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Course syllabus

Course Information.

This training session will address underground regulations. We will give you an understanding of what they are, what they are not, and what happens if you receive a petition alleging that your agency is using an underground regulation.

Instructor Information.

The underground regulation program is informally known as the "Chapter Two Unit" or CTU. The members of the CTU are:

Kathleen Eddy, Senior Counsel, keddy@oal.ca.gov, 916-323-7465
Peggy Gibson, Staff Counsel, pgibson@oal.ca.gov, 916-6805
Margaret Molina, Analyst, mmolina@oal.ca.gov, 916-324-6044.

We are available during normal business hours to answer questions. But, cannot tell you in the abstract whether a rule is an underground regulation. We must have all the relevant information and complete our analysis before making a determination.

Handouts and other resources:

- CCR, title 1, sections 250 et seq.
- Government Code sections 11340.5, 11342.600, 11340.9, 11425.60
- Timeline: graphic showing the various deadlines
- List of cases important to underground regulations
- Copy of *Tidewater Marine Western Inc v. Bradshaw* (1996) 14 Cal.4th 557
- Sample Determination. 2007 OAL Determination No. 6
- Sample Summary Disposition. 2007 OAL Determination No. 18(S)
- Sample section 280 certification
- Sample section 280 delegation
- Copy of the Powerpoint presentation with space for notes

Course Description/Objectives.

The Office of Administrative Law has recently re-established the underground regulation program. It is very different from the previous program both in procedure and in objectives. Our new program is designed to:

- Assist agencies in identifying possible underground regulations.
- Assist agencies in adopting regulations in response to a determination.
- Protect the public from underground regulations.
- Work with the agency and the public to resolve differences without the issuance of a formal determination.

- This course is primarily for rulemaking agencies to provide a background and understanding of underground regulations and OAL's role. The objectives are to provide you with an understanding of:
 - Why underground regulations are important to you?
 - What is an underground regulation?
 - What is not an underground regulation?
 - Case and law overview.
 - OAL's role in underground regulations
 - The process OAL uses in evaluating petitions alleging an underground regulation.
 - The difference between a full determination and a summary disposition.
 - A section 280 certification.
 - What happens after OAL issues its determination?

Available Support Services.

The Reference Attorney is an excellent source of information and advice. 916-323-6815, or staff@oal.ca.gov

You can also call any of the people in the CTU listed above.

Determinations issued from 2000 to the present are on line. Determinations from 1989 to 1999 will be on line soon. Until then, we can email you a copy of the determination you need. These older determinations are a good resource for understanding the analysis OAL conducts to make its determination.



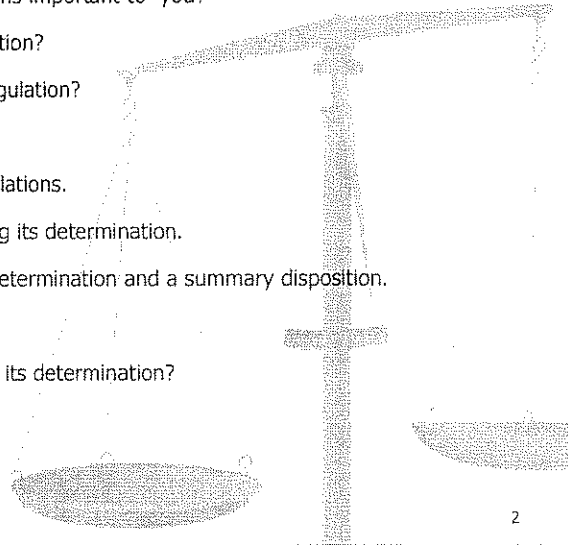
Underground Regulations

Information for State Agencies



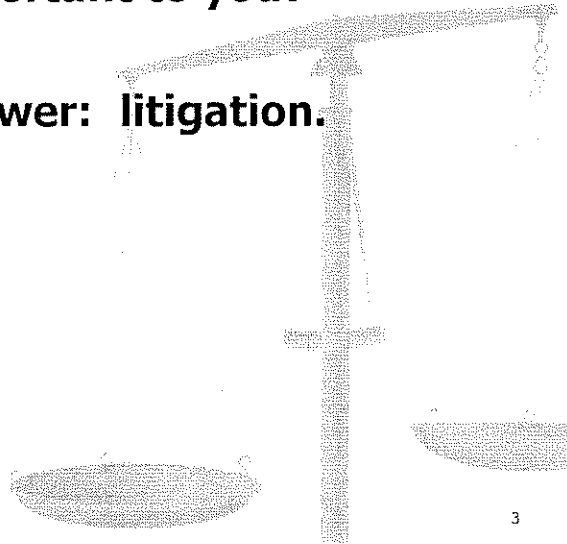
Introduction: Course Objectives

- Why are underground regulations important to you?
- What is an underground regulation?
- What is not an underground regulation?
- Case and law overview.
- OAL's role in underground regulations.
- The process OAL uses in making its determination.
- The difference between a full determination and a summary disposition.
- A section 280 certification.
- What happens after OAL issues its determination?
- Q& A



Why are underground regulations important to you?

- The short answer: litigation.



What **IS** an Underground Regulation?

- **"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. Government Code section 11342.600**

What **IS** an Underground Regulation?

- Government Code section 11340.5 prohibits the issuance, use, enforcement 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 Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

California Code of Regulations Title 1, section 250(a)

- "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

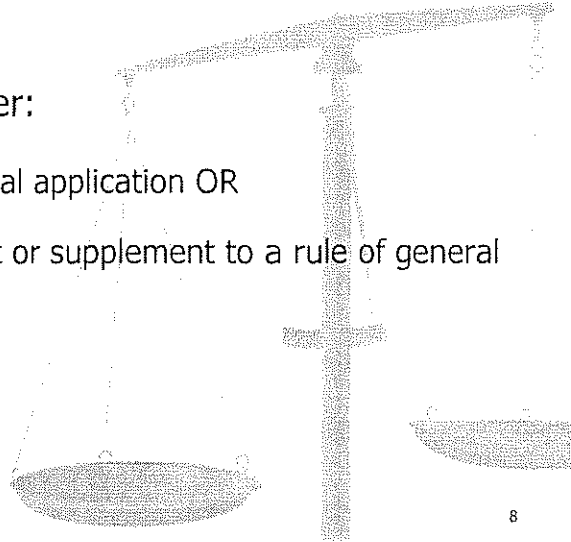


How to Recognize an Underground Regulation

- So, an underground regulation is a rule that meets the definition of a regulation and was not adopted pursuant to the APA, *BUT SHOULD HAVE BEEN*.
- *Tidewater Western Marine, Inc. v Bradshaw* (1996) 14 Cal.4th 557 established a 2 part test to determine if a rule meets the definition of a regulation.

Analysis: Step One

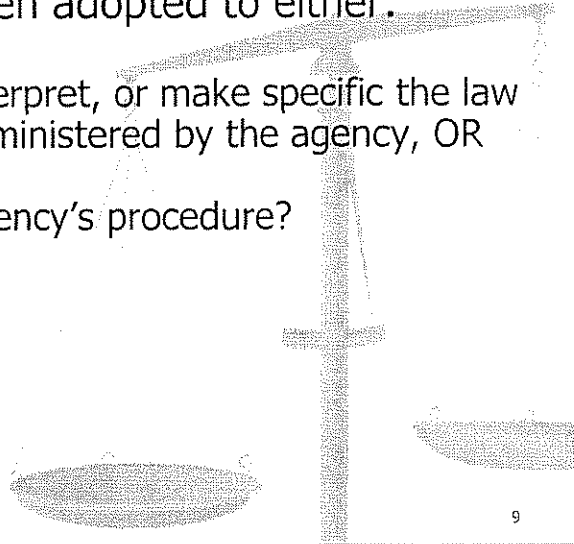
- Step one:
 - Is the rule either:
 - A rule of general application OR
 - an amendment or supplement to a rule of general application?



