

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

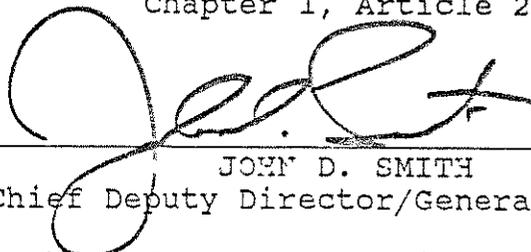
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MARSH FONG EU
SECRETARY OF STATE
OF CALIFORNIA

In re:)	1988 OAL Determination No. 5PM 1988
Request for Regulatory)	
Determination filed)	[Docket No. 87-011]
by Assemblyman Gilbert W.)	
Ferguson concerning the)	April 6, 1988
Fish and Game Commission's)	
"Wetlands Resources)	Determination Pursuant to
Policy" dated January 9,)	Government Code Section
1987 ¹)	11347.5; Title 1,
)	California Code of Regulations
)	Chapter 1, Article 2

Determination by:



JOHN D. SMITH

Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney

Gordon R. Young, Staff Counsel

Rulemaking and Regulatory

Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether the Fish and Game Commission's "Wetlands Resources Policy" dated January 9, 1987 is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that:

- (1) From the time of adoption of the "Wetlands Resources Policy" until December 3, 1987, the Fish and Game Commission failed to comply with the Administrative Procedure Act insofar as the Policy² implemented, interpreted, or made specific statutes granting the Department of Fish and Game authority to compel mitigation measures modifying streambed alteration projects.³
- (2) In all other respects, the Commission's "Wetlands Resources Policy" is not a "regulation" and need not be adopted pursuant to the Administrative Procedure Act.

10

THE ISSUE PRESENTED 4

The Office of Administrative Law ("OAL") has been requested to determine⁵ whether the Fish and Game Commission's "Wetlands Resources Policy" ("Policy") dated January 9, 1987⁶ is a "regulation" as defined in Government Code section 11342, subdivision (b), and therefore violates Government Code section 11347.5, subdivision (a).⁷

THE DECISION 8, 9, 10, 11

The Office of Administrative Law finds that:

- I. A portion of the sixth full paragraph of the Policy¹² (1) is subject to the requirements of the Administrative Procedure Act ("APA")¹³, (2) is a "regulation" as defined in the APA, but (3) between the date of issuance of the Policy and the date of this Determination was made non-regulatory by the issuance of another policy by the Commission on December 3, 1987, which restricted the application of the "Wetlands Resources Policy."
- II. The remainder of the Commission's Policy is not a "regulation" as defined in the APA and is not subject to the requirements of the APA.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The Fish and Game Commission ("Commission") was created by former section 25 1/2, of article IV of the California Constitution of 1902. Language establishing the Commission is currently found in section 20 of article IV of the California Constitution. Under the current provision, the Legislature is empowered to delegate to the Commission "such powers relating to the protection and propagation of fish and game as the Legislature sees fit."¹⁴ Fish and Game Code section 703 delegates to the Commission the authority to prescribe "general policies" which the Department of Fish and Game ("Department") is required to follow in administering and enforcing the provisions of the Fish and Game Code.¹⁵

Among the duties of the Department, is the responsibility under Fish and Game Code section 1601 to review construction plans of any state or local government agency or public utility which affect "the natural flow or bed, channel or bank of any river, stream or lake designated by the department. . . ."¹⁶ The Department is given the authority to require "reasonable modifications" of construction plans to include mitigation measures to protect fish or wildlife resources. The Department also has the authority to force any unresolved disagreement over proposed mitigation measures into binding arbitration.¹⁷ The Department's consent is a prerequisite to construction commencing, except for emergency work necessary to protect life or property.¹⁸

