CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by the Bay Planning Coalition concerning amendments to Chapters 2, 3 and 4 of the Water Quality Control Plan for the San Francisco Bay Basin (regarding wetland protection for San Francisco Bay) adopted by the San Francisco Regional Water Quality Control Board in Resolution No. 87-106 and the State Water Resources Control Board in Resolution No. 87-92 [1]	1989 OAL Determination No. 4 [Docket No. 88-006] March 29, 1989 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

Determination by:

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SYNOPSIS

The issues presented to the Office of Administrative Law are:

(1) whether Water Board policies (a) defining "wetlands" and (b) prescribing criteria for permit decisions on discharges to wetlands (including mitigation for any such discharges) are "regulations" required to be adopted in compliance with the Administrative Procedure Act, and

(2) if such wetlands protection policies are indeed "regulations" within the meaning of the APA, whether the policies are nonetheless impliedly exempt from the rulemaking requirements of the APA.

The Office of Administrative Law concludes that, as indeed the Board concedes, the above-noted policies are "regulations." The Office of Administrative Law further concludes, in contrast to the Board's position, that the Legislature has not "expressly" or "specifically" exempted these wetlands "regulations" from APA requirements. This conclusion applies only to the challenged "wetlands" amendments of the particular plan under review, the Bay Basin Plan.

THE ISSUE PRESENTED [3]

The Office of Administrative Law ("OAL") has been requested to determine[4] whether the amendments to Chapters 2, 3 and 4 of the Water Quality Control Plan for the San Francisco Bay Basin ("Basin Plan"), adopted by the San Francisco Regional Water Quality Control Board ("Regional Board") in Resolution No. 87-106 and the State Water Resources Control Board ("State Board") in Resolution No. 87-92, are "regulations" as defined in Government Code section 11342, subdivision (b), are subject to the Administrative Procedure Act ("APA"), and therefore violate Government Code section 11347.5, subdivision (a).[5]

THE DECISION [6,7,8,9]

OAL concludes that the above-noted amendments of Chapters 2 and 4[10] of the Basin Plan (1) are subject to the requirements of the APA,[11] (2) are "regulations" as defined in the APA, and (3) therefore violate Government Code section 11347.5, subdivision (a), except for certain provisions of the amendments that are either nonregulatory or are restatements of existing statutes or regulations.

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I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The position of State Engineer was created in 1878 to investigate problems of irrigation, drainage and navigation of rivers.[12,13] The control of water quality grew and changed in succeeding years to keep pace with the burgeoning needs and technology of a more complex society. The position of State Engineer changed over the years, going through restructuring and name changes, until the present State Water Resources Control Board was created by the Legislature in 1967 by combining the State Water Rights Board and the State Water Quality Control Board into one body.[14,15]

Although the State Board is divided into two statutory divisions, water rights and water quality, there are also additional administratively created divisions. The Board's powers include, among other things, water quality control.

Water Code section 13001, of the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act") (Water Code sections 13000 through 13999.16), provides in part:

> "It is the intent of the Legislature that the state board and each regional board shall be the principal state agencies with primary responsibility for the coordination and control of water quality . . . ." [Emphasis added.]

Authority [16]

Water Code section 179 provides:

> "The board succeeds to and is vested with all of the powers, duties, purposes, responsibilities, and jurisdiction vested in the Department and Director of Public Works, the Division of Water Resources of the Department of Public Works, the State Engineer, the State Water Quality Control Board, or any officer or employee thereof, under Division 2 (commencing with Section 1000), except Part 4 (commencing with Section 4000) and Part 6 (commencing with Section 5900) thereof; and Division 7 (commencing with Section 13000) of this code, or any other law under which permits or licenses to appropriate water are issued, denied, or revoked or under which the functions of water pollution and quality control are exercised." [Emphasis added.]

Water Code section 1058 provides:

> "The board may make such reasonable rules and regulations as it may from time to time deem advisable in car-

rying out its powers and duties under this code."

Applicability of the APA to Agency's Quasi-Legislative Enactments [17]

There are four provisions of law that evidence the applicability of the APA to "regulatory" components of regional water quality control plans--which plans the Board concedes are "regulations" within the meaning of the APA.[18]

Concerning the Board in general, the APA applies to all state agencies, except those "in the judicial or legislative departments."[19] Since the Board is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.[20]

In regards to the Board's quasi-legislative actions specifically concerning water quality, Water Code section 13222 requires that

> "Pursuant to such guidelines as the state board may establish, each regional board shall adopt regulations to carry out its powers and duties under this division [Division 7, "Water Quality," also known, pursuant to Water Code section 13020, as the "Porter-Cologne Water Quality Control Act"]." [Emphasis added.]

Under Water Code section 13240, the Regional Board has the duty "to formulate and adopt water quality control plans." Reading Water Code sections 13240 and 13222 together, we conclude that the Regional and State Boards[21] must "adopt regulations" codifying regulatory elements of proposed water quality control plans.

Title 23, California Code of Regulations, section 649, subsection (a) and section 649.1, concerning rulemaking proceedings by the State and Regional Boards, specifically require "regulations" to be adopted pursuant to the APA:

> "649. Scope.
>
> > "(a) 'Rulemaking proceedings' shall include any hearings designed for the adoption, amendment, or repeal of any rule, regulation, or standard of general application, which implements, interprets or makes specific any statute enforced or administered by the State and Regional Boards." [Emphasis added.]
>
> "649.1. Rulemaking Proceedings.
>
> > "Proceedings to adopt regulations, including notice thereof, shall, as a minimum requirement, comply

> with all applicable requirements established by the Legislature (Government Code Section 11340, et seq.) [the APA]. This section is not a limitation on additional notice requirements contained elsewhere in this chapter." [Emphasis added.]

We note that the Board has conceded that regional plans are "regulations." If this is the case, Title 23, CCR, sections 649, subsection (a) and 649.1 would appear to require the Board to comply with the APA in the "adoption . . . of any . . . regulation" contained in regional plans. Subsection 649(a) specifically refers to regulations adopted to implement statutes administered by regional boards.[22]

We note that a specific part of the CCR has been reserved for regulations adopted by regional boards. For instance, Title 23, CCR, chapter 4, subchapter 1 is reserved for regulations adopted by the San Francisco Bay Regional Water Quality Control Board. From 1960 to 1981, a regulation adopted by the San Francisco Regional Board prohibited dumping of garbage into San Francisco Bay.[23] Regulatory provisions of the challenged rules in this determination proceeding could similarly be codified in subchapter 1.

General Background

To facilitate understanding of the issues presented in this Request, we will discuss pertinent statutory and regulatory law, as well as the undisputed facts and circumstances that have given rise to the present Determination.

Background; This Request for Determination

The following background is based on facts and information submitted by the Bay Planning Coalition ("BPC") (the Requester) and the California Chamber of Commerce,[24] none of which was disputed by the Board.

In 1965, the Port of Oakland began the process of filling in the Distribution Center site (approximately 180 acres of former marshland) which is located in the City of Oakland near San Leandro. By 1969, the site was completely diked off from the Bay.

In 1972, Congress adopted the Clean Water Act ("Act")--amending and extending the Federal Water Pollution Control Act of 1948--setting forth as its mandate to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." The federal agency charged with the implementation of the Act is the U. S. Environmental Protection Agency ("EPA"). To accomplish the above objective, Congress sought to regulate the discharge of dredged or fill materials into "waters of the U. S." This was done by vesting in the U.S. Army Corps of Engineers ("Corps") the administrative authority over the discharge of such materials through a

federal permit program. Thus was born the "section 404 permit program."

Under section 404 of the Act, the Corps regulates the discharge of dredged or fill material into waters of the United States. Under section 402 of the Act, the EPA regulates the discharge of all other pollutants into such waters. A state may assume responsibility for administering either the section 404 or section 402 federal regulatory programs, or both programs, or neither program.

California has assumed such responsibility for the section 402 program. The State Board and Regional Board administer that program by issuing permits (known as "waste discharge requirements") for discharges of "waste" into "waters of the state."

California does not administer the program to regulate discharges of dredged or fill material under section 404; however, section 401 requires that the State Board certify to the Corps whether a project for which a Corps permit has been sought complies with state "water quality standards . . . (i.e., the Basin Plan)." A Corps permit is invalid without such certification (or the Board's waiver of certification).

Additionally, in 1972, an 89-page document entitled "Guidelines for San Leandro Bay," was produced by the Advisory Group on San Leandro Bay. This advisory group included a representative of the Regional Board. The Guidelines expressly recognized that the Port of Oakland had filled the former marshlands of the Distribution Center site. They also recommended the creation of a park along its shoreline and the development and use of the interior of the site for airport-related distribution purposes. The park was created, and the development of the interior continued.

Following the adoption of the challenged amendments at issue in this proceeding, the Regional Board wrote to the Port on November 3, 1987, and demanded that the Port stop development of the interior of the Distribution Center site until the Port had applied for and received the Regional Board's formal approval.

Background; The Basin Plan

Water Code section 13240, regarding the adoption of plans, requires that

> "Each regional board shall formulate and adopt water quality control plans for all areas within the region. Such plans shall conform to the policies set forth in Chapter 1 (commencing with Section 13000) of this division and any state policy for water quality control.

. . . Such plans shall be periodically reviewed and may be revised." [Emphasis added.]

The Water Quality Control Plan, San Francisco Bay Basin Region (2), dated December 1986, provides the following background about the Basin Plan:

"The original Water Quality Control Plan, San Francisco Bay Basin (Basin Plan) was adopted by the Regional Board and approved by the State Board in April 1975. The basic purpose of the basin planning effort is to provide future direction of water quality control management for protection of California's waters. The Plan satisfies the following needs:

"* The Plan is a requirement of the U.S. Environmental Protection Agency (EPA) for the allocation of federal grants to cities and districts for construction of wastewater treatment facilities.

"* The Plan fulfills requirements of the Porter-Cologne Act that call for water quality control plans in California.

"* The Plan provides a basis for establishing priorities in the disbursement of both state and federal grants for construction and upgrading of wastewater treatment facilities.

"* The Plan, by delineating water quality objectives to be achieved and maintained, provides a basis for establishment or revision of waste discharge requirements by the Regional Board and the establishment or revision of water rights permits by the State Board.

"* The Plan establishes conditions (discharge prohibitions) which must be met at all times."[25]

On December 17, 1986, the Regional Board revised the Water Quality Control Plan for the San Francisco Bay Basin. The State Board subsequently approved portions of these amendments to the Basin Plan and remanded other portions to the Regional Board for further consideration.

On August 19, 1987, the Regional Board adopted Resolution No. 87-106, revising the portion remanded by the State Board. Resolution No. 87-106 (which contains the challenged rules in this Determination) proposed revised amendments to Chapters 2, 3 and 4 of the Basin Plan.

The State Board approved and adopted the Regional Board's proposed revised amendments (Resolution No. 87-106) on September 17, 1987, in the State Board's Resolution No. 87-92.

The Bay Planning Coalition (the "Requester") filed a Request for Determination with OAL on May 20, 1988. In its Request, the Coalition alleged that "the adoption by the [Regional Board] and the [State Board] of amendments to Chapters 2, 3 and 4 of the [Basin Plan] . . . [Par.] . . . are regulations, not adopted per [the APA], nor fulfilling the substantive criteria set out in [Government Code] Section 11349.1. . . ." The Requester further alleges,

> "These amendments set forth wetland protection provisions for San Francisco Bay. Specifically, they define wetlands and prescribe criteria for permit decisions on discharges including mitigation requirements for any such discharges."[26]

On December 16, 1988, OAL published a summary of the Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.[27]

The State Board and the Regional Board jointly submitted an Agency Response to OAL on January 30, 1989.

On request of BPC, and with the agreement of all parties involved, OAL granted both the Requester and the Board the opportunity to submit additional arguments on the issue of whether or not the challenged rules are impliedly exempt from the APA. Additional arguments were received from the Requester on February 10, 1989, and from the Board on February 17, 1989.

II. DISPOSITIVE ISSUES

There are three main issues before us:[28]

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

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

(3) WHETHER THE LEGISLATURE HAS IMPLIEDLY EXEMPTED THE CHALLENGED RULES FROM THE APA.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

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

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

First, is the informal rule either

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

Second, has the informal 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?

In its Response,[29] the Board concedes that

> "the Water Quality Control Plan for the San Francisco 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. [Citation omitted.] . . . The water quality objectives and implementation program established by a water quality

> control plan <u>are binding standards</u>, not mere goals or guidelines. [Citations omitted.]" [Emphasis added.]

Furthermore, according to authoritative commentators:[30]

> "The plans contain an inventory of beneficial uses of the water within the region and water quality objectives to ensure the reasonable protection of beneficial uses and the prevention of nuisance. [Footnote omitted.] The objectives <u>are not merely directory, but are really standards that must be implemented by the regional boards</u>."

We agree that the plans are regulatory, for the following reasons.

For an agency rule to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[31] It has been judicially held that "rules significantly affecting the male prison population" are of "general application."[32] The challenged rules (i.e., the amendments) significantly affect all land that is or may be deemed "wetlands" located in the San Francisco Bay Region. These amendments also have a significant economic impact on land owners, users and developers of property within the Region's boundaries.

We generally accept the Board's concession that the water quality control plan implements, interprets and makes specific the law enforced or administered by the Board, i.e., the Porter-Cologne Act. We conclude, however, that not all of the amendments to the Basin Plan (the challenged rules) are regulatory. In order to discuss this issue, it is necessary that the challenged rules in the Request for Determination be identified.

<u>Identification of the Challenged Rules</u>

As stated above, BPC filed a Request for Determination with OAL challenging the amendments to Chapters 2, 3 and 4 of the Water Quality Control Plan of the San Francisco Bay Basin. In this determination proceeding, OAL did not review the amendments to Chapter 3 for the following reasons:

1. BPC did not include a copy of Chapter 3 amendments so that OAL could review them (as required by Title 1, CCR, section 122).

2. Though BPC initially stated it was requesting a determination concerning amendments to Chapters 2, 3 and 4 of the Basin Plan in the introduction of its Request, BPC made no further objection to, or

reference to, the amendments to Chapter 3 in its arguments.[33]

3. BPC submitted a copy of the Regional Board's Resolution No. 87-106 (the copy of the challenged rule) which contains only amendments to Chapters 2 and 4.

Resolution No. 87-106 contains amendments to Chapters 2 and 4 of the Basin Plan, numbered 1 through 7. A copy of Resolution No. 87-106 is attached to this Determination as Appendix A, along with the State Board's Resolution No. 87-92.

Amendment No. 4 states "All references in the Basin Plan to anti- and nondegradation policy should be replaced with references to State Board Resolution No. 68-16." Since a copy of the State Board Resolution No. 68-16 was not provided to OAL by BPC in its Request for Determination, we cannot review amendment No. 4 in <u>this</u> determination proceeding.

OAL will therefore limit its discussion and analysis to the six remaining amendments to Chapters 2 and 4 as they appear in the Regional Board's Resolution No. 87-106.

We conclude that amendment Nos. 1, 2, 3 and 5 are nonregulatory in that they are either a deletion of Basin Plan language (i.e., certain language has been rescinded), and therefore will not be reviewed in this determination proceeding; or they are merely informational. For example, amendment No. 1 states "Reference to Class III surface impoundments contained in the Wet Weather Overflows section of Chapter 4 should be deleted." Amendment No. 5 states

> "The last two paragraphs of the discussion of the Central Valley agricultural drainage problem in Chapter 4 should be deleted and replaced with: 'The State Board has taken an active role in the remediation of the selenium problem at Kesterson. . . .'"

Therefore, we are left with amendments Nos. 6 and 7, which we will discuss in order.

<u>DISCUSSION OF AMENDMENT NO. 6</u>:

Amendment No. 6 is an amendment of Chapter 2. No. 6 provides the following:

> "Wetlands are waters of the State and the United States. Wetlands are defined in 40 CFR 122.2 as those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands include saltwater marshes, freshwater marshes, open or closed brackish water marshes,

swamps, mudflats, and riparian areas. Because of the seasonality of rainfall in the Region, some wetlands may not be easy to identify by simple means. Therefore, in identifying wetlands the Board will rely on such indicators as hydrology, hydrophytic plants and/or hydric soils and implementation guidelines to be adopted by the Board.

"There are many actual and potential beneficial uses of wetlands, with wildlife habitat being the most significant of them. Other uses are identified in the following sections which describe two of the most important types of wetland habitat in the Region, marshes and mudflats. In addition, wetlands that are adjacent to the Bay and its tributaries contribute to the enhancement of the Bay's beneficial uses by acting as filtering agents for many pollutants, including solids and nutrients, as well as acting as habitat that serve as a transitional zone between open water and upland areas."

Amendment No. 6 meets the second prong of the two-part inquiry in that amendment No. 6 implements, interprets or makes specific the law enforced or administered by the Board, i.e., the Porter-Cologne Act. No. 6 also implements, interprets or makes specific Water Code sections 179 and 1058, which are set forth in this Determination under the subheading "Authority." No. 6 also governs the Board's procedures in the regulation of water quality.

More specifically, amendment No. 6 implements, interprets or makes specific Water Code sections 13240 and 13241. Section 13240 provides that

"Each regional board shall formulate and adopt water quality control plans for all areas within the region. Such plans shall conform to the policies set forth in Chapter 1 (commencing with Section 13000) of this division and any state policy for water quality control. . . . Such plans shall be periodically reviewed and may be revised." [Emphasis added.]

Section 13241 requires that

"Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; . . ." [Emphasis added.]

Section 13050, subdivisions (f), (h), (i) and (j) provide the following definitions:

"(f) 'Beneficial uses' of the waters of the state that may be protected against quality degradation include,

but are not necessarily limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.

"(h) 'Water quality objectives' means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."

"(i) 'Water quality control' means the regulation of any activity or factor which may affect the quality of the waters of the state and includes the prevention and correction of water pollution and nuisance."