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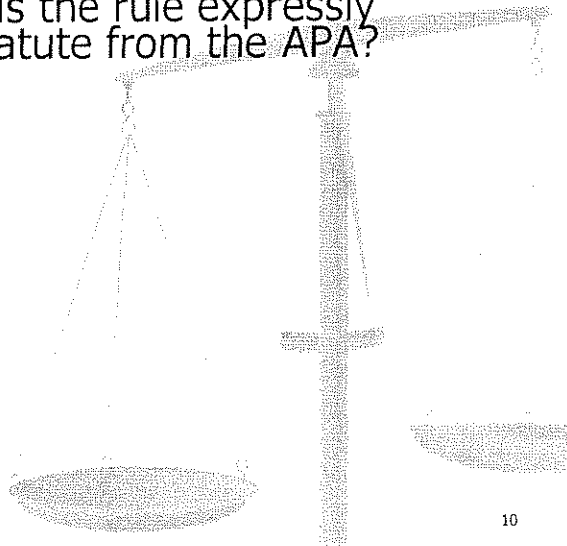
Analysis: Step Two

- Has the rule been adopted to either:
 - Implement, interpret, or make specific the law enforced or administered by the agency, OR
 - Govern the agency's procedure?



Analysis: Step Three

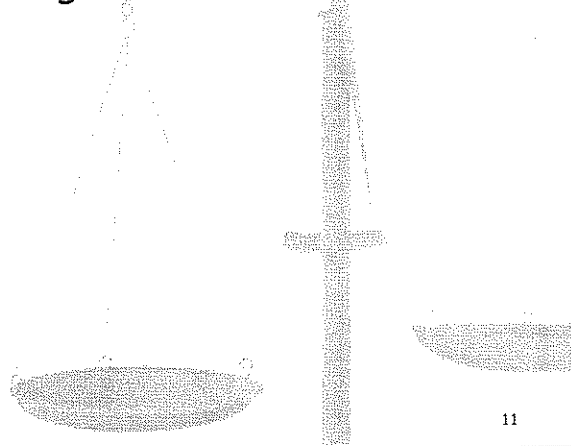
- The third step: is the rule expressly exempted by statute from the APA?



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Analysis: Conclusion

- If the rule satisfies the Tidewater two part test and is not exempt from the APA it is an underground regulation – **end of discussion.**



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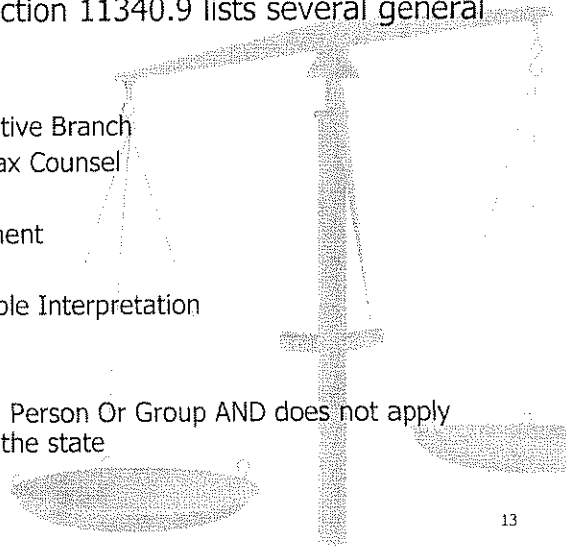
What is **NOT** an Underground Regulation

- **EXPRESS STATUTORY EXEMPTIONS FOUND IN THE APA AND IN OTHER STATUTES.**
- **RESTATEMENTS OF STATUTES OR REGULATIONS.**
- **RULES THAT DO NOT MEET THE DEFINITION OF A REGULATION.**

Express Statutory Exemptions From the APA

- Government Code section 11340.9 lists several general exemptions:

- (a) Judicial Or Legislative Branch
- (b) Legal Ruling Of Tax Counsel
- (c) Forms
- (d) Internal Management
- (e) Audit Guidelines
- (f) Only Legally Tenable Interpretation
- (g) Rate, Price, Tariff
- (h) Public Works
- (i) Specifically Named Person Or Group AND does not apply generally throughout the state



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Definition:

Rate:

“a fixed relation of quantity, amount or degree.”

Price:

“something which one ordinarily accepts voluntarily in exchange for something else.”

Tariff:

“list or schedule of articles on which a duty is imposed upon their importation into the United States...”

Fee:

“a charge fixed by law for services of public officers or for use of a privilege under control of government.”

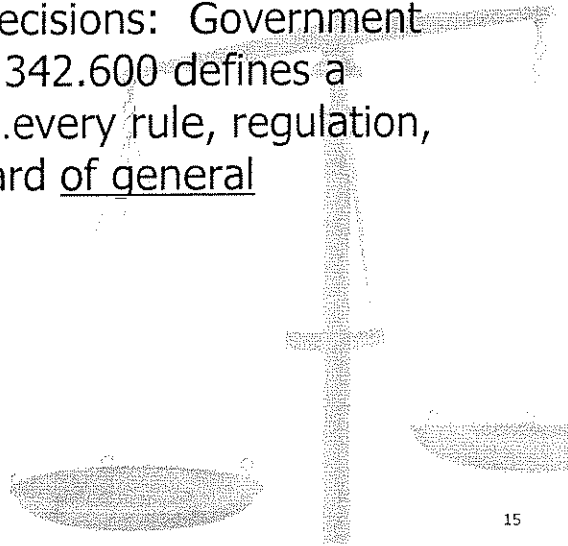
A fee is NOT exempt from the APA.

Restatements

- Restatements of statutes or regulations ARE NOT UNDERGROUND REGULATIONS.
- BUT any interpretation, addition, re-wording could be an underground regulation.

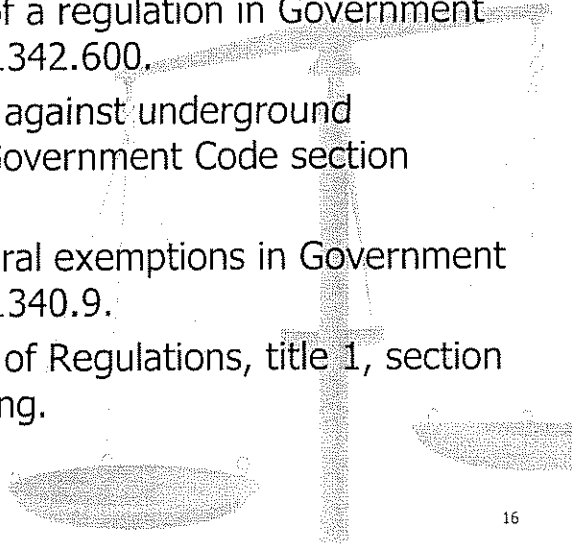
Rules that do not Meet the Definition of a Regulation

- Case by Case Decisions: Government Code section 11342.600 defines a regulation as "...every rule, regulation, order, or standard of general application..."



