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STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

BILL JONES
SECRETARY OF STATE

In re:	)	**1999 OAL Determination No. 17**
Request for Regulatory	)	
Determination filed by	)	**[Docket No. 98-001]**
EASTMAN CHEMICAL	)	
COMPANY concerning Public	)	**August 6, 1999**
Health Goal for DEHP	)	
adopted by the OFFICE OF	)	**Determination Pursuant to**
ENVIRONMENTAL HEALTH	)	**Government Code Section 11340.5;**
HAZARD ASSESSMENT[1]	)	**Title 1, California Code of**
	)	**Regulations, Chapter 1, Article 3**

Determination by: **CHARLENE G. MATHIAS, Deputy Director**

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SYNOPSIS

The Office of Administrative Law concludes that the Public Health Goal for the industrial chemical DEHP adopted by the Office of Environmental Health Hazard Assessment is in part a "regulation" which is invalid because it should have been, but was not, adopted pursuant to the Administrative Procedure Act.

Two parts of the Public Health Goal are invalid because they were not adopted pursuant to the Administrative Procedure Act: (1) the identification of DEHP as a teratogen and a reproductive toxicant and (2) the determination that a maximum of 12 parts per billion of DEHP can safely be allowed in drinking water.

One part of the Public Health Goal, the determination that DEHP is a carcinogen, is a "regulation" within the meaning of the Administrative Procedure Act , but is valid because DEHP is included in the official Proposition 65 list of chemicals known to the State of California to cause cancer, a list expressly exempted by statute from the requirements of the Administrative Procedure Act.

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DECISION [3], [4], [5], [6], [7]

The Office of Administrative Law ("OAL") has been requested to determine whether the Public Health Goal for the chemical **D**i(2-**e**thyl**h**exl) **p**hthalate ("DEHP") issued by the Office of Environmental Health Hazard Assessment ("OEHHA") is a "regulation" which is invalid unless adopted pursuant to the Administrative Procedure Act ("APA").[8]

Used in making polyvinyl chloride plastic, DEHP is a plasticizer which renders the material soft and malleable. The requester, Eastman Chemical Company, and the commenter, Aristech Chemical Corporation, are the principal manufacturers and distributors of DEHP in the United States, "if not the world."[9]

OAL concludes that the Public Health Goal for the chemical DEHP issued by OEHHA is in part a "regulation" which is invalid because it should have been, but was not, adopted pursuant to the APA.

Two parts of the Public Health Goal are invalid because they meet the APA definition of "regulation," but were not adopted pursuant to the APA: (1) the identification of DEHP as a teratogen[10] and a reproductive toxicant[11] and (2) the adoption of the presumptive standard that a maximum of 12 parts per billion can safely be allowed in drinking water. One part of the Public Health Goal, the determination that DEHP is a carcinogen, is a "regulation" within the meaning of the APA, but is valid because DEHP is included in the official Proposition 65 list of chemicals known to the State of California to cause cancer, a list expressly exempted by statute from the requirements of the APA.

The numerical maximum-parts-per billion criterion, in effect, constitutes a rebuttable presumption that the same criterion will be incorporated into the Department of Health Services ("DHS") regulation which sets the maximum contaminant level pursuant to the California Safe Drinking Water Act. By law, this presumption limits the discretion of DHS. The Legislature has not, however, expressly exempted adoption of this discretion-limiting presumption from the APA.

Senate Bill 635, now pending, would amend existing law to expressly exempt Public Health Goals adopted by OEHHA from the APA.

REASONS FOR DECISION

I. AGENCY; REQUEST FOR DETERMINATION

Agency

The Office of Environmental Health Hazard Assessment ("OEHHA") was created by Governor's Reorganization Plan No. 1 of 1991, submitted to the Legislature on May 17, 1991. The Government Code empowers the Governor, with certain qualifications, to reorganize the Executive Branch.[12] Since this 1991 plan was *not* rejected by either house of the Legislature within the prescribed time frame, it became law on July 17, 1991.[13] Pursuant to Government Code section 12080.9, each reorganization plan which takes effect is "printed in the same volume as the acts of the session of the Legislature to which it was submitted." Consistent with this mandate, the reorganization plan creating OEHHA appears in the Health and Safety Code as sections 59000-59019.

These Health and Safety Code sections specify that: (1) OEHHA is housed in the California Environmental Protection Agency and (2) that OEHHA assumes the duties previously performed by the Health Hazard Assessment Division of the Department of Health Services. This Division had emerged after Governor Deukmejian delegated his Proposition 65 duties to the Health and Welfare Agency (and thus to the Department of Health Services) in 1986-87.[14]

Background of Request for Determination

Senate Bill ("SB") 635, now pending, would expressly exempt Public Health Goals adopted by OEHHA from the APA. As part of the legislative process, an analysis of SB 635 was prepared by the staff of the Assembly Committee on Environmental Safety and Toxic Materials.[15] This committee analysis does a good job of summarizing the policy and legal issues that make up the background, not only the bill, but also of this request for determination. The following is an excerpt from the committee analysis; we have added three bracketed, bolded headings.

> "The California Safe Drinking Water Act requires the State Department of Health Services (DHS) to regulate the concentrations of contaminants in public water supplies by, among other things, adopting regulations that specify the maximum contaminant level (MCL) for each contaminant. The MCL for a contaminant is *established by a two-step, risk assessment/risk management process.*

. . .

" . . . **[Step One: Risk Assessment]** OEHHA evaluates the risk to public health posed by a contaminant, and based on the results of the risk assessment, adopts a public health goal (PHG). The PHG is the level at which the contaminant will (a) cause no known or anticipated adverse effect on human health, plus a margin of safety, if the contaminant is acutely toxic, or (b) pose no significant risk to health, if it is a carcinogen or otherwise causes a chronic disease.

"In determining the PHG for the contaminant, OEHHA is allowed to consider only health-related data. It can consider (a) the possible synergistic or combined effects of mixing one substance with one or more other substances, (b) the disproportionate effect the contaminant may have on susceptible populations, (c) the degree to which exposure may result in a physiological augmentation of the contaminant that will increase the risk of illness, and (d) the effect that exposure to the contaminant in drinking water will have if, people are also exposed to the contaminant through other routes of exposures.

"**[Step Two: Risk Management]**: After the PHG has been established by OEHHA, DHS then adopts the MCL. *The MCL must be set as close to the PHG as is feasible.* In order to determine feasibility, DHS evaluates the water treatment technologies that are available to reduce concentrations of the contaminant and the costs of using those technologies. After weighing the public health considerations of allowing concentrations of the contaminant in public water supplies that are above the PHG against the cost of reducing the concentration, DHS strikes a balance, determines a level that is the feasible level, and adopts the MCL by regulation. The MCL is an enforceable standard and represents the highest concentration of the contaminant that may be present in public water supplies.

"While the California Safe Drinking Water Act makes it clear that the MCL, an enforceable standard, is a regulation and subject to adoption under the Administrative Procedure Act, *the legal status of the PHG is more ambiguous.* It is not an enforceable standard because both OEHHA and DHS, by the express terms of the Act, are prohibited from requiring public water systems to comply with it. *While it is adopted by OEHHA, the statute is silent about whether it must be adopted using the procedures of the Administrative Procedure Act, implying instead that it [the Public Health*

Goal] is the end product of the risk assessment that the OEHHA prepares for each contaminant.

"Legal Status of Public Health Goals: On December 31, 1997, OEHHA adopted the final PHG for DEHP, an industrial chemical used primarily as a plasticizer which, when combined with polyvinyl chloride resins, can be used to fabricate numerous consumer products (surgical gloves, toys, upholstery, raincoats, etc). **[The State Agency Rules Challenged in the Request for Determination:]** *In the risk assessment that establish[ed] the PHG, OEHHA determined that DEHP is a carcinogen, a teratogen (a substance causing birth defects) and reproductive toxicant (a substance causing testicular damage). It set the PHG for DEHP at 12 parts per billion (ppb) based on its potential to cause cancer.*

"Following the completion [of] the DEHP risk assessment, Eastman Chemical Company filed suit in Sacramento Superior Court charging that the PHG is, in effect, a regulation and that, because OEHHA had not followed the requirements of the Administrative Procedures Act, its findings that DEHP is a carcinogen, a teratogen, and a reproductive toxicant as well as its establishment of the PHG at 12 ppb should be ruled invalid. On September 2, 1998, the court ruled against Eastman, finding that PHGs are not regulations.

"Eastman has since filed a petition with the Office of Administrative Law requesting the office to find that the PHG for DEHP is an 'underground regulation' and therefore subject to the Administrative Procedure Act. The petition argues that both the hazard determination made by the OEHHA - namely that DEHP is a carcinogen, teratogen, and a reproductive toxicant - and the risk characterization - the setting of the PHG at 12 ppb - are regulations. The Office of Administrative Law has Eastman's petition under review but has not yet made a ruling." [Emphasis added.]

The quoted analysis incorrectly states the timing of the request for determination. The request for determination was filed on February 13, 1998, apparently prior to the lawsuit. The lawsuit (*Eastman Chemical Company v. Rooney*) appears to have been filed in about May 1998.[16]

The Sacramento Superior Court filed a brief ruling on September 2, 1998. In this ruling, the court found that the challenged Public Health Goal for DEHP was not subject to the APA. The court stressed that the Health and Safety Code prohibited

the state from requiring water agencies to comply with public health goals. The court also stated that "mere scientific judgments"[17] are not quasi-legislative in nature and not appropriate for review by OAL.[18]

Then, in papers filed in October 1998, Eastman Chemical Company and Aristech Chemical Corporation sought immediate intervention in the trial court proceeding by the California Court of Appeal. On February 16, 1999, the Court of Appeal declined to intervene.