"(j) 'Water quality control plan' consists of a designation or establishment for the waters within a specified area of (1) beneficial uses to be protected, (2) water quality objectives, and (3) a program of implementation needed for achieving water quality objectives."

No. 6 further interprets Water Code section 13050, subdivision (e), which defines "Waters of the state" as "any water, surface or underground, including saline waters, within the boundaries of the state." The Water Code definition of "Waters of the <u>state</u>" (emphasis added) does <u>not</u> include "wetlands."[34] No. 6 states that "wetlands" are defined in Title 40, CFR, section 122.2. We note that section 122.2, defines "waters of the <u>United States</u>" (emphasis added), as including "wetlands." The federal definition of "waters of the United States" is not the same as the state definition of "waters of the state." Therefore, No. 6 is not a restatement of existing law.

No. 6. also governs the Board's procedures in the regulation of water quality by specifying how the Board will identify wetlands, i.e., No. 6 provides the "indicators" ("hydrology, hydrophytic plants and/or hydric soils") which the Board will rely upon in identifying wetlands. The amendment also states that the Board will use and rely upon "implementation guidelines" to be adopted by the Board to assist in identifying wetlands.[35] These "identification" procedures also implement and interpret Water Code section 13050, subdivision (i), which broadly defines "Water quality control" as meaning "the <u>regulation</u> of any activity or factor which may affect the quality of the waters of the state and includes the prevention and correction of water pollution and nuisance." (Emphasis added.)

Subdivision 13050(f), which sets forth the definition of "Beneficial uses" (see above), is further interpreted and

made specific by amendment No. 6. No. 6 identifies or designates the beneficial uses of wetlands which the Board is responsible for protecting "against quality degradation."

For the above stated reasons, we conclude that amendment No. 6 meets the definition of "regulation," and therefore violates Government Code section 11347.5.

DISCUSSION OF AMENDMENT NO. 7

Amendment No. 7 states that the following new section should be added to Chapter 4, entitled "WETLAND FILL":

> "The beneficial uses of wetlands are mainly affected by diking and filling. Pursuant to Section 404 of the Clean Water Act, discharge of fill material to waters of the United States must be performed in conformance with a permit obtained from the Army Corps of Engineers prior to commencement of the fill activity. However, in addition, under Section 401 of the Clean Water Act, the State must certify that any permit issued by the Corps pursuant to Section 404 will comply with water quality standards established by the State (i.e. the Basin Plans), or the State can waive such certification. If the State does not waive certification, the State Board's Executive Director, acting on the recommendation of the Regional Board, can grant or deny State certification. In the event of a conflict between the State and the Corps, or, in those rare instances where the Corps may not have jurisdiction, the Regional Board has independent authority under the State Water Code to regulate discharges to wetlands through waste discharge requirements or other orders.
>
> "The Regional Board will use Senate Concurrent Resolution No. 28 and California Water Code Section 13142.5 as guidance for action on wetlands. Senate Concurrent Resolution No. 28 states that, 'It is the intent of the legislature to preserve, protect, restore and enhance California's wetlands and the multiple resources which depend on them for the benefit of the people of the state.' California Water Code Section 13142.5 states 'Highest priority shall be given to improving or eliminating discharges that adversely affect . . . Wetlands, estuaries, and other biologically sensitive sites.
>
> "The Regional Board will require that any application for proposed fill activity within its regulatory jurisdiction include mitigation located within the same section of the Region, wherever possible, so that there will be no net loss of wetland acreage and no net loss of wetland value when the project and mitigation lands are evaluated together. In addition, the Regional Board will utilize EPA's Section 404(b)(1) Guidelines

> for Specification of Disposal Sites for Dredge or Fill Material in determining the circumstances under which wetlands filling may be permitted."

Amendment No. 7 contains three paragraphs. For purposes of analysis, we will discuss each paragraph separately.

Amendment No. 7 -- Paragraph 1

The first sentence of paragraph 1 is nonregulatory in that it is merely informational.

The second, third and fourth sentences of paragraph 1 are nonregulatory in that they restate or summarize sections 401 and 404 of the Federal Clean Water Act.

In the fifth sentence, the amendment states that

> "In the event of a conflict between the State and the Corps, or, in those rare instances where the Corps may not have jurisdiction, the Regional Board has independent authority under the State Water Code to regulate discharges to wetlands through waste discharge requirements or other orders." [Emphasis added.]

The fifth sentence implements, interprets or makes specific the law enforced and administered by the Board, i.e., the Porter-Cologne Act; in particular, Water Code sections 13240, 13241, and subdivision 13050(i) of the Act, for the same reasons set out above in the analysis of amendment No. 6.

More specifically, this "independent authority" sentence implements Water Code section 13243 which provides that

> "A regional board, in a water quality control plan [Basin Plan] or in waste discharge requirements, may specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted." [Emphasis added.]

The fifth sentence states that the Regional Board has independent authority to "regulate discharges to wetlands." Looking at amendment No. 7's use of the term "discharge" in light of the full context of paragraph 1, we find the term "discharges," as used in the fifth sentence of paragraph 1, to include "discharge of fill material." The issue here then is whether or not, under Water Code section 13243, the language "discharge of waste," includes the "discharge of fill material."

An opinion written by the Chief Counsel[36] of the State Board at the request of a Board Member, states the following:

> "Waste discharge requirements, and most enforcement orders issued pursuant to the Porter-Cologne Act, are issued in response to the discharge, or a proposed or threatened discharge, of waste. [Citations omitted.] The implementation measures which may be included in a Basin Plan amendment intended to protect wetlands therefore will depend on whether a discharge of dredged or fill material constitutes a discharge of waste within the meaning of the Porter-Cologne Act.
>
> "The Porter-Cologne Act defines waste broadly: '"Waste"' includes sewage and any and all other waste substances. . . .' [Citation omitted.]
>
> "The use of the term 'includes' in the definition of 'waste' indicates that the term should be interpreted broadly to effectuate the purposes of the Porter-Cologne Act. [Citation omitted.]
>
> "The rules of statutory construction also support a broad interpretation of the definition of 'waste' because that interpretation will determine the scope of coverage of the provisions of the Porter-Cologne Act authorizing issuance of waste discharge requirements and enforcement orders. The provisions determining the coverage of the regulatory statute are to be construed broadly to accomplish the purposes of the statute. [Citation omitted.]
>
> "These principles support an interpretation of the definition of waste to include substances such as earthen materials that could adversely affect water quality, even if the primary purpose of the discharge is not waste disposal."[37] [Emphasis added.]

We note that the definition of "waste" under Water Code section 13050, subdivision (d) does not include "fill materials." Subdivision (d) sets forth the definition of "waste" as

> "(d) 'Waste' includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation of whatever nature, including such waste placed within containers of whatever nature prior to, and for purposes of, disposal."

The Board, in amendment No. 7, is clearly implementing and interpreting Water Code sections 13243 and 13050, subdivision (d), by further defining the term "waste" or the "discharge

of waste" to include "fill or earthen materials" or the "discharge of fill or earthen materials."

For the reasons set forth above, we conclude that the fifth sentence is regulatory and in violation of Government Code section 11347.5.

Amendment No. 7 -- Paragraph 2

The second and third sentences of paragraph 2 are merely quotations from Senate Concurrent Resolution No. 28 and Water Code section 13142.5, and are therefore nonregulatory.

The first sentence of paragraph 2, however, states that "The Regional Board will use Senate Concurrent Resolution No. 28 and California Water Code Section 13142.5 as guidance for action on wetlands." (Emphasis added.) The use of Resolution No. 28 and Water Code section 13142.5 will be discussed separately.

SENATE CONCURRENT RESOLUTION NO. 28[38]

Government Code section 11347.5 expressly prohibits any state agency from "utiliz[ing] . . . any guideline . . . which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline . . . has been adopted as a regulation . . . pursuant to [the APA]." Government Code section 11342, subdivision (b), defines "regulation" as "every rule [or] regulation . . . adopted by any state agency to implement, interpret or make specific the law enforced or administered by it, . . ." Therefore, the issue is whether or not Resolution No. 28 meets the definition of "regulation."

Recognizing the importance of wetlands, the Legislature passed Resolution No. 28 with "the intent of the Legislature [being] to preserve, protect, restore, and enhance California's wetlands and the multiple resources which depend upon them for the benefit of the people of the state . . . ."[39] Resolution No. 28[40] is a legislative request directed towards the Department of Fish and Game "to propose a specified plan regarding the protection, preservation, restoration, acquisition, and management of wetlands, and to submit such plan to the Legislature not later than January 1, 1983."[41] Resolution No. 28 identifies the goals or objectives the Legislature wants to achieve through a plan proposed by the Department of Fish and Game that will preserve and protect California's wetlands. For example, in the resolution the Legislature requests that the Department of Fish and Game

> "prepare a plan which will identify means by which existing wetlands can be protected from conversion to other land uses and be managed in such a manner as to optimize their value as waterfowl habitat, former wetlands can be restored to wetland status and new wetlands

> created, and additional recreational benefits can be provided on existing, restored, or newly-developed wetlands . . . ."[42]

Whether Resolution No. 28 meets the definition of "regulation" is a difficult question to answer conclusively. From the amendment's language, it is not clear to what degree the Board intends to use Resolution No. 28 as "guidance": (1) if the Board intends to merely use the resolution's general goals and objectives as its own philosophy, then the use of Resolution No. 28 is nonregulatory; however, (2) if the Board intends to use the resolution as a standard in determining whether to grant or deny wetlands fill applications, i.e., implementing, interpreting or making specific the law enforced or administered by the Board, then the use of Resolution No. 28 is regulatory.

We assume for purposes of this Determination that the use of Resolution No. 28 as "guidance for action on wetlands" by the Board is merely the adoption of the resolution's general goals and objectives in the protection and preservation of wetlands as its own philosophy, or its own general goals and objectives.

Given the way amendment No. 7, paragraph 2 is drafted, we recognize that a court may very well find the "use of Resolution No. 28 as guidance" is regulatory. But in any event, in light of the apparent need to adopt the regulatory provisions of the challenged amendments pursuant to APA requirements, we would suggest that the Board carefully consider how to articulate its "use" of Resolution No. 28.

WATER CODE SECTION 13142.5

Water Code section 13142.5 is not a "regulation," it is a statute--part of the Porter-Cologne Act--which the Board is already responsible for implementing and enforcing as it relates to wetlands. Section 13142.5 sets forth the policy "of the state with respect to water quality as it relates to the coastal marine environment." The policy also includes requirements that relate to wetlands. For example, section 13142.5 requires that

> "(a) <u>Waste water discharges shall be treated</u> to protect present and future beneficial uses, and, where feasible, to restore past beneficial uses of the receiving waters. <u>Highest priority shall be given</u> to improving or eliminating discharges that adversely affect any of the following:
>
> (1) <u>Wetlands</u>, estuaries, and other biologically sensitive sites.

(2) Areas important for water contact sports.

(3) Areas that produce shellfish for human consumption.

(4) Ocean areas subject to massive waste discharge." [Emphasis added.]

Section 13142.5, subdivision (a) also provides factors that "shall . . . be considered in determining the effects of such discharges (emphasis added)"[43] to wetlands. Section 13142.5 further requires:

"(b) For each new or expanded coastal powerplant or other industrial installation using seawater for cooling, heating, or industrial processing, the best available site, design, technology, and mitigation measures feasible shall be used to minimize the intake and mortality of all forms of marine life.

"(c) Where otherwise permitted, new warmed or cooled water discharges into coastal wetlands or into areas of special biological importance, including marine reserves and kelp beds, shall not significantly alter the overall ecological balance of the receiving area." [Emphasis added.]

Water Code section 13142.5 governs waste water discharges to wetlands. The specific use or application of section 13142.5 by the Board is not regulatory. If, however, the Board's language in the amendment means that the Board intends to use section 13142.5 as mere "guidance," i.e., in a discretionary manner, in regards to wetlands, then the use of section 13142.5 as "guidance" is regulatory. The Board would then be implementing section 13142.5 in a manner that was in addition to that intended by the Legislature.

In summary, we find the first sentence of paragraph 2 to be nonregulatory as it relates to the use of Senate Concurrent Resolution No. 28. In regards to the use of Water Code section 13142.5 by the Board as "guidance" for actions on wetlands: (1) if, by this language, the Board means that it is merely applying section 13142.5 to action on wetlands, then the "use" of section 13142.5 is nonregulatory, however, (2) if, by this language, the Board means that it will "use" section 13142.5 in a manner not intended by the Legislature, i.e., "as [non-binding] guidance" or discretionary, in regards to action on wetlands, then the "use" is regulatory.

Amendment No. 7 -- Paragraph 3

The first sentence of paragraph 3 provides that

> "The Regional Board will require that any application for proposed fill activity within its regulatory jurisdiction include mitigation located within the same section of the Region, wherever possible, so that there will be no net loss of wetland acreage and no net loss of wetland value when the project and mitigation lands are evaluated together." [Emphasis added.]

In two prior determinations, OAL dealt with similar "mitigation" provisions.

In the first determination,[44] OAL found two provisions of the study titled "Diked Historical Baylands of the San Francisco Bay: Findings, Policies and Maps," issued by the San Francisco Bay Conservation and Development Commission ("Commission"), to be regulatory. These two particular provisions explicitly apply certain policies to projects within the Commission's jurisdiction. The provisions, headed "Policies on Diked Baylands Partly Within the Commission's Jurisdiction," state:

> "1. Development within priority use areas as shown on [San Francisco] Bay Plan maps should be permitted provided the development is consistent with the applicable Bay Plan policies. All wildlife values lost or threatened by development within priority use areas should be fully mitigated in accordance with Policies 2.c. and 2.d.
>
> "2. Development on those portions of diked baylands that are within the Commission's jurisdiction as defined by the McAteer-Petris Act should be permitted provided the development is consistent with the applicable policies of the Bay Plan. All wildlife values lost or threatened by development in such areas should be fully mitigated in accordance with policies 2.c. and 2.d." [Emphasis added.]

Policies 2.c. and 2.d. are part of a section headed "General Policies on Diked Historic Baylands." This section provides in part:

> "2. If some diked historic baylands cannot be retained in their existing uses, any development should meet the following criteria:
>
> . . . .

c. In all cases, mitigation should be provided whenever there is significant, unavoidable impact on the environment, such as by filling or excavating baylands. Mitigation should fully offset lost or adversely affected wildlife values. Projects should be designed and sited to buffer and protect any adjacent wildlife. Any areas provided as mitigation should be permanently preserved. Once mitigation has been provided for a project, repeated or cyclical losses of recovered vegetation or other values due to maintenance of the project should not require additional mitigation.

d. Mitigation should consist of the following: (1) acquisition, restoration, preservation and dedication of non-wetlands that can feasibly be restored to provide wetland values; or (2) acquisition, preservation, dedication, and, where necessary, restoration, of suitable diked historic baylands or other mudflats or marshes which will result in improved management practices enhancing the wildlife value of the area." [Emphasis added.]

In the second determination,[45] OAL found a portion of the Fish and Game Commission's ("Commission") "Wetlands Resources Policy" to violate Government Code section 11347.5 -- up until the time the Commission adopted a second policy which expressly precluded application of the challenged policy in those situations in which the Department of Fish and Game has anything other than an "advisory" role on permit decisions. The regulatory provision of the challenged policy stated:

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

OAL concluded that the above "no net loss of wetland acreage or value" provision of the "Wetlands Resources Policy" was regulatory in that the policy implemented, interpreted or made specific statutes granting the Department of Fish and Game authority to compel mitigation measures modifying streambed alteration projects.

We conclude in this determination proceeding, as we did in the two prior Determinations, that the "mitigation" requirement for "any application for proposed fill activity," that there will be "no net loss of wetland acreage or value," as

set forth in amendment No. 7, paragraph 3, implements, interprets and makes specific the law administered and enforced by the Board, i.e., the Porter-Cologne Act; and in particular, Water Code sections 13240 and 13241 quoted above.

The second sentence of paragraph 3 states that the Board will utilize EPA Section 404(b)(1)[46] guidelines of the Clean Water Act "in determining the circumstances under which wetlands filling may be permitted." (Emphasis added.) In other words, the EPA guidelines will be used in determining whether to grant or deny wetlands filling permits.

As stated above, the "utiliz[ation]" of "guidelines" which meet the definition of "regulation" is expressly prohibited by Government Code section 11347.5 unless the "guidelines" are adopted pursuant to APA requirements. EPA Section 404(b)(1) Guidelines are regulations; they may be found at Title 40, CFR, Part 230, titled "Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material," sections 230.1 through 230.80. The issue before us then is whether or not "use" of the EPA Section 404(b)(1) Guidelines by the Board in determining whether to grant or deny wetlands filling permits violates Government Code section 11347.5.

Section 404(b)(1) of the Clean Water Act states:

> "(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c),[47] of [Title 33, U.S.C.] . . . ." [Emphasis added.]

The EPA guidelines were developed by the Administrator of the EPA in conjunction with the Secretary of the Army acting through the Chief of Engineers.[48] The EPA Section 404(b)(1) Guidelines were adopted by the EPA as regulations and may be found in Title 40 as stated above.

As stated earlier in this Determination, under the subheading "Background; This Request for Determination," section 404 of the Clean Water Act relates to the discharge of dredged or fill material,[49] and section 402 relates to the discharge of any pollutant.[50] Each section permits a state to elect to administer its own permit program for discharges of dredged or fill materials, or pollutants.[51] California chose to administer the 402 permit program (to be administered by the State Board) and not the 404 permit program. The U.S. Army Corps of Engineers administers the 404 permit program.

Title 40, CFR, section 230.2(a) of the EPA guidelines states that

> "The Guidelines are applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States. Sites may be specified through:
>
> (1) The regulatory program of the U.S. Army Corps of Engineers under section 404(a) and (e) of the [Clean Water Act] . . . . " [Emphasis added.]