Case and Law Overview

- Statutes and regulations you need to know:
 - The definition of a regulation in Government Code section 11342.600.
 - The prohibition against underground regulations in Government Code section 11340.5.
 - The list of general exemptions in Government Code section 11340.9.
 - California Code of Regulations, title 1, section 250 and following.



Case and Law Overview:

Cases that interpret the APA and underground regulations:

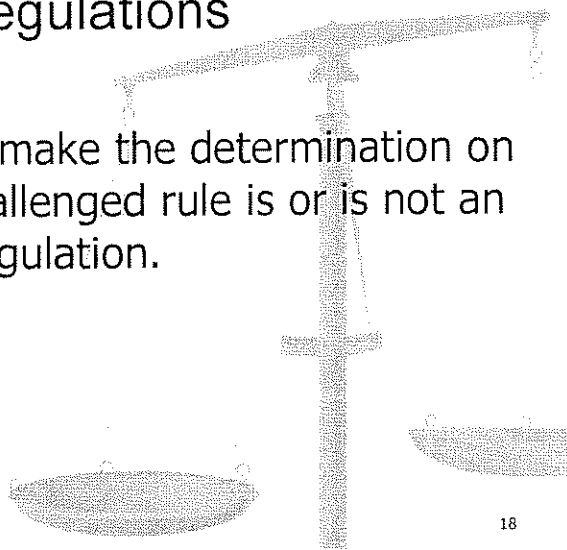
- *Armistead v SPB* (1978) 22 Cal.3d 198
- *Corrales et al., v. Bradstreet, as Labor Commissioner*, (2007) 153 Cal.App.4th 33
- *Faulkner v CA Toll Bridge Authority* (1953) 40 Cal.2d 317
- *Grier v Kizer* (1990) 219 Cal.App.3d 422
- *Morningstar v Pilgrim Group*, (2006), 38 Cal.4th 324
- *Roth v Department of Veterans Affairs* (1980) 110 Cal.App.3d 14
- *Tidewater Western Marine, Inc. v Bradshaw* (1996) 14 Cal.4th 557
- *United Systems of Arkansas v Stamison* (1998) 63 Cal.App.4th 1001



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OAL's Role in Underground Regulations

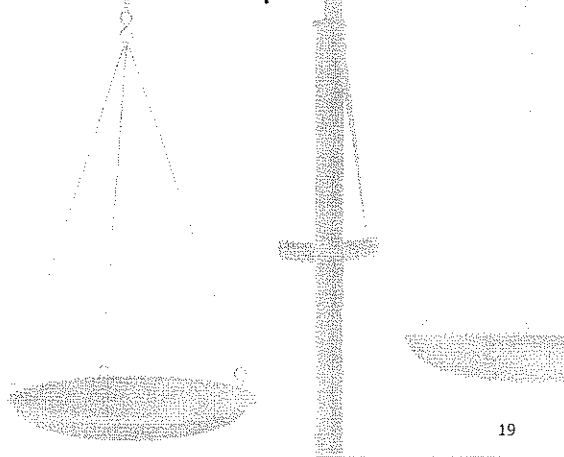
- OAL's role is to make the determination on whether the challenged rule is or is not an underground regulation.



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The Process

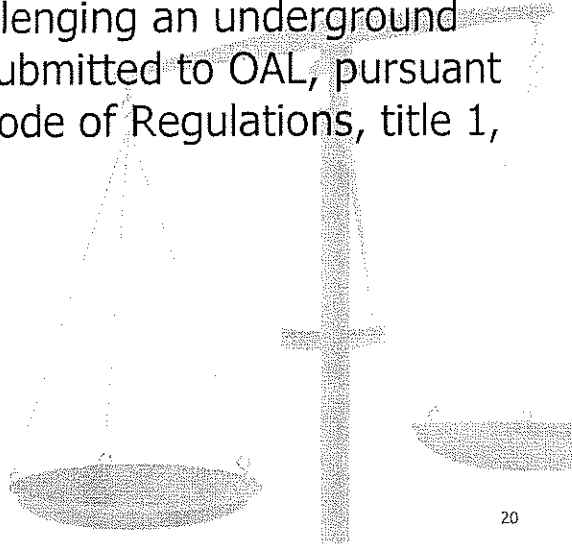
- Please let us know who in your agency we should contact to discuss the petition.



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The Process

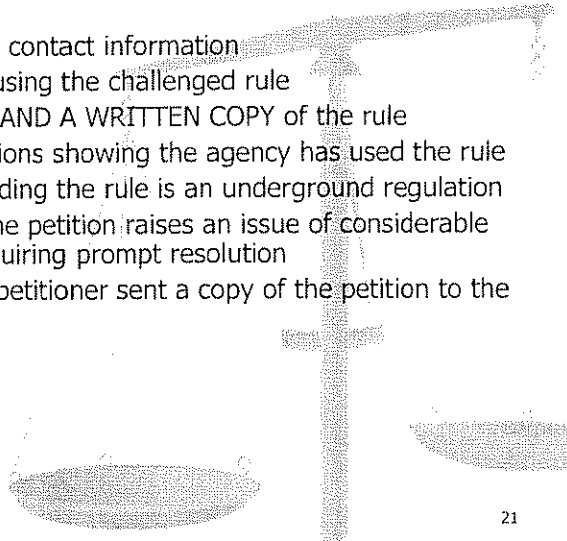
- A petition challenging an underground regulation is submitted to OAL, pursuant to California Code of Regulations, title 1, section 260.



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Contents of a Petition

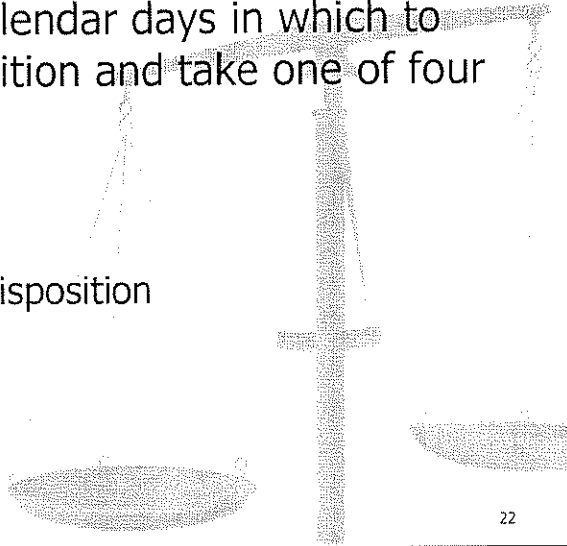
- Section 260 requires:
 - Petitioner's name and contact information
 - Name of the agency using the challenged rule
 - Complete description AND A WRITTEN COPY of the rule
 - Description of the actions showing the agency has used the rule
 - Legal basis for concluding the rule is an underground regulation
 - Demonstration that the petition raises an issue of considerable public importance requiring prompt resolution
 - Certification that the petitioner sent a copy of the petition to the agency



The Process

OAL has 60 calendar days in which to review the petition and take one of four actions:

- 1 Incomplete
- 2 Accept
- 3 Summary disposition
- 4 Decline



The Process

- Incomplete:

- OAL will notify the petitioner that additional information is needed.
- Petitioner has 60 calendar days to complete the petition.
- If the missing information is not received we will decline the petition.
- If the missing information is received OAL will begin the review process.

