STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

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BILL JONES
SECRETARY OF STATE

2002 OAL Determination No. 1

February 8, 2002

Requested by: **Chemical Industry Council**

Concerning: **Office of Environmental Health Hazard Assessment – Procedure for Prioritizing Candidate Chemicals for Consideration Under Proposition 65 by the "State's Qualified Experts"**

Determination issued pursuant to Government Code Section 11340.5; California Code of Regulations, Title 1, Section 121 et seq.

ISSUE

Does the Office of Environmental Health Hazard Assessment's "Procedure for Prioritizing Candidate Chemicals for Consideration Under Proposition 65 by the 'State's Qualified Experts'" constitute a regulation which is required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act?[1]

CONCLUSION

The Office of Environmental Health Hazard Assessment's "Procedure for Prioritizing Candidate Chemicals for Consideration Under Proposition 65 by the 'State's Qualified Experts'" does not constitute a regulation required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act. This document is an integral part and an essential step of the Governor and his designates carrying out the Governor's Proposition 65 duties under Health and Safety Code section 25249.8, and therefore, falls within the scope of the express statutory exemption from the Administrative Procedure Act contained in Health and Safety Code section 25249.8, subdivision (e).

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1. The request for determination was filed by the Chemical Industry Council which is represented in this matter by attorneys Gene Livingston and S. Craig Hunter, Livingston & Mattesich Law Corporation, 1201 K Street, Suite 1100, Sacramento, CA 95814. The Office of Environmental Health Hazard Assessment's response was filed by Colleen Heck, Chief Counsel, Office of Environmental Health Hazard Assessment, 1001 I Street, Sacramento, CA 95814. The request was given a file number of 00-004. This determination may be cited as "2002 OAL Determination No. 1."

BACKGROUND

General Background Regarding Proposition 65: Proposition 65, also known as the "Safe Drinking Water and Toxic Enforcement Act of 1986," was a ballot initiative adopted by California voters in the November 1986 General Election. This initiative was designed to protect people and their water supplies from harmful chemicals. Proposition 65 added chapter 6.6 to division 20 of the Health and Safety Code, encompassing sections 25249.5 through 25249.13 of the Health and Safety Code (along with making a few other statutory additions and amendments).

Health and Safety Code section 25249.8, as set forth in Proposition 65,[2] generally requires that the Governor (among other duties) publish at least annually a list of chemicals known to the state to cause cancer or reproductive toxicity. (Health and Safety Code section 25249.8 will be quoted in full and discussed in detail in the "ANALYSIS" section below.) For the listed chemicals, Proposition 65 establishes two primary prohibitions or requirements. First, Health and Safety Code section 25249.5 generally prohibits contaminating drinking water, stating: "No person in the course of doing business shall knowingly discharge or release a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water, notwithstanding any other provision or authorization of law [with some referenced exemptions]." Second, Health and Safety Code section 25249.6 generally provides for a warning requirement, stating: "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual [with some referenced exemptions]."

Proposition 65 further provides for its implementation in Health and Safety Code section 25249.12, which states: "The Governor shall designate a lead agency and such other agencies as may be required to implement the provisions of this chapter including this section. Each agency so designated may adopt and modify regulations, standards, and permits as necessary to conform with and implement the provisions of this chapter and to further its purposes." Pursuant to this provision, the Governor first designated California's Health and Welfare Agency and then, commencing in 1991 (and currently), the Office of Environmental Health Hazard Assessment ("OEHHA") as the "lead agency" for Proposition 65 implementation. The lead agency has adopted a body of regulations to implement Proposition 65 which is set forth in the California Code of Regulations ("CCR"), title 22, sections 12000 through 12903 and section 14000.