On February 24, 1999, Senate Bill 635 (Sher) was introduced, to amend Health and Safety Code section 116365, the key statute which mandates OEHHA to adopt public health goals.[19] SB 635 was amended on May 3, 1999, June 15, 1999, and June 28, 1999. The June 28, 1999 version of the bill states in part:

> "The determination of the toxicological endpoints of a contaminant and the publication of its public health goal in a risk assessment prepared by the Office of Environmental Health Hazard Assessment are *not subject to the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code* [the rulemaking part of the APA]." [Emphasis added.]

II. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE[20] ENACTMENTS OF OEHHA?

Government Code section 11000 states:

> "As used in this title [Title 2. "Government of the State of California" (which title encompasses the APA)], *'state agency' includes every state office*, officer, department, division, bureau, board, and commission." [Emphasis added.]

This statutory definition applies to the APA: i.e., it helps us determine whether or not a particular "state agency" is subject to APA rulemaking requirements. Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The rulemaking portion of the APA is also found in Title 2 of the Government Code: to be precise, it is Chapter 3.5 of Part 1 of Division 3.

OEHHA, a "state . . . office," is clearly a "state agency" within the meaning of Government Code section 11000.

The APA somewhat narrows the broad reach of the term "state agency" as given in Government Code section 11000. Government Code section 11342, subdivision (a), provides that for purposes of the APA, the term "state agency" does *not* include agencies in the "judicial or legislative departments of the state government."[21] OEHHA is in neither the judicial or legislative "departments" (or branches) of state government--it is in the executive branch. Accordingly, we conclude that--*pursuant to the APA of its own force*--APA rulemaking requirements generally apply to quasi-legislative enactments of OEHHA.[22]

OEHHA's enabling act (Health and Safety Code sections 59000-59019) contains three references to rulemaking. First, Health and Safety Code section 59012 states that "[t]he office may adopt and enforce rules and regulations for the execution of its duties."[23]

Second, Health and Safety Code section 59013 states that rules and regulations on matters related to the statutory responsibilities delegated to or enforced by local health departments must be submitted prior to adoption to the California Conference of Local Health Officers.

Third, Health and Safety Code section 59003 states that the Director of OEHHA shall have the powers of a department head as provided in the Government Code, which includes the power "[s]o far as *consistent with law*," to adopt rules and regulations as are necessary to govern the activities of the department. [Emphasis added.][24] Since statutes are one form of law, OEHHA must--under its enabling act--comply with the statutes pertaining to rulemaking (e.g., the APA).

Thus, both the APA and its enabling act provide that OEHHA's quasi-legislative enactments are subject to the APA. OEHHA has adopted regulations pursuant to the APA, including Title 14, California Code of Regulations sections 19030-19044 and Title 22, CCR, sections 12102-12306 and 15000-15040.

OAL, therefore, concludes that APA rulemaking requirements generally apply to OEHHA's quasi-legislative enactments.

We recognize, however, that there is a dispute here over whether PHGs are quasi-legislative enactments. As noted above, the Superior Court ruled very broadly that "mere scientific judgments" are not quasi-legislative in nature. This issue will be discussed below in part III of this determination.[25]

III. DOES THE CHALLENGED RULE CONTAIN "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Three Government Code provisions establish the basic framework for deciding whether particular agency rules are subject to the APA, that is, are they "regulations" within the meaning of the APA.

Government Code section 11346 provides:

> "It is the purpose of this chapter to establish *basic minimum procedural requirements for the adoption*, amendment or repeal *of administrative regulations*. Except as provided in section 11346.1, the provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this chapter repeals or diminishes additional requirements imposed by any such statute. The provisions of this chapter shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]

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

> ". . . *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, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

> "(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.]"

In *Grier v. Kizer*,[26] the California Court of Appeal upheld OAL's two-part test[27] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

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

Second, has the challenged rule been 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, OAL must conclude that it is a "regulation" subject to the APA. In applying the two-part test, we are mindful of the admonition of the *Grier* court:

> ". . . because 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*.[28] [Emphasis added.]"

Three California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "a statutory scheme which the Legislature has [already] established. . . ."[29] 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. . . ."[30]

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon" in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)[31] 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.[32] Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

> ". . . [The] Government Code . . . [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it. . . .* [Emphasis added.]"[33]

A. DOES THE CHALLENGED RULE CONSTITUTE A "STANDARD OF GENERAL APPLICATION"?

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.[34] At first glance, the DEHP Public Health Goal would appear to apply directly to all members of at least three classes:

(1) public water agencies preparing statutorily-mandated[35] annual consumer confidence reports concerning substances for which goals are set by OEHHA;

(2) members of the staff of the Department of Health Services who regulate the concentrations of contaminants in public water supplies; and

(3) persons interested in taking part in the development of duly adopted regulations which (a) designate particular chemicals as health hazards and (b) set maximum concentrations for these designated chemicals (for instance, how many parts per billion are allowed in drinking water).

The DEHP Public Health Goal would also appear to apply indirectly to all persons who will either provide or consume drinking water supplied pursuant to the final, duly adopted regulations, which by law must include a maximum DEHP level set "as close as feasible to *the corresponding public health goal,"* i.e., the presumptive standard that DEHP be permitted in drinking water at no more than 12 parts per billion. [Emphasis added.][36]

OEHHA appears to reject this common sense conclusion--that the DEHP Public Health Goal is a standard of general application. Indeed, OEHHA argues in substance that the Public Health Goal cannot constitute a "standard of general application" unless it is not only (1) a "rule of general application," but also (2) a rule that is (a) binding and that (b) mandates or controls conduct of the public outside of the agency. OEHHA argues that:

> "[t]he hallmark of a regulation is that it is *a rule of general application that is binding and that mandates or controls* conduct of the public outside of the agency. *(State Water Resources [Control] Board v. Office of Administrative Law* (1993) 12 Cal.App.3d 490, 497." [Emphasis added.][37]

This is an extraordinarily narrow reading of the statutory definition of "regulation" (Government Code section 11342, subdivision (g)), one which indeed is difficult to reconcile with the actual words of the provision. The statute does not at present restrict the term "regulation" to agency rules that are binding and mandatory.[38]

The APA definition of "regulation," however, could have been drafted to include this additional criterion. Government Code section 11342, subdivision (g), *could have been enacted as follows, but was not*:

> "Regulation" means
>
> *(1)* every rule, regulation, order, or standard of general application, *provided that the rule is binding and that it mandates or controls conduct of the public outside of the agency,* or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency
>
> *(2)* to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. . . . [Emphasis added to illustrate hypothetical addition to the statute.]"

Nonetheless, the Sacramento Superior Court appears to have been persuaded by

OEHHA's argument that public health goals are not "regulations" because they are not binding and do not mandate or control conduct[39] of the public outside of the agency.[40] A better approach, and the approach OAL has taken since first beginning to issue regulatory determinations in 1986,[41] is to confine legal analysis of alleged "underground regulations" to the criteria actually articulated in the APA. Adding new criteria to statutes is a task best left to the Legislature.[42]

(The Superior Court also based its ruling that PHGs are not subject to the APA in part on the conclusion that "mere scientific judgments" are not quasi-legislative in nature and not appropriate for review by OAL. We will turn to this scientific judgment issue after completing discussion of the "binding and mandatory" issue.)

We thus reject OEHHA's "binding and mandatory" argument on the ground that the APA's definition of "regulation" in Government Code section 11346, subdivision (g), does not include the "binding and mandatory" element. Further, we reject OEHHA's argument for the following additional reasons.[43]

(1) Accepting the OEHHA interpretation of "standard of general application" in this particular case has the broad policy consequence of encouraging agencies in general to evade APA notice and comment requirements without benefit of an express APA exemption, thus effectively ignoring the clear legislative intent stated in Government Code section 11346 (all exercises of quasi-legislative power subject to APA, absent *express* statutory exemption).

The policy underlying enactment of Government Code section 11346 is to make it very difficult for state agencies to plead successfully that policies issued by them are not subject to the APA. (See discussion of section 11346 in part IV of this determination.) This policy applies not only to arguments that an agency regulation should be deemed exempt from the APA, but also to arguments that an agency pronouncement is not a "regulation," and thus not subject to the APA.

(2) Though OEHHA has succeeded in raising nonfrivolous questions concerning whether the APA applies to PHGs, the guiding principle (according to the California Court of Appeal) is that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*[44] The APA was enacted to guarantee interested persons the opportunity to provide input (as prescribed) on proposed agency policies; there is a presumption that the APA applies; and the arguments and evidence marshaled by OEHHA are not sufficient to overcome that presumption.

(3) The California Supreme Court characterizes Government Code section 11342, subdivision (g), as "*very* broadly" (emphasis added) defining the term "regulation."[45] We cannot reconcile the fact that "regulation" is very broadly defined in the APA with OEHHA's effort to dramatically narrow this definition by adding an additional criterion.

(4) The Legislature intends the APA to apply to all exercises of quasi-legislative power conferred by any statute. (Government Code sec. 11346.) Clearly, this refers to the situation in which the Legislature by statute delegates to an administrative agency the power to adopt general policies supplementing the statute.