The Process

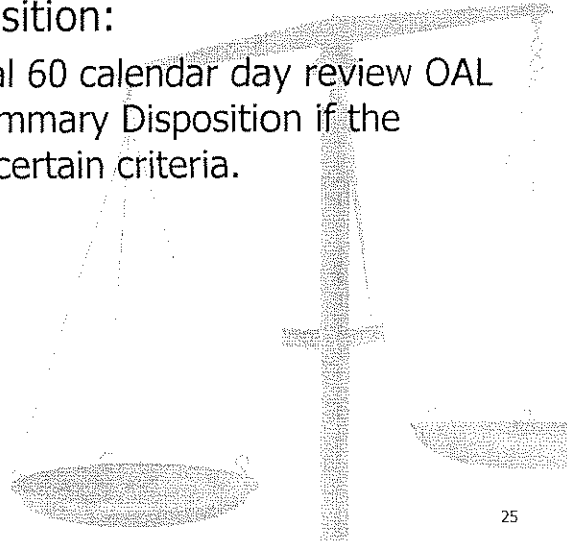
■ Accept:

- OAL will notify the petitioner and agency of the decision to accept. The clock begins running from publication in the Notice Register:
- The public has 30 calendar days to comment.
- The agency has 45 calendar days to respond.
- The petitioner has 15 calendar days after receipt of the agency's response to rebut.
- OAL will issue its determination within 120 calendar days.



The Process

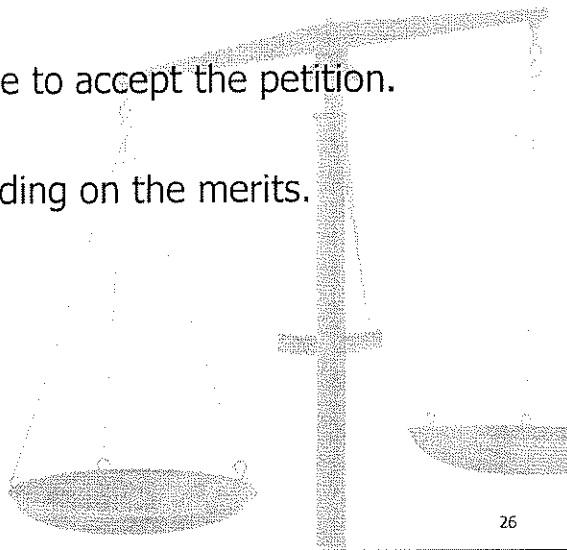
- Summary Disposition:
 - Within the initial 60 calendar day review OAL may issue a Summary Disposition if the petition meets certain criteria.



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The Process

- Decline:
 - OAL may decline to accept the petition.
 - This is not a finding on the merits.



Legal Analysis

- OAL is only concerned with these issues:

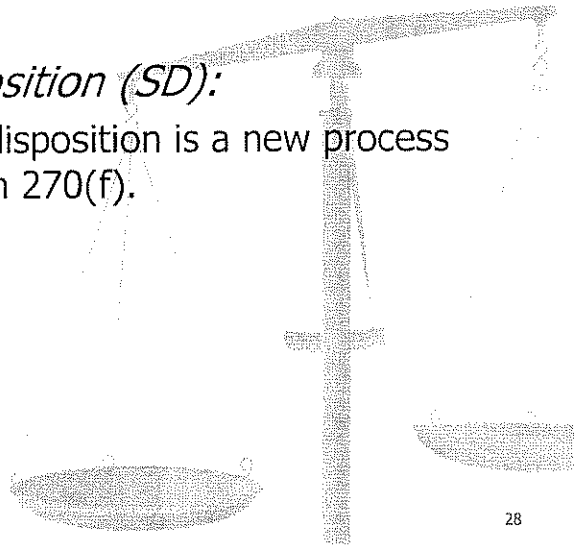
- Two *Tidewater* questions
 - General application
 - Implements or makes specific the agency's law
- Exemptions
- Other matters may be interesting, but are not relevant.



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Full Determination v. Summary Disposition

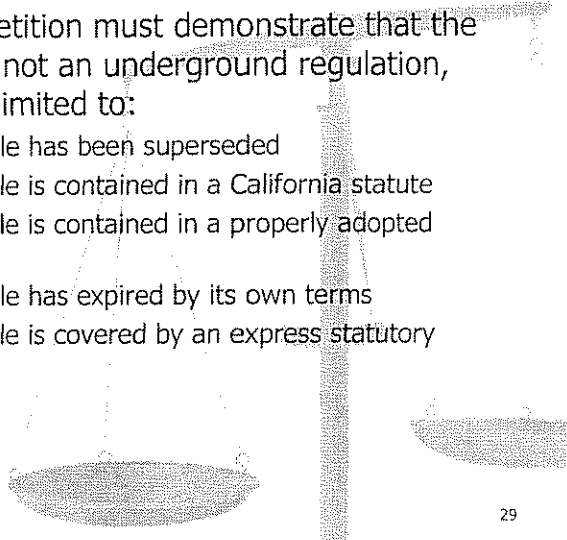
- *Summary Disposition (SD):*
 - The summary disposition is a new process found in section 270(f).



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Summary Disposition

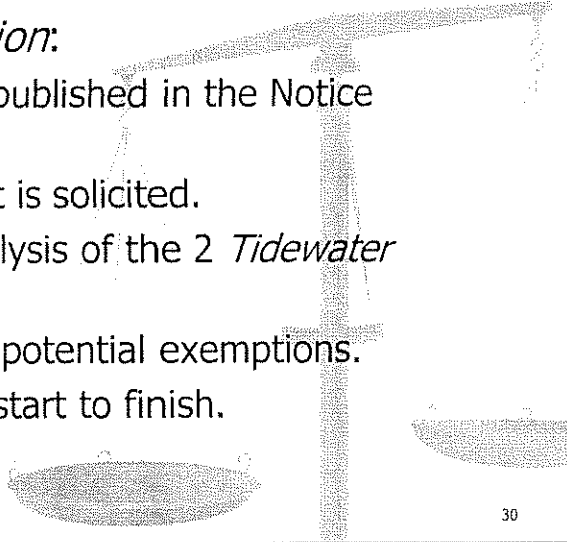
- The facts in the petition must demonstrate that the challenged rule is not an underground regulation, including but not limited to:
 - The challenged rule has been superseded
 - The challenged rule is contained in a California statute
 - The challenged rule is contained in a properly adopted regulation
 - The challenged rule has expired by its own terms
 - The challenged rule is covered by an express statutory exemption



Full Determination v. Summary Disposition

■ *Full Determination:*

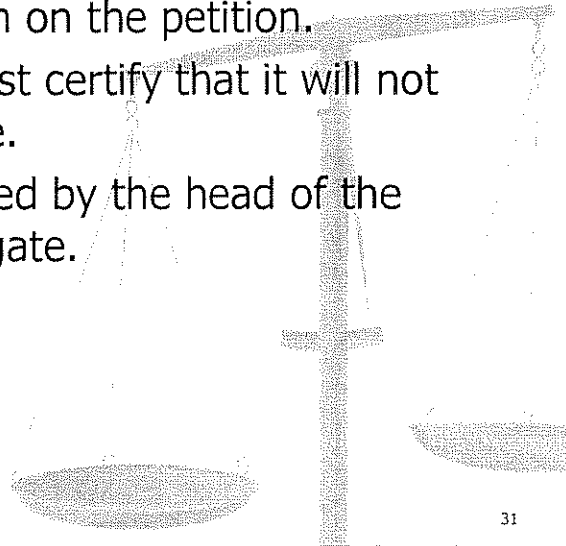
- The petition is published in the Notice Register.
- Public comment is solicited.
- A complete analysis of the 2 *Tidewater* questions.
- Analysis of any potential exemptions.
- 120 days from start to finish.