Fish and Game Code section 1603 provides similar powers to the Department for review of streambed alteration projects conducted by private parties. Fish and Game Code section 1603 makes it unlawful for "any person" to "substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank of any river, stream or lake designated by the department, or use any material from the streambeds, without first notifying the department of such activity, . . ."¹⁹ The Department is then permitted to require modifications to the proposed alterations it deems "necessary to protect fish and wildlife."²⁰

Authority 21

Fish and Game Code section 202 provides:

"The commission shall exercise its powers under this article by regulations made and

promulgated pursuant to this article. Regulations adopted pursuant to this article shall not be subject to the time periods for the adoption, amendment, or repeal of regulations prescribed in Sections 11346.2, 11346.4, and 11346.8 of the Government Code." [Emphasis added.]

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

The APA applies to all state agencies, except those "in the judicial or legislative departments."²² 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.²³

The Commission is exempt from certain specific provisions of the APA.²⁴ None of the exempt provisions, however, remove the Policy in question from the remaining APA rulemaking requirements.

General Background

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

A Request for Determination was filed with OAL on June 15, 1987, by Assemblyman Gilbert W. Ferguson ("Requester"). This Request concerns the Fish and Game Commission's "Wetlands Resources Policy" dated January 9, 1987 (attached as Exhibit A). This Policy expresses the intent of the Commission "to seek to provide for the protection, preservation, restoration, enhancement and expansion of wetland habitat in California." The sixth full paragraph of the Policy states, in part, that the Commission

"opposes, consistent with its legal authority, any development or conversion which would result in a reduction of wetland acreage or wetland habitat values. To that end, the Commission opposes wetland development proposals unless, at a minimum, project mitigation assures there will be 'no net loss' of either wetland habitat values or acreage." [Emphasis added.]

The Requester alleges that the Commission's policy of uniform opposition to any development project in wetland areas which shows a net loss of either wetland habitat values or acreage is a "regulation" as defined by Government Code section 11342, subdivision (b) and that this "regulation" has not been adopted pursuant to the APA.

On March 7, 1988, the Commission filed a Response to the Request with OAL. The Commission's Response asserts that the Policy is not a "regulation" because further guidelines adopted by the Commission on December 3, 1987 expressly limit the application of the Policy to permit decisions "where the Department's role is advisory, as in CEQA [California Environmental Quality Act]²⁵, NEPA [National Environmental Policy Act]²⁶, Clean Water Act Section 404²⁷, California Coastal Act²⁸, etc."²⁹ (Emphasis added.)

II. DISPOSITIVE ISSUES

There are two main issues before us:³⁰

- (1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (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:

" (a) 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 general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

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

First, is the informal rule either

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

Second, does the informal rule either

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

With respect to the portion of the sixth full paragraph of the Policy which is quoted above, the answer to both parts of this inquiry is "yes."³¹

With respect to the remainder of the challenged Policy, however, the answer to both parts of the inquiry is "no." The remaining paragraphs are non-regulatory. They do not (1) establish, modify, or supplement a rule of general application, or (2) implement, interpret or make specific the law enforced or administered by the Commission through the Department.

Analysis

As stated above, the following provision of the Policy met both prongs of the test up until December 3, 1987:

"[The Fish and Game Commission] opposes, consistent with its legal authority, any development or conversion which would result in a reduction of wetland acreage or wetland habitat values. To that end, the Commission opposes wetland development proposals unless, at a minimum, project mitigation assures there will be 'no net loss' of either wetland habitat values or acreage." [Emphasis added.]

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.³² The above-cited portion of the sixth full paragraph of the Policy is just such a rule. The practical effect³³ of the provision was to require any governmental agency or public utility or "any person"

developing wetlands to ensure that any proposed development project had no net loss of wetlands habitat values or acreage. This was because the Commission's Policy required the Department, as agent of the Commission, to uniformly oppose any wetlands development project which showed a net loss of wetlands acreage or habitat values. That opposition was³⁴ or could have been expressed by requiring streambed alteration mitigation measures prohibiting loss of wetlands acreage or requiring the acquisition of compensating acreage. Therefore, the policy clearly applied to all members of the two classes defined in Fish and Game Code sections 1601 and 1603--namely, "any governmental agency, state or local, and any public utility"³⁵ or "any person."

