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BILL JONES
SECRETARY OF STATE

# STATE OF CALIFORNIA

# OFFICE OF ADMINISTRATIVE LAW

## 2000 OAL Determination No. 9

**May 18, 2000**

**Requested by:** KATHLEEN KENNY

**Concerning:** CALIFORNIA COASTAL COMMISSION – **Policies Related to Development Projects as Defined in Public Resources Code Section 30624**

**Determination issued pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

## ISSUE

Do certain requirements of applicants for coastal development permits imposed by the California Coastal Commission constitute "regulations" as defined in Government Code section 11342, subdivision (g), which are required to be adopted pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with section 11340), Division 3, Title 2, Government Code; hereafter, "APA")?[1]

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1. This request for determination was filed by Kathleen Kenny, 19550 Cave Way, Topanga, CA 90290, (310) 455-2868 and arises from an application for a coastal development permit involving lands located in the Santa Monica Mountains and within the coastal zone subject to the jurisdiction of the California Coastal Commission. The California Coastal Commission's response was filed by Peter Douglas, Executive Director, 45 Fremont Street, Suite 2000, San Francisco, CA 94105-2219, (415) 904-5200. This request was given a file number of 99-011. This determination may be cited as "**2000 OAL Determination No. 9.**"

## CONCLUSION

The Commission's policies of requiring applicants for coastal development permits to submit geology and soils reports and to consent to site inspections subject to 24-hour notice constitute "regulations" as defined by the APA and are required to be adopted and codified pursuant to the rulemaking procedures of the APA. The remaining rules or requirements that are the subject of this regulatory determination do not constitute "regulations," and therefore are not subject to the APA rulemaking procedures.

## ANALYSIS

A determination of whether the Commission's policies or rules constitute "regulations" subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Commission, (2) whether the challenged policies or rules contain "regulations" within the meaning of Government Code section 11342, and (3) whether those challenged policies or rules fall within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Government Code sections 11342, subdivision (a); 11346.) In this connection, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Government Code section 11000.) The Commission is an executive branch state agency that has not been expressly exempted.

Moreover, Public Resources Code section 30333 makes the APA expressly applicable to the Commission. It states the following:

> "Except as provided in Section 18930 of the Health and Safety Code, the commission may adopt or amend, by vote of a majority of the appointed membership thereof, rules and regulations to carry out the purposes and provisions of this division, and to govern procedures of the Commission.
>
> "Except as provided in Section 18930 of the Health and Safety Code and paragraph (3) of subdivision (a) of Section 30620, *these rules and*

*regulations shall be adopted in accordance with the provisions of [the APA]*. These rules and regulations shall be consistent with this division and other applicable law." [Emphasis added.][2]

Thus, the APA rulemaking requirements specifically apply to the Commission. (See *Winzler & Kelly v. Department of Industrial Relations*, 121 Cal.App.3d at 126-128, 175 Cal.Rptr. at 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in the legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).)

(2) Government Code section 11340.5, subdivision (a), 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 subdivision (g) 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 [the APA]. [Emphasis added.]"

Government Code section 11342, subdivision (g), defines "regulation" as follows:

> ". . . *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 . . . . [Emphasis added.]"

Government Code section 11340.5, subdivision (b), authorizes OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements. It reads as follows:

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2. Section 30620, subdivision (a)(3), permits the Commission to adopt interpretive guidelines to assist local governments. The request for determination included a challenge to one of these guidelines. OAL, however, did not accept this part of the request based on the existence of this APA exemption. See *California Coastal Commission v. OAL* (1989) 210 Cal.App.3d 758, 258 Cal.Rptr. 560.

"(b) If [OAL] 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 that 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 (g) of Section 11342."[3]

OAL's regulations define "determination" as follows:

"(a) 'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code Section 11342(g), which is invalid and unenforceable unless

(1) It has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) It has been exempted by statute from the requirements of the APA." (Title 1, CCR, section 121, subdivision (a).)

According to *Engelmann v. State Board of Education* (1991) Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274 -275, agencies need not adopt as regulations those rules contained in a "'statutory scheme which the Legislature has [already] established . . . .'" But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ."

Similarly, agency rules properly adopted *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon." For example, *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 891 held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation. Statutes may

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3. See also *California Coastal Com'n v. OAL* (1989) 210 Cal.App.3d 758, 763, 258 Cal.Rptr. 560, 563 (OAL is empowered "to issue advisory opinions as to whether or not a particular action or rule is a regulation.")

legally be amended only through the legislative process; duly adopted regulations—generally speaking—may legally be amended only through the APA rulemaking process.