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The Section 280 Certification

- Suspends action on the petition.
- The agency must certify that it will not enforce the rule.
- It must be signed by the head of the agency or delegate.



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What Happens After OAL Issues its Determination?

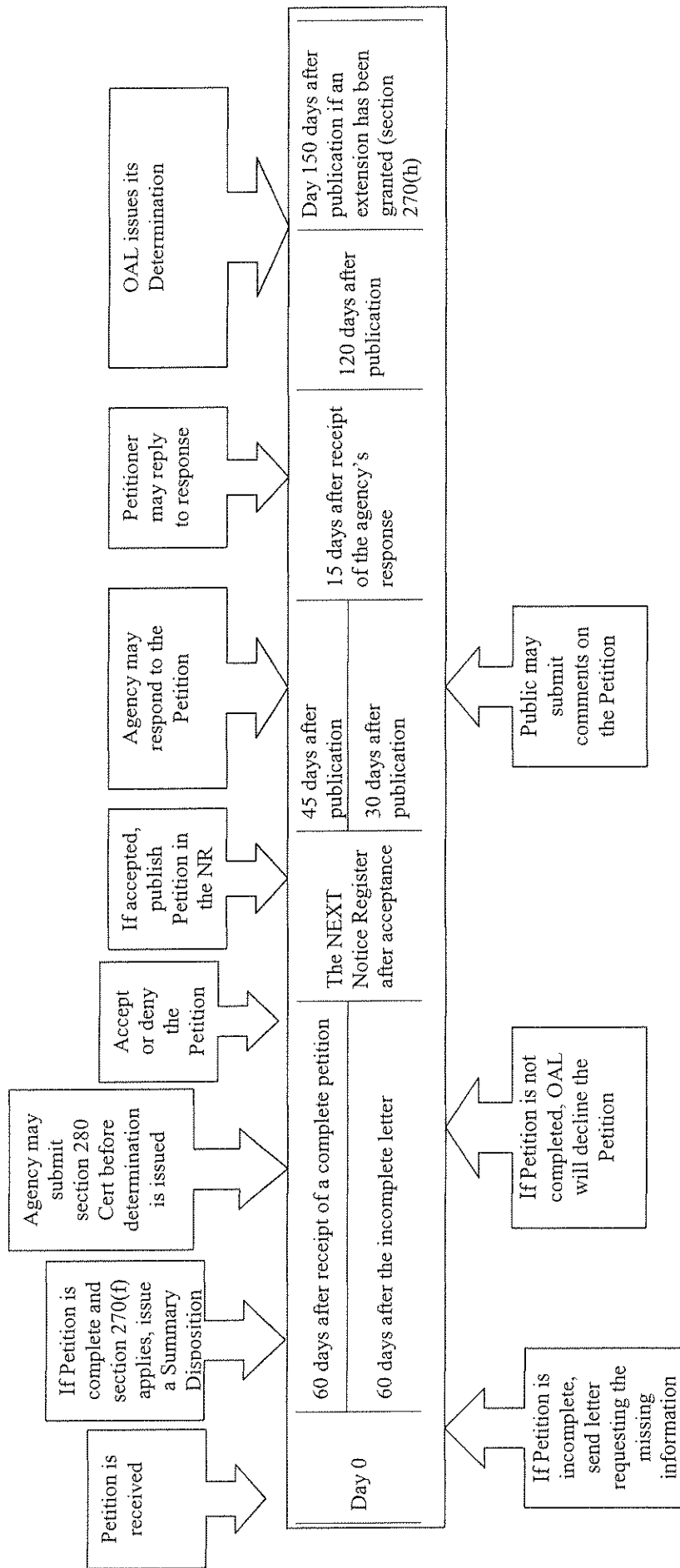
- Government Code section 11340.5 (d) provides that any person may obtain judicial review of a determination.
- Government Code section 11340.5 (e) limits the use of determination in court.



Where to Get More Information

- Kathleen Eddy, Senior Counsel,
keddy@oal.ca.gov, 916-323-7465
- Peggy Gibson, Staff Counsel,
pgibson@oal.ca.gov, 916-323-6805
- Margaret Molina, Analyst,
mmolina@oal.ca.gov, 916-324-6044
- Reference Attorney, staff@oal.ca.gov,
916-323-6815
- www.oal.ca.gov

Underground Regulations Timeline



STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW
300 CAPITOL MALL, SUITE 1250
SACRAMENTO, CA 95814

California Code of Regulations:

Title 1, Division 1, Chapter 2. Underground Regulations

§ 250. Definitions.

The following definitions shall apply to the regulations contained in this chapter:

(a) "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

(b) "APA" and "OAL" have the same definitions as in Section 1.

(c) "Interested person" means any person who submits a petition to OAL alleging that a state agency has issued, used, enforced, or attempted to enforce an underground regulation in violation of section 11340.5 of the Government Code.

Note: Authority cited: Section 11342.4, Government Code. Reference: Section 11340.5, Government Code.

Section 260. Submission of Petitions Regarding Underground Regulations.

(a) Any interested person may submit a petition to OAL alleging that a state agency has issued, used, enforced, or attempted to enforce an underground regulation and seeking a determination from OAL pursuant to Section 11340.5 of the Government Code. The petitioner shall submit a copy of the petition and all attachments to the agency prior to submitting it to OAL. The submission of a petition pursuant to this chapter is not required prior to commencing legal action alleging a violation of section 11340.5 of the Government Code.

(b) Any petition seeking a determination shall include all of the following:

- (1) The name and contact information of the petitioner.
- (2) The name of the agency that has allegedly issued, used, enforced, or attempted to enforce an underground regulation.
- (3) A complete description of the particular underground regulation and a written copy of the purported underground regulation. If the purported underground regulation is found in an agency manual, the petition shall identify the specific

provision of the manual alleged to comprise the underground regulation.

(4) A description of the actions of the agency showing that it has issued, used, enforced, or attempted to enforce the underground regulation.

(5) The legal basis for concluding that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code and that no express statutory exemption to the requirements of the AP A is applicable.

(6) Information demonstrating that the petition raises an issue of considerable public importance requiring prompt resolution.

(7) The petition's certification that the petitioner has submitted a copy of the petition and all attachments to the agency, including the name, address, and telephone number of the person to whom the copy was submitted.

Note: Authority cited: Section 11342.4, Government Code. Reference: Section 11340.5, Government Code.

Section 270. OAL Review of Petitions Regarding Underground Regulations.

(a) Upon receipt of a petition submitted pursuant to this chapter from an interested person.

(1) If the petition is incomplete, OAL will notify the petitioner in writing what items are missing from the petition, and that the deficiencies must be cured within 60 days of the date of the notice. OAL will decline to consider the petition if the required items are not received within 60 days of the date of the notice. OAL will begin the review period required in subsection (b) when the petition is complete.

(2) If the petition is complete, OAL will either accept or decline to consider the petition pursuant to subsection (b).

(b) No later than 60 days after receipt of a complete petition filed pursuant to this chapter, the office shall determine whether or not to consider the petition on its merits, in its entirety or in part, unless, prior to the end of the 60-day period, the agency submits to OAL a certification pursuant to section 280. OAL may consult with the petitioner and the agency to obtain additional information for its use in determining whether or not to consider the petition on its merits.