OEHHA was clearly granted power by the Legislature to adopt PHGs. The grant of power was quasi-legislative in nature (rather than quasi-judicial in nature), because PHGs constitute the formulation of policy intended to govern future decisions, rather than the application of pre-established rules to the peculiar facts of an individual case.[46] When OEHHA sets a PHG, the agency is clearly exercising this quasi-legislative power.[47]

(5) The OEHHA argument is inconsistent with the basic principle that the California APA applies not only to agency rules that are subject to notice and comment requirements under the federal APA, but also to agency rules that could be characterized under the federal APA as "interpretive guidelines"--general rules issued by an agency that are *not binding on the regulated public* and under *federal* law are not subject to notice and comment requirements.

Review of the legislative history of the California APA indicates that the Legislature has strictly limited APA exemptions, with an eye toward making a much greater proportion of *state* agency rules subject to public notice and comment requirements than Congress sought to achieve in the federal APA regarding *federal* agency rules.[48]

Though "interpretive guidelines" are expressly exempt from notice and comment requirements under the federal APA, the California Legislature has not enacted a parallel provision in the California APA.

It appears the Legislature intended that there be no exemption for "interpretive rules." Exempting interpretive guidelines was--and is--a clear policy alternative. The federal APA, first enacted in 1946, exempts "interpretive rules" and "policy statements" from notice and comment

requirements.[49] In enacting the California APA in 1947, the Legislature rejected a proposal to exempt "*any interpretative rule* or any rule relating to public property, public loans, public grants or public contracts" (emphasis added) from APA notice and hearing requirements.[50] It, therefore, seems clear that the 1947 Legislature considered and rejected the idea of following the federal example of exempting "interpretive rules" from notice and comment requirements.

The California Supreme Court has twice (in *Armistead* and in *Tidewater*) rejected the proposition that non-binding "interpretive guidelines" should be deemed exempt from California APA rulemaking requirements.[51]

(6) The OEHHA argument ignores clear language in the statutory prohibition of underground regulations, Government Code section 11340.5.

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

> "(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.]"

This statute prohibits agencies from performing *four* separately listed actions involving usage of an agency rule subject to the APA: (1) issuance, (2) utilization, (3) enforcement, or (4) attempted enforcement.

Apparently anticipating that state agencies would make creative legal arguments in an effort to avoid APA compliance, the statute prohibits not only enforcement, attempted enforcement, and utilization of rules subject to the APA, but also unadorned *issuance* of such rules. It is absolutely clear that OEHHA "issued" the DEHP Public Health Goal. It seems clear that section 11340.5 is intended to preclude agencies from evading APA compliance if the regulated party is unable to prove that the agency "enforced" or "attempted to enforce" the rule.

It is of interest that Health and Safety Code section 116365, subdivision (e)(2), directs OEHHA to "adopt" public health goals. OEHHA's enabling act authorizes it to "adopt" regulations.[52] Health and Safety Code section 116365, subdivision (a), directs the Department of Health Services to "adopt" primary drinking water standards for contaminants in drinking water. Government Code section 11342, subdivision (g), also uses the word "adopt" in the definition of "regulation." The APA uses the words "adopt" or "adoption" many times in referring agency rules that are subject to the APA. See, e.g., Government Code section 11340.6 & 11349.1.

Government Code section 11340.5 undermines OEHHA's argument in another way. Section 11340.5 proscribes not only agency rules which the agency overtly labels or treats as binding and mandatory, but also agency rules which are more benignly characterized by the agency--described as no more than a "guideline," a "criterion," a "bulletin," a "manual," an "instruction," or a "standard."[53]

(7) The OEHHA argument overlooks the case law principle that in determining whether or not an agency rule is a "regulation," that primary consideration be given to *the effect and impact on the public* of the rule.[54]

The clear effect of the challenged rule is to create a strong presumption that the formal DHS regulation will set the maximum parts per million as close as feasible to the standard adopted by OEHHA. Health and Safety Code section 116365, subdivision (a), *directs* the Department of Health Services to adopt primary drinking water standards for contaminants in drinking water "*based upon* the criteria set forth in subdivision (b)." [Emphasis added.] The first criterion listed in subdivision (b) is "(1) the public health goal for the contaminant adopted by [OEHHA] pursuant to subdivision (c)." Clearly, the Legislature has delegated its lawmaking power to OEHHA, and just as clearly directed DHS to give great weight to these OEHHA quasi-legislative decisions (i.e., public health goals.) "Each primary drinking water standard adopted by the department," the Legislature has stated in part, "*shall* be set at a level that is *as close as feasible* to the corresponding public health goal placing primary emphasis on the protection of public health . . . ." (Health and Safety Code section 116365, subdivision (a); emphasis added.)

The public's right to meaningful participation in the DHS rulemaking process is clearly drastically curtailed by preliminary adoption of a presumptive standard by OEHHA. The discretion[55] of DHS is limited, and, as a

consequence, the scope of influence of public comments is commensurately circumscribed.[56] According to the California Court of Appeal in *California Association of Nursing Home, Etc. v. Williams,*[57] a case involving enforcement by the Department of Health Services of standards issued by another agency (the Department of Finance):

- The APA was designed to promote two primary objections--*meaningful* public participation and effective judicial review.[58]

- Meaningful public participation and effective judicial review rest upon the assumption that a body of relevant evidentiary material will be compiled at the hearing, considered by the agency in formulating its order, preserved by it and transmitted to the court for the latter's use when and if review is sought.

- Effective judicial review is impossible without an identified body of the evidence upon which the agency acted.

- *Members of the public have a legitimate need to confront the body of data upon which the agency intends to act*; the agency may not utilize the public hearing as a facade for a private decision resting upon privately acquired data.

- Medi-Cal standards enforced by DHS were "imposed by decisions made within the State Department of Finance without compliance with the Government Code's demands for public participation in the determinative process."[59]

  "The [DHS] adoption of the [Department of Finance] fiat *without independent consideration of the underlying evidence* and without public or judicial access to it transgresses fundamental demands for the adoption of administrative regulations."[60]

The two-step PHG/MCL adoption process results, as in the earlier *Williams* case, creates a situation in which the Department of Health Services has limited discretion to alter standards developed by a second agency, and thus the rights the public would otherwise have under the APA in attempting to influence the proposed DHS regulation are curtailed. OEHHA adoption of PHGs diminishes the opportunity for meaningful public participation in development of the duly adopted DHS MCL regulations.

(8) The OEHHA argument fails to consider case law findings that "rebuttable presumptions" constitute "regulations."

1987 OAL Determination No. 10 concluded that a DHS rule stating a presumption violated the APA. The determination stated that allocating burdens of proof and creating presumptions were critically important methods of structuring legal proceedings; that it was difficult to imagine a situation in which an informal rule that explicitly created a presumption and then indicated how to rebut it could be characterized as non-regulatory.

In *Union of American Physicians & Dentists v. Kizer* (1990), the California Court of Appeal upheld 1987 OAL Determination No. 10, stating that:

> "We agree with the OAL that an informal rule which creates a presumption and then indicates how to rebut it is a regulation within the meaning of the APA. (1987 OAL Determination No. 10 . . . slip opn. Pp. 18-19.)"[61]

In *Tidewater v. Bradshaw* (1996), the California Supreme Court, though disapproving a number of earlier APA cases in whole or in part, cited *Kizer* with approval:

> "Examples of policies that courts have held to be regulations subject to the rulemaking procedures of the APA include: (1) *an informational 'bulletin'* defining terms of art and *establishing a rebuttable presumption* (*Union of American Physicians & Dentists v. Kizer* . . .); . . . ." [Emphasis added.][62]

We will focus on the OEHHA pronouncement that a maximum of 12 PPB of DEHP can safely be allowed in drinking water. That pronouncement is presumed to be the standard that DHS will formally adopt as a regulation pursuant to the APA, except to the extent that DHS can establish that the standard is *not* technologically or economically feasible.

(9) The OEHHA argument misinterprets a judicial comment concerning a relatively minor litigation decision of the State Water Resources Control Board.

As authority for the proposition that agency rules are not "regulations" within

the meaning of the APA unless they are "binding and mandatory," OEEHA cites *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697, 702. The *Water Board* case does not stand for this proposition. This 1993 case began with a request for determination challenging an amendment to a regional water quality control plan which defined the term "wetland." Responding to the request, the Board (then represented by staff attorneys) forthrightly conceded that these regional plans were "regulations" within the meaning of the APA, but then went on to argue at length that these plans were impliedly exempt from the APA because statutory adoption procedures applying to plans could not be harmonized with APA rulemaking procedures. The OAL determination harmonized the two sets of procedures.

Represented by the Attorney General, the Board then sought judicial review of the OAL determination. Apparently after reading the determination, the Attorney General advised the Board that continued sole reliance on the implied APA exemption argument looked like a losing proposition. In any event, the Board attempted to back away from the concession, arguing that the Legislature never intended the definition of "regulation" to encompass water quality control plans. The court responded to this noteworthy shift in strategy by pointedly quoting the concession statement in its opinion. Footnote 4 of the opinion reads:

> "The Boards framed the issue before OAL as follows: 'The question before [OAL] is not whether the amendments are regulatory. The State Board concedes that the Water Quality Control Plan for the San Francisco Bay Basin and all other water quality control plans adopted pursuant to Porter-Cologne set regulatory standards of general applicability which apply, interpret and make specific the requirements of Porter-Cologne. Water quality control plans are quasi-legislative. The water quality objectives and implementation program established by a water quality control plan are binding standards, not mere goals or guidelines.' "

The court then went on to state that it evaluated agency rules alleged to be "regulations" by looking to the content and effect of the rule, rather than merely relying on the label the issuing agency placed on the rule:

> ". . . the relevant Government Code sections are careful to provide OAL authority over regulatory measures *whether or not they are*

designated 'regulations' by the relevant agency. In other words, if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it. In light of this strong legislative mandate, concededly regulatory agency directives--such as the amendments to the water quality control plan at issue here--*must* be deemed regulations."[63] [Emphasis added.]