In *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251[4] the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g).

Under this test, a rule is a "regulation" for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule was adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency's procedure.

If an uncodified rule satisfies both parts of the two-part test, it is a "regulation" subject to the APA. In applying the two-part test, we are mindful of the admonition of the *Grier* court:

> "[B]ecause the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]" (219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.)

For an agency policy to be a "standard of general application," 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. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).)

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4. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rprt.2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer.*

There are six policies or rules that are the subject of this regulatory determination. Each must be individually analyzed pursuant to the foregoing two-part test enunciated in *Grier v. Kizer.*

(A) Landscaping Plan [5]

In conjunction with her application for a coastal development permit, Ms. Kenny was required by the Commission to submit plans by a licensed landscape architect. Ms. Kenny states that this requirement is an unwritten regulation.

The Commission correctly notes that it has the authority to impose special conditions on a case-by-case basis. (Public Resources Code section 30607.) In addition, the Commission has adopted a regulation which authorizes it to include conditions within a permit. (Title 14, CCR, section 13156, subdivision (c).)

Unlike a general rule, the Commission's action was directed specifically at Ms. Kenny. The Commission notes in its response that it "clearly did not intend that the permit condition relating to the submission of a landscaping plan by Ms. Kenny would apply to anyone other than Ms. Kenny and her co-applicant."[6] For that reason, the requirement that she submit a landscaping plan does not constitute a "regulation" which is subject to the APA because it is not a rule or standard of general application.

(B) Certificates of approval from local agencies [7]

Ms. Kenny challenges the requirement that applicants for coastal development permits are required to submit certificates of approval from local health and fire departments. The Commission notes, however, that this requirement is found in its existing regulations. Title 14, CCR, section 13052 states in part that:

> "When development for which a permit is required pursuant to Public Resources Code, Section 30600 or 30601 also requires a permit from one or more cities or counties or other state or local governmental agencies, a permit application shall not be accepted for filing by the Executive Director unless all such governmental agencies have granted at a minimum their preliminary approvals for said development."

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5. This rule was referred to as "Rule C" by both Ms. Kenny and the Commission.
6. Response of Commission ("Response"), p. 5.
7. This rule was referred to as "Rule D" by both Ms. Kenny and the Commission.

Included within this regulation is "[a]pproval of general uses and intensity of use proposed for each part of the area covered by the application as permitted by the applicable local general plan . . . ." (Title 14, CCR, section 13052, subdivision (i).)

The Commission further notes that the Los Angeles County General Plan conditions approval of homes in the Santa Monica Mountains on demonstrating compliance with fire and plumbing codes. Consequently, the Commission's requirement that applicants submit evidence of compliance with these local codes appears to be a direct application of section 13052, a regulation which has already been duly adopted pursuant to the APA. Therefore, the requirement challenged by Ms. Kenny is not itself a "regulation" which must be adopted pursuant to the APA.

(C) Exemption from the Permit Streamlining Act [8]

Ms. Kenny objects to the practice by Commission staff of "hold[ing] up projects for years claiming they have to wait for other agency permits to be issued."[9] Based on a Commission memorandum, she claims its staff is required to go forward even if it has not received approval from other agencies. Ms. Kenny appears to be challenging the manner in which the Commission is applying existing law in her particular situation.

The Commission correctly observes that existing law does provide the basis for it to require submission of approvals from other agencies prior to processing an application for a coastal development permit. (See Title 14, CCR, section 13052.) The Commission also notes that existing regulations also give its Executive Director the authority to waive these requirements if certain conditions are met. (See Title 14, CCR, section 13053, subdivision (e).)[10] Therefore, at best, Ms. Kenny has raised an issue concerning whether the Commission's *existing* regulations are consistent with statutory law. OAL has no authority to address such issues in a regulatory determination issued pursuant to Government Code section 11340.5.

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8. This rule was referred to as "Rule F" by Ms. Kenny and the Commission.
9. Request for Determination, p. 3.
10. Response to Request for Determination, pp. 9 – 10.

(D) Payment of $200 to add or change a name on an application [11]

In response to the claim that there is a regulation requiring payment of $200 to add or change a name, the Commission notes that its fees are consistent with existing regulations. There is a basic application fee of $500 to cover the type of permit Ms. Kenny was seeking. (See Title 14, CCR, section 13055, subdivision (a)(2).) There does not appear to be any type of regulatory fee imposed by the Commission to add or change a name. The response by the Commission indicates that the issue of payment of $200 apparently arose in conjunction with the assessment of *a basic application fee* of $500. Ms. Kenny apparently paid $200, thus leaving a balance due of $300. According to the Commission, the $300 was subsequently paid on February 14, 1995. For these reasons, we find no evidence of the existence of a rule requiring an additional payment of $200 to add or change a name.