This constituted a standard of general application as defined above and met the first prong of the test of a "regulation."

The Policy also implemented, interpreted, and made specific at least two statutes which the Commission, through the agency of the Department, administered or enforced--Fish and Game Code sections 1601 and 1603.

Therefore, the above excerpt from the Policy met the second prong of the test of a "regulation" during the period from its adoption through December 3, 1987.

In its Response dated March 7, 1988, the Commission made two principal arguments:

(1) The Policy was made non-regulatory by the adoption of a second policy³⁶ by the Commission on December 3, 1987, which expressly precluded application of the original Policy in those situations in which the Department has anything other than an "advisory" role on permit decisions, e.g., Fish and Game Code sections 1601 and 1603; and

(2) Application of the Policy in those situations in which the Department is only providing advisory comments to other permitting agencies is non-regulatory according to OAL's decision in 1986 OAL Determination No. 6 because the Policy doesn't "govern the future permit decisions of the issuing agency."³⁷

With the clear understanding that the Commission has indeed ceased to enforce the Policy through the Department in matters involving Fish and Game Code sections 1601 and 1603, OAL agrees with both contentions. OAL's 1986 Determination No. 6³⁸ involved a determination of whether a study entitled "Diked

Historical Baylands of the San Francisco Bay: Findings, Policies and Maps" issued by the San Francisco Bay Conservation and Development Commission ("BCDC") was a "regulation" and invalid and unenforceable unless adopted as a regulation pursuant to the Administrative Procedure Act. OAL determined that BCDC's application of its study policies through submission of advisory comments used in the permitting process administered by another government agency (i.e., permit applications pending before the U.S. Army Corps of Engineers) was non-regulatory. OAL stated:

"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. We earlier found comparable Coastal Commission documents to violate Government Code section 11347.5.

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."³⁹ [Emphasis in original.]

The same critical fact exists in the instant case. The Policy is no longer applied in situations where the Department or the Commission have primary permit jurisdiction or decisional authority. Therefore, the Policy as modified by the Commission's December 3, 1987 policy statement (attached as Exhibit B) no longer meets the second prong of the test. The Policy does not implement, interpret, or make specific the law enforced or administered by the Commission.

We therefore conclude that the cited portion of the sixth full paragraph of the Policy was initially a "regulation" as defined in Government Code section 11342, subdivision (b), but was made non-regulatory by the supplemental policy statement of December 3, 1987.⁴⁰

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

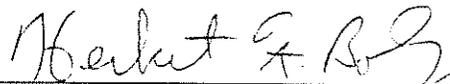
Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to procedural requirements of the APA.⁴¹ The regulatory portion of the Policy did not qualify for any exemption during the period from its adoption through December 3, 1987.⁴²

III. CONCLUSION

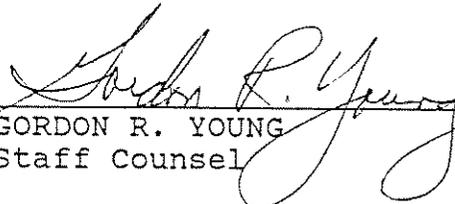
For the reasons set forth above, OAL finds that:

- I. The specified portion of the sixth full paragraph of the Policy (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, but (3) was made non-regulatory on December 3, 1987 by the issuance of the Commission's December 3, 1987 policy which restricts application of the Policy to those situations in which the Department has no permitting jurisdiction or decisional authority.
- II. The remainder of the Commission's Policy is not a "regulation" as defined in the APA and is not subject to the requirements of the APA.