The matter now before OAL, the request for determination concerning the PHG for DEHP, presents a different question. Whereas the Water Board's strategy before OAL was to rely wholly on the APA exemption argument, OEHHA's strategy before OAL is rely wholly on the argument that a PHG is not a "regulation."

The *Water Board* language relied upon by OEHHA was intended to point out the inconsistency between the arguments the Board made (1) to OAL and (2) to the court. The issue of whether agency rules which are *not* characterized by the issuing agency as "binding" was not before the *Water Board* court. (This question was, however, before the court in *Union of American Physicians and Dentists v. Kizer*,[64] which found to a be a "regulation" an agency rule which the agency *had* characterized as "not seek[ing] to substantially regulate behavior.")

The *Water Board* case presented the unusual situation in which all parties to the litigation had agreed that the rules under review were binding. In sharp contrast, in the case of the agency rules under review today, the issuing agency (OEHHA) does not concede that they are binding. In OAL's view, however, the PHG--pursuant to statute--has the significant legal effect of creating a rebuttable presumption that the 12 PPB standard will be incorporated into the DHS regulations, unless specified findings are made by DHS. It is hard to imagine a clearer example of a general rule which "makes specific" a law enforced or administered by an agency than a standard which presumptively sets a specific numerical level for a chemical.

(10) OEHHA makes much of the fact that the formal regulations setting maximum contaminant levels for drinking water are adopted by the Department of Health Services, a separate agency.[65] From the perspective of policy and legal analysis, however, it should make no difference whether the scientists drafting PHGs are employed by (1) the Health Hazard Assessment Division of the Department of Health Services (OEHHA's predecessor) or (2) by

OEHHA. In either case, the PHG would by law constitute a rebuttable presumption, which substantially limits the discretion of those drafting the final regulation. Critical here is the fact that the health-related policies in the PHG are in effect largely insulated from public influence in the final APA rulemaking, *without* benefit of an express APA exemption (that it, there is no statute which expressly states that--for example--the otherwise applicable public comment summary-and-response requirement does not apply to the pivotal OEHHA adoption proceedings).

(11) PHGs established by OEHHA play an important role in the implementation of the Safe Drinking Water Act. In addition to their influence upon primary drinking water standards,[66] PHGs affect the obligations of every public water system to provide their customers with the "consumer confidence" reports required by Health and Safety Code section 116470. The reports include a comparison of the quality of water delivered with PHGs, and when the level of contaminants exceeds PHGs: (1) the numerical public health risk associated with water which exceeds PHGs, (2) the category of risk, (3) a description of the best available control technology, (4) an estimate of the cost of using the technology, and (5) actions proposed to reduce the level of contaminants. When the level of a contaminant in the water exceeds a PHG, the water system is obliged to hold a hearing for the purpose of accepting and responding to public comment on the report. Thus, we see that consequences to the regulated water systems flow from the adoption of PHGs by OEHHA.

Thus, for these reasons, OAL cannot accept OEHHA's argument that agency rules must be "mandatory and binding" before they can meet the APA definition of "regulation." Next, we will discuss an issue raised in the Superior Court ruling.

The theory that "mere scientific judgments" not subject to the APA because they not quasi-legislative in nature and not appropriate for review by OAL

In its ruling on the demurrer of Cal EPA in the case of *Eastman Chemical Co. v. Peter Rooney, California EPA, et al.*, the Superior Court wrote:

> "Petitioner contends that despite the plain language of [Health and Safety Code] section 116365(c) the Court should find legislative intent that the duty of the Office to adopt a public health goal is in effect a regulation or standard mandating compliance with the Administrative Procedure Act. The basis for this contention is that section 116470 requires public water agencies to prepare annually a consumer confidence report respecting all substances for

which goals are set by the Office. Given that requirement, it is urged, the Legislature must have determined that the APA would apply to the denomination of substances in public health goals.

"The Court finds otherwise. The APA applies to all rules, regulations, orders, or standards of general application, but only when adopted to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedures. (Govt. Code section 11342 (g).) The public health goals envisioned here do none of these things, and are but precursors to a potential regulatory scheme, whence the language in the section that the office and department 'are prohibited from imposing any mandate that requires a public water system to comply with public health goal.' Moreover, the Conference Report notes that the goals are not intended to be 'enforceable regulatory standards.'

"*Denomination of a substance as a carcinogenic or reproductive contaminant, standing alone, does not in the face of this language rise to the level of a matter within APA's ambit. Mere scientific judgments are neither legislative nor quasi-legislative actions. Indeed, review by the Office of Administrative Law is not designed to review scientific judgments, but only to make legal determinations. . . .*" [Emphasis added.]

OAL cannot agree with the court's rationale. The statutory language alluded to in the first sentence of the last quoted paragraph prohibits the use of PHGs as "enforceable regulatory standards." It is plain that the standards contained in PHGs are *not enforceable*. This premise, however, does not support the conclusion that PHGs are not "regulations." As has been previously explained, the definition of "regulation" set forth in Government Code section 11342, subdivision (g), does not limit the scope of the term to standards which are enforceable. Indeed, many regulations are definitions, with no enforceable component. Also, some CCR provisions set forth acts that are permitted, but not required.

PHGs adopted by OEHHA *do have a legal effect*, precisely as was intended by the Legislature. OEHHA's scientific judgments are made as part of a deliberative process that, for this agency, culminates in the setting of a PHG. The underlying science serves as the factual basis for the PHG regulation. Setting a PHG is a quasi-legislative action by OEHHA, and is amenable to the APA rulemaking process.[67]

The Legislature relies upon the scientific expertise which resides in many of the agencies delegated quasi-legislative powers. These agencies routinely exercise such powers in full compliance with the requirements of the APA. Accordingly, OAL regularly reviews proposed regulations and amendments of existing regulations supported by rulemaking files which present substantial scientific evidence of the necessity for the proposed rules. Although OAL claims no scientific expertise, it is fully competent to review the administrative record prepared in support of a proposed regulation to determine whether it contains substantial evidence that the regulation is needed.[68] The rulemaking agencies which promulgate science-based standards have, historically, been able to assemble the factual information or data necessary to satisfy the legal "necessity" standard enforced by OAL.

Two prior requests for OAL determinations presented situations similar to the one in the current inquiry. Both involve attempts by the Department of Food and Agriculture ("DFA") to implement the Birth Defect Prevention Act of 1984.[69] This Act, which had the goal of preventing pesticide induced abortions, birth defects and infertility, required DFA to compile a list of mandatory health effects studies that it had on file for each active ingredient in registered pesticides. It instructed the DFA to provide to the Legislature its assessment of whether each of these studies was valid, complete and accurate and to further provide a list of data gaps for each active ingredient in pesticides registered in California. Finally, DFA was required to identify the 200 pesticide active ingredients with (1) the most significant data gaps, (2) the most widespread use and that (3) presented the most hazards to humans.

In January 1986, DFA issued "*Notice to Pesticide Registrants pertaining to the Birth Defect Prevention Act of 1984, California Notice 86-1.*" It was followed in September of the same year by "*Notice to Pesticide Registrants pertaining to the Birth Defect Prevention Act of 1984, California Notice 86-9.*" Both notices identified 200 pesticide active ingredients as compounds requiring further scientific study. In 1986 OAL Determination No. 8,[70] and again in 1987 OAL Determination No. 8, OAL considered whether the Notices were underground regulations. Although DFA's evaluation of the available studies and the hazards presented to humans by the compounds were based in science, OAL concluded that the compilation of the resulting list was a quasi-legislative action.

Similarly, OEHHA's development of PHGs involves the review of available studies, the use of scientific judgment and ultimately, the exercise of its discretion. It is the APA that affords the public its opportunity to influence agencies in their

exercise of quasi-legislative powers. The scientific nature of an agency's undertaking cannot foreclose meaningful public participation,[71] unless the Legislature grants the agency an express exemption from the APA.

Having concluded that three challenged rules are standards of general application, OAL must consider whether they meet the second prong of the two-part test.

B. DO THE CHALLENGED RULES IMPLEMENT, INTERPRET OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY OEHHA OR GOVERN OEHHA'S PROCEDURE?

Health And Safety Code section 116365, subdivision (c) (set out in full in endnote 19), directs OEHHA to adopt a Public Health Goal for each drinking water contaminant regulated or proposed to be regulated by DHS pursuant to a primary drinking water standard. The Public Health Goal for DEHP was adopted by OEHHA pursuant to this statutory authority.

Clearly, the PHG for DEHP implement, interprets, and makes specific section 116365, subdivision (c). OEHHA has implemented the statute by determining that DEHP is a carcinogen, a teratogen, and a reproductive toxicant. OEHHA has made the statute specific by determining that a maximum of 12 parts per billion of DEHP can safely be allowed in drinking water

OAL concludes, therefore, that the PHG for DEHP is not only a standard of general application, but also that it implements, interprets, and makes specific a law administered by OEHHA. Thus, the PHG for DEHP is a "regulation" within the meaning of the APA.

IV. DOES THE CHALLENGED RULE FOUND TO BE A "REGULATION" 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.[72] In *United Systems of Arkansas v. Stamison* (1998),[73] the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA.

