board of Equalization, June 25, 1986, Docket No. 85-005), California Administrative Notice Register 86, No. 28-Z, July 11, 1986, pp. B-7--B-26.
 - (5) 1986 OAL Determination No. 5 (Board of Osteopathic Examiners, August 13, 1986, Docket No. 85-002), California Administrative Notice Register 86, No. 35-Z, August 29, 1986, pp. B-10 -- B-25.
40. In order to be legally binding, enactments of a regulatory nature must appear in a constitutional, statutory, regulatory, or decisional law provision. See 1986 OAL Determination No. 3, Supplemental Information (Board of Equalization, August 14, 1986, Docket No. 85-004) California Administrative Notice Register 86, No. 35-Z, August 29, 1986, pp. B-6 -- B-9.
41. Government Code section 66632(f) provides in part:
- "A permit shall be granted for a project if the commission finds and declares that the project is either (1) necessary to the health, safety or welfare of the public in the entire bay area, or (2) of such a nature that it will be consistent with the provisions of this title and with the provisions of the San Francisco Bay Plan then in effect. To effectuate such purposes, the commission may grant a permit subject to reasonable terms and conditions including the uses of land or structures, intensity of uses, construction methods and methods for dredging or placing of fill." [Emphasis added.]
42. Government Code section 66601 provides in part:
- "The Legislature further finds and declares that . . . further piecemeal filling of the bay may place serious restrictions on navigation in the bay, may destroy the irreplaceable feeding and breeding grounds of fish and

wildlife in the bay, may adversely affect the quality of bay waters and even the quality of air in the bay area, and would therefore be harmful to the needs of the present and future population of the bay region."

43. Note 23, supra, pp. B-36--B-37, note 29; typewritten version, pp. 12-13, note 29.
44. Government Code section 11342(a). See Government Code sections 11346; 11343. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).
45. See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
46. 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 relating only to the internal management of the state agency. Government Code section 11342(b).
 - b. 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).
 - c. Rules that "establish [] or fix [] rates, prices or tariffs." Government Code section 11343(a)(1).
 - d. 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).
 - e. Contractual provisions previously agreed to by the complaining party.
47. Agency enactments are exempt from the APA if they are "directed to a specifically named person or to a group of persons and [do] not apply generally throughout the state." Government Code section 11343(a)(3); 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, Docket No. 85-001, April 8, 1986), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13; typewritten version pp. 6-7.

The internal mitigation provisions at issue here are not, however, directed to a specifically named group of persons; rather, they apply to any and all persons--an "open class"

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of persons--seeking development permits in that portion of the diked historical baylands that are within the jurisdiction of the Commission. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324, 253 P.2d 659.

Thus, the above noted exemption does not apply even though the enactments of the Commission govern a limited territory, one not coextensive with that of the State, and the internal mitigation provisions at issue here apply only to a small part of that limited territory.