(c) The decision to consider or to decline to consider a petition shall be at the exclusive discretion of OAL. Factors considered in deciding whether or not to accept a petition shall include, but are not necessarily limited to,

(1) The degree to which the petition raises an issue of considerable public importance requiring prompt resolution.

(2) Additional relevant information, if any, obtained pursuant to subsection (b).

(3) Availability of OAL personnel to complete the review of the petition pursuant to the time limits established by this chapter.

(d) If OAL declines to consider the petition, it shall immediately advise the petitioner and

the agency of the decision and specifically indicate that the decision in no way reflects on the merits of the underlying issue presented by the petition.

(e) If OAL decides to consider the petition on its merits, it shall either issue a summary disposition letter pursuant to subsection (f) or issue a determination pursuant to this section.

(f) (1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

(A) The challenged rule has been superseded.

(B) The challenged rule is contained in a California statute.

(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the AP A.

(D) The challenged rule has expired by its own terms.

(E) An express statutory exemption from the rulemaking provisions of the AP A is applicable to the challenged rule.

(3) A summary disposition letter shall state the basis for concluding that the challenged rule is not an underground regulation and shall specify that the issuance of the letter does not restrict the petitioner's right to adjudicate the alleged violation of section 11340.5 of the Government Code.

(4) A summary disposition letter shall be sent to the petitioner not later than 60 days following receipt of the complete petition.

(g) If OAL elects to issue a determination, it shall notify the petitioner and the agency of this decision and shall publish the petition or a summary of the petition in the next California Regulatory Notice Register, giving notice to the public that comments on issues raised by the petition may be submitted to OAL. Comments from the public must be submitted to OAL no later than 30 days from the date of publication. Any person submitting comments to OAL shall:

(1) simultaneously provide a copy of the comments to the agency and the petitioner.

(2) certify to OAL that copies were provided to the agency and petitioner.

(h) The agency may submit a response to the petition to OAL. No response may be considered by OAL unless the agency has provided a copy of the response to the petitioner simultaneously with submission of the response to OAL. Any response by the agency shall be submitted to OAL within 45 calendar days of the publication of the petition in the California Regulatory Notice Register. OAL may extend the time for an agency to file a response to a petition if the agency is a "state body" as defined in Section 11121 of the Government Code and the agency's response requires action taken at a meeting subject to the Bagley-Keene Open Meeting Act (commencing with Section

11120 of the Government Code), except that no extension pursuant to this subsection may be granted if it would prevent OAL's compliance with subsection (j).

(i) The petitioner may submit to OAL a reply to the agency's response not later than 15 calendar days after the agency response was provided to the petitioner pursuant to subsection (h).

(j) After the time for the petitioner to submit a reply to the agency's response, and no later than 120 (or 150 days if the agency has received an extension pursuant to subsection (h)) days after publication of the accepted petition in the California Regulatory Notice Register, OAL shall issue a determination as to whether or not the agency has issued, used, enforced, or attempted to enforce an underground regulation.

NOTE: Authority cited: Section 11342.4, Government Code. Reference: Section 11340.5, Government Code.

280. Suspension of Actions Regarding Underground Regulations.

(a) Any action of OAL or an agency pursuant to this chapter in connection with a petition shall be suspended if OAL receives a certification from the agency that it will not issue, use, enforce, or attempt to enforce the alleged underground regulation along with proof that the certification has been served on the petitioner. This certification shall be made by the head of the agency or a person with a written delegation of authority from the head of the agency.

(b) Upon receipt of this certification and proof of service, OAL shall do all of the following:

- (1) File the petition and the certification with the Secretary of State.
- (2) Publish a summary of the petition and the certification in the California Regulatory Notice Register.
- (3) Provide a copy of the certification to the petitioner.

Relevant Government Code sections

11340.5. Agency guidelines, criteria, bulletins, manuals, instructions, orders, standards of general application or other rules: adoption as regulation; filing; determination of status as regulation

(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 Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to 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 that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in Section 11342.600.

(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 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 that is the legal basis for the adjudicatory action is a regulation as defined in Section 11342.600.

11342.600. Regulation

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

11340.9. Application of chapter

This chapter does not apply to any of the following:

- (a) An agency in the judicial or legislative branch of the state government.
- (b) A legal ruling of counsel issued by the Franchise Tax Board or State Board of Equalization.
- (c) A form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to this chapter when one is needed to implement the law under which the form is issued.
- (d) A regulation that relates only to the internal management of the state agency.
- (e) A regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, or inspection, settling a commercial dispute, negotiating a commercial arrangement, or in the defense, prosecution, or settlement of a case, if disclosure of the criteria or guidelines would do any of the following:
 - (1) Enable a law violator to avoid detection.
 - (2) Facilitate disregard of requirements imposed by law.
 - (3) Give clearly improper advantage to a person who is in an adverse position to the state.
- (f) A regulation that embodies the only legally tenable interpretation of a provision of law.
- (g) A regulation that establishes or fixes rates, prices, or tariffs.
- (h) A regulation that relates to the use of public works, including streets and highways, when the effect of the regulation is indicated to the public by means of signs or signals or when the regulation determines uniform standards and specifications for official traffic control devices pursuant to Section 21400 of the Vehicle Code.
- (i) A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.

11425.60. Precedent; designation; index

- (a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.
- (b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.
- (c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall

be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

(d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997.

▷
Tidewater Marine Western, Inc. v. Bradshaw
Cal. 1996.

TIDEWATER MARINE WESTERN, INC., et al.,
Plaintiffs and Respondents,

v.

VICTORIA L. BRADSHAW, as Labor
Commissioner, etc., et al., Defendants and
Appellants.
No. S048739.

Supreme Court of California
Dec 19, 1996.

SUMMARY

In an action against the Labor Commissioner and related defendants by operators of fleets of seagoing vessels that transported workers and supplies between the California mainland and oil drilling platforms lying within the Santa Barbara Channel, the trial court entered a judgment prohibiting defendants from applying wage orders promulgated by the Industrial Welfare Commission (IWC) to plaintiffs' employees. (Superior Court of Santa Barbara County, No. 195103, William L. Gordon, Judge.) The Court of Appeal, Second Dist., Div. Six, No. B082689, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal, holding that the trial court erred when it enjoined the Labor Commissioner and related defendants from applying the IWC wage orders to these workers. The court held that federal law does not preclude the IWC from regulating maritime employment in the channel; California employment laws implicitly extend to employment occurring within California's state law boundaries, including all of the Santa Barbara Channel. Furthermore, the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. § 201 et seq.) does not conflict with California law, and the FLSA's seamen exemption does not create an affirmative bar against state regulation of employment. Even though the written enforcement policy promulgated by the state Division of Labor Standards Enforcement (DLSE) that interpreted the IWC wage orders was void owing to the failure of the DLSE to follow the Administrative Procedure Act (Gov. Code, § 11340 et seq.), the underlying IWC wage orders applied to these employees. Because they resided, received pay, and worked in California, they were "wage earners of California" (Lab. Code, § 50.5), who presumptively enjoyed the protection of

IWC wage orders. (Opinion by Chin, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d, 1e, 1f) Labor § 10--Regulation of Working Conditions--Wages--Application of State Wage Orders to Employees Working in Santa Barbara Channel.

