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

MAY 8 1987
At 4:13 o'clock P M.
MARCH FONG EU, Secretary of State
By [signature]
Deputy Secretary of State

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Patrick L. Splitt, App-Tech, Inc., concerning State Energy Resources Conservation and Development Commission's Alternative Component Packages "D" and "E", and 1-6[1]	1987 OAL Determination No. 6 [Docket No. 86-012] May 8, 1987 Determination Pursuant to Government Code Section 11347.5; Title 1, California Administrative Code Chapter 1, Article 2

Determination by: [signature]
LINDA HURDLE STOCKDALE BREWER, Director

John D. Smith, Chief Deputy Director/
General Counsel

Herbert F. Bolz, Coordinating Attorney
Debra M. Cornez and Kim M. Settles,
Staff Attorneys
Rulemaking and Regulatory
Determinations Unit

THE ISSUES PRESENTED [2]

The Office of Administrative Law (OAL) has been requested to determine whether or not eight specified energy conservation packages[3] issued by the State Energy Resources Conservation and Development Commission (Commission or CEC) are "regulations" as defined in Government Code section 11342(b). Builders may not obtain permits to build new homes in California unless they meet the kind of energy conservation criteria covered by these "packages."

THE DECISION [4,5,6,7]

I. The Office of Administrative Law has determined that the CEC properly implemented the Warren-Alquist Act by formally adopting energy conservation packages "D" & "E" as regulations which were approved by the State Building Standards Commission, and became effective January 1, 1987.[8,9]

II. The Office of Administrative Law finds that Alternative Component Packages 1-6 which were not formally adopted (1) are subject to the requirements of the Administrative Procedure Act (APA), (2) are "regulations" as defined in the APA and (3) are therefore invalid and unenforceable unless adopted pursuant to the APA.[10]

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The State Energy Resources Conservation and Development Commission was created by the Warren-Alquist Act in 1974.[11] The Energy Commission's responsibilities include, among other things, adopting regulations prescribing energy conservation criteria for new residential buildings.[12]

Authority [13]

The Commission has been granted general rulemaking authority by Public Resources Code section 25213. Section 25213 provides in part:

> "The commission shall adopt rules and regulations, as necessary, to carry out the provisions of this division in conformity with the provisions of the [APA]." [Emphasis added.]

Public Resources Code section 25402 specifically authorizes the Commission to adopt regulations in order to reduce the wasteful, uneconomic, inefficient or unnecessary consumption of energy.

Applicability of the APA to Agency's Quasi-Legislature Enactments

The APA applies to all state agencies, except those "in the judicial or legislative department."[14] Since the Commission is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Commission.[15]

Additionally, Public Resources Code section 25213 provides that:

> "The commission shall adopt rules and regulations, as necessary, to carry out the provisions of [Division 15] in conformity with the provisions of the [APA]. The commission shall make available to any person upon request copies of proposed regulations, together with reasons supporting their adoption." [Emphasis added.]

As noted by the court in Building Code Action v. Energy Resources Conservation and Development Commission,[16] the Commission is required to observe two special procedural steps (in addition to normal APA procedural requirements):

"In summary, the foregoing statutes [17] require the Commission to follow this procedure:

(a) To give notice of proposed regulations and of hearing thereon,

(b) To make available a summary of reasons for the regulations,

(c) To hold at least one public hearing, (i) at which any member of the public shall be given the opportunity to be heard to present statements, arguments or contentions in writing, (ii) and may be heard to present the same orally, (iii) and may examine witnesses testifying at the hearing, and

(d) To consider all the relevant matter presented to it before adopting the regulations.

[Emphasis added; footnote added.]

Background

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

The Legislature mandated that the Commission play a key role in the reduction of wasteful, uneconomic, inefficient or unnecessary consumption of energy. Public Resources Code section 25402, subdivisions (a) and (b) provide in part that the Commission shall:

"(a) Prescribe, by regulation, lighting, insulation climate control system, and other building design and construction standards which increase the efficiency in the use of energy for new residential and new nonresidential buildings. . . . . The commission shall periodically update the standards and adopt any revision which, in its judgment, it deems necessary. Six months after the commission certifies an energy conservation manual pursuant to subdivision (c) of Section 25402.1, no city, county, city and county, or state agency shall issue a permit for any building unless the building satisfies the standards prescribed by the commission pursuant to this subdivision or subdivision (b) of this section which are in effect on the date an application for a building permit is filed.