(E) Geology and soils reports [12]

Ms. Kenny challenges the Commission's policy of requiring submission of geology and soils reports as part of an application for a coastal development permit. Geology and soils reports are required for "any area of high geological risk."[13] One such area is the Santa Monica Mountains. The Commission notes that:

> "As a result of [its] *many years of experience with reviewing proposed development in the Santa Monica Mountains,* the Commission considers the area to be subject to high geological risk . . . ." [Emphasis added.][14]

According to the Commission, geology and soils reports are generally required of all applicants for development permits in the Santa Monica Mountains. We note that the Santa Monica Mountains extend along the Southern California Coast beginning roughly at Point Mugu and ending in the vicinity of Malibu. They extend as far east as Griffith Park in the City of Los Angeles and as far west as the limits of the City of Camarillo in Ventura County. (Public Resources Code section 33105.) They are described by the Legislature "as the last large undeveloped area contiguous to the shoreline within the greater Los Angeles

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11. This rule was referred to as "Rule H" by Ms. Kenny and the Commission.
12. This rule was referred to as "Rule A" by Ms. Kenny and the Commission.
13. Response, p. 3.
14. *Id.*

metropolitan region, comprised of Los Angeles and Ventura Counties . . . ." (Public Resources Code section 33001.) Thus, the Commission's policy applies to "all of the members of a class, kind, or order." (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See also *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571, 59 Cal.Rptr.2d 186, 194 (In order for the APA to be applicable to a rule, "the agency must intend its rule to apply generally, rather than in a specific case . . . . [A] rule applies generally so long as it declares how a certain class of cases will be decided.").)

Therefore, the Commission's policy requiring submission of geology and soils reports for all Santa Monica Mountains developments is a rule of general application. Were the Commission imposing the requirement for geology or soils reports on a case-by-case basis, the requirement would not be deemed a "regulation" under the APA.

The Commission indicates that it has adopted regulations that specify the information and approvals that must be submitted by an applicant for a coastal development permit. The Commission indicates that the geology and soils reports are required pursuant to the following regulations:

> Title 14, CCR, section 13053.5, subdivision (a), which requires an applicant to submit "[a]n adequate description . . . of the proposed development project site and vicinity sufficient to determine whether the project complies with all relevant policies of the Coastal Act . . . ."
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> Title 14, CCR, section 13053.5, subdivision (e), which gives the Executive Director and the Commission discretion to require "[a]ny additional information deemed to be required . . . or for development proposed for specific geographic areas . . . ."

Nothing in any of the above authorities, however, establishes a specific requirement that geology and soils reports must be submitted to the Commission with an application for a coastal development permit. Section 13053.5, subdivision (a), requires "an *adequate description* . . . of the proposed development project site." Subdivision (e) thereof authorizes the Commission to require "additional information."

The two challenged rules, which are not recited in any of the Commission's regulations, "implement, interpret or make specific" the above two regulations. One is that geology and soils reports are necessary when the application is for development that is "on a bluff face, bluff top, or in any area of high geological risk."[15] The second is that "the Commission considers [the Santa Monica Mountains] to be subject to high geological risk due to its common geological hazards such as landslides, erosion and flooding."[16] Consequently, development in this area cannot be approved without the submission of a geology and soils report.

The Commission indicates that the policy requiring submission of geology and soils reports implements and makes specific its current regulations. It states in its response the following:

> "Taken together, these regulations provide that applicants must submit a detailed description of their proposed development, including an analysis of existing site conditions. In *specific* locations and for *specific types* of development, the Commission or its Executive Director *may supplement* that general requirement with the directive that additional analyses must be submitted."[17] [Emphasis added.]

As previously discussed, the Commission indicates that the requirement for the geology and soils report is not case-specific, but rather "requires that applicants for development in [the Santa Monica Mountains] submit a geology and soils report."[18]

The Commission further notes that these requirements are contained in its *application form.*[19] In this respect, Government Code section 11342, subdivision (g), provides in part as follows:

> "'Regulation' does not mean or include . . . any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted

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15. *Id.*
16. *Id.*
17. *Id.*
18 *Id.* at 4.
19. *Id.* at 3.

pursuant to this part when one is needed to implement the law under which the form is issued."

Thus, a form is not itself a regulation requiring APA compliance unless it *adds something to existing legal requirements*, in which case, under Government Code section 11342, subdivision (g), a formal regulation is "needed to implement the law under which the form is issued."