According to the *Stamison* Court:

> "*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.* (See, e.g., Gov. Code, section 16487 ['The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.']; Gov. Code, section 18211 ['Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act']; Labor Code, section 1185 [orders of Industrial Welfare Commission 'expressly exempted' from the APA].) [Emphasis added.]"[74]

Express statutory APA exemptions may be divided into two categories: special and general.[75] *Special* express statutory exemptions typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions typically: (1) apply across the board to all state agencies and (2) are found in the APA. An example of a *special* express exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example of a *general* express exemption is Government Code section 11342, subdivision (g), part of which exempts "internal management" regulations of all state agencies from the APA.

APA EXCEPTIONS MUST BE "EXPRESS;" -- "EXPRESS" MEANS "EXPRESS" NOT "IMPLIED"[76]

Government Code section 11346 is the keystone provision of the APA. Enacted originally in 1947 as section 11420, it has changed remarkably little in the past half century.[77] Section 11346 provides:

> "It is the purpose of this chapter to establish *basic minimum procedural requirements for the adoption*, amendment or repeal *of administrative regulations. Except as provided in section 11346.1* [emergency regulations], the provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this chapter repeals or diminishes additional requirements imposed by any statute. This chapter *shall not be superseded or modified* by any subsequent legislation except to the extent that the legislation shall do so *expressly*." [Emphasis added.]

Despite the dramatic rewriting of the APA in 1979 which led to the creation of OAL, this section was reenacted unaltered, except for renumbering as section

11346. Section 11346 thus represents a clear and strong legislative policy of 52 years standing, which was reaffirmed and underscored by the determined 1979 legislative effort to establish a central quality control authority to review state agency rules.

What did the Legislature mean by the word "expressly" in section 11346?

According to settled principles of statutory interpretation, we are to look to the ordinary meaning of the word. According the *American Heritage Dictionary*,[78] "expressly" means "definitely and explicitly stated." It also means "in an express or definite manner; explicitly." In a usage note under the word "explicit," the *American Heritage Dictionary* states:

> "*Explicit* and *express* both apply to something that is CLEARLY STATED RATHER THAN IMPLIED. *Explicit* applies more particularly to that which is carefully spelled out: *explicit instructions*. *Express* applies particularly to a clear expression of intention or will: *an express promise* or *an express prohibition*." [Italicized emphasis in original; capitalized emphasis added.]

According to *Black's Legal Dictionary*, "express" means:

> "Clear; definite; explicit; plain; direct; *unmistakable*; *not* dubious or *ambiguous*. . . . Made known distinctly and explicitly, and not left to inference. . . . *The word is usually contrasted with 'implied.'*" [Emphasis added.][79]

As noted in part I of this determination, a 1999 legislative committee analysis indicated that the statute:

- is "ambiguous" concerning whether or not a PHG is a "regulation" subject to the APA [rather than resolving the APA applicability issue in "definite and explicit" (or "clear" and "unmistakable") language], and

- is silent on the question of whether or not a PHG must be adopted pursuant to the APA, doing no more than "implying" that the APA does not apply [rather than providing "a clear expression of intention" on the question of whether the APA applies].

The committee analysis states:

> "While the California Safe Drinking Water Act makes it clear that the MCL, an enforceable standard, is a regulation and subject to adoption under the Administrative Procedure Act, *the legal status of the PHG is more ambiguous.* It is not an enforceable standard because both OEHHA and DHS, by the express terms of the Act, are prohibited from requiring public water systems to comply with it. *While it is adopted by OEHHA, the statute is silent about whether it must be adopted using the procedures of the Administrative Procedure Act, implying instead that it [the Public Health Goal] is the end product of the risk assessment that the OEHHA prepares for each contaminant.*"

When the Legislature wants to expressly exempt an agency from the APA, it knows what to say. For instance, Labor Code section 1185 expressly exempts rules concerning the minimum wage and similar matters:

> "The orders of the [Industrial Welfare Commission (IWC)] fixing minimum wages, maximum hours, and standard conditions of labor for all employees, when promulgated in accordance with the provisions of this chapter, shall be valid and operative and such orders are *hereby expressly exempted from the provisions of Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code.*" [Emphasis added.]

This Labor Code section explicitly and unmistakably exempts the specified rules.

Returning to Government Code section 11346, we note that it also clarifies another important point. How do APA rulemaking requirements interact with statutes which prescribe *different* rulemaking procedures? Section 11346 answers this question comprehensively.

First, section 11346 declares that the purpose of the APA is to "establish basic *minimum* procedural requirements for the adoption, amendment or repeal of administrative regulations." (Emphasis added.)

Second, section 11346 declares that APA requirements are applicable to "the exercise of *any* quasi-legislative power conferred by *any* statute heretofore or hereafter enacted . . . ." (Emphasis added.)

Third, section 11346 provides that nothing in the APA "repeals or diminishes *additional* requirements imposed by any . . . statute [heretofore or hereafter enacted]." (Emphasis added.)

The application of these principles to the facts at hand is not difficult. (1) The APA does not repeal or diminish the "additional" procedural requirements spelled out in the California Safe Drinking Water Act. (2) Subsequently enacted statutes--such as the California Safe Drinking Water Act--cannot "supersede" or "modify" APA provisions unless the subsequent legislation does so "expressly." (3) Where both the APA *and* another statute impose limitations upon one particular agency's exercise of quasi-legislative power, and the other statute's limitations *add to* APA rules, *both* sets of limitations apply. Assume, for example, that the enabling act of agency X requires it to hold a public hearing prior to adopting regulations. According to the APA, a public hearing need not be scheduled unless a timely demand is received from the public. Section 11346 (and general principles of statutory interpretation) would indicate that agency X must comply with *both* APA procedures (e.g., summarize and respond to written public comments) *and* the specific mandate of its enabling act (i.e., hold a public hearing even if one is not specifically demanded by a member of the public).[80]

A. DO THE CHALLENGED STANDARDS FALL WITHIN ANY *SPECIAL* EXPRESS APA EXEMPTION?

Though this statute was not cited by OEHHA, we have located one special express exemption which applies directly to one of OEHHA's core responsibilities.

The electorate, enacting Proposition 65 on November 4, 1986, expressly stated that a mandated list of health-endangering chemicals was intended to be exempt from the APA. Health and Safety Code section 25249.8, subdivision (a), states in part:

> "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* . . . , and he shall cause such list to be revised and republished in light of additional knowledge at least once per year thereafter. . . ." [Emphasis added.]

Health and Safety Code section 25249.8, subdivision (e), states:

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

This Health and Safety Code section explicitly and unmistakably exempts the specified rules.

Thus, OEHHA, the agency currently entrusted with the duty of maintaining the Proposition 65 list, may add chemicals to and remove chemicals from this list *without complying with APA procedural requirements*. This Proposition 65 list is printed in Title 22 of the California Code of Regulations in section 12000. In a typical submission to OAL, OEHHA submitted revisions to this CCR section in a document dated August 20, 1996, which stated in part that the submission was a "*regulation* published pursuant to HSC section 25249.8 and is *exempted from APA requirements*." [Emphasis added.][81]

We agree with OEHHA's characterization of its submission: that is, that amendments to the Proposition 65 list which add or remove chemicals are "*regulation[s]*. . . exempted from APA requirements." [Emphasis added.] But for the express APA exemption contained in Health and Safety Code section 25249.8, OEHHA would be required by law to adopt a regulation in compliance with the APA in order to designate a chemical as one "known to the state to cause cancer or reproductive toxicity."

This official Proposition 65 list designates DEHP as a carcinogen. The list does *not*, however, designate DEHP as a teratogen or as reproductive toxicant. Since OEHHA has, pursuant to a special express statutory exemption, duly designated DEHP as a carcinogen, we conclude that the portion of the PHG which determined DEHP to be a carcinogen, though a "regulation," is nonetheless valid because DEHP is included in the official Proposition 65 list of chemicals known to the State of California to cause cancer, a list expressly exempted by statute from the requirements of the APA.

The Proposition 65 exemption does not cover the determination that DEHP is a teratogen and a reproductive toxicant. The Proposition 65 exemption does not cover the OEHHA determination that a maximum of 12 parts per billion of DEHP can safely be allowed in drinking water.

Our research has disclosed no other special express statutory exemption that applies to the remaining OEHHA rules found to be "regulations."

B. DO THE CHALLENGED STANDARDS FALL WITHIN ANY *GENERAL* EXPRESS APA EXEMPTION?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.[82] Rules concerning certain specified activities of state agencies are not subject to the procedural

requirements of the APA.[83]

Internal Management

The APA excepts policies which pertain solely to the internal management of a single state agency from the notice and hearing requirements of the Act.[84] Government Code section 11342, subdivision (g) states:

> "'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, *except one that relates only to the internal management of the state agency.* [Emphasis added.]"

However, as the *Grier* Court found: ". . . the definition of regulation is broad, as contrasted with the scope of the internal management exception, which is narrow."[85] Internal management policies are those designed to govern the internal operations of the state agency. The exception does not apply to ". . . the rules necessary to properly consider the interests of all . . . under the . . . . statutes . . ."[86]

Grier v. Kizer provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states:

> "*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . . .*" [Fn. omitted.]' . . . [Citation; emphasis added by *Grier* court.]
>
> "*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The

consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][87]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extended] well beyond matters relating solely to the management of the internal affairs of the agency itself[,]' and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . ."[88]

The Public Health Goal for DEHP does not apply solely to OEHHA staff. This Public Health Goal would appear to apply directly to all members of at least three classes:

(1) public water agencies preparing statutorily-mandated[89] annual consumer confidence reports concerning substances for which goals are set by OEHHA;

(2) members of the staff of the Department of Health Services who regulate the concentrations of contaminants in public water supplies; and

(3) persons interested in taking part in the development of duly adopted regulations which (a) designate particular chemicals as health hazards and (b) set maximum concentrations for these designated chemicals (for instance, how many parts per billion are allowed in drinking water).