In addition, two scientific committees have been created in OEHHA to advise and assist the Governor and the Director of OEHHA in the implementation of Health and Safety Code section 25249.8 (including the listing of chemicals known to the state to cause cancer or reproductive toxicity). The members of the first committee, the Carcinogen Identification Committee ("Carcinogen Committee"), have been designated as the "state's qualified experts" for rendering an opinion on whether specific chemicals have been clearly shown to cause cancer. The

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2. Throughout the remainder of this determination, when we refer to "Proposition 65," we are generally referring to chapter 6.6 of division 20 of the Health and Safety Code (Health and Safety Code sections 25249.5 through 25249.13), including any amendments to those sections subsequent to the original adoption of the Safe Drinking Water and Toxic Enforcement Act of 1986.

members of the second committee, the Developmental and Reproductive Toxicant (DART) Identification Committee ("DART Committee"), have been designated as the "state's qualified experts" for rendering an opinion on whether specific chemicals have been clearly shown to cause reproductive toxicity. These committees are composed of experts from areas of specialization such as epidemiology, oncology, developmental toxicology, reproductive toxicology, teratology, pathology, medicine, public health, biostatistics, biology, toxicology, and related fields. The members of these two committees, who are appointed by the Governor and serve at the pleasure of the Governor, are considered to be members of OEHHA's "Science Advisory Board" (or "SAB") for Proposition 65, and the two committees are sometimes also referred to collectively as the "SAB Identification Committees." CCR, title 22, sections 12301 through 12305 establish these committees and set forth their duties.

Background Regarding this Request and the Document at Issue: The Chemical Industry Council has requested a determination from the Office of Administrative Law ("OAL") pursuant to Government Code section 11340.5 and CCR, title 1, section 121 et seq. regarding a document issued by OEHHA entitled "Procedure for Prioritizing Candidate Chemicals for Consideration Under Proposition 65 by the 'State's Qualified Experts'" (the "Prioritization Procedure"; dated May 1997).

The Prioritization Procedure pertains to the requirement of Health and Safety Code section 25249.8 that the Governor publish at least annually a list of those chemicals known to the state to cause cancer or reproductive toxicity.[3] One of the mechanisms by which a chemical is placed on the Governor's list is "if in the opinion of the state's qualified experts [the chemical] has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity . . . ." (Health & Saf. Code, sec. 25249.8, subd. (b).) The state's qualified experts – the Carcinogen Committee and the DART Committee – evaluate chemicals for possible inclusion on the Governor's list and render the required opinions as to whether particular chemicals cause cancer or reproductive toxicity. Related to these scientific assessments by the SAB Identification Committees, OEHHA has developed the Prioritization Procedure to delineate OEHHA's role in the preliminary evaluation of chemicals for the two committees. OEHHA has described in general terms the purpose and content of the Prioritization Procedure as follows:

> "The purpose of this document is to describe the procedure used by OEHHA to identify, prioritize, and select candidate chemicals for evaluation by the SAB Identification Committees. The procedure is designed to ensure that the efforts of the SAB are focused on chemicals which pose the greatest hazard to Californians, and that these chemicals are selected in an open, objective and predictable manner. This procedure ensures that chemicals posing the highest level of carcinogenic, reproductive or developmental hazard concern are addressed first and forthwith by the SAB. At appropriate points in the prioritization process, opportunity is provided for input and review by state agencies and departments, individual SAB Identification Committee members, the Committees as a whole if they so choose, the scientific community, and the public. This process has been

3. The list of chemicals known to the state to cause cancer or reproductive toxicity is published in CCR, title 22, section 12000.

the subject of extensive review and comment by the public, external scientists, and by the SAB Identification Committees. This refined prioritization process should ensure that chemicals posing the highest degree of hazard are identified promptly and brought to the SAB for their evaluation and finding within an estimated time frame of 9 to 15 months." (Prioritization Procedure, page 1.)