Therefore, the EPA guidelines are federal regulations,[52] to be used by the Corps in administering, or by states that have elected to administer, the section 404 permit program (regarding the discharge of dredged or fill material).[53] By their own definition, the EPA Section 404(b)(1) Guidelines do not govern or apply to the process of "determining the circumstances under which wetlands filling may be permitted" (emphasis added) by the Water Resources Control Board of a state that did not elect to administer the section 404 permit program. In essence, what the Board is doing is "borrowing" and applying the EPA Section 404(b)(1) Guidelines in making the decision of whether or not to grant or deny a wetlands filling permit--a manner in which the EPA guidelines were not meant to be used.

For the above noted reasons, we conclude that the use of the EPA Section 404(b)(1) Guidelines by the Board "in determining the circumstances under which wetlands filling may be permitted" violates Government Code section 11347.5.

This second sentence of paragraph 3 of amendment 7 also implements, interprets or makes specific the law enforced and administered by the Board; in particular, Water Code sections 13420 and 13421, and therefore it is regulatory.

FOR THE ABOVE STATED REASONS, WE CONCLUDE THAT AMENDMENTS NOS. 6 AND 7 ARE "REGULATIONS" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b), EXCEPT WHERE THE AMENDMENTS MERELY RESTATE EXISTING LAW OR ARE NONREGULATORY.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.[54] None of the recognized exceptions (enumerated in the preceding footnote) apply to the regulatory amendments of the Basin Plan.

THIRD, WE INQUIRE WHETHER THE LEGISLATURE HAS IMPLIEDLY EXEMPTED THE CHALLENGED RULES FROM APA REQUIREMENTS.

As discussed above in Part I, under the subheading "Applicability of the APA to Agency's Quasi-Legislative Enactments," we have concluded that several provisions of the APA, the Porter-Cologne Act and the Board's own duly adopted regulations--when read together--compel the conclusion that amendments to regional plans be adopted pursuant to the APA. Assuming for the sake of argument that the above analysis were not deemed dispositive, we will now discuss the Board's argument that the challenged rules are impliedly exempt from APA rulemaking requirements.

This complex issue will be analyzed as follows. First, we will provide an overview of the Board's arguments. Second, we will evaluate the Board's characterization of the "question before OAL" and review in detail crucial information on the APA--its structure and the intent of its drafters. Third, we will examine each of the five principal arguments the Board has developed in support of its implied exemption thesis. Fourth, and finally, we will assess the consequences that would flow from interpreting the APA as the Board urges, on the one hand, and as BPC urges, on the other hand.

BOARD'S ARGUMENTS IN SUPPORT OF AN IMPLIED APA EXEMPTION

Conceding that the challenged amendment to the San Francisco Basin Plan is regulatory in nature, the Board sets out the following five arguments in support of the proposition that the amendment is impliedly exempt from the APA:

(1) the Legislature exempted Water Quality Control Plans from the APA when it established a separate adoption procedure in the Porter-Cologne Act;

(2) the Porter-Cologne procedure fulfills the objectives of the APA and further evidences the Legislature's intent to exempt the process from the APA;

(3) the legislative history of the Porter-Cologne Act provides inescapable support for the validity of the planning process used by the regional and state Boards;

(4) the Legislature's ratification of the Board's adoption process indicates a legislative intent to exempt water quality planning from the APA;

(5) the state and regional boards have consistently interpreted the Porter-Cologne Act as establishing the procedure to be followed in adopting water quality control plans.

THE BOARD'S CHARACTERIZATION OF THE ISSUE

The Board introduces the above arguments with the following characterization of the issue in this proceeding:

> "The question before OAL is whether the Legislature ever intended the Regional Boards or the State Board to comply with the APA when it established the procedure for basin plan adoption in the Porter-Cologne Act. As will be shown below, the Legislature never intended that the APA apply to the basin planning process. The impossibility of complying with both procedures, the inappropriate nature of regulation format for water quality control plans, and the fact that the procedures set out in Porter-Cologne provide the same public protections as the APA, coupled with the legislative history of the Porter-Cologne planning process and repeated legislative ratification of the process currently used by the State and Regional Boards all indicate that the procedures currently in place are appropriate. As a result, the amendment in question and the entire array of water quality control plans are valid."[55] [Emphasis added.]

We reject the Board's characterization of the key issue. The issue before us is summed up in a regulation adopted by OAL to govern regulatory determination proceedings. Title 1, CCR, subsection 121(a) defines "determination" as:

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

The Final Statement of Reasons issued by OAL in 1985 when subsection 121(a) was adopted states:

> "Section 121(a) sets forth the definition for the term 'determination'. . . . In order to make such a determination, OAL must determine both whether the rule meets the definition of a [']regulation['] contained in the Government Code and also whether the specific rule in question must be adopted pursuant to the [APA]. Although a specific rule

> may in fact be a [']regulation['] as defined in Government Code section 11324(b), it may be statutorily exempt from the general provisions for adoption of regulations specified in Chapter 3.5 of the Government Code. For example, some statutes specifically exempt certain regulations from the requirements of Chapter 3.5 of the Government Code. Such rules are not made invalid and unenforceable by Government Code section 11347.5. Therefore, in order for OAL to render a complete determination pursuant to Government Code section 11347.5, OAL must determine both whether the rule is a [']regulation['] as defined in the Government Code and whether the rule must be adopted pursuant to the [APA], or whether the rule is statutorily exempt from these provisions. Thus, the regulations specify that OAL's determination will include findings on both of these matters." [Emphasis added.]

OAL's 1985 statement faithfully reflects both the plain language of the APA and judicial interpretation of that language. Government Code section 11346--enacted in 1947, reenacted unchanged in 1979--unequivocally states that APA procedural requirements

> "shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]

In Winzler & Kelly v. Department of Industrial Relations ("Winzler")[56] in 1981, the California Court of Appeal stated that state agency "regulations" were covered by the APA unless "expressly" or "specifically" exempted by statute.

Before turning to an examination of the express exemption requirement of section 11346, we will put the matter into context by reviewing in detail both the structure of the APA and pertinent legislative intent material.

Reviewing the development of the APA will also serve to respond to the emphasized portion of the Board's statement of the issue before us, which would suggest that we are limited to considering legislative intent as of the 1969 enactment of the Porter-Cologne Act. This is not correct. THE PROPER QUESTION IS WHETHER OR NOT THE LEGISLATURE INTENDS--IN LIGHT OF ALL PERTINENT LEGAL PROVISIONS, CASES, AND LEGISLATIVE INTENT MATERIALS--THAT THE CHALLENGED RULE BE DEEMED EXEMPT FROM APA REQUIREMENTS.

Due weight must be given both to the 1947 enactment of the APA and to post-1969 legal developments, such as Armistead v. State Personnel Board[57] and the statutory prohibition against underground regulations, Government Code section

'11347.5.[58] Nowhere in the 67 pages of briefs filed by the Board in this proceeding does the Board quote or even mention Government Code section 11347.5. In fact, the Board discusses the APA very briefly, never mentioning a number of provisions that bear upon the implied exemption thesis. We will compensate for these omissions in the following discussion.

STRUCTURE OF APA; LEGISLATIVE INTENT

The California Administrative Procedure Act[59] consists of three components, chapters 3.5, 4, and 4.5. Each of these chapters is found in Part 1, "State Departments and Agencies," of Division 3, "Executive Department," of Title 2, "Government of the State of California," of the California Government Code. In this portion of this Determination, otherwise undesignated references to "sections" are references to Government Code provisions.

Chapter 3.5, titled "Office of Administrative Law" and comprising sections 11340 through 11356, contains criteria governing not only the way in which state agency rulemaking is conducted, but also the content[60] of rules proposed for adoption. Chapter 3.5 also provides for a central quality control review process to be conducted by OAL.

Chapter 4, titled "Office of Administrative Hearings" and comprising sections 11370 through 11370.5, concerns the officers and staff of the Office of Administrative Hearings (OAH). OAH is the central office which provides administrative law judges for state agencies which do not directly employ such officers.

Chapter 4.5, titled "Administrative Adjudication" and comprising sections 11500 through 11528, contains administrative hearing procedures which certain agencies are required to follow.

As noted in Winzler, the APA "establishes minimum procedural requirements applicable to quasi-legislative and quasi-judicial actions by state agencies."[61] (Emphasis added.) Chapter 3.5 sets minimum procedural requirements applicable to quasi-legislative actions. An example of a quasi-legislative action is an agency policy statement defining a statutory term.[62] Chapter 4.5 sets minimum requirements applicable to quasi-judicial actions. An example of a quasi-judicial action is a ruling, following a proper hearing, that the license issued to a particular person should be revoked.

For present purposes, the critical distinction between chapters 3.5 and 4.5 is the scope of their coverage. Specifically, which state agencies must comply with the "minimum requirements"? Reviewing these two chapters, it is clear--despite the deceptive simplicity of the statement just

quoted from the Court of Appeal--that the Legislature gave dramatically different answers to these questions. Basically, "all" state agencies other than those specifically exempted must comply with the APA rulemaking requirements contained in Chapter 3.5.[63] In sharp contrast, only agencies specifically listed in Chapter 4.5 (or in individual agency enabling acts) must comply with APA administrative adjudication requirements contained in Chapter 4.5.[64]

What evidence is there that the Legislature intended that all agencies not specifically exempted be required to follow the "minimum" rulemaking requirements set out in chapter 3.5?

The key statutory provisions were first enacted in 1947 under the sponsorship of Governor Earl Warren. According to a memo from the key department head to Governor Warren, AB 35

> "was introduced . . . following two years of work on the problems involved in the adoption of rules and regulations by state administrative agencies. It is a continuation of the program for organizing and improving the procedure of state administrative agencies which was undertaken in 1945 by the enactment of the Administrative Procedure Act. As you will recall, that legislation which was recommended by the Judicial Council and sponsored by you, provided a uniform system for the quasi-judicial hearings of state agencies. It was pointed out in the Judicial Council study that further work was required with respect to the quasi-legislative (or "rule making") activities of the state agencies. This bill does the job and it is designed to set up the basic, minimum procedural requirements with which state agencies must comply in the adoption of rules and regulations.
>
> ". . . .
>
> "Articles 4 and 5 of the Chapter 4 are new and they specify the minimum procedure required in the adoption of rules and regulations. With certain exceptions (emergency rules), every state agency adopting regulations of general application is required to give advance notice of the intention to adopt a regulation and is required to afford the public an opportunity to express its view, at a public hearing or by submitting written argument and evidence.
>
> ". . . .
>
> "The only opposition to the bill was from the Public Utilities Commission and the Industrial Accident Commission. However, amendments were

> adopted [i.e., Article 6] to meet their objections [i.e., they were largely exempted] and they withdrew their objections." [Emphasis added.][65]

Similarly, a bill analysis prepared on July 11, 1947, by the Office of Legislative Counsel noted that AB 35 establishes

> "uniform minimum procedural requirements for the exercise of the rulemaking power of administrative agencies." [Emphasis added.]

Five interrelated statutory provisions enacted in 1947 reveal the scope of coverage of chapter 3.5: Government Code sections 11346, 11346.1, subdivision (a), 11342, subdivisions (b) and (c), and 11343, subdivision (a).

We will begin with section 11346, which contains a number of pertinent provisions.[66] Section 11346 provides:

> "It is the purpose of this article 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 article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superceded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]

Before turning to the APA provision referred to in section 11346 (section 11346.1), we note the basic definition of "regulation," i.e., the category of enactments which must be adopted pursuant to APA rulemaking requirements, as set out in section 11342, subdivision (b):

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure,
>
> . . ." [Emphasis added.]

Prior to examining section 11346.1, we should also look to the definition of "state agency" contained in section 11342, subdivision (b):

> "'State agency' and 'agency' does not include an agency in the judicial or legislative branches of the state government." [Emphasis added.]

Thus, the statutory term "state agency" applies only to agencies in the Executive Branch of state government.

Note should also be taken of another category of governmental entity which is not subject to APA rulemaking procedures--local agencies. While local agencies such as school districts are in a limited sense "state agencies," chapter 3.5 was nonetheless

> "intended to apply only to those state agencies exercising under authority of statute certain statewide functions, or who [sic] exercise some statewide function locally under some statute specifically localizing that function. . . ."[67] [Emphasis added.]

The exceptions referred to in section 11346 are described in section 11346.1, subdivision (a), which currently provides:

> "This article does not apply to any regulation not required to be filed with the Secretary of State under this chapter, and only this section and Sections 11346.2 and 11349.6 apply to an emergency regulation adopted pursuant to subdivision (b), or to any regulation adopted under Section 8054 or 3373 of the Financial Code." [Emphasis added.]

The requirement for filing regulations and the exceptions to that requirement are set out in section 11343, which provides in part that:

> "Every state agency shall:
>
> (a) Transmit to [OAL] for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one which:
>
> (1) Establishes or fixes rates, prices, or tariffs.
>
> ". . . ." [Emphasis added.]

The above noted statutes and legislative history documents make clear that the rulemaking portion of the APA was intended to and does plainly apply to "all" regulations adopted by "all" state agencies. Applying the APA as it stood in 1977, the Winzler court summed up the pertinent law. A given policy is

> "subject to the APA if the following three conditions coexist: (1) the [policy] is a quasi-legislative action; (2) it amounts to a 'regulation' within the meaning of section [11342, subdivision (b)]; and (3) it is not

> expressly exempted by either the APA or the [pertinent agency enabling act]." [Emphasis added.][68]

Later in the opinion, the Winzler court again touched on the question of when an agency action may be deemed to be exempt from the APA. The court stated that an enactment which was (1) conceded to be quasi-legislative in nature, and which (2) was a "regulation," (3) "is subject to the APA unless specifically exempted." [Emphasis added.][69]

In asserting that it is impliedly exempt from the APA, the Board relies heavily on the case of American Friends Service Committee v. Procunier.[70] It is interesting that Winzler--though citing Procunier for the principle that the APA should be read together with statutes applying solely to particular agencies--nonetheless contains the above noted statements that APA exemptions must be "express" or "specific." It is difficult to reconcile Procunier and Winzler without concluding that the Winzler court perceived Procunier as involving an "express" APA exemption.

The APA provisions quoted above have appeared in substantially the form quoted since 1947.[71] Winzler provides an authoritative appellate interpretation as of the year 1977.

Since 1977, several legally significant developments have occurred, notably:

1. The watershed case of Armistead v. State Personnel Board (1978),[72] which authoritatively clarified the scope of the statutory term "regulation."

2. The 1979 re-enactment of the above noted 1947 APA provisions.

3. The 1979 creation of OAL, a "central office in state government with the power and duty to review regulations to ensure that they are written in a comprehensible manner, are authorized by statute and are consistent with other law,"[73] reflecting strong legislative concerns that state agency rules had become too numerous, were sometimes unnecessary, sometimes unclear, and sometimes legally flawed.

4. The 1982 enactment of Government Code section 11347.5 (AB 1013/McCarthy) which in broad terms prohibited state agencies from issuing, utilizing, attempting to enforce, or enforcing agency rules which should have been--but were not--adopted pursuant to the APA.

5. The development of an administrative interpretation of APA exemption issues by OAL in the years 1985--1989, punctuated in 1987 by legislation amending section 11347.5.

6. Enactment by the Legislature and the voters of a number of express APA exemptions (covering rulings of tax counsel of the State Board of Equalization and the Franchise Tax Board,[74] the California Lottery (in general),[75] and a list of chemicals as specified in Proposition 65[76]).

We will briefly discuss the first and second of the above developments.

First, despite a promising beginning in the late 1940's, there was in the mid-1950's widespread non-compliance with APA rulemaking requirements by state agencies. As quoted by the California Supreme Court in Armistead, the First Report of the Senate Interim Committee on Administrative Regulations stated in 1956:

> "'The committee is compelled to report to the Legislature that it has found many agencies which avoid the mandatory requirements of the [APA] of public notice, opportunity to be heard by the public, filing with the Secretary of State, and publication in the Administrative Code.
>
> "'The committee has found that some agencies did not follow the act's requirements because they were not aware of them; some agencies do not follow the act's requirements because they believe they are exempt; at least one agency did not follow the act because it was too busy; some agencies feel that the act's requirements prevent them from administering the laws required to be administered by them; and many agencies . . . believe the function being performed was not in the realm of quasi-legislative powers. . . .
>
> "'The manner of avoidance takes many forms, depending on the size of the agency and the type of law being administered, but they can all be briefly described as "house rules" of the agency.
>
> "'They consist of the rules of the agency, denominated variedly as "policies," "interpretations," "guides," "standards," or the like, and are contained in internal organs of the agency such as manuals, memoranda, bulletins, or are directed to the public in the form of circulars or bulletins.'"[77]

The 1978 Armistead decision signalled a sharp turn in judicial attitudes toward agency compliance with the APA. Prior to Armistead, some courts had in effect condoned agency non-compliance with the APA.[78] The Armistead decision not only vacated the Court of Appeal decision which had found in favor of the state agency, but also undermined a number of earlier Court of Appeal decisions. The Armistead court's unanimous broad reading of the statutory term "regulation" made clear that APA rulemaking requirements were henceforth to be taken seriously by state agencies.

Second, sections 11346, 11346.1, subdivision (a), 11342, subdivisions (b) and (c), and 11343, subdivision (a) were all re-enacted in 1979, virtually without change--except for the creation of OAL as the central agency responsible for reviewing proposed regulations prior to filing them with the Secretary of State. This re-enactment without change must be given special weight in light of the California Supreme Court's clear signal one year earlier in Armistead that it would vigorously enforce APA requirements. We are compelled to conclude that the Legislature was aware of and accepted Armistead's interpretation of APA requirements.