The trial court erred when it enjoined the Labor Commissioner and related defendants from applying wage orders promulgated by the Industrial Welfare Commission (IWC) to workers on oil drilling platforms lying within the Santa Barbara Channel. Federal law does not preclude the IWC from regulating maritime employment in the channel; California employment laws implicitly extend to employment occurring within California's state law boundaries, including all of the Santa Barbara Channel. Furthermore, the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. § 201 et seq.) does not conflict with California law, and the FLSA's seamen exemption does not create an affirmative bar against state regulation of employment. Even though the written enforcement policy promulgated by the state Division of Labor Standards Enforcement (DLSE) that interpreted the IWC wage orders was void owing to the failure of the DLSE to follow the Administrative Procedure Act (Gov. Code, § 11340 et seq.), the underlying IWC wage orders applied to these employees who, because they resided, received pay, and worked in California, were "wage earners of California" (Lab. Code, § 50.5), who presumptively enjoyed the protection of IWC wage orders. California's state law boundaries applies to the interpretation and application of these wage orders, which constituted state law, and those boundaries encompassed the Santa Barbara Channel.

[See 2 **Witkin**, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 314.]

(2) State of California § 1--Jurisdictional Boundaries--Beyond Coastline.

Under state law, California's territorial boundaries extend three nautical miles beyond the outermost islands, reefs, and rocks, and include all waters between those islands and the coast (Cal. Const., art. III, § 2; Gov. Code, § § 170, 171.) Under this state law definition of California's boundaries, the entire Santa Barbara Channel is within the state. On the

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other hand, federal law defines California's territorial boundaries more narrowly, extending three nautical miles from the coast, and including a three-mile-wide band around any islands lying off the coast, but excluding waters between the islands and the coast (43 U.S.C. § § 1301(b), 1312). Under this federal law definition of *559 California's boundaries, the central portion of the Santa Barbara Channel is not within the state. Nevertheless, California is authorized to exercise local police power functions within the territory found to belong to the United States. Federal law boundaries apply when the extent of a state's territorial jurisdiction is relevant to the operation of federal law. Thus, federal law defines the state's boundaries for all purposes, political and proprietary, as between nation and state. However, where state criminal law does not conflict with federal law, the state boundaries as defined by the California Constitution and statutes are the limits to which the Legislature implicitly intended to extend California's criminal laws.

(3) Constitutional Law § 34--Distribution of Governmental Powers--Conflicts Between Federal and State Powers and Their Resolution--Federal Preemption.

In determining whether federal law preempts state law, a court's sole task is to ascertain the intent of Congress. Moreover, this intent must be clear and manifest. Preemption may occur in three situations: (1) where the federal law expressly so states, (2) where the federal law is so comprehensive that it leaves no room for supplementary state regulation, or (3) where the federal and state laws actually conflict.

(4) Administrative Law § 18--Administrative Construction and Interpretation of Enabling Statutes.

A court accords great weight and respect to a valid administrative construction of a controlling statute or regulation.

(5) Administrative Law § 17--Administrative Procedure Act--Purpose.

One purpose of the Administrative Procedure Act (Gov. Code, § 11340 et seq.) is to ensure that those persons or entities whom a regulation will affect have a voice in its creation, as well as notice of the law's requirements so that they can conform their conduct accordingly. The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of

agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny.

(6) Administrative Law § 17--Administrative Procedure Act--Regulations Subject to Act.

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) has two principal *560 identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, § 11342, subd. (g)). Interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in subsequent cases. Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA (Gov. Code, § § 11343, subd. (a)(3), 11346.1, subd. (a)). Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations.

(7) Administrative Law § 17--Administrative Procedure Act--Regulations Subject to Act--Agency's Written Statement of Policy.

A written administrative policy of general application is a regulation that is subject to the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.). A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law. Hence, a written policy, promulgated by the Division of Labor Standards Enforcement (DLSE) that interprets state wage orders, that is applied generally to a class of similar cases, and that does not merely restate or summarize the DLSE's prior decisions or advice letters, is a regulation within the meaning of the APA. (Disapproving, to the extent they hold otherwise, *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968 [38 Cal.Rptr.2d 549], and *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239 [211 Cal.Rptr. 792].)

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CHIN, J.

In this case, we decide whether the wage orders of the Industrial Welfare Commission (IWC) govern employment in the Santa Barbara Channel. To decide that question, we must decide, among other things, whether written interpretive policies of the state agency charged with enforcing IWC wage orders constitute regulations within the meaning of the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.). We conclude that these interpretive policies do constitute regulations and therefore are void because they were not adopted in accordance with the APA. Nevertheless, we conclude that the agency properly exercised its enforcement jurisdiction and that the trial court erred in granting a permanent injunction barring enforcement. Accordingly, we affirm the judgment of the Court of Appeal.

I. Factual and Procedural Background

Plaintiffs Tidewater Marine Western, Inc. (Tidewater), and Zapata Gulf Pacific, Inc. (Zapata), are maritime firms that transport (or transported) workers and supplies from the California coast to oil-drilling platforms located in the Santa Barbara Channel. Plaintiff Offshore Marine Service Association (OMSA) is a trade association representing the owners and operators of vessels engaged in offshore marine services. The crew members who work for Tidewater and Zapata in the Santa Barbara Channel reside in California. They are on duty 12 hours during a 24-hour period, but the demands of work are inconstant, and crew members may spend part of this duty period engaged in leisure activities. Zapata and Tidewater compensate their crew members at a flat daily rate of pay without

special compensation for “overtime.”

Defendant IWC is the state agency empowered to formulate regulations (known as wage orders) governing employment in the State of California. (Lab. Code, § § 1173, 1178.5, 1182.) Defendant Division of Labor Standards Enforcement (DLSE), headed by defendant Victoria L. Bradshaw, as Labor Commissioner, is the state agency empowered to enforce California's labor *562 laws, including IWC wage orders. (Lab. Code, § § 21, 61, 95, 98-98.7, 1193.5.) IWC wage order No. 4-89 governs employees “in professional, *technical*, clerical, *mechanical*, and similar occupations ... unless such occupation is performed in an industry covered by an industry order of this Commission.” (Cal. Code Regs., tit. 8, § 11040, subd. 1, italics added.) IWC wage order No. 9-90 governs employees in the transportation industry, which includes “any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air, or *water*, and all operations and services in connection therewith ...” (Cal. Code Regs., tit. 8, § 11090, subd. 2(C), italics added.) Wage orders Nos. 4-89 and 9-90 both bar work in excess of eight hours in any twenty-four-hour period unless the employer pays “overtime,” which is generally “[o]ne and one-half (1 1/2) times the employee's regular rate of pay,” increasing to “[d]ouble the employee's regular rate of pay for all hours worked in excess of twelve (12) hours.” (Cal. Code Regs., tit. 8, § § 11040, subd. 3(A)(1), (2), 11090, subd. 3(A)(1), (2).)

Starting about 1978, employees in the maritime industry began filing claims with the DLSE. The DLSE determined on a case-by-case basis whether state labor laws applied to these employees, considering such factors as the type of vessel, the nature of its activities, how far it traveled from the California coast, how long it was at sea, and whether it left from and returned to the same port. The DLSE also considered contacts, if any, between the employees and California, such as whether the employees entered into their employment contracts in California, resided in California, owned property in California, paid taxes in California, made regular purchases in California, sent their children to California schools, or spent significant time in California. The DLSE eventually replaced this case-by-case adjudication with a written enforcement policy, which provides: “IWC standards apply to crews of fishing boats, cruise boats, and similar vessels operating exclusively between California

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ports, or returning to the same port, if the employees in question entered into employment contracts in California and are residents of California.” In the early 1980's, this written policy existed only in a draft policy manual the DLSE prepared for the guidance of deputy labor commissioners. In 1989, however, the DLSE prepared a formal “Operations and Procedures Manual” incorporating the same policy and made that manual available to the public on request. The manual reflected “an effort to organize ... interpretive and enforcement policies” of the agency and “achieve some measure of uniformity from one office to the next.” The DLSE prepared its policy manuals internally, without input from affected employers, employees, or the public generally.