Some of the successive prioritization steps set forth in the Prioritization Procedure can be described briefly and generally as follows: OEHHA maintains a list of potential candidate chemicals ("Category I" chemicals). Chemicals are randomly selected from Category I (with published notice in the California Regulatory Notice Register of the random selection). For the randomly selected chemicals, OEHHA reviews and evaluates data, develops draft data summaries, and assigns draft priorities. OEHHA then releases the draft data summaries and draft priorities for scientific and public comment (with a 60-day comment period), holds a public workshop, analyzes comments, and assigns final priorities. Chemicals identified as posing a high hazard concern are placed on the "Candidate List." OEHHA then selects chemicals from the Candidate List for the preparation of draft hazard identification documents and for consideration by the appropriate SAB Identification Committee. For the selected chemicals, OEHHA publishes a notice in the California Regulatory Notice Register and solicits scientific data, studies and analyses. The SAB Identification Committees, as the state's qualified experts, thereafter consider the selected chemicals for inclusion on the Governor's list of chemicals known to the state to cause cancer or reproductive toxicity.

OEHHA did not formally adopt the Prioritization Procedure as a regulation pursuant to the rulemaking provisions of California's Administrative Procedure Act ("APA"; ch. 3.5 (commencing with sec. 11340), pt. 1, div. 3, tit. 2, Gov. Code).[4] The Chemical Industry Council generally asserts in its request for determination that OEHHA's Prioritization Procedure is a regulation which is required to be adopted pursuant to the APA. OEHHA generally asserts in its response to the request for determination that the Prioritization Procedure is not a regulation which is required to be adopted under the APA. It is this issue which OAL addresses below.

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4. In 1996, as part of the development of the Prioritization Procedure, OEHHA published in the California Regulatory Notice Register a "Notice of General Public Interest" regarding the public availability of the draft Prioritization Procedure and provided for a 60-day public comment period regarding the draft. (California Regulatory Notice Register 96, No. 40-Z, October 4, 1996, p. 1865.) During the public comment period, OEHHA also held a public workshop to discuss and receive comments on the draft. OEHHA received a number of public comments and summarized and responded to these comments collectively by general topic area. Although OEHHA did provide the public notice, opportunity for public comments, and summary and response to public comments discussed above, the agency did not formally adopt (and apparently did not intend to formally adopt) the Prioritization Procedure in accordance with all of the specific requirements of the APA. For example, a formal APA notice was not published in accordance with Government Code sections 11346.4 and 11346.5, a formal "final statement of reasons" was not prepared in accordance with Government Code section 11346.9, subdivision (a), and a complete rulemaking file was not maintained in accordance with Government Code section 11347.3 and submitted to OAL for review in accordance with Government Code sections and 11349 through 11349.3.

ANALYSIS

Government Code section 11340.5, subdivision (a), generally prohibits state agencies from issuing rules without complying with the APA. It states as follows:

> "(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 [Government Code] Section 11342.600, 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 [the APA]."

For purposes of the APA, Government Code section 11342.600 defines "regulation" as follows:

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

Generally, all regulations issued by state agencies in the executive branch of government are required to be adopted pursuant to the APA, *unless expressly exempted by statute.* (Gov. Code, sec. 11346; *United Systems of Arkansas, Inc. v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411 ("*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.*" (Emphasis added.)) A number of statutes have been enacted, both within the APA itself and outside the APA, which set forth express exemptions from APA requirements. For example, Government Code section 11340.9 expressly sets forth within the APA a number of types of regulations and other circumstances where the APA does not apply. Similarly, statutes outside the APA may contain express exemptions from the APA rulemaking requirements, often exemptions which apply to particular regulations of a particular state agency.

In order to determine whether the APA applies to OEHHA's Prioritization Procedure, it is necessary to examine the specific language of Health and Safety Code section 25249.8, the statute pertaining to the Governor publishing the list of chemicals known to the state to cause cancer or reproductive toxicity. Health and Safety Code section 25249.8 reads in full as follows:

> "(a) On or before March 1, 1987, the Governor shall cause to be published a list of those chemicals known to the state to cause cancer or reproductive toxicity within the meaning of [Proposition 65], and he shall cause such list to be revised and republished in light of additional knowledge at least once per year thereafter. Such list shall include at a minimum those substances identified by reference in Labor Code Section 6382(b)(1) and those substances identified additionally by reference in Labor Code Section 6382(d).
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> "(b) A chemical is known to the state to cause cancer or reproductive toxicity within the meaning of [Proposition 65] if in the opinion of the state's qualified experts it has been

clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity, or if a body considered to be authoritative by such experts has formally identified it as causing cancer or reproductive toxicity, or if an agency of the state or federal government has formally required it to be labeled or identified as causing cancer or reproductive toxicity.