(b) Prescribe, by regulation, energy conservation design standards for new residential and new nonresidential buildings. The standards shall be performance standards and shall be promulgated in terms of energy consumption per gross square foot of

> floorspace, but may also include devices, systems, and techniques required to conserve energy. . . . The commission shall periodically review the standards and adopt any revision which, in its judgment, it deems necessary. A building that satisfies the standards prescribed pursuant to this subdivision need not comply with the standards prescribed pursuant to subdivision (a) of this section. The commission shall comply with the provisions of this subdivision before January 1, 1981." (Emphasis added.)

The Commission adopted interim standards for residential buildings in 1977 and additional standards in 1978. In 1981, the Commission adopted extensive revisions to the standards, codified in Title 24, CAC, sections 2-5351 and 2-5352.

Public Resources Code section 25402.1 authorizes the Commission to adopt prescriptive alternative methods for compliance with the standards described in Public Resources Code section 25402. In compliance with Public Resources Code section 25402.1 (and Health and Safety Code sections 18930 and 18935), ACP's "D" and "E" were formally adopted by the Commission and approved by the State Building Standards Commission (SBSC). These two ACP's became effective January 1, 1987.

The APA generally requires state agencies to submit proposed regulations to OAL for approval.[18] However, the APA and certain provisions of the Health and Safety Code provide that proposed "building standards" regulations will be reviewed by SBSC rather than OAL.[19]

Government Code section 11356 states:

> "(a) The provisions of Article 6 (commencing with Section 11349) [the six substantive standards] shall not be applicable to any <u>building standards</u> subject to the approval of the State Building Standards Commission.
>
> (b) The provisions of Article 5 (commencing with Section 11346) [procedural requirements] shall be applicable to those <u>building standards</u>, except that the office shall not refuse to publish any notice of proposed building standards which has been approved by, and submitted to, [OAL] by the State Building Standards Commission pursuant to Section 18935 of the Health and Safety Code." [Emphasis added.]

Health and Safety Code section 18935 provides in part:

> "If the [Building Standards Commission] determines that the adopting agency has complied with the provisions of Article 5 (commencing with Section 11346) of the [APA], the commission shall approve the notice and initial

> statement of reasons for proposed building standards, and submit them to [OAL] for the sole purpose of inclusion in the California Administrative Notice Register."

Public Resources Code section 25402.2, the specific statute pertaining to CEC energy-conservation building design rules, states:

> "Any standard adopted by the [Energy Commission] pursuant to Section 25402 and 25402.1 which is a building standard as defined in Section 25488.5 shall be submitted to the State Building Standards Commission for approval pursuant to, and is governed by, the provisions of the State Building Standards Law, Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code and Section 25216.4 of this code. Such building standards adopted by the commission and published in the State Building Standards Code shall be enforced as provided in Sections 25402 and 25402.1." [Emphasis added.]

On October 27, 1986, Patrick L. Splitt, President of APP-TECH, Inc., filed a Request for Determination concerning eight specified energy conservation packages issued by the Commission.

II. PRELIMINARY ISSUE

In its Response to the Request for Determination, the Commission raises the following issue:

> whether two of the eight energy conservation packages ("D" & "E") have been formally adopted by the CEC, approved by the State Building Standards Commission, and incorporated into Title 24, CAC, section 2-5351.

As stated previously, packages "D" and "E" were formally adopted by the CEC as regulations, were approved by the State Building Standards Commission, and became effective January 1, 1987.[20,21]

III. DISCUSSION OF DISPOSITIVE ISSUES

There are two main issues before us:[22]

(1) WHETHER THE CHALLENGED RULES ARE REGULATIONS WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" 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 part:

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

Applying the definition of "regulation" found in Government Code section 11342(b) involves a two-part inquiry.

First, is the informal rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, does the informal rule either

- implement, interpret, or make specific the law enforced or administered by the Department or
- govern the Department's procedure?

Here, the challenged rules are ACP's 1-6 (see Appendix B).

The Commission has adopted procedural regulations purportedly implementing the substantive building standards mandated by Public Resources Code sections 25402 and 25402.1 and contained in Title 24, CAC sections 2-5342 and 2-5351. Title

20, CAC, section 1409(d), one the above-described procedural regulations provides:

> "The Commission may approve any alternative component package, in addition to the packages in Section 2-5342 and 2-5351(c) of Chapter 2-53, which it determines will meet the energy budgets and is likely to apply to a significant percentage of new buildings or to a significant segment of the building construction and design community." [Emphasis added.]

In interpreting Public Resources Code sections 25402 and 25402.1, Section 1409(d) purportedly allows the Commission to approve ACP's that comply with the performance standards adopted in the State Building Code. Builders can then choose an ACP which the Commission has expressly found will meet the required energy budgets when installed in a new building. According to the Commission, the "certification" of ACP's 1-6 was permissible under section 1409(d).