APA EXCEPTIONS MUST BE "EXPRESS;" -- "EXPRESS" MEANS "EXPRESS," NOT "IMPLIED"

In 1947, the Legislature enacted the following APA provision:

> "It is the purpose of this article 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 article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]

In 1947, the above provision was numbered Government Code section 11420. 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 42 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,[79] "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." [Underlined 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.][80]

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 statute explicitly and unmistakably exempts the listed rules. It is noteworthy, however, that the IWC has an elaborate public comment procedure that goes back to the World War I era, and is in some ways more stringent than the APA. Also, we note that the exemption is conditional--the Commission must follow the non-APA rulemaking procedures spelled out in the Labor Code. Further, we note that the exemption does not exempt the listed rules from the APA publication requirements. Thus, the researcher or member of the regulated public need not launch a multi-city search for the written rule. He or she need only turn to the

appropriate CCR volume to locate the most current version of the rule. In fact, when work is completed later this year in placing the CCR into a data base, subscribers will be able to gain instant access via computer to the text of regulations appearing in the CCR.

Section 11346 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, second 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 Porter-Cologne Act. (2) Subsequently enacted statutes--such as the Porter-Cologne 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).[81]

PERTINENT APA/OAL DEVELOPMENTS, 1947-1988

Between the time "all" agencies were mandated to follow APA rulemaking requirements in 1947 and the watershed case of Armistead v. State Personnel Board in 1978, there was a long

period in which the Legislature and the courts often took a laissez-faire attitude toward APA compliance. Armistead signaled a strong determination to enforce the express terms of the APA. When AB 1013 was introduced in 1982 for the express purpose of codifying the Armistead holding by explicitly prohibiting agency use of "underground regulations," numerous state agencies vigorously opposed the bill, stating that if the bill were passed, substantial amounts of material would have to be codified, i.e., placed in the California Administrative Code, now the California Code of Regulations. Other agencies sought exemptions from the requirements of the proposed law.[82] For instance, the Coastal Commission unsuccessfully sought an amendment exempting "legislatively mandated guidelines." (Emphasis added.)[83] On the other hand, numerous private sector organizations[84] supported the legislation, noting that codification of informally issued regulatory material--after public comment and review by OAL--was the point.

AB 1013 unanimously passed both houses of the Legislature. After it was forwarded to the Governor on February 9, 1982, the Resources Agency (parent agency of the Water Board) urged its veto on the grounds that:

> "the bill would wipe out instructions issued to coordinate policy in the departments in the Agency. Examples include the shoreline erosion policy and the wetlands policy. . . . Under this bill, we would have to abandon the policies until we went through the formal process of adopting the policies as regulations."
>
> " . . . .
>
> "If AB 1013 were to become law, the many instructions and announced policies would have to be abandoned." [Emphasis added.][85]

After AB 1013 (Government Code section 11347.5) was signed into law, the Board made attempts in 1982 and 1985 to obtain an express legal exemption from APA requirements for regional plans.

In May 1982, OAL published a notice inviting public comment on a rulemaking proposal, which included a draft regulation designed to define the term "regulation." Ultimately, OAL determined that this particular regulation was unnecessary. Of particular interest for present purposes, however, was a comment submitted by the Water Board concerning the draft regulation.[86] The Board urged that the draft be revised to exempt two categories of agency rules from the definition of "regulation" and thus from APA rulemaking requirements. The two categories were "interpretive guidelines" and "legislatively mandated programs." (Emphasis added.) "Both interpretive guidelines and plans which are specifically

required by statute," the Board argued, "should not go through [the APA] process." The Board comment continued:

> "The Legislature has specifically required the State Board and Regional Boards to prepare regional water quality control plans. Sections 13240-13247 of the Water Code tell the Boards what to do, how to do it, and how to review it. The entire process is as self-contained as it is mandated." [Emphasis added.]

Several years later--in 1985--OAL published a notice inviting public comment on proposed regulations intended to set out definitions and procedures for the regulatory determinations program. This rulemaking effort ultimately resulted in the addition to the California Code of Regulations of sections 121 through 128 in Title 1. Again, the Water Board submitted a comment.[87] Again, using much of the same language as appeared in the 1982 memo, the Board recommended adoption of a definition of "regulation," with exemptions for "interpretive guidelines" and "plans which are specifically mandated by statute."

OAL declined to adopt the recommended exemption language, noting, inter alia, that the Government Code already adequately defined the term "regulation." We further noted that California courts have decided whether or not particular rules were subject to APA requirements by applying the applicable statutory law to the specific facts under consideration. "In issuing determinations pursuant to Government Code section 11347.5," we stated, "OAL will follow the decisions and rules of analysis and interpretation employed by the California courts."[88]

Also in 1985, a memo from the Resources Agency directed the San Francisco Regional Board to discontinue use of the 1977 Resources Agency Wetlands Policy as a basis for denying or approving project in wetlands.[89] The 1977 policy bears two headings: "Wetlands Policy for Proposed Construction Projects" and "Policy for Preservation of Wetlands in Perpetuity." The 1985 memo stated:

> "The Resources Agency's Wetlands Policy dated September 19, 1977 remains in effect pending a review and possible reissuance . . . . However, in accordance with AB 1013 (McCarthy, 1982) (now Government Code section 11347.5) the policy was classified as an 'underground regulation' which had not been adopted through the process prescribed by the Administrative Procedure Act consisting of public review and certification by the Office of Administrative Law. As a result of this legislation, the Wetlands Policy cannot be used as a basis to deny or approve a project or activity in a wetland. The policy may be used as an in-house

> guideline in commenting on environmental aspects of projects or activities.
>
> "The Agency is currently working with the Department of Fish and Game to redraft appropriate language for a new policy which may then be submitted for public review as outlined in the [APA]. Meanwhile, numerous other agencies of state and federal governments have in effect fully authorized regulations containing guidelines which adequately define appropriate activities in wetlands. These regulations are taken into account when state resource departments comment on proposed projects and activities and should be referred to in your Basin Plan." [Emphasis added.]

This Resources Agency memo clearly reflects the belief that the 1977 Wetlands Policy violated the APA and that Basin Plans should contain only material that had been "fully authorized"--i.e., had been adopted pursuant to the APA, in statute, or in federal regulation. This 1985 memo--like the 1982 Resources Agency memo quoted above--interprets Government Code section 11347.5 as prohibiting the Agency or its constituent departments and boards from enforcing wetlands mitigation policies without first following APA procedures. It is noteworthy that the mitigation requirements which formed the heart of the admittedly invalid 1977 Policy have now been reincarnated as amendment No. 7 to Chapter 4 of the Bay Basin Plan, one of the provisions that is under review in this determination proceeding.

In an earlier determination, OAL concluded that the Department of Corrections could not legally have individual prison wardens separately adopt local rules that were virtually identical to statewide rules that had previously been found to violate the APA. It would appear that the 1985 Resources Agency memo relied on the same sort of analysis: individual regional boards could not separately incorporate into basin plans material that if issued by the Resources Agency itself would violate the statutory prohibition against underground regulations.

One persistent theme in Board comments on applicability of the APA to regional plans (see Board argument one) is that the APA should not be deemed applicable because the plan-drafting scenario outlined in the Water Code (and Board regulations and informal rules) is "mandatory" and "self-contained."

The fact that it is mandatory to adopt the plans is not controlling. This simply means that the agency is mandated to perform a particular function and to comply with the APA. Accepting the Board's "mandated-means-exempt" thesis would lead to the illogical conclusion that many of the most important agency actions would not be subject to the full APA

notice and comment protections. OAL has earlier rejected the argument that any time the Legislature fails to specifically re-instruct an agency to comply with the APA, that the Legislature thereby waives all APA rulemaking requirements.[90]

The second facet of the Board's argument sets forth the proposition that if an area of agency activity is arguably "self-contained," that means it is thereby exempt from APA requirements. We reject this line of reasoning. The characterization of the regional plan adoption system as "self-contained" fails to reflect the reality that the sketchy system omits several key procedural protections that the Legislation deemed in the APA to constitute "basic minimum procedural requirements." (Emphasis added.) The Legislature's use of the word "minimum" seems to us to indicate that the Legislature was aware that certain agencies already were required to follow (or might in the future be required to follow) particular procedural steps tailored to the particular area of law the agency was charged with administering. Use of the word "additional" in section 11346 clearly reflects the fundamental legislative policy judgment that rulemaking requirements imposed by statutes outside the APA would be deemed to supplement rather than supplant APA requirements.

Showing remarkable foresight, the drafters of section 11346 also addressed the question of whether or not subsequent legislation should be deemed to have impliedly superseded or modified the APA. The answer to this question was "no"--such legislation was not to be deemed to have cancelled out or changed APA requirements "except to the extent that such legislation shall do so expressly." (Emphasis added.) In short, the Legislature was quite comfortable with the prospect that certain agencies might have to comply with two sets of requirements when exercising quasi-legislative power.

The courts have also accepted the fact that agencies might have to conform to two sets of rules governing their actions in given arenas. The 1976 case of Natural Resources Defense Council v. Arcata National Corporation[91] involved the question of whether or not the Division of State Forestry (and regulated lumber companies) had to comply with both the California Environment Quality Act and the Z'Berg-Nejedly Forest Practice Act of 1973. The 1985 case of State Personnel Board v. Fair Employment and Housing Commission[92] involved the question of whether or not the California Highway Patrol in the matter of complaints of discrimination by applicants for civil service positions had to comply with both the California Fair Employment and Housing Act and Article 7 of the California Constitution (which gives SPB exclusive jurisdiction over civil service examinations).

BOARD'S FIRST CONTENTION: THE LEGISLATURE EXEMPTED WATER QUALITY CONTROL PLANS FROM THE APA WHEN IT ESTABLISHED A SEPARATE ADOPTION PROCEDURE IN THE PORTER-COLOGNE ACT.

OAL CONCLUSION: ABSENT IRRECONCILABLE CONFLICT BETWEEN THE TWO STATUTES, THERE IS NO BASIS FOR CONCLUDING THAT "REGULATIONS" CONTAINED IN PLANS HAVE BEEN IMPLIEDLY EXEMPTED FROM THE APA. IT IS NOT "IMPOSSIBLE" TO HARMONIZE THE APA WITH THE PORTER-COLOGNE ACT, I.E., THERE IS NO CONFLICT BETWEEN THE ACTS ON THE MATTER OF EFFECTIVE DATES OF PLANS; PORTER-COLOGNE SIMPLY REQUIRES THE BOARD TO SIGN OFF ON PLANS DRAFTED BY REGIONAL BOARDS PRIOR TO SUBMITTING THE PLAN (OR ANY REGULATORY PLAN PROVISIONS) TO OAL.

The Board argues that it is "impossible"[93] to comply with both the Porter-Cologne plan development procedures and APA rulemaking requirements. Specifically, the Board asserts that it is not possible to comply both with the Porter-Cologne Act's provisions concerning the effective date of plans and with APA provisions concerning the effective date of regulations.

The Board has meticulously constructed a complex rationale for its current[94] position that regional plans are impliedly exempt from the APA. Ultimately, the entire rationale hinges upon a highly debatable interpretation of a Water Code provision that provides such limited support that the Board did not quote it directly. The crux of the Board's argument is that the Porter-Cologne Act requires that regional plans become legally effective on the day the State Board approves the plan in question. We will refer to this thesis as the "effective date theory."

The Board contends:

> ". . . Under Porter-Cologne, Water Code section 13245 establishes the effective date of a basin plan as the date it is approved by the State Board. Under Government Code Sections 11346.2 and 11349.3, regulations are not effective until 30 days after filing with OAL, and OAL may disapprove of the regulation and send it back to the promulgating agency for revision. Clearly a basin plan cannot be effective when approved by the State Board and still be subject to a 30-day period in which the plan may be either approved or disapproved. . . ." [Emphasis added.][95]

Nowhere in its 43 page opening brief did the Board directly quote the pertinent sentence from Water Code section 13245. Responding to the Board, BPC quoted the key provision:

> ". . . contrary to the Board's assertions, the Porter-Cologne Act does not establish the effective

date of a basin plan as the date it is approved by the State Board. The statute states [in part]:

> A water quality control plan, or a revision thereof adopted by a regional board, shall not become effective unless and until it is approved by the state board.
>
> "(Water Code section 13245, emphasis added.) This section does not affirmatively prescribe any effective date; it merely confirms that a basin plan approved by a regional board is not effective before it is approved by the State Board. In providing that a basin plan shall not become effective 'unless and until' it is approved by the State Board, the Legislature left open the possibility that a basin plan could become [legally] effective at any time after its approval."[96] [Emphasis in original.]

Attempting to rebut BPC's argument, the Board in turn stated that the emphasized sentence from Water Code section 13245

> ". . . must be read in conjunction with Section 13246, which requires the State Board to act within 60 days after the Regional Board submits the plan or within 90 days after the Regional Board resubmits a plan previously returned to the Regional Board. [Footnote 3 added below.] These provisions simply do not mean that the plans may become effective at some later date after approval by another agency. These statutes require the State Board to act [on plans] within 60 or 90 days and state that they become effective upon approval by the State Board."
>
> [Footnote 3:] "A review of the history of Section 13425 supports the Board's position that the plan becomes effective upon approval by the State Board and not at some later date. The old provision was found in Water Code Section 13052.2, which stated: 'Any such water control policy shall become effective 60 days from the date of its filing in the office of the state board, unless specifically disapproved by the state board.' When Porter-Cologne was enacted in 1969, the provision was changed to require affirmative approval by the State Board, and Section 13246 was added to keep the 60 (or 90) day effective date. It was not intended to delay the effective date beyond the prescribed time period, and it was clearly not intended to allow for further approval by another agency."

The fundamental difficulty with the Board's thesis is that the language of the statute fails to support the Board's interpretation: the word "date" does not appear in the statute.

While it is true that Water Code section 13245 provides that a regional plan amendment cannot take effect "until" approved by the State Board, and that Water Code section 13246 requires the State Board to "act" on plan amendments within 60 days,[97] nowhere does it say that a plan amendment may not be subject to further approvals.

Regional Board Resolution 87-106, part C (see Appendix A) requests the State Board to "transmit the proposed Basin Plan amendments to [EPA] for approval." (Emphasis added.) How can the plan amendment be effective the date the State Board approves it and also be awaiting EPA approval?

Other approvals might also be needed. For example, regional plan amendments that impose local mandates are subject to the approval of the Department of Finance. Regional plans amendments that call for certain actions might require preparation of contracts which would be subject to the approval of the Department of General Services. An amendment might conceivably require an interagency agreement between several state agencies. A given amendment might require a legislative change or an appropriation of funds before it could become effective.

Similarly, regulations proposed by the Board for inclusion in the CCR are routinely "adopted" by the Board for submission to OAL. See, for instance, State Board Resolution No. 88-131, "Adoption of Regulations Governing Licensure of Underground Storage Tank Testers." (Emphasis added.) It is essential that proposed CCR provisions be "adopted" by the State Board before they can become law. Board approval, while a necessary step in the process of the proposed rules being codified in the CCR, is however not in itself sufficient.

In short, we agree with the synopsis of Water Code section 13245 presented in a recent law review article, which stated: "Water quality control plans or amendments are not effective unless approved by the State Board."[98]

The State Board relies heavily on the use of the word "approval" in Water Code section 13245, suggesting that it is hopelessly inconsistent with the APA terms concerning "approval" or "disapproval" of proposed regulations by OAL. However, closer analysis shows that it is not uncommon for the Legislature to require policy review and "approval" (or disapproval) of one agency's proposed regulations by a parent agency prior to submission of the proposal to OAL. For instance, the Bureau of Home Furnishings and Thermal

Insulation must obtain the "approval" of the Director of Consumer Affairs prior to forwarding proposed regulations to OAL for review.[99] The common feature of these intermediate approval schemes seems to be a concern that rules proposed by the originating agency be subjected to a policy review prior to being forwarded to OAL for a legal review for compliance with APA requirements.

We must also pay careful attention to the APA's provision concerning "adoption" of proposed regulations by rulemaking agencies prior to submission to OAL. Several APA sections clearly indicate that proposed regulations must be "approved by" or "adopted by" the promulgating agency prior to being forwarded to OAL for approval or disapproval. The APA also uses the word "adopt" in the sense of being approved by OAL for inclusion in the CCR. It is this latter "adoption" that marks the official promulgation of the regulation and the date upon which the regulation often becomes legally effective.[100,101]

We note that the Board's assertions concerning the intent of the 1969 amendments are not supported by citations to legislative history documents. In any event, we must look first at the express terms of Water Code sections 13245 and 13246. We are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them.[102] We may not insert into a statute qualifying provisions that were not included or rewrite a statute to conform to an inferred intention that does not appear from its language.[103]

HARMONIZING APPARENT CONFLICTS BETWEEN GENERAL REMEDIAL STATUTES AND SPECIFIC AGENCY ENABLING ACTS

As the State Board correctly points out, two key legal issues are (1) the interaction between general and specific statutes in pari materia (i.e., concerning the same subject) and (2) the doctrine of implied repeal. The most comprehensive and thoughtful treatment of purported conflict between a general remedial statute and a specific agency enabling act is found in Natural Resources Defense Council v. Arcata National Corporation.[104] ("Natural Resources Defense Council" or "NRDC"). The general principles for reviewing claims of disharmony between general and specific statutes found in Natural Resources Defense Council are useful in attacking the alleged conflict between the APA and the Water Code.

As the Board correctly points out, the sweeping nature of the ban on implied exceptions contained in Government Code section 11346 also necessitates application of an additional legal doctrine, the doctrine of implied repeal. Before addressing the implied repeal question, we will discuss the general/specific issue.