"(c) On or before January 1, 1989, and at least once per year thereafter, the Governor shall cause to be published a separate list of those chemicals that at the time of publication are required by state or federal law to have been tested for potential to cause cancer or reproductive toxicity but that the state's qualified experts have not found to have been adequately tested as required.

"(d) The Governor shall identify and consult with the state's qualified experts as necessary to carry out his duties under this section.

"(e) In carrying out the duties of the Governor under this section, the Governor and his designates shall not be considered to be adopting or amending a regulation within the meaning of the Administrative Procedure Act as defined in Government Code section 11370. [Emphasis added.]"[5]

In connection with our analysis of the applicability of the APA to OEHHA's Prioritization Procedure, we must focus specifically upon Health and Safety Code section 25249.8, subdivision (e), as quoted immediately above. Health and Safety Code section 25249.8, subdivision (e), establishes an *express statutory exemption* from APA requirements by providing in clear, unequivocal language that, to the extent that the Governor and his designates are carrying out the various duties of the Governor under section 25249.8, they "shall not be considered to be adopting or amending a regulation within the meaning of the Administrative Procedure Act . . . ."

In examining the language of the APA exemption in Health and Safety Code section 25249.8, subdivision (e), it is significant that the scope of the exemption includes not only the actions of the Governor but also the actions of the Governor's "designates" in relation to carrying out the various duties of the Governor under Health and Safety Code section 25249.8. The Governor's "designates" in this context include OEHHA (the designated "lead agency" for Proposition 65 implementation), and the Carcinogen Committee and the DART Committee in OEHHA. We note that Health and Safety Code section 25249.8, subdivision (d), further requires that "[t]he Governor shall identify and consult with the state's qualified experts as necessary to carry out his duties under this section." The opinions and findings of the "qualified experts" are also referenced in relation to the particular duties of the Governor in subdivision (b) of Health and Safety Code section 25249.8.

We read Health and Safety Code section 25249.8 as providing that the Governor and his designates -- including OEHHA and the Carcinogen Committee and DART Committee in

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5. Government Code section 11370 reads as follows: "Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act."

OEHHA -- shall be responsible for carrying out the duties of the Governor under that section (including the periodic publication of the list of chemicals known to the state to cause cancer or reproductive toxicity). Moreover, to the extent that the Governor and his designates are carrying out those duties, they and the rules and procedures that they establish in relation to carrying out those specific duties shall be exempt from the APA. The Prioritization Procedure sets forth the procedures used by OEHHA to identify, prioritize, and select candidate chemicals for further evaluation by the SAB Identification Committees, in direct connection with the process of determining the specific chemicals to be included on the Governor's list under Health and Safety Code section 25249.8. The Chemical Industry Council itself has characterized the Prioritization Procedure as follows: "The [Prioritization Procedure] is undertaken as *OEHHA's initial steps to listing a chemical on the Proposition 65 chemical list.*"[6] (Emphasis added.) We think that OEHHA's development and use of the Prioritization Procedure is an integral part and an essential step of the Governor and his designates carrying out the Governor's duty of periodically publishing a list of chemicals known to the state to cause cancer or reproductive toxicity. Thus, we think that the APA exemption in Health and Safety Code section 25249.8, subdivision (e), applies to the Prioritization Procedure.