In this case, the Commission's form is being used to implement its existing regulations by imposing the *general* requirement concerning geology and soils reports. Thus, this particular element of the form is a "regulation" which is subject to the APA. (See *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 736 – 737, 188 Cal.Rptr. 130, 135 – 136 (use of standardized score sheet "to achieve a classification formerly determined on a subjective basis" was subject to the APA).)

The Commission maintains that "requirements concerning geology and soils reports are not underground regulations because they are authorized by both the Coastal Act and Permit Streamlining Act, as well as the Commission's regulations that implement both of these laws."[20]

We are cognizant of the policies adopted by the Legislature in the 1976 Coastal Act and by its precursor, the Coastal Zone Conservation Act, approved by the people in Proposition 20 in 1972. Moreover, we also recognize the Commission's *authority* to impose reasonable terms and conditions in connection with the issuance of coastal development permits to ensure the development will be in accordance with the Coastal Act (Public Resources Code Section 30607), including the authority to require submission of geology and soil reports. Furthermore, we do not question that such policies are undoubtedly *consistent* with the Commission's enabling legislation and the Permit Streamlining Act. However, whether the Commission has the authority for its actions is not a factor in determining whether the Commission has issued, utilized or enforced a rule, guideline or policy which has not been adopted pursuant to the APA in order to implement, interpret or make specific the Coastal Act or existing regulations. (See Government Code sections 11340.5, subdivision (a); 11342, subdivision (g) and also *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204, 149 Cal.Rptr. 1, 4 ("rules that interpret and implement other rules" are subject to the APA).)

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20. *Id.* at 4.

Case law distinguishes the concept of an agency's authority from the issue of whether this authority has been exercised in compliance with the APA. (*United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411 ("Section 12102 only authorizes DGS to establish procedures; it does not speak to whether such procedures are subject to the APA."); *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 250.)

For these reasons, we conclude that the Commission's policy of requiring geology and soils reports by permit applicants for coastal development in the Santa Monica Mountains is a "regulation" and is subject to the APA unless expressly exempted by statute.

(F) Consent to noticed on-site inspection and recordation of deed conditions on owner's property deed [21]

Ms. Kenny challenges the rule which "requires numerous deed recordings -- to include recordings waiving one's [right] to a search warrant."[22] The Commission explains this practice as follows:

> "[T]he Commission does [include] as a condition of approval of permits a standard condition concerning noticed staff inspections during project construction. . . .
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> "When the Commission approves an application for a coastal development permit, it includes various 'standard' conditions as part of its approval. . . . One of those 'standard conditions' requires that 'Commission staff shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.'
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> ". . . The Commission has included standard conditions in its approval of applications for coastal development permits since its inception."[23]

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21. This rule was referred to as "Rule E" by Ms. Kenny and the Commission.
22. Request, p. 3.
23. *Id.* at 7.

The Commission maintains that this "standard condition at issue is not an underground regulation because the *Commission adopts it in individual permits as part of its quasi-judicial action on coastal development permits . . . .*" [Emphasis added.][24]

If the condition were imposed on a strictly case-by-case basis, this would be the case. The Commission, however, has acknowledged that the condition is a "*standard*" one and is imposed "[w]hen [it] approves an application for a coastal development permit." This suggests that the condition is a rule or standard of general application.

In this respect, language in *Tidewater Marine Western, Inc. v. Bradshaw* is instructive. The California Supreme Court noted that in order for the APA to be applicable to a rule, "the agency *must intend* its rule to apply generally, rather than to a specific case." (14 Cal.4th at 571, 59 Cal.Rptr.2d at 194. [Emphasis added].) The Commission's response indicates that it intends that the noticed inspection condition be applied *generally to every applicant seeking a coastal development permit.*

The Commission's action in imposing general conditions is not adjudicatory, but *quasi-legislative*. This point was made by the California Supreme Court in *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 188 Cal.Rptr. 104. There, the Court held that:

> "The action under consideration – adoption of guidelines interpreting the Coastal Act's access provisions – *unquestionably falls within the category of quasi-legislative agency action, as opposed to quasi-judicial or adjudicatory proceedings*. [Citations.] The guidelines are the formulation of a general policy intended to govern future permit decisions, rather than the application of rules to the peculiar facts of an individual case." (33 Cal.3d at 168 – 69, 188 Cal.Rptr. at 110 – 11 [Emphasis added].)