According to the Natural Resources Defense Council court:

> "Broadly speaking, a specific provision relating to a particular subject will govern in respect to that subject as against the general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate. However, it is well settled that the statutes and codes blend into each other and are to be regarded as constituting but a single statute. ONE SHOULD SEEK TO CONSIDER THE STATUTES NOT AS ANTAGONISTIC LAWS BUT AS PARTS OF THE WHOLE SYSTEM WHICH MUST BE HARMONIZED AND EFFECT GIVEN TO EVERY SECTION. Accordingly, statutes which are *in pari materia* should be read together and harmonized if possible. Even when one statute merely deals generally with a particular subject while the other legislates specially upon the same subject with greater detail and particularity, THE TWO SHOULD BE RECONCILED AND CONSTRUED SO AS TO UPHOLD BOTH OF THEM IF IT IS REASONABLY POSSIBLE to do so.[105]
>
> ". . . [A]s a matter of statutory interpretation the various statutes must be harmonized if it is reasonably possible. As stated [by the California Supreme Court], 'even though, in some particular or particulars, the provisions of two or more statutes apparently are in conflict one with the other, nevertheless, if possible and practicable, such SEEMING INCONSISTENCIES SHOULD BE RECONCILED to the end that the law as a whole may be given effect.'"[106] [All citations omitted; capitalized emphasis added; Latin term italicized in original, underlined here].

In Natural Resources Defense Council, the issue was whether provisions of the Z'Berg-Nejedly Forest Practice Act (and implementing regulations) supplanted provisions of the California Environmental Quality Act (CEQA) (and implementing regulations). The specific issue was whether the State Forester was required in reviewing timber harvesting plans, to comply not only with the specific Forest Practice Act, but also with the general environmental protection act, CEQA--by preparing an environmental impact report (EIR). Though involving different statutes, the NRDC case involves a number of striking similarities to the matter before us:

1. Both cases involve an alleged conflict between general remedial legislation and narrowly focused agency enabling acts; both remedial statutes (CEQA and the APA) are logical and carefully devised programs of wide application and broad public purpose that were designed to supplement existing statutory procedures.[107]

2. In both cases, the specific statute is silent on the question of whether the general statute applies, while the general statute explicitly applies (in all-inclusive terms) to "all state agencies."

3. Both cases involve legislatively mandated "plans," in the case at hand, regional water quality control plans, in NRDC, timber harvesting plans.

4. Both cases involve allegations that timing provisions related to state agency approval of the respective plans cannot be harmonized with the pertinent general statute; upon close examination, however, these apparent inconsistencies prove illusory.

5. Both cases involve unpersuasive allegations that the limited procedures required in the agency enabling act should be viewed as a "comprehensive, self-contained regulatory system" that should be deemed to serve as a "functional equivalent" of the more demanding procedure spelled out in the general remedial statute.[108]

ATTORNEY GENERAL OPINION: APPARENTLY CONFLICTING STATUTES MUST BE RECONCILED IF POSSIBLE

Following NRDC, we are obliged to attempt to harmonize the cited Water Code sections with the APA, if reasonably possible. In support of its argument that "regulations" in regional plans need not be adopted pursuant to the APA, the Board cites a 1947 Opinion of the California Attorney General. The Board stated:

> "The [Procunier] Court thus held that the rulemaking power of the Director [of Corrections] was impliedly exempt from the APA. [footnote omitted] See also 10 Ops.Atty.Gen. 275 (1947) in which the Attorney General [opined] that certain regulatory powers of the Fish and Game Commission were impliedly exempt from the requirements of the APA because of inescapable conflicts."[109]

We agree that this 1947 Opinion is helpful in resolving the implied exemption question before us. However, we read the Opinion very differently than does the Board. The ultimate conclusion of the Opinion was that the the Fish and Game Commission was not exempt from the APA. The Opinion merely concludes that--due to irreconcilable conflicts[110] between the Fish and Game Code and the APA--that the Commission need not comply with several rather minor APA provisions. The Attorney General stated:

> "It is well settled that APPARENTLY CONFLICTING STATUTES in pari materia MUST BE RECONCILED or correlated, though passed at different times, TO GIVE EFFECT TO BOTH IF POSSIBLE, but if not possible then the special statute will take precedence over the general statute."[111] [Citations omitted, capitalization added, Latin term italicized in original, underlined here.]

Noting that section 11346 prescribed a minimum, but did not diminish additional requirements imposed by other statutes, the Attorney General took the approach that the Commission had to comply with all APA requirements and all Fish and Game Code requirements that were not in apparent conflict. The Commission, it was concluded, should comply with its enabling act rulemaking provisions, "and should also comply with the [APA] in so far as compliance with the latter is possible."[112] [Emphasis added.] Thus, in 1947, the Fish and Game Commission worked out a way to comply as fully as possible with both its enabling act and the APA.

Today, in 1989, it is clearly "possible" for the Board to comply with Porter-Cologne plan development requirements and APA rulemaking requirements. There are several methods of complying with both statutes. One efficient compliance method would be to publish an APA rulemaking notice when the plan amendment is first developed by the regional board, scheduling the APA public hearing for the same date the regional board is required to hold a Porter-Cologne public hearing under Water Code section 13244.

All that it would take to harmonize the two notice requirements would be to publish notice of the APA/Porter-Cologne hearing one or more times in a newspaper of general circulation in the affected locality. Statewide notice of the proposed amendment for APA purposes would be afforded by publication in the California Regulatory Notice Register. Informing the public on a statewide basis of proposed plan amendments early in the amendment adoption process might actually improve the process by permitting the regional board to address a wider spectrum of public concerns prior to submitting the amendment to the State Board for formal approval.

We agree with the Board that plans as such need not be put through the APA process. To the degree, however, that particular plan provisions fall within the statutory definition of "regulation," those particular provisions must be adopted pursuant to the APA.[113]

THE TWO CALIFORNIA APPELLATE CASES CITED BY THE BOARD FOR SUPPORT OF ITS IMPLIED EXEMPTION THESIS DO NOT APPLY HERE BECAUSE THERE IS NO CONFLICT AND BECAUSE THE CASES ARE INCONSISTENT WITH SUBSEQUENT LEGAL DEVELOPMENTS

The Board relies heavily on two California appellate cases for support of its implied exemption thesis. The two cases are American Friends Service Committee v. Procunier[114] and Alta Bates Hospital v. Lackner.[115] Neither case really helps the Board, however, because--as we have shown--there is no conflict between the Porter-Cologne Act and the APA.

Assuming for the sake of argument that a conflict had been shown, the two cases are nonetheless readily distinguishable. Viewed in isolation, both cases do appear to support the Board's position. Viewed in the context of the development of the APA (as outlined above), and closely analyzed, however, neither case supports the Board's position.

AMERICAN FRIENDS SERVICE COMMITTEE V. PROCUNIER

The 1973 Procunier case involved an effort to compel the Department of Corrections to begin to comply with APA rulemaking requirements in adopting regulations applying to prison inmates. Procunier concerned a unique regulated community and was quickly rendered obsolete by subsequent legal developments. The case had, in any event, been decided on extremely narrow grounds. After the California Supreme Court in Armistead re-interpreted the APA provision upon which the Procunier holding had been predicated, and after the Legislature twice passed bills[116] instructing the Department of Corrections to adopt its regulations pursuant to the APA, not much was left of Procunier, except for some disembodied principles of statutory construction--several of which have materialized in the Board's brief.

Procunier interpreted two Government Code provisions: section 11342, subdivision (b) and 11343, subdivision (a)(3).

Section 11342, subdivision (b) defines "regulation" in part as "every rule, regulation, order, or standard of general application." (Emphasis added.)

Section 11343, subdivision (a)(3), provides that "every" state agency shall transmit to OAL for filing with the Secretary of State every regulation adopted or amended by it except one which:

> "Is directed to a specifically named person or to a group of [specifically named] persons and does not apply generally throughout the state." [Emphasis added.]

The Court apparently had decided that prisoners were a "group of persons" within the meaning of section 11343, subdivision (a)(3).[117]

The key issue, the Court stated, was the meaning of the phrases underlined directly above. According to the Court, this was the question:

> "Are the [inmate control] regulations herein presented those which, in the meaning of the above quoted sections, are of limited or general application? While it is obvious the prisons and prisoners partake of a character both special and unique, the precise language of the earlier quoted sections defining the nature, function, and interrelationships does not suggest or inspire a ready answer to the question." [Emphasis added.]

The Court finally concluded:

> "We conclude from the foregoing that [the Department of Corrections'] rules and regulations are embraced within the exception defined by Government Code section [11343, subdivision (a)(3)], and are thus beyond the purview of the APA." [Emphasis added.]

We concluded in 1986 OAL Determination No. 1 that the Procunier Court's interpretation of the "specifically named person" exception had been in substance overruled by a higher court:

> "The Exception for Specifically Named Persons or Groups of Persons--Government Code section 11343(a)(3)
>
> "The scope of this exception has not yet been definitively established in case law. The only case applying this exception has in substance been overruled by Armistead. The earlier case, American Friends Service Committee v. Procunier held that rules pertaining to state prison inmates were exempt from the Act because the rules were directed specifically 'to a group of persons and [did] not apply generally throughout the state.'
>
> In 1976, the Legislature amended the Department of Corrections' rulemaking statute to require that Department to adhere to the Act. In 1978, the Armistead court held that the challenged State Personnel Board rule was invalid absent compliance with the Act--despite the fact that the rule applied solely to a specifically named group of persons, i.e., California state civil service employees.
>
> Armistead held that the rule, even though it applied to a specific class of persons, nonetheless 'applied generally throughout the state.' This broad interpretation of what constitutes general application suggests that the section 11343(a)(3) exemption may only be invoked in that rare circumstance when an executive branch action applies to a group of persons, and does not apply generally throughout the state." [Emphasis in original; footnotes omitted.]

The Board argues that Procunier alternatively held that Department of Corrections rules were impliedly exempt from the APA because (1) Penal Code provisions were a special statute which controlled over the inconsistent general APA and (2) the Department's longstanding administrative interpretation considered the APA inapplicable to Corrections. We reject this theory. Judicial comments on these subjects are indeed present in Procunier, but are in the nature of additional thoughts which tended to support the conclusion that an express exemption applied. Nowhere does the court use the terminology "alternative holding" or "hold in the alternative." Our research has disclosed no subsequent case which has relied on Procunier to conclude that a state agency rule was impliedly exempt from the APA. Indeed, as discussed above, the most helpful subsequent case, Winzler, though citing Procunier, states unequivocally that agency rules are subject to the APA unless "expressly" or "specifically exempted."[118]

In any event, Natural Resources Defense Council presents a more recent, more thoughtful, and more comprehensive treatment of the special statute/general statute situation. Johnston presents a similarly more reliable post-Armistead treatment of the administrative interpretation issue.

Under the heading "Board's Second Contention," we will discuss how Procunier stresses the fact that since no evidence had been presented that the Legislature wanted prisoners to participate in making prison rules, that the Penal Code provisions would be deemed to satisfy APA concerns.

ALTA BATES HOSPITAL V. LACKNER

As the Board recognizes, the critical hurdle that must be overcome before an implied exemption may be established is the statutory requirement that APA exemptions be express.[119] While it is true that the Lackner opinion appeared to recognize an implied exemption, it is troubling that no reference is made to Government Code section 11346.[120] In any event, we agree with BPC's reading of Lackner:

> ". . . [T]he court held that a provision of the Welfare and Institutions Code authorizing the Director of the Department of Health to make an across-the-board ten percent cutback in medical payments under certain emergency circumstances specified in the statute was not to be slowed by the procedures specified in the APA. At the outset, it should be noted that the court does not even mention Government Code section 11346 and, for all the appears in the opinion was unaware of that provisions. In any event, the circumstances of the Lackner case are extreme, and the court's decisions hardly

> serves as a model for this case. The court noted that the Welfare and Institutions Code provision related to a particular, narrow subject, it applied to emergency circumstances in which adequate funds may not be available, and called for prompt action. The statute further specified that the director was to make a subjective choice based on a level of factual proof lower than that intended to apply to decisions made under the APA. Concluding that application of the APA procedures would 'effectively eviscerate' the narrow Welfare and Institutions Code provision and render totally useless its specific procedure, the court held that the APA did not apply.
>
> "The circumstances here differ greatly from those in Lackner. As discussed below, there is no conflict at all between the APA and the Porter-Cologne Act procedures. Both statutes have broad application. This is not an emergency situation, and the applicable level of factual proof remains unchanged from that established in the APA. The extraordinary circumstances that compelled the Lackner court to recognize that the APA did not apply simply do not exist here."[121]

Thus, we reject the argument that Procunier and Lackner require us to find the challenged rule impliedly exempt from the APA.

HAVE PORTER-COLOGNE REGIONAL PLAN REVIEW PROCEDURES REPEALED BY IMPLICATION THE EXPRESS EXCEPTION REQUIREMENT CONTAINED IN GOVERNMENT CODE SECTION 11346?

We agree with the Board that an implied exception to APA requirements can be established only if it is concluded that Government Code section 11346 has been repealed by implication. We agree with BPC that the legal standard for resolving claims of implied repeal is found in In re Thierry S. ("Thierry").[122] We conclude, however, that because there is no conflict between the APA and the Porter-Cologne Act, that section 11346 has not been repealed by implication.

According to Thierry, repeals by implication are recognized only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts, Thierry states, are bound, if possible, to maintain the integrity of both statutes if the two may stand together.[123]

According to Arvin Union High School District v. Ross,[124] (citing Procunier), the general presumption against implied repeals may be overcome when the later statute gives undebatable evidence of an intent to supersede the earlier.

In the case at hand, as has been discussed above, there is (1) a rational basis for harmonizing the two statutes and (2) it is highly debatable that Water Code section 13245 (enacted in 1969) was intended to supercede Government Code section 11346, as enacted in 1947. The 1979 verbatim re-enactment of section 11346 means that section 11346 represents the more recent expression of legislative policy. Insofar as the conglomeration of recent statutory references to regional plans presented in the Agency Response is entitled to any weight in the implied repeal context, it should be regarded as effectively negated by the 1983 enactment of the statutory prohibition on underground regulations, Government Code section 11347.5.

Thus, we conclude that section 11346 has not been repealed by implication.

BOARD'S SECOND CONTENTION: THE PORTER-COLOGNE PROCEDURE FULFILLS THE OBJECTIVES OF THE APA AND FURTHER EVIDENCES THE LEGISLATURE'S INTENT TO EXEMPT THE PROCESS FROM THE APA.

OAL CONCLUSION: IF REGULATORY PLAN MATERIAL DOES NOT UNDERGO PUBLIC COMMENT AND OAL REVIEW PURSUANT TO THE APA, A NUMBER OF BASIC APA OBJECTIVES WILL BE FRUSTRATED.

The argument that the Porter-Cologne plan review procedures fulfill the objectives of the APA is strongly reminiscent of an argument rejected by the court in the Natural Resources Defense Council case, discussed above. In Natural Resources Defense Council, it was argued that the Forest Practices Act ("FPA") (the agency enabling act) should be viewed as a "comprehensive self-contained regulatory system" that should be deemed to serve as a "functional equivalent" of the more demanding procedure spelled out in the the California Environmental Quality Act ("CEQA") (the general remedial statute).

In addressing the functional equivalence argument, the Natural Resources Defense Council court carefully compared Forest Practices Act procedures to CEQA, highlighting areas in which FPA procedures fell short of protecting the interests served by CEQA. While recognizing that the timber harvest plan procedures did cover significant environmental issues, the NRDC court identified some critical deficiencies:

> ". . . [I]t is not required that the timber harvesting plan fully analyze and disclose the adverse environmental consequences of the proposed projects; that it provide reasonable alternatives to the proposed actions or that it recommend mitigation measures to minimize the

> impact of the proposed activities. And although the Rules provide that the state forester shall invite and consider written comments regarding the plan. . ., and while there are also provisions for a public hearing for the adoption and revision of the Rules . . . . the state forester is under no obligation to respond in any manner to the suggestions coming from members of the public, much less to furnish a good faith, reasoned analysis setting forth in detail the reasons why the economic and social value of the project overcome the significant environmental objections raised by the public."[125] [Emphasis added.]

We recognize that the Porter-Cologne plan development procedures afford some opportunity for public participation.[126] However, APA procedures provide considerably more opportunities. Further, these APA public participation rights are guaranteed by statute, rather than merely being a matter of agency custom.

Moreover, the APA--but not the Porter-Cologne Act--requires disclosures concerning the impact of the proposed regulation on local agencies,[127] on the state budget,[128] on small businesses,[129] on private persons,[130] and on housing costs.[131] Also, the APA requires state agencies' rules to be reviewed by OAL, an independent agency, prior to taking effect.

One of the APA requirements closely monitored by OAL is the proviso that the rulemaking agency supply a written (1) summary of each public comment and (2) explanation of how the proposed regulation has been changed to accommodate the comment or the reasoning for making no change.[132] Creating a presumption that proposed regulations should ordinarily be changed to reflect public concerns, this requirement means at a minimum that rulemaking agencies must closely and thoughtfully review public comments in order to resolve substantive concerns of the regulated public.

If public comments that raise difficult questions are simply ignored or dismissed without explanation, OAL disapproves the regulation proposal and returns it to the responsible agency. This APA summary and response requirement does not exist in the Porter-Cologne plan development procedures. Thus, if regional plan amendments are deemed exempt from APA requirements, we will forfeit the benefits of this valuable mechanism for maximizing agency responsiveness to public concerns.

It is important to point out here that the full text of a regional plan amendment need not be sent to OAL--only the portions that create new law. Thus, there would be no need to submit complete amendments to OAL, only the "regulatory" portions--only the provisions that, for instance, define

statutory terms. The regulatory portions of regional plans could either be printed in full in the CCR or incorporated by reference into an appropriate CCR provision.

It is true that APA rulemaking procedures take time: the public is given 45 days notice of the initial public hearing, the exact text of the proposed regulation and a statement of reasons must be made available 45 days prior to the hearing; the public must be given 15 days notice of posthearing changes to the regulatory text, if these changes substantially modify regulatory requirements, etc.