DATE: April 6, 1988



HERBERT F. BOLZ
Coordinating Attorney



GORDON R. YOUNG
Staff Counsel

Rulemaking and Regulatory
Determinations Unit

1 This Request for Determination was filed by:

The Honorable Gilbert W. Ferguson
Assemblyman, Seventieth District
State Assembly
State Capitol
Sacramento, CA 95814
Attn: Cathy Pirie
(916) 445-7222

The Fish and Game Commission's Response was signed by:

Harold C. Cribbs
Executive Secretary
Fish and Game Commission
1416 Ninth Street
Sacramento, CA 95814
(916) 445-5708

2 That is, a portion of the sixth full paragraph of the Policy, as noted below in this Determination.

3 By "streambed alteration," OAL is referring to alteration of any body of water falling within the scope of Fish and Game Code sections 1601 and 1603. Fish and Game Code section 1601 governs construction projects by governmental agencies or public utilities which "divert, obstruct or change the natural flow or bed, channel or bank of any river, stream or lake designated by the department. . . ." Fish and Game Code section 1603 governs construction projects by "any person" which "substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank of any river, stream or lake designated by the department, . . ."

Some of the rivers, streams or lakes referred to in Fish and Game Code sections 1601 and 1603 are also "wetlands" as that term is used in the Commission's "Wetlands Resources Policy" dated January 9, 1987. According to the Commission's Response, dated March 7, 1988, to this Request for Determination, the Commission has adopted the definition of wetlands utilized by U.S. Fish and Wildlife Services in applying its "Wetlands Resources Policy." That definition, according to the Commission, is as follows:

"Wetlands are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface

or the land is covered by shallow water. For purposes of this classification, wetlands must have one or more of the following three attributes: (1) at least periodically, the land supports predominantly hydrophones; (2) the substrate is predominantly undrained hydric soil; and (3) the substrate is non-soil and is saturated with water or covered by shallow water at some time during the growing season of each year.' (Classification of Wetlands and Deepwater Habitats of the United States; FWS/OBS 79/31; December 1979)."

See Commission's Response, Presentation of Glen Rollins to the Commission on June 24, 1987, page 4; Commission's Response, Policy dated December 3, 1987, page 1.

- 4 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. 85-001), California Regulatory 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 CCR). 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. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal

agency interpretation of a statute. In Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 88 Daily Journal D.A.R. 3095, the court found that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism."

- 5 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121(a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."
[Emphasis added.]

- 6 A copy of the Fish and Game Commission's "Wetlands Resources Policy" dated January 9, 1987 is attached to this Determination as Exhibit A.

- 7 Government Code section 11347.5 (as amended by Stats. 1987, c. 1375, sec. 17) provides:

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

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added.]

8 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 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 Regulatory 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 (interpretation of statute by agency charged with its enforcement is entitled to great weight). 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, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

- 9 Three comments--all supporting the Requester--were received concerning this Request for Determination. The commenters were: Richard Lyon, California Building Industry Association, 1107 9th St., Suite 1060, Sacramento, CA 95814; Ellen Johnk, Bay Planning Coalition, 666 Howard St., Suite 301, San Francisco, CA 94105; M. Andriette Adams, Esq., 26161 Marguerite Parkway, Suite D, Mission Viejo, CA 92692, on behalf of the Mission Viejo Company. The Commission filed a Response, dated March 7, 1988, to this Request for Determination. All comments and the Commission's Response were considered in making this Determination.

In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected rulemaking 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.

- 10 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subdivision (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

- 11 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on page 1.

- 12 The regulatory provision of the Policy is:

"[The Fish and Game Commission] opposes, consistent with its legal authority, any development or conversion which would result in a reduction of wetland acreage or wetland habitat values. To that end, the Commission opposes wetland development proposals unless, at a minimum, project mitigation assures there

will be 'no net loss' of either wetland habitat values or acreage."