The Commission further asserts that ACP's 1-6 are not rules or regulations as defined by Government Code, section 11342(b), because they do not set new standards when compared to the performance standards set forth in sections 2-5342 and 2-5351 of Title 24, CAC. The Commission urges that a distinction should be drawn between the terms "certification" and "regulation," stating that:

> "In the simplest of terms, certifying that a package meets a standard and adopting a new standard are not the same thing. The former is not a regulation subject to the APA; the latter clearly is."

We reject the Commission's contention for the following reasons:

> First, ACP's 1-6 are clearly "standards" of general application within the meaning of Government Code section 11342(b). These ACP's apply on a statewide basis to any builder applying for a permit to build a home in California. The Commission's semantic distinction between "certification" and "regulation" cannot obscure the fact that the ACP's are standards of general application within the meaning of the governing statute.[23]
>
> Second, ACP's 1-6 implement, interpret, and make specific the law enforced or administered by the Commission. In the Commission's official Energy Conservation Manual, it is significant that informally adopted ACP's 1-6 are printed sided by side with ACP's A-E, which were, by contrast, formally adopted as building standards regulations pursuant to Public Resources Code sections 25402 and 25402.1. Appendix B

to this Determination illustrates all too clearly how the Commission utilizes ACP's 1-6 as though they were formal regulations. Clearly, builders demonstrating compliance with ACP's 1, 2, 3, 4, 5 or 6 are deemed to fulfill statutory energy conservation requirements just as readily as builders demonstrating compliance with formally-adopted ACP's A, B, C, D, or E. As was the case in the earlier Coastal Commission[24] and San Francisco Bay Conservation and Development Commission[25] Determinations, these informal rules governing granting of permits cannot be characterized as non-regulatory.

We conclude that ACP's 1-6 are "regulations" within the meaning of the key provision of Government Code section 11342.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES 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.[26,27] We conclude that none of the recognized exceptions (set out in note 26) apply to ACP's 1-6.

III. CONCLUSION

For the reasons set forth above, OAL finds:

A. that Alternative Component Packages D and E have been formally adopted as regulations;

B. that ACP's 1-6 are (1) subject to the requirements of the APA, (2) 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.

DATE: May 7, 1987

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1 In this proceeding, Patrick L. Splitt, President of App-Tech Inc., represented himself. The Commission was represented by John D. Chandley, Counsel for the Commission.

2 The legal background of the regulatory determination process --including a 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. 85-011), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CAC). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396 n.5, 211 Cal.Rptr. 758, 764 n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems.

3 These eight "alternative component packages" are composed of eight lists of building design features. The first two packages are labelled "D" and "E", the other six are labelled 1 through 6. Appendix A, an excerpt from the State Building Code, Part 2, Title 24, CAC, illustrates alternative component packages "D" and "E". Appendix B, an excerpt from the Fall 1984 Energy Conservation Manual for New Residential Buildings, contains packages 1-6 (in addition to "D" and "E").

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, 94, 130 Cal.Rptr. 321, 324-325. 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.)

5 One public comment was received from Emilio E. Varanini, III, Esq., Marron, Reid & Sheehy, on behalf of the Mineral Insulation Manufacturers Association, who later requested that the comment be attributed instead to Dow Chemical Company. This comment, which supported Mr. Splitt, was considered in making this determination.

A timely Response to the Request for Determination was received from the Commission and was considered in making this determination.

In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected agencies to submit responses. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

6 An OAL finding that a challenged rule is illegal unless adopted "as a regulation" does not of course exclude the possibility that the rule could be validated by subsequent incorporation in a statute.

7 Pursuant to Title 1, CAC, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State.

8 In a comment submitted to OAL, Dow Chemical Company asserts that ACP's "D" and"E" do not satisfy existing "energy budgets" and are void because they were adopted contrary to legislative intent. At issue in this proceeding is whether or not ACP's "D" and "E", and ACP's 1 through 6 are "regulations" as defined by Government Code section 11342(b) which have not been adopted as a regulation and filed with the Secretary of State in accordance with the APA. (See tit. 1, Cal. Admin. Code, Section 121; Gov. Code, sec. 11347.5.)

9 Action of an administrative agency carries the presumption of correctness and regularity which places the burden of demonstrating invalidity on the assailant. California Association of Nursing Homes, Etc. v. Williams (1978) 4 Cal.App.3d 811, 84 Cal.Rptr. 590 (challenged validity of regulation basd on propriety of regulation adoption procedure); Campbell Industries v. Board of Equalization 167 Cal.App.3d 863, 213 Cal.Rptr. 533 (challenged the accuracy of the Board's regulatory interpretation of a statute).