However, these procedures--culminating in independent OAL review--are designed, among other things, to minimize the likelihood that the proposed regulations will be vulnerable to court challenges. The amendment to the Bay Basin plan that is the subject of this proceeding could easily have been put through APA rulemaking procedures in half the time it took to complete the existing plan development procedures. The Board concedes that the amendment was the

> "result of . . . six public workshops, three public hearings and three meetings before both the Regional Board and the State [Board], and a prior decision of the Regional Board that was remanded by the State Board . . . ."[133]

The Board relies on language in Procunier and in Alta Bates to support its thesis that the Porter-Cologne Act fulfills the objectives of the APA. Initially, we note that both of these older cases dealt with APA requirements as they existed prior to the dramatic 1979 amendments. Several key APA requirements did not exist prior to 1979, for instance, (1) the comment summary-and-response proviso and (2) independent review by OAL. Thus, pre-1979 judicial comments must be read with caution.

Statements of the Procunier court, in particular, must be viewed with great caution. For instance, the Board quotes[134] the following language from Procunier:

> "The [Procunier] Court ruled that the procedures required by the Penal Code for the adoption of regulations fulfilled the purposes of the APA so that 'it may reasonably be inferred that the Legislature did not intend to superimpose separate and unnecessary statutory procedures designed to meet the same purposes and objectives.'"[135]

There are two fundamental fallacies in applying the reasoning reflected in the above language to the question of whether Porter-Cologne procedures fulfill the same purposes and objectives as the APA.

First, the Procunier court made clear that the uncodified rules at issue in that case were not the sort of rules to which the APA was intended to apply. According to Procunier, the APA had two basic objectives:

> "We observe the basic purposes of APA to be two-fold, namely, to provide in the context of a multi-agency control and supervision over widely varied business and professional enterprises and activities a standard and uniform procedure whereby those affected by the controls may be heard; and second, to provide a repository accessible to the public in which general administrative rules and regulations may be found, thus avoiding secrecy."[136] [Emphasis added.]

The Procunier court then concluded that the Legislature did not intend that the prisoner-control rules then before it be made subject to the APA. The Court stated:

> "Our reading of both APA and the applicable provisions of the Penal Code discloses no suggestion of an intent that those most directly affected by [the Department of Corrections'] rules and regulations, namely the prisoners and parolees themselves, either be consulted prior to the adoption of the rules and regulations, or that they be assembled and transported to hearings so that they might participate therein and their views made known." [Emphasis added.]

Given that the court had initially characterized the APA as being designed to apply solely to rules governing business and professional enterprises, it not surprising that it proceeded to conclude that rules concerning prison administration were not intended to be covered by APA rulemaking procedures.

In any event, the court went on to list Penal Code provisions requiring that prisoners be given a copy of prison rules and that prison rules be filed with the Board of Corrections, along with another statute which stated that public records of all agencies were open to inspection by any citizen. This is the context of the language quoted by the Board concerning how APA purposes may be fulfilled by "other and independent provisions of law." A close reading of the opinion thus reveals that the Procunier court felt--given the unique nature of the community regulated by the Department of Corrections, i.e., inmates confined in state prisons--that the public participation objective of the APA was wholly inapplicable. The quoted language concerning APA objectives being met by other provisions of law thus refers solely to the accessibility facet of what Procunier perceived as the two basic objectives of the APA.

The second fundamental fallacy of relying on Procunier language in the Porter-Cologne context is that the wetlands rules at issue in this determination proceeding clearly do fall in the category of rules affecting "business and professional enterprises." Thus, even under the very narrow conception of APA applicability articulated in Procunier, the procedures used to develop the wetlands rules would be subject to a much more searching scrutiny than were the prisoner control rules at issue in 1973.

Not only the specific list of "minimum" rulemaking procedures prescribed by the APA, but also the judicial characterization of APA objectives has evolved considerably since 1973. The more demanding APA procedures, such as the public comment summary-and-response proviso, have already been discussed. In 1976, Justice Friedman, a member of the Third District panel that decided Procunier, supplied a more generous characterization of the primary purpose of the APA. Procunier had stated that specified segments of the population had the right to "be heard" concerning agency controls.[137] The 1976 case, California Optometric Association v. Lackner,[138] described the first objective as "the assurance of meaningful public participation in the adoption of administrative regulations by state agencies." [Emphasis added.]

One other subsequent history note should be made concerning Procunier. The author of the 1973 opinion was Third District Court of Appeal Presiding Justice Richardson. Following his subsequent appointment to the California Supreme Court, Justice Richardson concurred in the unanimous judgment of the Armistead court in 1978 that APA rulemaking requirements be more stringently enforced.

In short, we reject the Board's contention that Porter-Cologne procedures fulfill APA objectives. In fact, the notable discrepancy between Porter-Cologne and APA procedures tends to show that the Legislature did not intend to exempt regulatory material contained in regional plans from APA rulemaking requirements.

BOARD'S THIRD CONTENTION: THE LEGISLATIVE HISTORY OF THE PORTER-COLOGNE ACT PROVIDES INESCAPABLE SUPPORT FOR THE VALIDITY OF THE PLANNING PROCESS USED BY THE REGIONAL AND STATE BOARDS.

OAL CONCLUSION: LACKING AN IRRECONCILABLE CONFLICT BETWEEN PORTER-COLOGNE PLAN DEVELOPMENT PROCEDURES AND APA REQUIREMENTS, THE LEGISLATIVE INTENT MATERIALS PRESENTED BY THE BOARD ARE NOT SUFFICIENT IN THEMSELVES TO SUPPORT A CONCLUSION THAT KEY APA PROVISIONS HAVE BEEN REPEALED BY IMPLICATION.

BOARD'S FOURTH CONTENTION: THE LEGISLATURE'S RATIFICATION OF THE BOARD'S ADOPTION PROCESS INDICATES A LEGISLATIVE INTENT TO EXEMPT WATER QUALITY CONTROL PLANNING FROM THE APA.

OAL CONCLUSION: THE LEGISLATURE, LIKE THE RESOURCES AGENCY UNDERSECRETARY IN 1985, PRESUMABLY THOUGHT THAT REGIONAL PLANS WERE BASED SOLELY UPON "FULLY AUTHORIZED" STATE AND FEDERAL LAWS; IN ANY EVENT, A REFERENCE TO AN INVALID ACT DOES NOT VALIDATE THE ACT.

BOARD'S FIFTH CONTENTION: THE STATE AND REGIONAL BOARDS HAVE CONSISTENTLY INTERPRETED THE PORTER-COLOGNE ACT AS ESTABLISHING THE PROCEDURES TO BE FOLLOWED IN ADOPTING WATER QUALITY CONTROL PLANS.

OAL CONCLUSION: LEGISLATIVE INTENT MATERIALS REVEAL ANXIETY ABOUT THE IMPACT OF 1982 APA AMENDMENTS ON PLANS; OAL RULEMAKING RECORDS REVEAL EFFORTS TO OBTAIN EXPRESS APA EXEMPTIONS COVERING REGIONAL PLANS; ADMINISTRATIVE INTERPRETATIONS NOT PROMULGATED IN SUBSTANTIAL COMPLIANCE WITH THE APA ARE ENTITLED TO NO DEFERENCE; AGENCY ATTEMPTS TO EXEMPT AGENCY RULES FROM APA REQUIREMENTS VIA REGULATION ARE INVALID; INSOFAR AS APA APPLICABILITY ISSUES ARE CONCERNED, THE EXPERT AGENCY INTERPRETATION TO WHICH DEFERENCE SHOULD BE SHOWN IS THAT OF OAL.

The Board alleges that it has consistently and over many years viewed regional plans as exempt from the APA. There are some indications that this interpretation has not been absolutely consistent. As noted above, the San Francisco Regional Board had a duly adopted regulation concerning water quality in San Francisco Bay on the books for over 20 years. As also noted above, following the enactment of Government Code section 11347.5, the Board twice attempted to persuade OAL to adopt regulations expressly exempting regional plans from APA requirements. Similarly, another agency attempted to have section 11347.5 amended prior to enactment to expressly exempt legislatively mandated plans.

We have five additional objections to the Board's "administrative interpretation" contention: (1) administrative interpretations not properly promulgated are entitled no weight, (2) duly adopted regulatory provisions purporting to exempt agency enactments from APA requirements are invalid, (3) an erroneous agency interpretation cannot be validated by the mere passage of time, (4) the APA applicability question at issue here is not a technical water quality problem involving the administrative expertise of the Board, (5) as the agency charged with enforcing the APA, OAL is the agency to whose interpretations deference should shown when treating questions of APA applicability, and, (6) the

Board's reliance on Procunier is ill-founded, for reasons outlined above.

OBJECTIONS ONE AND TWO

The Board argues that both its uncodified administrative interpretation and its duly adopted regulations support the "effective date thesis." We reject this argument. Neither of the proffered bases effectively support it. Insofar as the argument rests on an inferred intention not appearing in the language of the statute, we reject it. Insofar as the argument rests on an administrative interpretation not adopted pursuant to the APA, we reject it for the reasons set out in Johnston v. Department of Personnel Administration:[139]

> "When an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will ordinarily be followed if not clearly erroneous. . . .
>
> "The rule is applied to administrative regulations promulgated by an administrative body authorized to promote a statute's purposes. . . . Conversely, an 'administrative construction' which has not been promulgated in substantial compliance with the [APA] merits no weight as an agency interpretation. (Subd. (b), section 11324, and sections 11346 and 11350; Armistead . . . ."
>
> "'In any event, administrative construction of a statute, while entitled to weight, cannot prevail when a contrary legislative purpose is apparent . . . . " [Emphasis added.]

Insofar as the Board's argument is based on the premise that it has by duly adopted regulation exempted itself from the APA, we reject the argument on the grounds that only the Legislature has the authority to exempt quasi-legislative agency enactments from APA requirements.[140]

The final sentence in the above quotation from the Johnston opinion states that an administrative construction of a statute cannot prevail "when a contrary legislative purpose is apparent." In the matter of APA applicability to regional plans, we are essentially weighing numerous instances of creatively interpreted legislative silence (primarily involving the Water Code) against numerous explicit APA provisions. We would thus conclude that the Board's administrative interpretation of the Water Code cannot prevail against the contrary legislative purpose clearly articulated in the APA.

REMAINING OBJECTIONS

The Board asserts that

> ". . . an administrative agency's long-standing administrative interpretation that standards or rules adopted pursuant to the specific act it administers are not subject to the Administrative Procedure Act is entitled to deference.' American Friends Service Committee v. Procunier. . . ."[141]

The Board further asserts that the principle that an agency's interpretation of the statute it enforces is entitled to great weight applies with particular force where there has been acquiescence over many years by persons having an interest in the matter, citing DeYoung v. City of San Diego (1983).[142] However, the Board omitted the crucial conclusion of the above noted rule of statutory construction that "courts will generally not depart from such an interpretation unless it is clearly erroneous." [Citations omitted, emphasis added.][143] Furthermore, "an erroneous administrative construction does not become decisive of law no matter how long it is continued." (Emphasis added.)[144]

Even assuming the Board's interpretation is not clearly erroneous or otherwise invalid, it is less significant because the interpretation does not concern a technical matter involving the Board's administrative expertise.

> "What deference should be accorded an administrative construction of a statute itself requires a judicial construction of the limits of the claimed source of rulemaking authority, whether that be the substantive provisions of an applicable statute or the statutory boundaries of a delegated power. 'The proper scope of a court's review is determined by the task before it.' [Citation omitted.] It is in any event a judicial task. [Citations omitted.] Where the language of the governing statute is intelligible to judges their task is simply to apply it, whether that be language of substantive limitation or the boundaries of a delegation of rule-making authority. Where the intelligibility of the statutory language depends upon the employment of administrative expertise, which it is the purpose of a statutory scheme to invoke, the judicial role 'is limited to determining whether the [Department] has reasonably interpreted the power which the Legislature granted it.' [Emphasis added, Citation omitted.]" [145]

It is important to note that substantive provisions of the Basin Plan are not in issue. The sole issue before us in this part of the Determination is whether the challenged rules are exempt from the provisions of the APA, an area of the law in which OAL has the exclusive administrative

authority (Gov. Code sections 11347.5, 11342 and Cal. Code Regs., tit.1, section 121) and it is OAL's interpretation not the Board's which is entitled to great weight.

WHAT CONSEQUENCES WILL FLOW FROM OAL'S DECISION ON THE IMPLIED EXEMPTION CLAIM?

DECIDING THAT THE CHALLENGED RULE IS IMPLIEDLY EXEMPT FROM APA REQUIREMENTS MIGHT IN THE SHORT RUN MAKE IT EASIER FOR THE BOARD TO ADOPT PLANS, BUT WOULD IN THE LONG RUN UNDERMINE THE PUBLIC PARTICIPATION AND OAL REVIEW PROVISIONS OF THE APA AND LEAD TO MORE LITIGATION.

The Board has predicted dire consequences if we find that the challenged rule is invalid. The Board argues that:

> "the APA process is ill-suited to achieve the necessary ends which water quality control plans address. To require additional and unnecessary procedures at this stage will create chaos, uncertainty and economic hardship while providing no additional protection to the regulated public and the people of California."[146]

Specifically, the Board argues that the following will occur if OAL determines that the challenged rule (the amendment to the Bay Basin Plan) is invalid:[147]

1. The remainder of the San Francisco Bay Basin Plan and all other California water quality control plans will "necessarily" be invalidated.

2. If all regional water plans are invalid in toto, these consequences will follow:

   a. Waste dischargers now considered exempt from the State Board's regulations will be considered subject to them.

   b. All municipalities now considered eligible for construction grants would instead be ineligible.

   c. The EPA and thousands of parties would no longer be able to rely upon regional plans as establishing water quality standards in California.

   d. The federal government would directly enforce the federal Clean Water Act in California, because California would have no state-adopted standards.

e. Local entities will be ineligible for hundreds of millions of dollars of federal sewage treatment funds.

f. Lacking regional plans, regional boards will have to make each determination on an ad hoc basis, leading to a "tremendous burden on the regulatory process and . . . uncertainty among the regulated community."

g. The validity of plans issued by other state agencies could be called into question, including the California Water Plan of the Department of Water Resources, the San Francisco Bay Plan of the Bay Conservation and Development Commission, and local plans of the Coastal Commission.

We note that the Board seeks to greatly expand the scope of our inquiry from (1) a four-page amendment to one particular regional plan to not only (2) hundreds of pages of material in other Water Board plans but also (3) to other plans adopted by other state agencies. No request for determination having been filed concerning any of this other material, it is thus not before us in this or any other determination proceeding. We, therefore, express no opinion on this other material.

It must be noted, moreover, that only a part of the challenged rule in the matter at hand has been determined to be regulatory in nature. It should also be noted that if the Board's policy is to define "wetlands" as shown in the challenged rule, it would require only one rulemaking action to adopt that definition into the CCR for statewide application --not 20 rulemaking actions for each of 20 plans. If the wetlands definition and the accompanying mitigation requirements are in fact mandatory statewide policies, it would seem more efficient to conduct one statewide rulemaking proceeding and definitively resolve the question than to conduct 16 separate Porter-Cologne plan review proceedings, plus four additional proceedings involving plans originated by the State Board.

Also, if the Board concludes following this Determination that one of the specific Bay Plan amendment paragraphs found to violate Government Code section 11347.5 is critical to the administration of the water quality control program, the Board could submit emergency regulations to OAL, finding pursuant to Government Code section 11346.1 that the proposed regulations are "necessary for the immediate preservation of the public peace, health and safety or general welfare." If the Board presents "specific facts showing the need for immediate action" pursuant to Government Code section

11346.1, subdivision (a) and meets the requirements of Government Code section 11349.6, OAL will approve the emergency regulations. OAL is required by statute to act on emergency regulation submissions within 10 days; if the need is great and workload permits, it is possible for OAL to review such regulation proposals within 48 hours.

For example, in 1987, OAL determined that the 520-page Department of Corrections' "Classification Manual" violated Government Code section 11347.5.[148] After the Sacramento Superior Court followed the Determination and enjoined use of the Manual,[149] OAL approved emergency regulations designed by the Department to prevent disruption of the critical prisoner classification function.

While we appreciate the intensity of the Board's commitment to avoid following APA procedures for adoption of regulatory portions of regional plans, such comments are more appropriately directed to the Legislature. In exercising its power under Government Code section 11347.5, OAL must "enforce statutes as written."[150] We are "without the power to determine the wisdom, desirability, or propriety of statutes enacted by the Legislature."[151]

Decisions as to whether or not to exempt executive branch agencies from APA requirements should be made by the legislative branch of state government, based upon "the belief that the Legislature as the most representative organ of government should settle insofar as possible controverted issues of policy . . . ."[152]

Concerned about "deep-seated problems of agency accountability and responsiveness,"[153] the Legislature established minimum standards for the exercise of quasi-legislative power by state agencies in 1947, re-enacted and expanded these standards in 1979, and explicitly prohibited agency use of "underground" regulations in 1982. In section 11346, the Legislature drew a "bright line," clearly articulating its will that quasi-legislative enactments be adopted pursuant to APA requirements unless "expressly" exempted. This "express exemption" requirement provides clear guidance to persons drafting legislation and to all interested parties. If this requirement is too readily waived, we run the risk of creating substantial uncertainty as to which agency rules are subject to the APA, of increased litigation, and of a gradual decline in the opportunities for meaningful public participation in agency rulemaking.

We note one last time the dire consequences predicted by the Board, should we determine that plans are not impliedly exempt from the APA. There is a fallacy in the Board's argument: the consequences of its failure to follow the APA are not justification for continuing to fail to follow the APA. Similarly, if water quality issues are as important to

California as the Board alleges, then we should strive for a maximum rather than minimum level of public participation in the development of water quality policy.

III. CONCLUSION

For the reasons set forth above, OAL finds that the amendments to Chapters 2 and 4 of the Basin Plan, (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) therefore violate Government Code section 11347.5, subdivision (a), except for certain amendments that are either nonregulatory or are restatements of existing statutes or regulations.

DATE: March 29, 1989

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APPENDIX A

STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 87-92

APPROVAL OF AMENDMENTS TO CHAPTERS 2, 3, AND 4 OF THE WATER QUALITY CONTROL PLAN FOR THE SAN FRANCISCO BAY BASIN

WHEREAS:

1. The California Regional Water Quality Control Board, San Francisco Bay Region (San Francisco Bay Regional Board), revised the Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) on December 17, 1986.