We conclude that the PHG for DEHP does not fall within the internal management exemption, nor within any other general express statutory exemption. Accordingly, OAL concludes that the rule is without legal effect because it has not been adopted in compliance with the APA.

CONCLUSION

The Office of Administrative Law concludes that the Public Health Goal for the industrial chemical DEHP adopted by the Office of Environmental Health Hazard Assessment is in part a "regulation" which is invalid because it should have been, but was not, adopted pursuant to the APA.

Two parts of the Public Health Goal are invalid because they were not adopted pursuant to the APA: (1) the identification of DEHP as a teratogen and a reproductive toxicant and (2) the determination that a maximum of 12 parts per billion of DEHP can safely be allowed in drinking water.

One part of the Public Health Goal, the determination that DEHP is a carcinogen, is a "regulation" within the meaning of the APA , but is valid because DEHP is included in the official Proposition 65 list of chemicals known to the State of California to cause cancer, a list expressly exempted by statute from the requirements of the APA.

DATE: August 6, 1999

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ENDNOTES

1. This request for determination was filed Christian Volz and Carol Rene Brophy of McKenna & Cuneo, L.L.P., Steuart Street Tower, One Market, San Francisco, CA 94104-1475, (415) 267-4000, counsel for Eastman Chemical Company. McKenna and Cuneo also submitted a comment dated March 8, 1999, during the public comment period, on behalf of both Eastman Chemical Company and Aristech Chemical Corporation. A second public comment was received from Gene Livingston and S. Craig Hunter of Livingston & Mattesich Law Corporation, 1201 K Street, Suite 1100, Sacramento, CA 95814, (916) 442-1111, counsel for the California Chamber of Commerce and the Chemical Industry Council. The state agency was represented by (1) Deputy Attorney General Susan L. Durbin, Department of Justice, 300 South Spring Street, Suite 5212, Los Angeles, CA 90013, (213) 897-2639 and (2) Colleen Murphy, Chief Counsel, Office of Environmental Health Hazard Assessment, 301 Capitol Mall, Room 205, Sacramento, CA 95814-4308, (916) 322-0493.

   The Eastman comment of March 8, 1999 characterized the request for determination as including a request for a ruling on "whether OEHHA may adopt PHGs without first conducting an external scientific peer review of their scientific bases as mandated by California Health and Safety Code section 57004". OAL denies this request for two reasons. First, this matter was not included in the original request for determination, and additional agency rules may not be added after issuance of the notice of acceptance. Second, this issue is in any event a matter for the courts, not for OAL in the context of a request for determination. The claim involves not an agency rule allegedly subject to the APA, but rather the question of whether a non-APA procedural requirement applies to issuance of public health goals.

2. Senior Staff Counsel David Potter contributed the "mere scientific judgment" and consumer confidence survey discussions to part III of this determination.

3. This determination may be cited as **"1999 OAL Determination No. 17 ."**

   Pursuant to Title 1, CCR, section 127, this determination becomes effective on the 30th day after filing with the Secretary of State, which filing occurred on the date shown on the first page of this determination.

   Government Code section 11340.5, subdivision (d), provides that:

   > "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 [in the California Regulatory Notice Register]."

   Determinations are ordinarily published in the Notice Register within two weeks of the date of filing with the Secretary of State.

4. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (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.) An agency rule found to violate the APA could also simply be rescinded.

5. OAL does not review alleged underground regulations for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations were proposed by the rulemaking agency under the APA, OAL would review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 and 11349.1.)

6. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 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(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. [Emphasis added.]"

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note 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.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, 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.*

7. *OAL Determinations Entitled to Great Weight in Court*

The California Court of Appeal has held that a statistical extrapolation rule utilized by the

Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, disapproved on other grounds in *Tidewater*. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10**, CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL's conclusion, stating that:

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted for its consideration in the case, the court further found:

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of [a statute] by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration*.[*Id.*; emphasis added.]"

See also *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4,** California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384, at p. 391 (reasons for according due deference consideration to OAL determinations).

8. According to Government Code section 11370:

> "*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*. [Emphasis added.]"

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

9. Comment on request for determination, dated March 8, 1999, page 2, note 2.

10. A substance causing birth defects.

11. A substance causing testicular damage.

12. Government Code sections 12080-12081.2 (added by Statutes of 1967, chapter 1540, p. 3665; renumbered and amended by Statutes of 1968, chapter 449, p. 1055, sec. 16). See California Constitution, Article V, section 6.

13. Government Code section 12080.5.

14. See, e.g., Title 22, CCR, section 12102(e), referring to Executive Order D-61-87.

15. Received via Internet e-mail from the Senate bill update service on July 3, 1999, concerning SB 635, for a Committee hearing scheduled for July 6, 1999.

16. First amended complaint dated May 20, 1998 was submitted by the requester, along with other litigation documents.

17. The statement that "mere scientific judgments" are *not* quasi-legislative in nature is a dramatic departure from existing law, established practice, and common understanding. Many pages of the CCR consist of listings of chemicals which are prohibited in specified contexts, or whose use is regulated. Similarly, although the determination that a particular species is threatened or endangered is grounded in science, when a species is, for instance, determined to be endangered, a regulation is formally adopted, with full opportunity for public input on the validity of the scientific judgments upon which the regulation is based.

18. The ruling stated, in full:

"Petitioner contends that despite the plain language of [Health and Safety Code] section 116365(c) the Court should find legislative intent that the duty of the Office to adopt a public health goal is in effect a regulation or standard mandating compliance with the Administrative Procedure Act. The basis for this contention is that section 116470 requires public water agencies to prepare annually a consumer confidence report respecting all substances for which goals are set by the Office. Given that requirement, it is urged, the Legislature must have determined that the APA would apply to the denomination of substances in public health goals.

"The Court finds otherwise. The APA applies to all rules, regulations, orders, or standards of general application, but only when adopted to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedures. (Govt. Code section 11342 (g).) The public health goals envisioned here do none of these things, and are but precursors to a potential regulatory scheme, whence the language in the section that the office and department 'are prohibited from imposing any mandate that requires a public water system to comply with public health goal.' Moreover, the Conference Report notes that the goals are not intended to be 'enforceable regulatory standards.'

"Denomination of substance as a carcinogenic or reproductive contaminant, standing alone, does not in the face of this language rise to the level of a matter within APA's ambit. Mere scientific judgments are neither legislative or quasi-legislative actions. Indeed, review by the Office of Administrative Law is not designed to review scientific judgments, but only to make legal determinations regarding authority and necessity for proposed administrative regulations. There are means available to attack such denomination as arbitrary and capricious, as when wholly unsupported by reasonable scientific standards, but compulsion of APA proceedings is not one of them.

"The demurrer is sustained without leave to amend with respect to those causes of action requiring the Office to comply with the rulemaking procedures of the APA and the peer review procedures of Government Code section 57004 when adopting public health goals. The demurrer is overruled in all other respects. The motion to strike is denied."

19. Health and Safety Code section 116365:

(a) The department shall adopt primary drinking water standards for contaminants in drinking water that are based upon the criteria set forth in subdivision (b) and shall not be less stringent than the national primary drinking water standards adopted by the United States Environmental Protection Agency. Each primary drinking water standard adopted by the department shall be set at a level that is as close as feasible to the corresponding public health goal placing primary emphasis on the protection of public health, and that, to the extent technologically and economically feasible meets all of the following:

(1) With respect to acutely toxic substances, avoids any known or anticipated adverse effects on public health with an adequate margin of safety, and

(2) With respect to carcinogens, or any substances that may cause chronic disease, avoids any significant risk to public health.

(b) The department shall consider all of the following criteria when it adopts a primary drinking water standard:

(1) The public health goal for the contaminant adopted by the Office of Environmental Health Hazard Assessment pursuant to subdivision (c).

(2) The national primary drinking water standard for the contaminant, if any, adopted by the United States Environmental Protection Agency.

(3) The technological and economic feasibility of compliance with the proposed primary drinking water standard. For the purposes of determining economic feasibility pursuant to this paragraph, the department shall consider the costs of compliance to public water systems, customers, and other affected parties with the proposed primary drinking water standard, including the cost per customer and aggregate cost of compliance, using best available technology.

(c) The Office of Environmental Health Hazard Assessment shall perform a risk assessment and, based upon that risk assessment, shall adopt a public health goal based exclusively on public health considerations, for each drinking water contaminant regulated, or proposed to be regulated, by the department pursuant to a primary drinking water standard. The risk assessment shall be performed using the most current principles, practices, and methods used by public health professionals who are experienced practitioners in the field of epidemiology, risk assessment, and toxicology. The office and the department are prohibited from imposing any mandate that requires a public water system to comply with a public health goal. Each public health goal shall be set in accordance with all of the following criteria:

(1) Each public health goal shall be set for acutely toxic substances, at a level at which no known or anticipated adverse effects on health will occur, with an adequate margin of safety.