- 13 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.
- 14 California Constitution, article IV, section 20(b).
- 15 See Fish and Game Code section 702. The mandatory compliance of the Department with the Commission's "general policies" is demonstrated by the statute's language--the Director of the Department of Fish and Game "is responsible to the commission for administration of the department in accordance therewith." See also Commission's Response, page 2.
- 16 Fish and Game Code section 1601. Fish and Game Code section 1601 states:

"Except as hereinafter provided, general plans sufficient to indicate the nature of a project for construction by, or on behalf of, any governmental agency, state or local, and any public utility, of any project which will divert, obstruct or change the natural flow or bed, channel or bank of any river, stream or lake designated by the department in which there is at any time an existing fish or wildlife resource or from which these resources derive benefit, or will use material from the streambeds designated by the department, shall be submitted to the department. When an existing fish or wildlife resource may be substantially adversely affected by such construction, the department shall notify the governmental agency or public utility of the existence of such fish or wildlife resource together with a description thereof and will propose reasonable modifications in the proposed construction as would allow for the protection and continuance of the fish or wildlife resource, including procedures to review the operation of such protective measures. Such proposals shall be submitted within 30 days of receipt of such plans, with the provision that this time may be extended by mutual agreement. Upon a determination by the department and after notice to the affect-

ed parties of the necessity for an onsite investigation or upon the request for an onsite investigation by the affected parties, the department shall make an onsite investigation of the proposed construction and shall make such investigation before it proposes any modifications.

"Within 14 days of receipt of the department's proposals, the affected agency or public utility shall notify the department in writing as to the acceptability of the proposals, except that this time may be extended by mutual agreement. If such proposals are not acceptable to the affected agency or public utility, then that agency or public utility shall so notify the department. Upon request the department shall meet with the affected agency or public utility within seven days of receipt of such notification or such time as may be mutually agreed upon for the purpose of developing proposals which are acceptable to the department and the affected agency or public utility. If mutual agreement is not reached at such meeting a panel of arbitrators shall be established; provided, however, that the appointment of such panel may be deferred by mutual consent of the parties. The panel shall be established within seven days of such meeting and shall be composed of one representative of the department, one representative of the affected agency or public utility, and a third person mutually agreed upon or if no agreement can be reached, the third person shall be appointed in the manner provided by Section 1281.6 of the Code of Civil Procedure. The third person shall act as panel chairman. The panel shall have power to settle disagreements and make binding decisions regarding such fish and wildlife modifications. Such arbitration shall be completed within 14 days from the day that the composition of the panel is established, unless the time is extended by mutual agreement. Expenses of the department representative are to be borne by the department; expenses of the representative of the governmental agency, state or local, or the public utility are to be borne by the governmental agency, state and local, or the public utility; expenses of the chairman are to be paid one-half by each party.

"Agencies or public utilities proposing projects affected by this section shall not commence such operations until the department has found that such project will not substantially adversely affect an existing fish or wildlife resource or until the department's proposals, or the decisions of a panel of arbitrators, have been incorporated into such projects.

"The department shall determine and specify types of work, methods of performance or remedial measures which shall be exempt from the operation of this section.

"With regard to any project which involves routine maintenance and operation of water supply, drainage, flood control, or waste treatment and disposal facilities, notice to and agreement with the department shall not be required subsequent to the initial notification and agreement unless the work as described in the agreement is substantially changed, or conditions affecting fish and wildlife resources substantially change, and such resources are adversely affected by the activity conducted under the agreement. This provision shall be applicable in any instance where notice to and agreement with the department has been attained prior to the effective date of this act.

"The provisions of this section shall not be applicable to emergency work necessary to protect life or property; however, notification by the agency or public utility performing such emergency work shall be made to the department within 14 days of the commencement of such emergency work."

17 Id.

18 Id.

19 Fish and Game Code section 1603.

20 Id.

21 We discuss the affected agency's rulemaking authority (see

Gov. Code, sec. 11349, subd. (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 Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the Abase 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, subdivision (a). At that time, any 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. (Gov. Code, sec. 11349.1.)