2. On May 21, 1987, the State Water Resources Control Board (State Board) adopted Resolution No. 87-49 approving portions of these amendments to the Basin Plan and remanding other portions to the San Francisco Bay Regional Board for further consideration.

3. The San Francisco Bay Regional Board adopted Resolution No. 87-106 on August 19, 1987 revising the items remanded by State Board Resolution No. 87-49.

4. The proposed revised amendments to the Basin Plan include wetland protection provisions. These amendments define wetlands in accordance with the definition established by the Environmental Protection Agency's regulations implementing the Clean Water Act.

5. The proposed revised amendments to Chapters 2, 3, and 4 of the Basin Plan as included in San Francisco Bay Regional Board Resolution No. 87-106 are appropriate in accordance with State Board Resolution No. 87-49.

6. The proposed Basin Plan amendments are consistent with the requirements of Public Resources Code Section 21000 et seq. (California Environmental Quality Act).

7. Basin plan amendments do not become effective until approved by the State Board.

8. The wetlands protection provisions in the proposed revision to the Basin Plan call for implementation guidelines for wetlands identification. The State Board finds that implementation guidelines for determining wetlands' value would also be desirable. Regional Board guidelines do not take effect until they are approved by the State Board.

THEREFORE BE IT RESOLVED:

1. That the State Board approves the revised Basin Plan amendments as described in San Francisco Bay Regional Board Resolution No. 87-106 adopted on August 19, 1987.

2. That approval is with the understanding that since the Environmental Protection Agency's definition is used, and the proposed revised amendments do not define "riparian," the statement in the revised amendments that wetlands include "riparian areas" refers only to those areas along watercourses that are inundated or saturated at sufficient frequency and duration that they meet the Environmental Protection Agency's definition of wetlands.

3. That approval is with the understanding that since the proposed revised amendments area based upon the Environmental Protection Agency's definition of wetlands, the San Francisco Bay Regional Board will give great deference to the Environmental Protection Agency's administrative interpretation of that definition.

4. That the State Board directs the San Francisco Bay Regional Board to adopt implementation guidelines for determining wetlands value, and submit them to the State Board for approval no later than April 1, 1988.

5. That the State Board directs the San Francisco Bay Regional Board to include in its implementation guidelines a method for addressing general certification or a waiver of certification of Corps of Engineer Permits pursuant to Section 401 of the Federal Clean Water Act for solar salt making and maintenance activities associated with solar salt making.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 17, 1987.

_____

Maureen Marche'
Administrative Assistant to the Board

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

RESOLUTION NO. 87-106

ADOPTING AMENDMENTS TO THE WATER QUALITY CONTROL PLAN
AND REQUESTING APPROVAL FROM
THE STATE WATER RESOURCES CONTROL BOARD

WHEREAS, on December 17, 1986, the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Board), adopted amendments to the Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) and requested that the State Water Resources Control Board (State Board) approve those amendments;

WHEREAS, on May 21, 1987, the State Board adopted Resolution No. 87-49, approving portions of those amendments to the Basin Plan but remanding other portions to the Regional Board for further consideration;

WHEREAS, the Regional Board has developed new proposed amendments to the Basin Plan in accordance with Section 13240 et seq. of the California Water Code;

WHEREAS, a committee of the Regional Board held a public hearing on August 17, 1987, and the Regional Board held a public hearing on August 19, 1987 on the proposed Basin Plan amendments in accordance with Section 13244 of the California Water Code;

WHEREAS, the Basin Plan amendments must be approved by the State Board as provided in Sections 13245 and 13246 of the California Water Code before becoming effective;

WHEREAS, the Regional Board prepared an environmental assessment evaluating significant environmental impacts and alternatives in compliance with Public Resources Code Section 21000 et seq. (CEQA) and found that no significant adverse environmental impacts would result from implementation of the proposed Basin Plan amendments, and that environmental assessment applies to these proposed amendments; and

WHEREAS, the proposed Basin Plan amendments are consistent with the requirements of the Clean Water Act, as amended;

THEREFORE, BE IT RESOLVED THAT:

A. The Regional Board adopts the following Basin Plan amendments:

   1. Reference to Class III surface impoundments contained in the Wet Weather Overflows section of Chapter 4 should be deleted.

2. The second and third sentences of Guideline No. 4 listed under the Erosion and Sediment Control Section of Chapter 4 which state as follows should be deleted:

   "In addition, the Regional Board may find that any water quality problems caused by erosion and sedimentation for such a project were due to the negligent lack of an adequate erosion control ordinance and enforcement program by the local permitting agency. Such a finding of negligence could subject a permitting agency to liability for indemnification to a developer if civil monetary remedies are recovered by the State."

3. The discussion of wastewater treatment requirements for the City and County of San Francisco contained in the Municipal Facilities section of Chapter 4 which states in part "A full compliance deadline beyond July 1, 1988 must be part of a consent decree or other court-ordered time schedule," should be revised to state "A full compliance deadline beyond July 1, 1988 must be part of an enforceable time schedule."

4. All references in the Basin Plan to anti- and nondegradation policy should be replaced with references to State Board Resolution No. 68-16.

5. The last two paragraphs of the discussion of the Central Valley agricultural drainage problem in Chapter 4 should be deleted and replaced with:

   "The State Board has taken an active role in the remediation of the selenium problem at Kesterson. The San Joaquin Valley Drainage Program, another State and Federal interagency program, has begun to further investigate the problems associated with the drainage of agricultural lands to develop solutions to those problems."

6. The discussion of wetlands contained in the proposed amendments to Chapter 2 should be deleted and replaced with:

   "Wetlands are waters of the State and the United States. Wetlands are defined in 40 CFR 122.2 as those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adopted for life in saturated soil conditions. Wetlands include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and riparian areas. Because of the seasonality of rainfall in the Region, some wetlands may not be easy to identify by simple means.

Therefore, in identifying wetlands the Board will rely on such indicators as hydrology, hydrophytic plants and/or hydric soils and implementation guidelines to be adopted by the Board.

There are many actual and potential beneficial uses of wetlands, with wildlife habitat being the most significant of them. Other uses are identified in the following sections which describe two of the most important types of wetland habitat in the Region, marshes and mudflats. In addition, wetlands that are adjacent to the Bay and its tributaries contribute to the enhancement of the Bay's beneficial uses by acting as filtering agents for many pollutants, including solids and nutrients, as well as acting as habitat that serve as a transitional zone between open water and upland areas."

7. The prohibition of discharge of solid wastes or earthen materials to wetlands contained in Chapter 4 should be deleted. The following new section should be added to Chapter 4 immediately after the prohibitions:

"WETLAND FILL

The beneficial uses of wetlands are mainly affected by diking and filling. Pursuant to Section 404 of the Clean Water Act, discharge of fill material to waters of the United States must be performed in conformance with a permit obtained from the Army Corps of Engineers prior to commencement of the fill activity. However, in addition, under Section 401 of the Clean Water Act, the State must certify that any permit issued by the Corps pursuant to Section 404 will comply with water quality standards established by the State (i.e. the Basin Plans), or the State can waive such certification. If the State does not waive certification, the State Board's Executive Director, acting on the recommendation of the Regional Board, can grant or deny State certification. In the event of a conflict between the State and the Corps, or, in those rare instances where the Corps may not have jurisdiction, the Regional Board has independent authority under the State Water Code to regulate discharges to wetlands through waste discharge requirements or other orders.

The Regional Board will use Senate Concurrent Resolution No. 28 and California Water Code Section 13142.5 as guidance for action on wetlands. Senate Concurrent Resolution No. 28 states that, 'It is the intent of the legislature to preserve, protect, restore and enhance California's wetlands and the multiple resources which depend on them for the benefit of the people of the state.' California Water Code Section 13142.5 states

"Highest priority shall be given to improving or eliminating discharges that adversely affect ... Wetlands, estuaries, and other biologically sensitive sites."

The Regional Board will require that any application for proposed fill activity within its regulatory jurisdiction include mitigation located within the same section of the Region, wherever possible, so that there will be no net loss of wetland acreage and no net loss of wetland value when the project and mitigation lands are evaluated together. In addition, the Regional Board will utilize EPA's Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredge or Fill Material in determining the circumstances under which wetlands filling may be permitted."

B. The State Board is requested to approve the proposed Basin Plan amendments in accordance with Sections 13245 and 13246 of the California Water Code.

C. Upon approval, the State Board is requested to transmit the Basin Plan amendments to the U.S. Environmental Protection Agency for approval.

I, Roger B. James, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of a resolution adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on August 19, 1987.

[signed]

ROGER B. JAMES
Executive Officer

1 This Request for Determination was filed by Ellen Johnck, Executive Director, for the Bay Planning Coalition, 666 Howard Street, Suite 301, San Francisco, CA 94105, (415) 543-3830. The State Water Resources Control Board and the California Regional Water Quality Control Board for the San Francisco Bay Region were represented by William R. Attwater, Chief Counsel, Craig M. Wilson, Assistant Chief Counsel, and Steven H. Blum, Staff Counsel, of the State Water Resources Control Board, 901 P Street, Suite 411A, Sacramento, CA 95814, (916) 322-0188.

To facilitate indexing and compilation of determinations, OAL assigned--beginning with 1989 OAL Determination No. 2--consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "92" rather than "1."

2 Mr. Bolz wrote the discussion concerning the third dispositive issue; Ms. Cornez wrote the discussion concerning the first and second dispositive issues.

We wish to acknowledge Barbara Eckard, Staff Counsel, for her research of the "when should deference be given to an agency's interpretation of a statute" issue, and for her time spent editing the Determination. We also wish to acknowledge Gordon Young, Staff Counsel, for his time spent editing the Determination.

3 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

> Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n. 5, 211 Cal.Rptr. 758, 764, n. 5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Boreta Enterprises, Inc. v. Department of Alcohol Bev-

erage Control (1970) 2 Cal.3d 85, 107, 84 Cal.Rptr. 113, 128 (where agency had failed to adopt, pursuant to the APA, policy statement banning licensees from employing topless waitresses, court declined to "pronounce a rule in an area in which the Department itself is reluctant to adopt one," but also noted agency failure to introduce evidence in the contested disciplinary hearings supporting the conclusion that the forbidden practice was contrary to the public welfare and morals because it necessarily led to improper conduct), vacating, (1969) 75 Cal.Rptr. 79 (roughly the same conclusion; multiple opinions of interest as early efforts to grapple with underground regulation issue in license revocation context); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Pacific Southwest Airlines v. State Board of Equalization (1977) 73 Cal.App.3d 32, 140 Cal.Rptr. 543 (invalidating Board policy that aircraft qualified for statutory common carrier tax exemption only if during first six months after delivery the aircraft was "principally" (i.e., more than 50%) used as a common carrier); Sangster v. California Horse Racing Board (1988) 202 Cal.App.3d 1033, 249 Cal.Rptr. 235 (Board decision to order horse owner to forfeit $38,000 purse involved application of a rule to a specific set of existing facts, rather than "surreptitious rulemaking"); Wheeler v. State Board of Forestry (1983) 144 Cal.App. 3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of proper rule articulating standard by which to measure licensee's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found that administrative instructions promulgated by the Department of Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which im-

plemented the program to intercept state income tax refunds to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have the force of law and establish rules governing the matter covered. We note that the court issued its decision without referring to either:

(1) the watershed case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or

(2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that, in an analogous factual situation involving the intercept requirements for federal income tax refunds, the California State Department of Social Services recently submitted to OAL (OAL file number 88-1208-02) Internal Revenue Service (IRS) Tax Refund Intercept Program regulations. These regulations were approved by OAL and filed with the Secretary of State on January 6, 1989, transforming the ongoing IRS intercept requirements from administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 54, infra).

See also, the following Opinions of the California Attorney General, which concluded that compliance with the APA was required in the following situations:

Administrative Law, 10 Ops.Cal.Atty.Gen 243, 246 (1947) (rules of State Board of Education); Workmen's Compensation, 11 Ops.Cal.Atty.Gen. 252 (1948) (form required by Director of Industrial Relations); Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56 (1956) (Department of Industrial Relations rules governing electrical wiring in trailer parks); Los Angeles Metropolitan Transit Authority Act, 32 Ops.Cal.Atty.Gen. 25 (1958) (Department of Industrial Relations's State Conciliation Service rules relating to certification of labor organizations and bargaining units); Part-time Faculty as Members of Community College Academic Senates, 60 Ops.Cal.Atty.Gen. 174, 176 (1977) (policy of permitting part-time faculty to serve in academic senate despite

regulation limiting service to full-teachers). Cf. Administrative Procedure Act, 11 Ops.Cal.Atty.Gen. 87 (1948) (directives applying solely to military forces subject to jurisdiction of California Adjutant General fall within "internal management" exception); Administrative Law and Procedure, 10 Ops.Cal.Atty.Gen. 275 (1947) (Fish and Game Commission must comply with both APA and Fish and Game Code, except that where two statutes are "repugnant" to each other and cannot be harmonized, Commission need not comply with minor APA provisions).

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

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

See 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 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

5 Government Code section 11347.5 provides:

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

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

tion 11342.

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

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

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

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

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

6 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325

(interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." [Emphasis added.]

7 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

In the matter at hand, thirteen public comments were submitted to OAL:

1. California Chamber of Commerce.
2. Citizens for a Better Environment (CBE).
3. San Francisco Bay Conservation and Development Commission (BCDC).
4. Environmental Defense Fund.
5. Mr. and Mrs. James J. Mulvery.
6. Sierra Club, San Francisco Bay Chapter.
7. Sierra Club, and Legal Defense Fund, Inc.
8. Save San Francisco Bay Association.
9. Santa Clara Valley Audubon Society, Inc.
10. Golden Gate Audubon Society.
11. Marin Audubon Society.
12. Leo McCarthy, Lieutenant Governor of California.
13. Thomas E. Warriner, Esq., Undersecretary of the California Health and Welfare Agency.

On January 30, 1989, the Board submitted a Response to the Request for Determination, which was considered in making this Determination.

8 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Gov. Code sec. 11347.5, 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).

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

10 Amendments to Chapter 3 were not reviewed in this determination proceeding; see discussion under the subheading "Identification of the Challenged Rules," in the text.

11 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL for the purchase price of $3.00.

12 For detailed history, see "California Water Law In Perspective," Gavin M. Craig, West's Ann. Water Code (1971 ed.), pp. LXV-CVIII.

13 Statutes, 1877-78, chapter 429.

14 Statutes, 1967, chapter 284; Water Code, article 3, chapter 2, division 1.

15 "California Water Law In Perspective," supra, note 12 at pp. XCII-XCV.

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

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

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

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

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

17 Whether the water quality control plans are quasi-legislative acts by the Board is not an issue in this Determination. As stated by the Board (Agency Response, pp. 2-3), "Water quality control plans are quasi-legislative. . . . [Citations omitted.]"

18 See Agency Response, p. 2: "The State Board concedes that the Water Quality Control Plan for the San Francisco 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. [Citation omitted.]"

19 Government Code section 11342, subdivisions (a) and (b). See Government Code sections 11343 (line 1), 11346, and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956).

20 See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 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 APA when engaged in quasi-legislative (i.e., "regulatory") activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

21 After reviewing applicable law, including Water Code section 13245, we conclude that the State Board must approve any regional plan or plan amendment prior to the filing with OAL of regulatory plan provisions.

22 The Board interprets another Board regulation, Title 23, CCR, subsection 649(b), to exempt regional plans from compliance with the APA. We reject this interpretation. The Board lacks the authority to exempt itself from the APA by regulation. (See 1987 OAL Determination No. 5 (State Personnel Board, April 30, 1987, Docket No. 86-011), California Administrative Notice Register 87, No. 20-Z, May 15, 1987, p. B-40, B-50; typewritten version, p. 12, citing Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1135-1136). Only the Legislature can exempt state agencies from APA requirements.

Also, subsection 649(b) is by its terms, limited to "informational" matters. Clearly, regional plan provisions conceded by the Board to be "quasi-legislative" and "regulatory" in nature cannot be deemed to be merely "informational" in character.

23 Title 23, CCR, section 3000. Effective September 29, 1960 (California Administrative Notice Register 60, No. 19); repeal filed September 2, 1981, effective October 2, 1981 (California Administrative Notice Register 81, No. 36).

24 The California Chamber of Commerce submitted a public comment regarding this Request for Determination. On September 28, 1988, a Request for Determination was originally filed by David Ivester, of Washburn & Kemp, 144 Second Street, P. O. Box 880130, San Francisco, CA 94188, (415) 543-8131, on behalf of the Chamber challenging the same amendments to the Basin Plan as the ones at issue in this proceeding. It was agreed upon by all parties concerned that the Chambers' filing would be accepted by OAL as a formal Request (Docket No. 88-016) as well as a public comment on this Request for Determination (Docket No. 88-006).

25 See Water Quality Control Plan, San Francisco Bay Basin Region (2), dated December 1986, p. I-3, as provided by the State Board and Regional Board as Exhibit A in the Agency Response.

26 Request for Determination, p. 2. This description of the amendments was not disputed by the Boards.

27 Register 88, No. 51-Z, p. 3999.

28 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); see also, cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 3 to today's Determination.

29 Agency Response, pp. 2-3.

30 See "Overview of California Water Rights and Water Quality Law," ((1988) 19 Pacific L.J. 957, 998) written by William R. Attwater, Chief Counsel for the State Board, and James Markle, Senior Staff Attorney, who is responsible for the legal support of the State Board's water rights program.

31 Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

32 Stoneham v. Rushen I (1982) 137 Cal.App.3d 729, 735, 188 Cal.Rptr. 130, 135; Stoneham v. Rushen II (1984) 156 Cal.App.3d 302, 309, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.