In the case of *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744, the California Court of Appeal considered an issue of the scope of an APA exemption. This case involved the APA exemption for a regulation which "establishes or fixes rates, prices or tariffs."[7] The case arose when the Department of Industrial Relations established wage rates for field surveyors throughout northern California under the California prevailing wage laws (Lab. Code, sec. 1720 et seq.). The director of the Department of Industrial Relations initially determined that field surveyor classifications were covered under the prevailing wage laws (the "coverage determination"). The director of the Department of Industrial Relations subsequently determined the wage rates to be paid to the surveyors (the "wage rate determination"). The Court of Appeal stated that the director's wage rate determination was exempt under the "rates, prices or tariffs" exemption. At issue on appeal was whether the director's initial coverage determination was also within the scope of this APA exemption. In its decision, the California Court of Appeal stated:

> "[The Department of Industrial Relations] argues that the coverage determination should be exempted from the APA requirements because it is part of the rate setting process. Labor Code section 1773 provides the method to be used by the director in determining general prevailing rates. In this determination the director shall fix the rate for each craft, classification or type of work. *Thus, the determination of the classification or type of work covered is an essential step in the wage determination process and a rate cannot be fixed without such a determination. As the wage determination process is exempted from the prior hearing requirements of the APA, coverage determination, as an integral part of that process, is also exempted.* There is no requirement that the director grant an

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6. The Chemical Industry Council's request for determination, page 8.

7. The "rates, prices or tariffs" APA exemption was contained in Government Code section 11380 at the time of the actions considered in the *Winzler & Kelly v. Department of Industrial Relations* decision. This exemption now appears in Government Code section 11340.9, subdivision (g).

> [APA] hearing prior to the determination of the type of work covered. [Emphasis added.]" (121 Cal.App.3d at 128, 174 Cal.Rptr. at 748.)

Just as the coverage determination was an integral part and an essential step of the wage rate determination process and therefore fell within the scope of the "rates, prices or tariffs" APA exemption in the *Winzler & Kelly v. Department of Industrial Relations* case, we think that in the matter currently at issue the OEHHA Prioritization Procedure is an integral part and an essential step of the Governor and his designates carrying out the Governor's duties under Health and Safety Code section 25249.8, and therefore the Prioritization Procedure falls within the scope of the APA exemption in Health and Safety Code section 25249.8, subdivision (e).

In its request for determination, the Chemical Industry Council characterizes the APA exemption in Health and Safety Code section 25249.8, subdivision (e), as a "very limited" exemption and states the following: "That single special express statutory exemption only exists for, and applies to, the actual listing by the Governor of chemicals on the Proposition 65 list, pursuant to Health and Safety Code section 25249.8."[8] This reading of the APA exemption in Health and Safety Code section 25249.8, subdivision (e) – essentially limiting the scope of the exemption to only the actual ultimate listing of chemicals itself – is unduly narrow. As we indicated earlier in our analysis of this APA exemption, Health and Safety Code section 25249.8, subdivision (e), expressly exempts from the APA not only the actions of the Governor but also the actions of the Governor's designates in carrying out the duties of the Governor under section 25249.8. Furthermore, Health and Safety Code section 25249.8, subdivision (d), specifically requires that "[t]he Governor shall identify and consult with the state's qualified experts as necessary to carry out his duties under this section," and subdivision (b) of section 25249.8 also refers to the opinions or findings of the "state's qualified experts." Thus, we think that the exemption provided for in Health and Safety Code section 25249.8, subdivision (e), includes within its scope the spectrum of activities, rules, and procedures involved in carrying out the Governor's duties under section 25249.8, including the activities, rules, and procedures of OEHHA, the Carcinogen Committee, and the DART Committee in fulfilling the Governor's duty of periodically publishing a list of chemicals known to the state to cause cancer or reproductive toxicity. OEHHA's Prioritization Procedure is within this scope of the APA exemption, being an integral part and an essential step of the Governor and his designates carrying out the Governor's duties under Health and Safety Code section 25249.8.

The Chemical Industry Council, in setting forth its position that no special express statutory APA exemption (including the exemption in Health and Safety Code section 25249.8, subdivision (e)) applies to the Prioritization Procedure, focuses upon Health and Safety Code section 25249.12, the statute which provides general rulemaking authority for the adoption of Proposition 65 regulations. Health and Safety Code section 25249.12 reads: "The Governor shall designate a lead agency and such other agencies as may be required to implement the provisions of [Proposition 65] including this section. Each agency so designated may adopt and modify regulations, standards, and permits as necessary to conform with and implement the provisions of [Proposition 65] and to further its purposes." The Chemical Industry Council states:

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8. The Chemical Industry Council's request for determination, page 15.