Moreover, the guidelines under attack in *Pacific Legal Foundation* were imposed *as a condition to receiving a permit for development*. (33 Cal.3d at 164, 188 Cal.Rptr. at 107.)[25] In this regard, the author of *California Public Agency*

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24. *Id.*
25. The Commission's interpretive guidelines were subsequently held not to be subject to the APA because of *an express statutory exemption*. (See *California Coastal Commission v. Office of Administrative Law* (1989) 210 Cal.App.3d 758, 258 Cal.Rptr. 560.) The

*Practice* noted in the following passage that general permit conditions imposed by the Commission were quasi-legislative, rather than quasi-adjudicatory.

> "A quasi-legislative action involves the formulation or adoption of a broad, generally applicable policy or rule of conduct that is based on general public policy and is intended to govern future decisions. *For example, a policy that a 25-foot public access strip will be required as a condition to granting permits for beach-front property development is a quasi-legislative action.*" (Ogden, Gregory L., 1 *California Public Agency Practice* (1996) § 20.06[2][a] at 20-19, citing *Pacific Legal Foundation v. California Coastal Commission* [Footnotes omitted][Emphasis added].)

Even if standard conditions were adopted in an adjudicatory process, they could nonetheless be found to be general rules that implement, interpret, and make specific the Commission's enabling legislation and existing regulations. Government Code section 11340.5 contains no exemption for "quasi-judicial" enactments. Moreover, "rules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA." (*Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 4.)

The Commission notes that Title 14, CCR, section 13156, subdivision (d), "provides that permits shall include '[s]uch standard provisions as shall have been approved by resolution of the Commission . . . .'"[26] This regulation, however, does not specify *which* standard provisions or conditions may be imposed. By imposing the general requirement that one such standard condition is consent to a noticed inspection, the Commission has "implemented, interpreted, or made specific" section 13156, subdivision (d). This standard condition is therefore a "regulation" as that term is defined in Government Code section 11342, subdivision (g).

The Commission also observes that its "practice of approving permits subject to conditions is *authorized* by § 13156(d)."[27] As discussed above, the fact that the Commission may have the authority to adopt a particular rule or policy does not mean that the Commission may adopt the rule without complying with the APA.

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Commission has not maintained in response to Ms. Kenny's challenge that this statutory exemption applies.

26. Response to Request for Determination, p. 7.
27. *Id.*

The Commission also lacks the power to exempt *itself* or any of its actions from the APA. Only the Legislature may lawfully create such an exemption. Government Code section 11346 states that:

> "This chapter [the APA] shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly."

In addition, exemptions must be express rather than implied. *"When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language."* (*United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411 [Emphasis added].) Thus, the Commission's authority to impose rules or conditions does not obviate the need for compliance with the APA.

Finally, the Commission suggests that the review of *existing* regulations that was mandated by the Legislature beginning in 1980 pursuant to AB 1111 (See Ch. 567, Stats. 1979; hereafter "Assembly Bill 1111") constituted approval by OAL of the subject rules. With the enactment of the modern version of the APA, there was a need to conduct a review of *existing* regulations which had previously been adopted by state agencies. Thus, AB 1111 required all state agencies subject to the APA to review and then submit their existing regulations to OAL. (See AB 1111, p. 1790, former Government Code section 11349.7, subdivision (a), repealed by Stats. 1987, ch. 1375, § 21.) Under the AB 1111 procedures, OAL was authorized to initiate its own review of the submitted regulations for compliance with the APA rulemaking procedures. If, upon such review, OAL determined that the regulations did not meet the standards of the APA, it was required to order the adopting agency to show cause why the regulations should not be repealed. (Former Government Code section 11349.7, subdivisions (g) & (h).)

The Commission's position is that the regulations that *authorize* it to require geology and soils reports and to impose the standard condition permitting on-site inspections were "*reviewed*" and "*approved*" by OAL in the AB 1111 process, thus entitling them to a presumption of compliance with the APA and estopping OAL from determining now that a rulemaking process is required for the report and condition.[28]

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28. *Id.* at 3, 7.

The regulations in question were not approved or reviewed by OAL pursuant to the AB 1111 procedure. Under this procedure, the Commission was first required to undertake a review of its existing regulations. (Government Code section 11349.7, repealed by Stats. 1987, ch. 1375, § 21.) Members of the public also had the opportunity to petition OAL for independent review of regulations submitted by the agency. (*Id.*) Having received no requests from the public for review of the Commission's regulations, OAL did not review them.