33 On page 2 of the Request for Determination, BPC states "On August 19, 1987 the Regional Board adopted, by Resolution No. 87-106, the Basin Plan amendments at issue herein." (Emphasis added.) Resolution No. 87-106 makes no mention of Chapter 3 in the seven amendments listed in the Resolution.

34 We also note that Water Code section 13050, subdivision (e) does not include in its definition of "waters of the state" "saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and riparian areas."

35 These "implementation guidelines" were not submitted as part of the challenged rules in the Request, therefore OAL will not review these "guidelines" in this determination proceeding.

36 See memorandum written by William R. Attwater, Chief Counsel, State Water Resources Control Board, dated July 28, 1987, to Danny Walsh, Board Member, submitted as part of Exhibit C with the Request for Determination.

37 Memorandum, dated July 28, 1987, p. 5.

38 Based on the quotation from Senate Concurrent Resolution No. 28 as provided in amendment No. 7, and without further information to go on, we presume Resolution No. 28 is the same resolution as "Resolution Chapter 92; Senate Concurrent Resolution No. 28 - Relative to wetlands. (Filed with Secretary of State September 13, 1979)."

39 Senate Concurrent Resolution No. 28 - Relative to wetlands. Resolution Chapter 92 (Filed with the Secretary of State September 13, 1979).

40 A legislative resolution is merely a declaration or expression of the will of one of the houses of the Legislature, other than by the passage of a bill, and a joint or concurrent resolution is one that is concurred by both houses. Generally, a resolution is not a legislative act, and therefore does not have the force or effect of law. The Legislature, in passing a resolution, does not exercise its lawmaking power unless the Constitution specifically provides a special mode for the enactment of a law by the Legislature. As to the ordinary effect of a resolution versus a formal

statute, the Constitution provides that the Legislature may make no law except by statute and may enact no statute except by bill. (See 58 Cal.Jur.3d, Statutes, sec. 2, pp. 293-294.)

41 Senate Concurrent Resolution No. 28 - Relative to wetlands. Resolution Chapter 92; Filed with the Secretary of State September 13, 1979.

42 Id.

43 These factors are set forth in section 13142.5, subdivision (a):

> "Ocean chemistry and mixing processes, marine life conditions, other present or proposed outfalls in the vicinity, and relevant aspects of areawide waste treatment management plans and programs, but not of convenience to the discharger, shall for the purposes of the section, be considered in determining the effects of such discharges. Toxic and hard-to-treat substances should be pretreated at the source if such substances would be incompatible with effective and economical treatment in municipal treatment plants."

44 1986 OAL Determination No. 6 (Bay Conservation and Development Commission, September 3, 1986, Docket No. 86-002) California Administrative Notice Register 86, No. 38-Z, September 19, 1986, p. B-18.

45 1988 OAL Determination No. 5 (Fish and Game Commission, April 6, 1988, Docket No. 87-011), California Regulatory Notice Register 88, No. 16-Z, April 15, 1988, p. 1378.

46 Title 33, U.S.C., section 1344(b)(1).

47 Section 1343(c) is the same as section 403(c) of the Clean Water Act.

48 See Title 40, CFR, section 230.2 (a).

49 Section 404(a) (Title 33, U.S.C., section 1344(a)) states "The Secretary may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites. . . ."

50 Section 402(a)(1) (Title 33, U.S.C., section 1342(a)(1)) provides that "the Administrator may . . . issue a permit for the discharge of any pollutant, or combination of pollutants, . . ."

51 See section 404(g) and section 402(b) of the Clean Water Act.

52 The EPA 404(b)(1) guidelines set forth definitions; establish four conditions which must be satisfied in order to make a finding that a proposed discharge of dredged or fill material complies with the Guidelines; sets forth factual determinations which are considered in determining whether or not a proposed discharge satisfies the four conditions; describes the physical and chemical components of a site and provides guidance as to how proposed discharges of dredged or fill material may affect these components; and detail the special characteristics of particular aquatic ecosystems in terms of their values, and the possible loss of these values due to discharges of dredged or fill material, etc. (See Tit. 40, CFR, sec. 230.4.)

53 Federal regulations that govern the <u>section 402 permit program</u> (regarding the discharge of pollutants) may be found at Title 40, CFR, Part 122, titled "EPA Administered Permit Programs: The National Pollutant Discharge Elimination System," sections 122.2 through 122.64. See Title 40, CFR, section 122.1(a).

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

a. Rules relating <u>only</u> to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, <u>except</u> where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

c. Rules that "[establish] or [fix] <u>rates</u>, <u>prices</u> or <u>tariffs</u>." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a <u>specifically named</u> person or group of persons <u>and</u> 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. (b).)

f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Kaaren Morris), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $108.

55 Agency Response, p. 4.

56 (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 746.

57 (1978) 22 Cal.3d 198, 149 Cal.Rptr 1.

58 Natural Resources Defense Council v. Arcata National Corporation (1976) 59 Cal.App.3d 959, 972-974, 131 Cal.Rptr. 172, 180-181.

59 Government Code section 11370 provides that chapters 3.5, 4, and 4.5 "constitute, and may be cited as, the Administrative Procedure Act."

60 This is a crucial difference between review of Regional Board rules by the State Board and by OAL. The Porter-Cologne plan adoption procedures do provide certain basic procedural protections to the public. However, the APA provides for independent legal review of the content of proposed rules by OAL. It is thus fundamentally incorrect to assert that the Porter-Cologne procedures meets all the concerns underlying the APA. One of the prime concerns of the 1979 amendments to the APA was to require all regulatory material issued by state agencies to be reviewed by an independent agency.

61 Supra, note 56, 121 Cal.App.3d at 126, 174 Cal.Rptr. at 746.

62 For instance, OAL defined the statutory term "determination" in Title 1, CCR, subsection 121(a).

63 "With inapplicable exceptions, regulations adopted by state agencies must be filed with the Secretary of State and published in the California Administrative Code. (Gov. Code sections 11380, 11409.)" California Association of Nursing Homes, Etc. v. Williams (1970) 4 Cal.App.3d 800, 808, 84 Cal.Rptr. 590, 594. (Emphasis added.) As the quotation just above reveals, the Williams court concluded that only the exceptions appearing in former sections 11380 (now 11343) and 11409 (now 11344) permitted agencies to avoid APA rulemaking requirements.

64 Government Code sections 11500, subdivision (a), and 11501.

65 Memo dated July 3, 1947, from James A. Arnerich, Director, Department of Professional and Vocational Standards, pp. 1-2.

66 The following analysis of the statutory scheme outlined in the APA generally follows Winzler, supra note 56, 121 Cal.App.3d at 125, 174 Cal.Rptr. at 746.

67 Henry George School of Social Science of San Diego v. San Diego Unified School District (1960) 183 Cal.App.2d, 82, 85-86, 6 Cal.Rptr. 661, 663.

68 Supra, note 56, 121 Cal.App.3d at 126, 174 Cal.Rptr. at 747.

69 Id., 121 Cal.App.3d at 127, 174 Cal.Rptr. at 747.

70 (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

71 As noted below, OAL--referred to in section 11343--was not created until 1979.

72 22 Cal.3d 198, 149 Cal.Rptr. 1.

73 Government Code section 11340, subdivision (e).

74 Government Code section 11342, subdivision (b).

75 Government Code section 8880.26.

76 Health and Safety Code section 25249.8, subdivision (e) (list of chemicals known to the State to cause cancer or reproductive toxicity). This section states that actions implementing this section "shall not be considered to be [adoptions] or [amendments] [of] regulation[s] within the meaning of the [APA] as defined in Government Code Section 11370." The voters thus knew what to say if they wanted to exempt material from compliance with the APA.

The Board and several commenters have argued that the reference to regional plans in Health and Safety Code section 25249.11, subdivision (d) means that the voters have in effect ratified the validity of regional plans and in effect decided that plans are exempt from the APA. We do not agree that the mention of one facet of regional plans in Prop. 65 constituted a voter-passed exemption of all regulatory

material in all plans from all APA requirements. There are several problems with this line of reasoning. First, all material in regional plans--as this Determination demonstrates--is not regulatory in nature. The fact that several facets of one particular amendment to one particular regional plan have been determined by OAL to be regulatory, does not even necessarily mean that the balance of that particular plan is wholly regulatory--much less other plans.

Second, the fact that the voters approved the express APA exception quoted above when passing Prop. 65 seriously undercuts the argument that they, in enacting section 25249.11, intended--without ever alluding to the matter--to exempt all material in all plans from APA compliance. (The proper legal test would be whether passage of Prop. 65 repealed by implication Government Code section 11346. Arvin Union School District v. Ross (1985) 176 Cal.App.3d 189, 200, 221 Cal.Rptr. 720, 726.

Third, the fact that the voters refer to a specific governmental enactment in a ballot proposition does not mean that the enactment is thereby made immune from all possible legal attacks. For instance, a statute referred to in an approved ballot proposition could subsequently be found by a court to be unconstitutional. Further, presumably, voters approving a ballot proposition do so in the belief that referenced enactments have been validly enacted. In the matter at hand, there is nothing in Prop. 65 indicating that regional plans had not been adopted in compliance with all applicable legal requirements, including the APA.

The Board and the commenters, in discussing the validity of section 25249.11's reference to plans, are really raising a legal issue not properly part of this determination proceeding.

77 Supra, note 72, 22 Cal.3d at 205, 149 Cal.Rptr. at 4.

78 See, e.g., City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 88 Cal.Rptr. 12 (discussed in 1987 OAL Determination No. 10 (Department of Health Services, August 6, 1987, Docket No. 86-016) summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 63) and Hubbs v. California Department of Public Works (1974) 36 Cal.App.3d 1005, 112 Cal.Rptr. 172.

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

80 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.)

81 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.

82 Other agencies, noting the potential impact of AB 1013 on traditional agencies practices, obtained express statutory exemptions following enactment of Government Code section 11347.5. See, e.g., AB 227 (Young), passed by Legislature in 1983, which amended Government Code section 11342, subdivision (b) to exclude "legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization" from the definition of "regulation."

83 Letter from J. William Yeates, Coastal Commission Legal Counsel/Legislative Liaison, dated June 22, 1981, to Assemblyman Leo McCarthy, p. 2.

84 Including a participant in this proceeding, the California Chamber of Commerce.

85 Undated memo in Governor's chaptered bill file (Statutes of 1982, Chapter 61, section 1), from Huey D. Johnston, Secretary for Resources.

86 Memo to OAL dated July 27, 1982, from Craig M. Wilson, Staff Counsel III.

87 Memo from Craig M. Wilson, Staff Counsel III to Roseann C. Stevenson, OAL General Counsel, dated June 13, 1985.

88 Final Statement of Reasons, Part II, pp. 13-14.

89 Memo from Undersecretary for Resources Terrence M. Eagan to Roger B. James, Executive Officer, California Regional Water Quality Control Board, San Francisco Region, dated September

20, 1985 (Exhibit B to Request).

90 1986 OAL Determination No. 8 (Department of Food and Agriculture, October 15, 1986, Docket No. 86-004), California Administrative Notice Register 86, No. 44-Z, October 31, 1986, pp. B-21, B-34; typewritten version p. 18.

91 See note 81, supra.

92 (1985) 39 Cal.3d 422, 217 Cal.Rptr. 16.

93 Agency Response, p. 3 ("The impossibility of complying with both procedures . . . ." [Emphasis added.]).

94 The Board earlier sought an express regulatory exemption from APA requirements from OAL.

95 Agency Response, p. 13.

96 BPC brief of Feb. 10, 1989, p. 9.

97 90 days if a resubmission.

98 Attwater and Markle, supra note 30, 19 Pacific Law Journal at p. 999.

99 Business and Professions Code section 19034. See also Business and Professions Code section 9891.11 (Director of Consumer Affairs must approve Tax Preparers Board regulations).

100 See Government Code, section 11346.5, subdivision (a)(1).

101 See Government Code, section 11344, subd. (a).)

102 Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1226, 236 Cal.Rptr. 853, 857.

103 Id.

104 (1976) 59 Cal.App.3d 959, 131 Cal.Rptr. 172.

105 Id., 59 Cal.App.3d at 965, 131 Cal.Rptr. at 175-176.

106 Id., 59 Cal.App.3d at 971, 131 Cal.Rptr. at 180.

107 Id., 59 Cal.App.3d at 965, 131 Cal.Rptr. at 176.

108 Id., 59 Cal.App.3d at 965 and 974-975, 131 Cal.Rptr at 175 and 181-182.

109 Agency Response, p. 12.

110 See also Emergency Building Regulations, 55 Ops.Cal.Atty.Gen. 183 (1972) (no conflict between specific statute and APA where specific statute is silent on particular point addressed by APA).

111 Administrative Law and Procedure, 10 Ops.Cal.Atty.Gen. 275, 276 (1947).

112 Id., 10 Ops.Cal.Atty.Gen. at 276.

113 We will assume for the sake of argument that to adopt regulatory portions of basin plans pursuant to the APA would be inconsistent with traditional Board practices, would be inconvenient, perhaps even frustrating. However, the pertinent question is whether APA compliance is required by law.

114 See note 70, supra.

115 (1981) 118 Cal.App.3d 614, 175 Cal.Rptr. 196.

116 Shortly after the Procunier decision was handed down, the Legislature passed a bill requiring Corrections to follow the APA, but the bill was vetoed by Governor Reagan. The bill does nonetheless constitute some evidence of legislative

intent that Corrections be subject to the APA.

117 The Court apparently did not consider the question of whether or not the Legislature intended to refer to a group of specifically named persons, i.e., John Jones, Mary Smith, and Betty Gallagher, rather than an abstract category of persons, such as "all California residents over the age of 18."

118 See note 56, supra.

119 Government Code section 11346.

120 See also "Adjustment of Drug Product Prices Pursuant to Welfare and Institutions Code section 14105.7," 67 Ops.Cal.Atty.Gen. (1984) (rules changing drug prices either expressly exempt under rate, price, tariff exception or impliedly exempt pursuant to Alta Bates Hospital). Like Alta Bates Hospital, the 1984 opinion fails to discuss the applicability of Government Code section 11346. Cf. Natural Resources Defense Council, see note 58, supra, and "Timber-Harvesting Plans -- California Environmental Quality Act," 57 Ops.Cal.Atty.Gen. 587 (1974). Cf. 1986 OAL Determination No. 5 (Board of Osteopathic Examiners, August 13, 1986, Docket No. 85-002), California Administrative Notice Register 86, No. 35-Z, August 29, 1986, p. B-10, B-16--B-17; typewritten version, pp. 9-10 (rate, price, tariff exception should be construed narrowly).

121 BPC's brief, dated February 10, 1989, pp. 6-7.

122 (1977) 19 Cal.3d 727, 744, 139 Cal.Rptr. 708 (no rational way to reconcile two statutes where first statute imposed requirement that warrantless juvenile misdemeanor arrests could only be made for offenses committed in the presence of the arresting officer and second statute contained no such limitation).

123 Id., 19 Cal.3d at p. 744, 139 Cal.Rptr. at p. 717.

124 (1985) 176 Cal.App.3d 189, 200, 221 Cal.Rptr. 720, 726 (Proposition 13 gave undebatable evidence of intent to repeal earlier statute which permitted override elections to raise ad valorem property taxes).

125 Supra, note 104, 59 Cal.App.3d at 976, 131 Cal.Rptr. at 182-183.

126 Public participation opportunities are greater than is the case with some agency rules, such as the semi-secret personnel rule at issue in Armistead, which was totally insulated from comment by members of the regulated public.

127 Government Code section 11346.5, subdivision (a)(5).

128 Government Code section 11346.5, subdivision (a)(6).

129 Government Code section 11346.53.

130 Government Code section 11346.53, subdivision (e).

131 Government Code section 11346.55.

132 Government Code section 11346.7, subdivision (b)(3).

133 Agency Response, p. 1.

134 Agency Response, p. 12.

135 33 Cal.App.3d at 262, 109 Cal.Rptr. at 29.

136 33 Cal.App.3d at 261-262, 109 Cal.Rptr. 28.

137 We have located no other case which has agreed with Procunier that the APA is limited to rules concerning business and professional enterprises and activities.

138 60 Cal.App.3d 500, 506, 131 Cal.Rptr. 744, 748.

139 Supra, note 102, 191 Cal.App.3d at 1226, 236 Cal.Rptr. at 857.

140 See supra, note 22.

141 Agency Response, p. 40.

142 147 Cal.App.3d 11, 18, 194 Cal.Rptr. 722, 726.

143 Id.; see also Dermegerdich v. Rank (1984) 151 Cal.App.3d 848, 851, 190 Cal.Rptr. 30, 32.

144 Golden Gate Scenic S.S. Lines v. Public Utilities Commission (1962) 57 Cal.2d 373, 377 n.2, 19 Cal.Rptr. 657, 659 n.2.

145 California Beer and Wine Wholesalers Association Inc. v. Department of Alcoholic Beverage Control (1988) 201 Cal.App.3d 100, 107, 247 Cal.Rptr. 60, 65.

146 Agency Response, p. 8.

147 Id., pp. 39-43.

148 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-74.

149 Herships & Oldfield v. McCarthy (Super. Ct. Sacramento County, 1987, No. 350531, order issuing injunction re Classification Manual filed June 1, 1987).

150 See Johnston, supra, note 102, 191 Cal.App.3d at 1226 and 236 Cal.Rptr. at 858.

151 Id. (rejecting state agency arguments that adverse judicial ruling would lead to "deluge of requests for full evidentiary hearings of every routine change in job assignment within the state civil service workforce of over 180,000 employees").

152 Clean Air Constituency v. California State Air Resources Board (1974) 11 Cal.3d 801, 818, 114 Cal.Rptr. 577, 587, quoting Jaffe, Judicial Control of Administrative Action (1965), pp. 41, 85.

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

154 We wish to acknowledge the substantial contribution of Unit Legal Assistant Kaaren Morris and Senior Legal Typist Tande' Montez in the preparation of this Determination.