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

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

24 The Commission's APA exemptions are set forth in Fish and Game Code sections 202, 215, and 240. Section 202 exempts the Commission from compliance with various time periods when adopting regulations under the APA. Regulations usually go into effect on the 30th day after filing with the Secretary of State. Section 202 exempts the Commission's regulations

from this provision. Other APA time requirements exempted by section 202 include the requirement that notice be published 45 days prior to a public hearing or the close of the public comment period; the one year effective period of a notice; the requirement of 15 days notice to request a public hearing; and the 15 days notice required in order for the Department to utilize the sufficiently related change procedure. Fish and Game Code section 215 provides a varying effective date for regulations filed with the Secretary of State--regulations are "effective at the time specified therein, but not sooner than 10 days after such filing." Fish and Game Code section 240, subdivision (a)(1) provides an alternative basis for a finding of emergency when the Commission proposes to adopt emergency regulations.

- 25 California Environmental Quality Act, Public Resources Code sections 21000-21177.
- 26 National Environmental Policy Act, Title 42, United States Code, section 4321.
- 27 Title 33, United States Code, section 1344, ("Permits for dredged or fill material").
- 28 California Coastal Act of 1976, Public Resources Code section 30000-30900.
- 29 See Commission's Response, page 5.
- 30 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1951) 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 4 to today's Determination.
- 31 The regulatory portion of the Policy met both parts of the two-part test of a "regulation" until the Commission's adoption of its second policy statement on December 3, 1987.
- 32 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
- 33 OAL is aware of the holding by the U.S. District Court, located in Sacramento, in Mega Renewables v. County of Shasta ((1986 E.D.CA.) 644 F.Supp. 491) that section

1603 "does not impose a state permit requirement." (Id., at 644 F.Supp. 495.) The issue in this Determination, however, is not whether the authority to compel mitigation measures in streambed alteration projects constitutes a permit, but whether such authority has been administered or enforced by the Department in accordance with the dictates of the Commission's Policy. The answer is clearly "yes," until adoption of the second policy on December 3, 1987.

- 34 The Commission's Response, page 6, indicates that the Policy was used, albeit mistakenly, in the context of a section 1603 streambed alteration project:

"Ms. Adams is wrong about the Policy being used in formation of 1603 Agreements. The Commission guidelines adopted on December 3, 1987, specifically limit application to only those circumstances where the Department's role is advisory. Please refer to BPC remarks #2 on page 5. Ms. Adams was told that the incident she referred to on October 2, 1987, regarding a Streambed Alteration Agreement for Mission Viejo had been taken care of and the warden was informed that she had misused the Policy. The guidelines adopted December 3, 1987, make it very clear when the policy is to be utilized by the Department. Ms. Adams must have missed this when she reviewed the Commission's Policy and guidelines." [Emphasis in original.]

- 35 Fish and Game Code section 1601.

- 36 An undated copy of the second policy which the Commission attached to its verified Response is attached to this Determination as Exhibit B. The Commission's restriction of the Policy to non-decisional or advisory permit decisions is set forth in Exhibit B, page 1, which states:

"The Commission has found the policy and implementation procedures to be nonregulatory in nature. Their intended application is in those circumstances where the Department's role is advisory, as in, but not limited to, the application of the California Environmental Quality Act, National Environmental Protection Act, California Coastal Act, Clean Water Act, and other applicable state and

federal laws and regulations." [Emphasis added.]

37 See Commission's Response, page 5.

38 1986 OAL Determination No. 6 (Bay Conservation and Development Commission, September 3, 1986, Docket No. 86-002), California Administrative Notice Register 86, No. 38-Z, September 19, 1986, pp. B-18--B-35.