In this connection, on July 30, 1985, OAL wrote the following to the Commission:

> "The California Coastal Commission completed its review of regulations and submitted to [OAL] the . . . Statement of Review Completion (SORC) in compliance with Government Code section 11349.7. . . .
>
> Since no requests [for review] have been received by this office, *you are hereby notified that OAL will not proceed with an independent review of these regulations.*" [Emphasis added.]

Furthermore, with respect to the legal significance of any review of regulations by OAL, "[t]he approval of a regulation by [OAL] . . . shall not be considered by a court in any action for declaratory relief brought with respect to a regulation." (Government Code section 11350, subdivision (c).)

Put another way, Section 11350 provides that there is no collateral legal significance to OAL's approval of a regulation which is the subject of a subsequent legal challenge. This principle is reinforced by provisions that were later added to govern the review of existing regulations in 1982. (Stats. 1982, Ch. 1573, p. 6211.) Former Government Code section 11349.7, subdivision (n), provided in part as follows:

> "The power of a court to invalidate a regulation shall not be altered or barred by the fact that [OAL] has not ordered the repeal of a regulation pursuant to this section."

Thus, the fact that OAL did not order a repeal under the AB 1111 process would not insulate the regulation in question from subsequent legal challenge. Moreover, the fact that a broadly written CCR provision is either not ordered repealed or is approved by OAL does not act as a legal barrier for OAL to determine whether a rule that implements, interprets, or makes specific that CCR

provision is itself a regulation subject to APA compliance. The contrary would result in the creation of an implied exemption from the APA.[29]

As a secondary part of this challenge, Ms. Kenny objects to the Commission's requirement that she record on her property deed the conditions or restrictions imposed on her development. The Commission notes in its response that it imposed a special condition with respect to future improvements to her house and that it required Ms. Kenny to submit evidence that she "had recorded a deed restriction against her parcel which reflected these limitations." The Commission further notes that "it intended that this special condition would apply only to Ms. Kenny's application."[30]

It appears from the record that the particular deed restrictions were directed at a specific person; namely, Ms. Kenny. Therefore, they do not constitute "regulations," as that term is defined in the APA. (See *Tidewater Marine Western, Inc. v. Bradshaw*, *supra*, 14 Cal.4th at 571, 59 Cal.Rptr.2d at 194 (rule applied in a specific case is not a "regulation" subject to the APA).)

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29. Were OAL to accept this notion, it would also be condoning what amounts to an implied exemption from the APA for the Commission based on the theory of estoppel. It is axiomatic that an administrative regulation which is in conflict with, or violates a statute is void. (*Morris v. Williams* (1967) 67 Cal.2d 733, 737, 63 Cal.Rptr. 689, 692; *Henning v. Div. Of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 759, 268 Cal.Rptr. 476, 483.) For these reasons, application of the doctrine of estoppel would be particularly inappropriate. (See *Elliott v. Contractors' State License Bd* (1990) 224 Cal.App.3d 1048, 1053, 274 Cal.Rptr. 286, 289; *Shoban v. Bd. of Trustees* (1969) 276 Cal.App.2d 534, 544, 81 Cal.Rptr. 112, 118 (Estoppel cannot be invoked against a public agency when to do so "would be harmful to some specific public policy or public interest or where it would enlarge the power of a governmental agency or expand the authority of a public official."); *Boren v. State Personnel Bd.* (1951) 37 Cal.2d 634, 643, 234 P.2d 981 ("authority of a public officer cannot be expanded by estoppel."); *Wilshire Ins. Co. v. Garamendi* (1992) 5 Cal.App.4th 1573, 1581, 8 Cal.Rptr.2d 55, 59, citing *Jacques, Inc. v. State Bd. of Education* (1957) 155 Cal.App.2d 448, 462, 318 P.2d 6, *quoting County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 826, 186 P.2d 124 ("'It is clear . . . that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public.'").)

30. Response, p. 8.

(3) With respect to whether the Commission's rules fall within any recognized exemption from APA requirements, generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. (Government Code section 11346; *United Systems of Arkansas 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.])

As discussed above, although the Commission may contend that an *implied* exemption to the APA exists, it has not contended that any *express* exemption applies. Nonetheless, it is incumbent on OAL to determine whether any such express statutory exemption might apply.

Public Resources Code section 30333 makes the APA specifically applicable to rules and regulations adopted by the Commission with two stated exceptions. It reads in part as follows:

> "Except as provided in Section 18930 of the Health and Safety Code[31] and paragraph (3) of subdivision (a) of Section 30620, these rules and regulations shall be adopted in accordance with the provisions of [the APA]."