> "No special express statutory exemption appears in [Proposition 65] for any section other than Health and Safety Code section 25249.8. Specifically, Health and Safety Code section 25249.12, the statute that empowers OEHHA to adopt regulations to implement [Proposition 65], and presumably the statute that OEHHA used to adopt the [Prioritization Procedure], has no special express exemption. Since special exemptions from compliance must be expressed in the statute, and may not be implied [citations omitted], OEHHA's implementation of [Proposition 65] and, therefore, its adoption of the [Prioritization Procedure] must be done in full compliance with the APA."[9]

Health and Safety Code section 25249.12 provides the general rulemaking authority for OEHHA to adopt regulations implementing Proposition 65, and generally those regulations (in the absence of an applicable APA exemption) must be adopted in compliance with the APA. However, as indicated earlier, we think that, in establishing the Prioritization Procedure, OEHHA was implementing Health and Safety Code section 25249.8, and therefore, the Prioritization Procedure falls within the scope of the express statutory APA exemption set forth in Health and Safety Code section 25249.8, subdivision (e). The fact that Health and Safety Code section 25249.12, the general rulemaking authority statute relating to Proposition 65 regulations, does not contain within its own terms an express APA exemption is not meaningful since an applicable express APA exemption does exist in Health and Safety Code section 25249.8, the section that OEHHA was implementing in establishing the Prioritization Procedure.

The Chemical Industry Council, in focusing upon OEHHA's general Proposition 65 rulemaking authority as set forth in Health and Safety Code section 25249.12, further states:

> "The California Code of Regulations also supports the conclusion that no special express statutory exemption exists for OEHHA's adoption of the [Prioritization Procedure] (the authority cited for title 22, California Code of Regulations section 12000 {the actual Proposition 65 chemical list} is Health and Safety Code section 25249.8 . . . ; the authority cited for all other regulations is Health and Safety Code section 25249.12 . . .). Clearly, when adopting implementing regulations, OEHHA has recognized the need to comply with the APA. It must have done so also when adopting the [Prioritization Procedure]."[10]

OEHHA (and its predecessor Proposition 65 lead agency, the Health and Welfare Agency) have, in fact, periodically published a list of chemicals known to the state to cause cancer or reproductive toxicity in CCR, title 22, section 12000. Section 12000 properly cites as "authority" Health and Safety Code section 25249.8, since section 25249.8 (including the exemption in subdivision (e)) is being relied upon as the specific authority for the adoption and amendment of Section 12000.[11] This list of chemicals in CCR, title 22, section 12000, although

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9. The Chemical Industry Council's request for determination, page 16.

10. The Chemical Industry Council's request for determination, page 17.

11. Government Code section 11349, subdivision (b), defines "authority" for APA purposes to mean "the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation."

not subject to the APA because of the statutory APA exemption, is specifically required to be "published" pursuant to Health and Safety Code section 25249.8, and the publication of the list of chemicals in the CCR satisfies the publication requirement. OEHHA (and its predecessor Proposition 65 lead agency, the Health and Welfare Agency) have, in fact, also properly adopted a number of Proposition 65 regulations in compliance with the APA under the general Proposition 65 rulemaking authority of Health and Safety Code section 25249.12.[12] These regulations adopted under the APA are included in chapter 3, subdivision 1, part 2, division 2 of title 22 of the CCR and properly cite Health and Safety Code section 25249.12 as the rulemaking "authority" for the adoption of these regulations.