(2) Each public health goal shall be set for a carcinogen or other substance that may cause chronic disease at a level that, based upon currently available data, does not pose any significant risk to health.

(3) To the extent the information is available, the office shall consider possible synergistic effects resulting from exposure to, or interaction with, two or more contaminants.

(4) The office shall consider the effect of the contaminants upon subgroups that comprise a meaningful portion of the general population, including, but not limited to, infants, children, pregnant women, the elderly, individuals with a history of serious illness, or other subpopulations, that are identifiable as being at greater risk of adverse health effects due to exposure to contaminants in drinking water than the general population.

(5) The office shall consider the contaminant exposure and body burden levels that alter physiological function or structure in a manner that may significantly increase the risk of illness.

(6) If the office finds that the currently available scientific data is insufficient to determine the amount of a contaminant that creates no significant risk to public health, the public health goal shall be set at a level that is protective of public health with an adequate margin of safety, based exclusively on health considerations and factoring in the considerations set forth in paragraphs (1) to (5), inclusive, and paragraph (7), and using the most current principles, practices, and methods used by public health professionals who are experienced practitioners in the fields of epidemiology, risk assessment, and toxicology. However, if adequate scientific evidence demonstrates that a safe dose response threshold for a contaminant exists, then the public health goal should be set at that threshold. The department may set the public health goal at zero if necessary to satisfy the requirements of this paragraph.

(7) The office shall consider exposure to contaminants in media other than drinking water, including, but not limited to, exposures in food, in the ambient and indoor air, and the resulting body burden.

(d) Notwithstanding any other provision of this section, any maximum contaminant level in effect on August 22, 1995, may be amended by the department to make the level more stringent pursuant to this section. However, the department may only amend a maximum contaminant level to make it less stringent if the department shows clear and convincing evidence that the maximum contaminant level should be made less stringent and the amendment is made consistent with this section.

(e) (1) Public health goals established by the office shall be reviewed at least once every five years and revised, pursuant to the provisions of subdivision (c), as necessary based upon the availability of new scientific data.

(2) On or before January 1, 1998, the office shall adopt a public health goal for at least 25 drinking water contaminants for which a primary drinking water standard has been adopted by the department. The office shall adopt a public health goal for 25 additional drinking water contaminants by January 1, 1999, and for all remaining drinking water contaminants for which a primary drinking water standard has been adopted by the department by no later than December 31, 1999. A public health goal shall be concurrently adopted by the office with the adoption of a primary drinking water standard by the department for any newly regulated contaminant.

(f) The department or office may review, and adopt by reference, any information prepared by, or on behalf of, the United States Environmental Protection Agency for the purpose of adopting a national primary drinking water standard or maximum contaminant level goal when it establishes a California maximum contaminant level or public health goal.

(g) At least once every five years after adoption of a primary drinking water standard, the department shall review the primary drinking water standard and shall, consistent with the criteria set forth in subdivisions (a) and (b), amend any standard if any of the following occur:

(1) Changes in technology or treatment techniques that permit a materially greater protection of public health or attainment of the public health goal.

(2) New scientific evidence that indicates that the substance may present a materially different risk to public health than was previously determined.

(h) Not later than March 1 of every year, the department shall provide public notice of each primary drinking water standard it proposes to review in that year pursuant to this section. Thereafter, the department shall solicit and consider public comment and hold one or more public hearings regarding its proposal to either amend or maintain an

existing standard. With adequate public notice, the department may review additional contaminants not covered by the March 1 notice.

(I) This section shall operate prospectively to govern the adoption of new or revised primary drinking water standards and does not require the repeal or readoption of primary drinking water standards in effect immediately preceding January 1, 1997.

(j) The department may, by regulation, require the use of a specified treatment technique in lieu of establishing a maximum contaminant level for a contaminant if the department determines that it is not economically or technologically feasible to ascertain the level of the contaminant.

20. An agency action is quasi-legislative in nature (rather than quasi-judicial in nature), if the action constitutes the formulation of policy intended to govern future decisions, rather than the application of pre-established rules to the peculiar facts of an individual case. *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 168-69, 188 Cal.Rptr. 104, 111.

21. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also *Auto and Trailer Parks*, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a thorough discussion of the rationale for the "APA applies to all agencies" principle, see **1989 OAL Determination No. 4** (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

1989 OAL Determination No. 4 was upheld by the California Court of Appeal in *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697, 16 Cal.Rptr. 2d 25, rehearing denied, Feb. 19, 1993.

22. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in 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).

23. The word "may" in section 59012 cannot mean that OEHHA has discretion to adopt quasi-legislative rules either (1) in compliance with the APA adoption requirements or (2) without complying with the APA. According to the California Court of Appeal, the significance of the word "may" in this context is that the agency is not required to adopt regulations, but that "regulations, if promulgated, must comply with the APA." *Engelmann v. State Board of Education* (1993) 2 Cal.App.4th 47, 59, 3 Cal.Rptr.2d 264, 272. In other words, under a "may adopt" statute, the agency need not issue any general rules or standards, but if the agency does elect to issue such rules or standards, then they are subject to the APA.

24. Quoting Government Code section 11152.

25. Further, as will be discussed below in part III of this determination, a recent California Supreme Court case (*Tidewater v. Bradshaw*) suggests that APA adoption requirements may apply not only to all quasi-legislative enactments, but also to additional agency enactments which while not quasi-legislative in nature, nonetheless fall within the scope of the "very broad" statutory definition of "regulation," and are thus subject to the APA. This means that, even if the challenged OEHHA enactments were determined *not* to be quasi-legislative in nature, they could still be judicially determined to be subject to APA adoption requirements.

26. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. 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. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

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.*

27. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, . . . slip op'n., at p. 8.) [*Grier*, disapproved on other grounds in *Tidewater*]."

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in California Regulatory Notice Register 96, No. 8-Z, February 23, 1996, p. 292.

28. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001,1010, 74 Cal.Rptr.2d 407, 412, review denied.

29. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.

30. *Id.*

31. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.

32. *Id.*

33. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

34. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. 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).

35. Health and Safety Code section 116470.

36. Health and Safety Code section 116365, subdivision (a).

37. The correct citation is 12 Cal.App.4th 697, 702.

38. Indeed, the concept that an agency rule cannot meet the statutory of "regulation" unless it is binding seems fundamentally wrong. An agency rule that is a "regulation" is only binding unless and until it has been duly adopted pursuant to the APA. *Armistead*, p. 2 (state agency could validate invalid personnel rule by adopting in compliance with the APA). An agency rule that is a "regulation," but has not been adopted pursuant to the APA is "void." *Tidewater*. Such a void rule cannot logically be characterized as "binding."

39. The California Court of Appeal has rejected the argument that agency pronouncements are not "regulations" if they are simply informational in nature and do not seek to substantially regulate behavior, noting that agency rules which implement, interpret, and make specific the law enforced or administered by the agency require the promulgating agency to comply with the APA. *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 502, 272 Cal.Rptr. 886, 892.

40. The Court's ruling states in part:

> "The APA applies to all rules, regulations, orders, or standards of general application, *but only when adopted to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedures.* (Govt. Code section 11342 (g).) The public health goals envisioned here do none of these things, and are but precursors to a potential regulatory scheme, whence the language in the section [Health and Safety Code section 116365] that the office and department 'are prohibited from imposing any *mandate* that requires a public

water system to comply with public health goal.'" [Emphasis added.]

The judicial ruling seems to envision the *second* part of the two-part "regulation" test as incorporating the "binding and mandatory" criterion postulated by OEHHA. This is an interesting and significant feature of the ruling, one which unwittingly exposes the weakness of the underlying OEHHA argument. OEHHA argued that a state agency rule could not be deemed to constitute a "regulation" within the meaning of APA unless it was "binding and mandatory," imaginatively distilling this criterion from the *first* part of the two-part "regulation" test (standard of general application). The Court apparently accepted the premise that only agency rules which were "binding and mandatory" could constitute "regulations," but it linked this criterion to the *second* part of the two-part test (interpret, implement, or make specific).

The reality here is that neither part of two-part test contains the "binding and mandatory" criterion. Since this criterion is found in neither part of the statutory test, one might as well link it to the second part as to the first part.

41. See, e.g., 1999 OAL Determination No. 20, pp.9-14; 1999 OAL Determination No. 3, pp.7-9 (rules are "regulations" even if not stated in mandatory terms or characterized as binding). Both of these determinations also involve rebuttable presumptions found to violate the APA.

42. Though courts will, of course, be called upon to determine (1) whether specific statutory language constitutes an express statutory exemption (e.g., *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 74 Cal.Rptr.2d 407, review denied) and (2) the scope of a particular express statutory exemption (e.g., *California Coastal Commission v. Office of Administrative Law* (1989) 210 Cal.App.3d 758, 258 Cal.Rptr. 560, review denied), it seems clear that courts may not themselves create APA exemptions based solely upon public policy concerns. Pertinent principles concerning limitations on judicial power were stated in a 1987 APA case from the California Court of Appeal for the Third District: *Johnston v. Department of Personnel Administration* (1987) 191 Cal.App.3d 1218, 236 Cal.Rptr. 853, review denied. The *Johnston* court rejected a state agency's argument that a statute be interpreted to include a criterion that reflected agency practice, a criterion that was not actually present in the statute. The Court stated:

> "A court may not insert into a statute qualifying provisions not included or rewrite a statute to conform to an inferred intention that does not appear from its language. (*Mills v. Superior Court* (1986) 42 Cal.3d 951, 957, 232 Cal.Rptr. 141, 728 P.2d 211,)" (191 Cal.App.3d at 1223.)