Section 30620, subdivisions (a) and (b), provide as follows:

> "(a) By January 30, 1977, the commission shall, consistent with this chapter, prepare interim procedures for the submission, review, and appeal of coastal development permit applications and of claims of exemption. These procedures shall include, but are not limited to, the following:
>
> (1) Application and appeal forms.
>
> (2) Reasonable provisions for notification to the commission and other interested persons of any action taken by a local government pursuant to this chapter, in sufficient detail to ensure that a preliminary review of that action for conformity with this chapter can be made.

31. Health and Safety Code section 18930 pertains to building standards adopted by state agencies.

(3) Interpretive guidelines designed to assist local governments, the commission, and persons subject to this chapter in determining how the policies of this division shall be applied in the coastal zone prior to the certification of local coastal programs. However, the guidelines shall not supersede, enlarge, or diminish the powers or authority of the commission or any other public agency.

"(b) Not later than May 1, 1977, the commission shall, after public hearing, adopt permanent procedures that include the components specified in subdivision (a) and shall transmit a copy of those procedures to each local government within the coastal zone and make them readily available to the public. The commission may thereafter, from time to time, and, except in cases of emergency, after public hearing, modify or adopt additional procedures or guidelines that the commission determines to be necessary to better carry out this division."

The California Supreme Court was asked to review these sections in *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 188 Cal.Rptr. 104, relating to a challenge to the Commission's interpretive guidelines requiring public access dedication as a condition to permits for the development of beachfront property. In the course of its decision, the Court observed in a footnote, the following:

"Section 30803 states in part: 'Any person may maintain an action for declaratory and equitable relief to restrain any violation of this division [the Coastal Act].' It parallels Government Code section 11350, which makes declaratory relief generally available to review administrative regulations. ***Section 11350 has no application to the guidelines, however, because the Legislature specifically exempted the guidelines from the provisions of the California Administrative Procedure Act.*** (Gov. Code, § 11340 et seq.) The guidelines were authorized under Public Resources Code section 30620, subdivision (a)(3). However, the Legislature also enacted Public Resources Code section 30333, which provides that 'the commission may adopt rules and regulations to carry out the purposes and provisions of this division [the Coastal Act], and to govern procedures of the commission. [¶] *Except as provided in . . . paragraph (3) of subdivision (a) of Section 30620,* these rules and regulations shall be adopted in accordance with the provisions of [the Administrative Procedure Act].'" [Emphasis in original in italics.] [Emphasis added in bold italics.] (33 Cal.3d at 169, fn. 4, 188 Cal.Rptr. at 111, fn. 4.)

The effect of this language in *Pacific Legal Foundation v. California Coastal Commission* was that *any* interpretive guidelines, regardless of when they were promulgated (before or after January 30, 1977), were considered to be exempt from the APA. This became apparent in *Coastal Commission v. Office of Administrative Law* (1989) 210 Cal.App.3d 758, 258 Cal.Rptr. 560). What is important to note at this juncture, however, is that the holding in this latter case is *limited to* the interpretive guidelines. In framing the issue, the Court of Appeal stated as follows:

> "The statute is ambiguous. Although subdivision (a) refers to interim procedures and subdivision (b) refers to permanent procedures, *the type of procedure at issue – interpretive guidelines* relating to coastal development permit applications *is defined only by subdivision (a)(3)*."
>
> * * * *
>
> "The Supreme Court in *Pacific Legal Foundation* considered *interpretive guidelines* adopted by the Commission in 1980, which were thus permanent guidelines." (210 Cal.App.3d at 762, 258 Cal.Rptr. at 562 [Emphasis added] [Footnote omitted].)

The Court of Appeal found that subdivision (a)(3) referred to the "type of procedure" rather than the "permanency of the procedure." The "type of procedure at issue [was the] interpretive guidelines." (258 Cal. Rptr. at 562.) In addition, the Court recognized that the interpretive guidelines were "defined *only* by subdivision (a)(3)" as opposed to any other provisions in Section 30620. Further, in quoting Section 30620, subdivision (b), the court emphasized the following language: "permanent procedures that *include the components specified in subdivision (a)*." The Court appears to be saying that the "permanency of the procedure" should not be the critical factor in determining the scope of the exemption. Rather, the scope of the exemption was to extend to interpretive guidelines as defined in subdivision (a)(3). Some of the guidelines were temporary (i.e. those described in subdivision (a)) and some were permanent (those described in subdivision (b).)