39 Id., typewritten version, pp. 11-12.

40 Although the second policy does not expressly state that the section 1601 and 1603 mitigation measures for streambed alteration projects are no longer covered by the Policy, the Commission's Response, page 5, to a comment by the Bay Planning Coalition shows that to be the case:

"Policy would be used in approving streambed alteration agreements (Fish and Game Code Section 1600 et seq.). The Commission's Wetlands Resource Policy will not be used in approving streambed alteration agreements. Commission guidelines adopted December 3, 1987, limit policy application to only those circumstances where the Department's role is advisory, as in CEQA, NEPA, Clean Water Act Section 404, California Coastal Act, etc."

41 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. (Gov. Code, sec. 11342, subd. (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. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally

or throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (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 an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations (available from OAL, (916) 323-6225, ATSS 473-6225) is a helpful guide for locating such information.

42 Although the Commission referred to the "internal management" exception in its Response, it did not appear to rely upon that exception as a persuasive argument. See Commission's Response, pages 4 and 7. In any event, the internal management exception is not applicable because, through the agency of the Department's enforcement, the Policy affected a group of persons other than the employees of the originating agency. The courts have consistently held that the internal management exception does not cover situations such as this. (See Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1; Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.) The recent case of Americana Termite Company, Inc. v. Structural Pest Control Board

(1988) 88 Daily Journal D.A.R. 3095 is consistent with this interpretation. In Americana Termite, the Second District Court of Appeal found that the Structural Pest Control Board's auditing selection procedures came within the internal management exception because they were "merely an internal enforcement and selection mechanism." (Id., at page 3096.) For a detailed discussion of the internal management exception, see 1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002), California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 451-453, typewritten version, pp. 7-9.

WETLANDS RESOURCES POLICY

The Fish and Game Commission finds that:

I. California's remaining wetlands provide significant and essential habitat for a wide variety of important resident and migratory fish and wildlife species.

II. The quantity and quality of the wetlands habitat remaining in California have been significantly reduced; thus, maintenance and restoration are essential to meet the needs of the public for fish and wildlife resources and related beneficial uses. In addition, the protection, preservation, restoration, enhancement and expansion of wetlands as migratory bird breeding and wintering habitat are justly recognized as being critical to the long-term survival of such species. Wetland habitat is also recognized as providing habitat for over half of the listed endangered and threatened species in California.

III. Projects which impact wetlands are damaging to fish and wildlife resources if they result in a net loss of wetland acreage or wetland habitat value.

IV. Through the passage of Senate Concurrent Resolution 28 (January 1, 1983), the Legislature, in recognition of the importance of wetlands, indicated its "intent to preserve, protect, restore and enhance California's wetlands and the multiple resources which depend upon them for the benefit of the people of the state". The Legislature further declared its desire that wetland habitat acreage be increased by 50 percent by the year 2000.

Therefore, it is the policy of the Fish and Game Commission to seek to provide for the protection, preservation, restoration, enhancement and expansion of wetland habitat in California.

Further, it is the policy of the Fish and Game Commission to strongly discourage development in or conversion of wetlands. It opposes, consistent with its legal authority, any development or conversion which would result in a reduction of wetland acreage or wetland habitat values. To that end, the Commission opposes wetland development proposals unless, at a minimum, project mitigation assures there will be "no net loss" of either wetland habitat values or acreage.

The Commission strongly prefers mitigation which would achieve expansion of wetland acreage and enhancement of wetland habitat values.

Furthermore, to make recommendations to the Commission on implementation of this policy, a temporary Working Group shall be established. It shall make recommendations concerning the following:

A. Long-range planning, prioritization and implementation of a comprehensive program to protect, enhance and expand wetlands;

B. Enhancing public awareness of and mobilizing public support for the need to protect wetlands;

C. Cooperative mechanisms and coordination with local government and private sector interests to achieve A. and B.; and

D. Needed legislation, regulations, staffing and/or funding necessary to accomplish A., B. and C.

The Working Group shall include the Commission's Subcommittee on Waterfowl and one representative, selected by the Commission, from each of the following: local government; environmental group; sportsmen/conservation group; and wetlands developers/converters. Additionally, it shall include one representative of the Department of Fish and Game as designated by the Director. The group's work shall be coordinated by the Executive Secretary of the Commission who shall present its recommendations, which shall include guidelines for the Department's implementation of this policy including an appropriate wetland definition, to the Commission no later than June 30, 1987.