Responding to an agency argument that failure to interpret the statute to include a criterion customarily included as a matter of agency practice would lead to a "deluge" of hearing requests, the *Johnston* Court also stated:

> "DPA's argument is more appropriately addressed to the Legislature. . . . The sole judicial function is to enforce statutes as written. This court is without the

authority to determine the wisdom, desirability, or propriety of statutes enacted by the Legislature. (*Estate of Horman* (1971) 5 Cal.3d 62, 77, 95 Cal.Rptr. 433, 485 P.2d 785.)"

43. These are alternative grounds for our decision.

44. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001,1010, 74 Cal.Rptr.2d 407, 412, review denied.

45. *Tidewater v. Bradshaw* (1996) 14 Cal.4th 557, ___, 59 Cal.Rptr.2d 186, 194.

46. *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 168-69, 188 Cal.Rptr. 104, 111.

47. The OEHHA argument also fails to consider key language in *Tidewater* indicating that the scope of the APA's definition of "regulation" may not be limited to those agency enactments deemed to be quasi-legislative in nature. According to the *Tidewater* court:

> "Moreover, even if we were to agree with Professor Asimow that the Legislature did not consider interpretive regulations to be 'quasi-legislative,' an agency would arguably still have to adopt these regulations in accordance with the rulemaking procedures of the APA. Government Code section 11346 states that APA rulemaking procedures apply 'to the exercise of any quasi-legislative power"; however, the STATUTE DOES NOT STATE the opposite, i.e., THAT RULEMAKING PROCEDURES DO NOT APPLY WHEN AN AGENCY ADOPTS RULES THAT ARE *NOT* QUASI-LEGISLATIVE. On the other hand, Government Code section 11340.5 makes clear that the rulemaking procedures of the APA apply to any 'regulation,' and the definition of regulation includes 'every rule . . . adopted . . . to *interpret* . . . the law . . . (i.e., interpretive regulations). (Gov. Code, sec. 11342, subd. (g), italics added.) If the Legislature did not intend the APA to apply to interpretive regulations, we do not think it would have expressly included interpretive regulations in this definition."[Italic emphasis by the Court; capitalized emphasis added by OAL.] (59 Cal.Rptr.2d at 197.)

48. Government Code section 11346: *Armistead v. State Personnel Board* (1978) 22 Cal.3d. 198, 201, 149 Cal.Rptr. 1, 2,

49. Title 5, U.S.C. section 553 (a)(3)(A).

50. SB 824 (1947/DeLap) initially provided that interpretive rules were exempt from the APA. This provision was amended out, and then SB 824 died in committee. A competing bill, AB 35, which did *not* exempt interpretive rules from the APA, was approved by the Legislature and chaptered as 1947, ch. 1425.

51. *Tidewater v. Bradshaw* (1996) 14 Cal.4th 557, ___, 186 Cal. Rptr. 186, 196-97.

52. Health and Safety Code section 59012.

53. Also, section 11340.5 bans agency issuance of "criteria"which satisfy the two part test. The Legislature explicitly refers to the public health goal as a "criterion" that must be followed by DHS.

54. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.

55. OEHHA argues that Eastman's request should be rejected by OAL because federal law currently sets a far more stringent limitation on the amount of DEHP that may be present in drinking water than is proposed in the challenged Public Health Goal. OEHHA argues: "The PHG will, as a practical matter, . . . not 'control or limit the discretion of DHS' in setting the drinking water standard for DEHP, as Eastman argues, until such time, if any, as the federal standard is revised to a level below the PHG." (OEHHA Superior Court brief, August 26, 1998, p. 7.)

Eastman argues that:

> "No primary drinking water standard may be set at a level less stringent than the national primary drinking water standard adopted by the United States Environmental Protection Agency ('U.S. EPA'). [Health and Safety Code section 116365(a).] Although at the moment the national primary drinking water standard for DEHP (6 ppb) is lower than California's PHG (12 ppb) such that the PHG will not drive the California primary drinking water standard, that fact alone does not excuse OEHHA from conducting a scientifically sound and objective analysis of DEHP for purposes of setting the PHG nor does it vitiate the effect the PHG has on the regulated community. The truth of this statement is aptly demonstrated by the fact the Eastman and Aristech Chemical Corporation . . . have already petitioned U.S. EPA to delist or significantly raise, DEHP as a carcinogen based on new data and scientific advances that have occurred since DEHP was initially listed and the 6 ppb primary standard was established. If the national primary drinking water standard for DEHP is removed, then the PHG will be the scientific basis for the state agency standard. . . ." (Request for determination, pp. 6-7.)

We cannot accept OEHHA's argument. Though we agree that "as a practical matter," the PHG does not limit OEEHA's discretion at this moment, the federal standard might change at any time, following which the PHG could in fact substantially limit DHS's discretion.

Also, the issue before OAL is not the short term *practical* consequences of a PHG, but whether a PHG meets the *legal* definition of "regulation." Finally, the underlying legal question raised by the request for determination applies to all PHGs set by OEHHA: the basic legal analysis should not change simply due to the fact that the particular PHG challenged here involves a situation in which there happens to be a stiffer federal standard.

56. Finding that agency rules are exempt from the APA undercuts one of the main purposes of the APA, meaningful public participation in agency rulemaking. See **1993 OAL Determination No. 5**, CRNR 94, No. 2-Z, January 14, 1994, p. 61 and **1989 OAL Determination No. 4**, CRNR 89, No. 16-Z, April 21, 1989, p. 1026.

57. (1970) 4 Cal.App.3d 948, __, 84 Cal.Rptr. 590

58. *California Optometric Association v. Lackner* (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.

59. 84 Cal.Rptr. at 595, n.6.

60. 84 Cal.Rptr. At 599; emphasis added.

61. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 892.

62. 14 Cal.4th 557, 572, 59 Cal.Rptr. 186, 195.

63. 12 Cal.App.4th at 703.

64. 223 Cal.App.3d 490,___,27 Cal.Rptr. 886, 892.

65. In *Armistead*, there were two defendants, the State Personnel Board (which authored the basic policy) and the Department of Water Resources (which relied on the State Personnel Board policy in taking action against plaintiff Armistead). Using the terms of Government Code section 11340.5, the State Personnel Board "issued" the policy, while the Department of Water Resources "utilized" the policy. Both state agencies violated the APA's ban on underground regulations.

66. See Health and Safety Code section 116365, subdivision (b), paragraph (1)

67. The court ruling ignores the reality that many CCR provisions (and proposed regulations) have both (1) non-scientific and (2) scientific portions. Health and Safety Code section 57004 mandates a peer review process for "the *scientific portions* of the proposed rule [or regulation]." [Emphasis added.] The fact that a portion of a rule or regulation involves scientific material does not mean that portion is a not a "regulation." For instance, defining the critical environmental term "wetland" involves considerable scientific input, but a variety of definitions are possible--some broader, some narrower, all grounded in science.

68. As provided in Government Code section 11349.1, subdivision (c), OAL is precluded from substituting its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations.

69. Food and Agricultural Code section 13121.

70. CANR 86, No. 44-Z, October 31, 1986.

71. If the court's view is correct, this would presumably mean that the public could not comment on the wisdom of policies such as adding MTBE to gasoline to reduce air pollution because such policies are merely "scientific judgments."

72. Government Code section 11346.

73. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.

74. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.

75. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself).

76. The following material is adapted from 1989 OAL Determination No. 4, the determination upheld in *State Water Resources Control Board v. Office of Administrative Law.*

77. Nonsubstantive amendments were made by statutes of 1994, chapter 1039 (AB 2531).

78. 2d College Ed. (1982), pp. 478-79.

79. 5th ed., 1979, p. 521. Under the heading "express authority," *Black's* also states:

"... An authority given in direct terms, definitely and explicitly, and not left to inference or implication, *as distinguished from authority which is* general, *implied*, or not directly stated or given." (Emphasis added.)

80. See **1986 OAL Determination No. 2** (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, pp. B-31, B-40, typewritten version, pp. 19-20, citing *Natural Resources Defense Council, Inc. v. Arcata National Corporation* (1976) 59 Cal.App.3d 959, 965, 131 Cal.Rptr. 172.

81. Form 400 dated August 20, 1996, signed by Charles M. Shulock, Acting Director; OAL regulatory action number 96 0820 06 P.

82. Government Code section 11346.

83. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)

    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. (g).)

    c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343,

subd. (a)(1); emphasis added.)

d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally 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. (g).)

f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *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). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, pp. 168-169, 175-177, CRNR 91, No. 43-Z, October 25, 1991, p. 1458-1459, 1461-1462. In *Grier v. Kizer* ((1990) 219 Cal.App.3d 422, 437-438, 268 Cal.Rptr. 244, 253), the court reached the same conclusion as OAL did in **1987 OAL Determination No. 10**, pp. 25-28 (summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 63); complete determination published on February 23, 1996, CRNR 96, No. 8-Z, p. 293, 304-305), rejecting the idea that *City of San Joaquin* (cited above) was still good law.

84. Government Code section 11342, subdivision (g).

85. *Grier v. Kizer, supra,* 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 251, disapproved on another point, *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198.

86. *City of San Marcos v. California Highway Commission, Department of Transportation* (1976) 60 Cal.App.3d 383, 408, 131 Cal.Rptr. 804, 820, quoted in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204-205, 149 Cal.Rptr. 1, 3.

87. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)

88. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.

89. Health and Safety Code section 116470.