However, neither the California Supreme Court in *Pacific Legal Foundation v. California Coastal Commission*, nor the Court of Appeal in *California Coastal Commission v. Office of Administrative Law* stated that *other types* of "permanent procedures" or policies found in subdivision (b) are also included within the statutory exemption. Subdivision (b) should be read in the context of Section

30333. Section 30333 *expressly limits* the exemption to paragraph (a)(3) of Section 30620. One of the basic canons of statutory interpretation is that by exempting one particular item, the Legislature clearly intended that all other items are to be excluded from the exemption. (*Parmett v. Superior Court* (1989) 212 Cal.App.3d 1261, 1266, 262 Cal.Rptr. 387, 389.) This is nothing more than a particular application of the familiar maxim "expressio unius est exclusio alterius." (See 2A Sutherland, *Statutes and Statutory Construction*, 6th Ed., § 47.23 at 304 – 317.) Therefore, we conclude that only the Commission's interpretive guidelines are covered by this express statutory exemption.

Given the scope of the interpretive-guidelines exemption, the next issue we must consider is whether the exemption would apply to the rules that are the subject of the current request for determination. In this regard, the Court in *Pacific Legal Foundation* observed that the interpretive guidelines relating to access conditions were "*not mandatory*" in nature but rather required the Commission to adopt a flexible approach to access exactions on a case-by-case basis. (33 Cal.3d at 174, 188 Cal.Rptr. at 115 [Emphasis added].)

In this respect, the Commission has an interpretive guideline entitled "Geologic Stability of Blufftop Development." This guideline states the following:

> "The applicant for a permit for blufftop development *should* be required to demonstrate that the area of demonstration is stable for development . . . . The applicant *should* file a report evaluating the geologic conditions of the site and the effect of the development prepared by a registered geologist or professional civil engineer with expertise in soils or foundation engineering, or by a certified engineering geologist." [Emphasis added.][32]

This guideline does not contain mandatory language. It should be contrasted with the rules which are subject to the current request for determination. The Commission's response does not suggest that these rules are *not* mandatory or binding. On the contrary, the Commission states that these rules are binding on applicants seeking coastal development permits. With respect to geology and soils reports, the Commission states the following:

> "The filing information about which Ms. Kenny complains *is required* pursuant to two provisions of [the Commission's] regulations . . . .

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32. California Coastal Commission, Statewide Interpretive Guidelines (December 16, 1981) "Geologic Stability of Blufftop Development," p. 3.

* * * *

> "Taken together, these regulations provide that applicants *must* submit a detailed description of their proposed development . . . .
>
> * * * *
>
> "The Commission's application form *requires* that an application for development 'on a bluff face, bluff top, or in any area of high geological risk' *must be accompanied by 'a comprehensive, site-specific geology and soils report* . . . prepared in accordance with the Commission's Interpretive Guidelines.' . . . . Thus, the Executive Director *requires that applicants for development in [the Santa Monica Mountains] submit a geology and soils report. The Commission's practice of requiring the information is authorized under § 13053.5(a) and (e).*" [Response pp. 2–4, Emphasis added.]

The Commission's standard condition for consent to on-site inspections states as follows:

> "One of those 'standard conditions' *requires* that 'Commission staff *shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.*'" [Response, p. 7, Emphasis added.]

Given their mandatory nature,[33] neither of these policies would qualify as interpretive guidelines, particularly in light of the statement made by the California Supreme Court in *Pacific Legal Foundation v. California Coastal Commission*. Thus, in our view, the policies in question by their nature would not be deemed to be interpretive guidelines covered by the express statutory exemption of Public Resources Code section 30620. Consequently, we conclude that no express statutory exemption applies to either of these policies.

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33. The distinction between the Commission's interpretive guidelines and what were termed its "quasi-legislative rules" was also underscored by the California Court of Appeal in *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 503 – 505, 83 Cal.Rptr.2d 850, 855 – 856. It should be noted, however, that in order to be subject to the APA, a "regulation" need not be mandatory or binding. The critical factor is not whether the "regulation" is characterized as mandatory or binding, but rather, its "effect and impact on the public." *Winzler & Kelly v. Dept. of Industrial Relations* (1981) 121 Cal.App.3d 120, 127, 174 Cal.Rptr. 744, 747.

Therefore, the Commission's policies of requiring applicants for coastal development permits to submit geology and soils reports and to consent to site inspections subject to 24-hour notice constitute "regulations" as defined by the APA and are required to be adopted and codified pursuant to the rulemaking procedures of the APA. The Commission may propose regulations to adopt these policies pursuant to the rulemaking procedures of the APA. The remaining rules or requirements that are the subject of this regulatory determination do not constitute "regulations," and therefore are not subject to the APA rulemaking procedures.

DATE: May 18, 2000

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