FISH AND GAME COMMISSION COMMENT TO THE DEPARTMENT
OF FISH AND GAME ON THE WETLAND POLICY IMPLEMENTATION PROPOSAL

Principles of Application

The Fish and Game Commission accepts the wetland definition, mitigation strategies and habitat value assessment methodologies recommended by the Department in its report submitted to the Commission Wetland Subcommittee on June 24, 1987. The Commission expects the Department of Fish and Game to apply the Commission's wetland policy and the Department's proposed implementing procedures with scientific accuracy; sound judgment; and in a manner which assures the protection and enhancement of the state's wetland resources. The Department, in its application of the policy and implementation procedures to specific situations, should strive to maximize the long-term interests of the fish and wildlife resources involved and to make recommendations that are both timely and appropriate to this end. The Department may depart from the letter of the policy only when such departure will better serve the long-term interests of wetland resource protection. The Department shall report such departure and the rationale for such departure to the Commission at its next scheduled meeting.

Scope of Policy

The Commission has found the policy and implementation procedures to be nonregulatory in nature. Their intended application is in those circumstances where the Department's role is advisory, as in, but not limited to, the application of the California Environmental Quality Act, National Environmental Protection Act, California Coastal Act, Clean Water Act, and other applicable state and federal laws and regulations.

The Commission does not wish the policy and the implementing procedures to be applied to projects or actions previously reviewed and commented upon by the Department and for which relevant permits have been issued. However, when further Department review is authorized or required due to project modification or additional public actions, the Department should consider any prior recommendations or agreements when applying the Commission's wetland policy.

Definition

The Commission concurs with the Department's recommendation to use the U.S. Fish and Wildlife Service's (USFWS) definition as the basis for wetland identification. When all three wetland indicators (i.e., hydric soils, wetland vegetation, and hydrology) are present, the presumption of wetland existence shall be conclusive. Where less than three indicators are present, policy application shall be supported by the demonstrable use of wetland areas by wetland associated fish or wildlife resources, related biological activity, and wetland habitat values.

The USFWS wetland identification system should be applied by professionals trained in its methodology. The accuracy of existing wetland inventory mapping should not necessarily be assumed. The Commission supports the Department's current practice of on-site inspections of projects which would impact wetlands and strongly encourages the Department to conduct on-site inspections of such projects and particularly whenever requested to do so by project proponents or concerned public agencies.

Landowner Cooperatio

Both the Commission and the Department recognize that the response of landowners, private and public, is an important factor in the success or failure of any State policy to create, protect, restore or enhance wetland habitat. The Commission acknowledges that landowners are not normally obligated to either create or enhance wetlands on their property except as may be otherwise required by law, thus, many wetlands and wetland values exist primarily because of voluntary actions taken by landowners. Therefore, the Commission urges the Department to proceed with the development and implementation of a comprehensive program of incentives that will encourage and facilitate landowner cooperation with the state in achieving its wetland objectives, including the voluntary retention of existing wetlands and the creation of new wetlands and enhanced habitat values, and the elimination of disincentives to accomplishing these objectives. This program should be viewed as an important component of the Commission's wetland policy, and a desirable complement to programs based directly or indirectly on regulatory authority.

Working Group Issues

The Commission has determined that the appointment of a temporary working group, as provided for in its wetlands policy adopted on January 9, 1987, is impractical. However, because the implementation of the wetland policy is important, the Commission requests the Department to seek ongoing input on relevant wetland issues from groups interested in providing it. The Department should keep the Commission informed of the results of this process.