While OEHHA has appropriately recognized that as a general matter Proposition 65 regulations must be adopted pursuant to the APA (as reflected by the many Proposition 65 regulations citing Health and Safety Code section 25249.12 as authority), this recognition does not mean that *all* Proposition 65 rules and procedures, beyond the publication of the actual list of chemicals in CCR, title 22, section 12000, must necessarily be adopted pursuant to the APA. As stated earlier, we think that the exemption in Health and Safety Code section 25249.8, subdivision (e), includes within its scope not just the published list of chemicals set forth in CCR, title 22, section 12000, but also other rules and procedures (like OEHHA's Prioritization Procedure) which constitute an integral part and an essential step of the Governor and his designates carrying out the Governor's duties under Health and Safety Code section 25249.8. In summary, while we recognize that in general Proposition 65 regulations must be adopted pursuant to the APA and that those regulations appropriately will cite Health and Safety Code section 25249.12 as "authority," we also think that the express APA exemption in Health and Safety Code section 25249.8 applies to rules and procedures (such as the Prioritization Procedure) which are an integral part and an essential step of the Governor and his designates (including OEHHA) carrying out the Governor's duties under Health and Safety Code section 25249.8.

Finally, the Chemical Industry Council cites a number of court cases in support of its assertion that no special express statutory APA exemption (including Health and Safety Code 25249.8, subdivision (e)) applies to the Prioritization Procedure.[13] OAL has examined the cited court cases. These cases provide some support for the position that Proposition 65 regulations are generally (in the absence of an express statutory APA exemption) to be adopted in accordance with the APA -- a position with which OAL agrees. However, none of the cited court cases discuss the issue of the scope of the APA exemption in Health and Safety Code section 25249.8, subdivision (e), and none of these cases in any manner indicate that this exemption would be inapplicable to the Prioritization Procedure.

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12. Examples of Proposition 65 regulations which have been adopted under the APA (and which cite Health and Safety Code section 25249.12 as "authority") include (a) CCR, title 22, sections 12401, 12403, and 12405 which further define when there has been a "discharge" or "release" of a listed chemical under Health and Safety Code section 25249.5; (b) CCR, title 22, sections 12501, 12502, 12503, and 12504 which further define when there has been an "exposure" to a listed chemical under Health and Safety Code section 25249.6; and (c) CCR, title 22, section 12903 which relates to Proposition 65 "notices of violation" under Health and Safety Code section 25249.7.

13. The Chemical Industry Council's request for determination, pages 16 and 17.

For the reasons set forth above, OAL concludes that OEHHA's Prioritization Procedure does not constitute a regulation required to be adopted pursuant to the APA. The Prioritization Procedure is an integral part and an essential step of the Governor and his designates carrying out the Governor's duties under Health and Safety Code section 25249.8, and therefore the adoption of the Prioritization Procedure falls with the scope of the express statutory APA exemption contained in Health and Safety Code section 25249.8, subdivision (e).[14]

DATE: February 8, 2002

DAVID B. JUDSON
Deputy Director and Chief Counsel

DEBRA M. CORNEZ
Senior Counsel
Determinations Program Coordinator

Bradley J. Norris

BRADLEY J. NORRIS
Counsel

Regulatory Determinations Program
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, California 95814-4339
(916) 323-6225, CALNET 8-473-6225
Facsimile No. (916) 323-6826
Electronic Mail: staff@oal.ca.gov

14. In addition to the issue of whether the APA exemption in Health and Safety Code section 25249.8, subdivision (e), applies to the Prioritization Procedure, the Chemical Industry Council (in its request for determination) and OEHHA (in its response to the request for determination) have presented their positions regarding the following two additional issues: (1) whether the Prioritization Procedure is, in fact, a "regulation" within the technical meaning of Government Code section 11342.600, and (2) whether the Prioritization Procedure is exempt from the APA under the "internal management" APA exemption set forth in Government Code section 11340.9, subdivision (d). As discussed in the "ANALYSIS" section of this determination, OAL concludes that OEHHA, in adopting the Prioritization Procedure, was "not . . . considered to be adopting or amending a regulation within the meaning of the Administrative Procedure Act as defined in Government Code Section 11370" pursuant to the APA exemption of Health and Safety Code section 25249.8, subdivision (e). This conclusion fully responds to the question of the applicability of the APA to the Prioritization Procedure. Therefore, we think that it is unnecessary for OAL to address the two additional issues mentioned above.