10 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.

11 Public Resources Code sections 25000 - 25986.

12 Public Resources Code section 25402.

13 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349(b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Administrative Code, OAL will, pursuant to Government Code section 11349.1(a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of necessity, authority, clarity, consistency, reference, and nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1(a). At that point in time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review

of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. Government Code section 11349.1.

14 Government Code section 11342(a). See Government Code sections 11346; 11343. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).

15 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.

16 (1980) 102 Cal.App.3d 577, 585-586; 162 Cal.Rptr. 734, 739.

17 The statutes referred to in the case are Public Resources Code sections 25402, 25213, and 25214; Government Code sections 11423, 11424, and 11425 (now redesignated as 11346.4, 11346.5, 11346.8).

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18 Government Code sections 11349.1--11349.4.

19 Health and Safety Code section 18930.

20 Government Code 11347.5; Title 1, CAC, section 121.

21 Both in the CEC rulemaking that culminated in formal adoption of "D" and "E" and in his Request for Determination, Mr. Splitt presented an argument concerning the validity of packages "D" and "E". Mr. Splitt argued that "D" and "E" were invalid because they were inconsistent with Title 20, CAC, section 1409(d)'s requirement that any such packages must meet the new home energy budgets contained in the State Building Code (i.e., specified energy consumption per square foot).

State Building Standards Commission is only authorized to review proposed building standards for consistency with other provisions of the State Building Code. Health and Safety Code section 18930(a)(1). Title 20, CAC, section 1409(d) is

not a building standard; it is not found in the State Building Code. Thus, SBSC did not review "D" and "E" to determine if these packages were consistent with section 1409(d).

In this Request, Mr. Splitt seeks to transform his "consistency" objection to "D" and "E" into a claimed violation of Government Code section 11347.5. He argues that since "D" and "E" were adopted by the CEC and are purportedly inconsistent with section 1409(d), this is, in and of itself, evidence that the CEC utilized some "secret criterion," which supplemented 1409(d) and is a violation of Government Code section 11347.5.

We reject this argument. Assuming arguendo that the CEC used some unknown legal basis to approve "D" & "E" it would still not warrant OAL invalidating "D" and "E" under Government Code section 11347.5. Packages "D" and "E" cannot be characterized as informal "guidelines" rendered invalid by Government Code section 11347.5, since these two packages have been formally adopted by the CEC, approved by the State Building Standards Commission, and incorporated into the CAC.

22 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); 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.

We also conclude that ACP's 1-6 are "quasi-legislative" in nature because they are rules formulating general policies oriented toward future decisions. Gov. Code, §11346. See Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal.3d 158, 168, 188 Cal.Rptr. 104, 111 (quasi-legislative acts are reviewable by ordinary mandamus (Code Civ. Pro., sec. 1085) or action for declaratory relief (Code Civ. Pro., sec. 1060); whereas, quasi-judicial or adjudicatory acts are reviewable by administrative mandamus (Code Civ. Pro., sec. 1094.5)).

23 The above noted distinction also cannot be reconciled with the statutory definition of "building standard". Health and Safety Code section 18909 defines "building standard" as:

> "any rule, regulation, order, or other requirement promulgated by a state agency, . . . which specifically regulates, requires, or forbids the method of use, properties, performance, or types of materials used in

the construction, alteration, improvement, repair, or rehabilitation of a building, . . ."

24 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.

25 1986 OAL Determination No. 6 (Bay Conservation and Development Commission, September 3, 1986, Docket No. 86-002), California Administrative Notice Register 86, No. 41-Z, October 31, 1986, pp.B-21-B-58.

26 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 and which do not apply generally or throughout the state. Government Code section 11343(a)(3).

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. Government Code section 11342(b).

f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (Sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International

Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as a exhaustive list of possible APA exceptions.

27 Arguably, the Commission need not comply with APA requirements concerning creation of ACP's because Title 20, CAC, section 1409(d) permits the Commission to simply "approve" certain ACP's. We reject this argument for the reasons expressed in 1987 OAL Determination No. 5 (State Personnel Board, April 30, 1987, Docket No. 86-011), California Administrative Notice Register 20-Z, May 15, 1987, p. B-___; typewritten version, pp. 11-12. Here, the "guidelines" are ACP's 1-6. These guidelines have not been formally adopted as regulations and thus cannot withstand scrutiny under Government Code section 11347.5.

Further, section 1409(d) should be read together with governing statutes, with the result that any ACP "approved" by the Commission pursuant to section 1409(d) cannot be issued, utilized, or enforced until adopted as a building standard and incorporated into the Building Code.