In 1987, the DLSE began applying IWC wage order No. 4-80, the predecessor to wage order No. 4-89, to maritime employees working in the *563 Santa Barbara Channel. Various shipping associations, including OMSA, brought an action in federal court, seeking an injunction curtailing enforcement of California's labor laws, and Tidewater intervened in that action. (*Pacific Merchant Shipping Ass'n v. Aubry* (C.D.Cal. 1989) 709 F.Supp. 1516.) Among other things, the plaintiffs asserted that the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. § 201 et seq.) preempted California's attempt to regulate the overtime pay of certain maritime employees. The FLSA requires employers engaged in “commerce” to pay overtime wages to their employees (29 U.S.C. § 207), but the FLSA includes an express exception for seamen. (29 U.S.C. § 213(b)(6).) This exception covers Tidewater's and Zapata's crew members. The plaintiffs asserted that the exception evidenced congressional intent to preempt state laws mandating overtime pay for seamen. The plaintiffs also argued that federal law and Coast Guard regulations provided seamen with ample protection. (See, e.g., 46 U.S.C. § § 8101, 8104; 46 C.F.R. § 15.101 et seq. (1995).)

The federal district court issued an injunction, but the Ninth Circuit Court of Appeals reversed. (*Pacific Merchant Shipping Ass'n v. Aubry* (9th Cir. 1990) 918 F.2d 1409, cert. den. (1992) 504 U.S. 979 [119 L.Ed.2d 578, 112 S.Ct. 2956].) The Ninth Circuit held that federal law did not preempt the IWC wage orders governing overtime wages, but the court expressly did not decide whether the IWC wage orders were enforceable against maritime employers under state law. (918 F.2d at p. 1425.)

Starting in 1992, various employees of Tidewater and

Zapata working aboard boats operating in the Santa Barbara Channel filed suits in Santa Barbara Superior Court, seeking retroactive overtime pay. Plaintiffs responded by filing this action, again asking for an injunction curtailing enforcement of the IWC wage orders governing overtime pay.

Plaintiffs argue that the Legislature did not intend the IWC's jurisdiction to extend beyond California's federal law boundaries. Plaintiffs also renew their argument that federal law preempts state law. Finally, plaintiffs assert that the provision in the DLSE's “Operations and Procedures Manual” that interprets the IWC wage orders as applying to Tidewater's and Zapata's operations in the Santa Barbara Channel is an “underground regulation” that was not issued in accordance with the APA and is therefore void.

The superior court granted an injunction barring application of IWC wage orders to Tidewater's and Zapata's employees working more than three miles off the coast, but the Court of Appeal reversed. The Court of Appeal held, among other things, that the relevant provision of the DLSE's Operations and Procedures Manual was not a regulation subject to the rulemaking *564 procedures of the APA, but merely an “interpretation” that “applies the wage order to a specific group of employers.” We granted review, and, though we disagree with some of the Court of Appeal's reasoning, we affirm.

II. Discussion

(1a) Though the superior court's injunction covered Tidewater's and Zapata's employees working *anywhere* more than three miles from the California coast, the Court of Appeal focused on those employees who are named defendants in this action and who work in the Santa Barbara Channel. Because we are reviewing the decision of the Court of Appeal, our focus is also on Tidewater's and Zapata's operations in the Santa Barbara Channel. At issue, of course, is whether IWC wage orders apply to those operations.

A. Federal Law Does Not Bar California From Regulating Maritime Employment in the Santa Barbara Channel

As an initial matter, we consider whether federal law precludes the IWC from regulating maritime employment in the Santa Barbara Channel. If it does,

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then we need not consider whether the IWC attempted to do so when it adopted wage orders Nos. 4-89 and 9-90.

1. *California has the power to regulate employment outside its federal law boundaries*

(2) Under state law, California's territorial boundaries extend three nautical miles beyond the outermost islands, reefs, and rocks, and include all waters between those islands and the coast. (Cal. Const., art. III, § 2; Gov. Code, § § 170, 171; *People v. Weeren* (1980) 26 Cal.3d 654, 661 [163 Cal.Rptr. 255, 607 P.2d 1279] (*Weeren*).) Under this state law definition of California's boundaries, the entire Santa Barbara Channel is within the state. On the other hand, federal law defines California's territorial boundaries more narrowly, extending three nautical miles from the coast, and including a three-mile-wide band around any islands lying off the coast, but excluding waters between the islands and the coast. (43 U.S.C. § § 1301(b), 1312.) Under this federal law definition of California's boundaries, the central portion of the Santa Barbara Channel is not within the state. (*United States v. California* (1965) 381 U.S. 139, 169-171 [14 L.Ed.2d 296, 313-316, 85 S.Ct. 1401].)

In defining California's federal law boundaries, Congress did not, however, suggest that California lacked power to regulate conduct outside those boundaries and within broader state law boundaries. (*565 *Weeren, supra*, 26 Cal.3d at p. 666.) Congress adopted the statute defining California's federal law boundaries in response to the United States Supreme Court's opinion in *United States v. California* (1947) 332 U.S. 19 [91 L.Ed. 1889, 67 S.Ct. 1658] (supplemental opn. at 332 U.S. 804 [92 L.Ed. 382, 68 S.Ct. 20]). In that case, the State of California and the United States disputed the ownership of the land, and more significantly the minerals, adjacent to the coast and underlying the Pacific Ocean. The Supreme Court held that, with the exception of bays, all the land seaward of the low-water mark belonged to the United States. (332 U.S. at p. 805 [92 L.Ed. at p. 383].) Nevertheless, the high court expressly conceded that California is "authorized to exercise local police power functions" within the territory found to belong to the United States. (332 U.S. at p. 36 [91 L.Ed. at p. 1898].) Congress responded to the high court's decision by enacting the Submerged Lands Act (43 U.S.C. § 1301 et seq.), which defined California's boundaries as extending three geographical miles seaward of the low-water line,

and which transferred to California ownership of the underwater lands located within its boundaries.

In *Weeren*, we considered the applicability of California's criminal laws in the territory beyond California's federal law boundaries but within its state law boundaries. We stated the federal law boundaries apply "when the extent of a state's territorial jurisdiction is relevant to the operation of federal law." (*Weeren, supra*, 26 Cal.3d at p. 660.) Thus, federal law defines "the state's 'boundaries' for all purposes, political and proprietary, 'as between Nation and State.'" (*Id.* at p. 663.) On the other hand, where state criminal law does not conflict with federal law, "the state boundaries as defined by our state Constitution and statutes ... are the limits to which the Legislature implicitly intended to extend California's criminal laws" (*Id.* at p. 669.) Thus, we did not interpret the federal law boundaries as limiting the state's power to regulate conduct outside those boundaries and within broader state law boundaries. (1b) Like the criminal laws at issue in *Weeren*, California employment laws implicitly extend to employment occurring within California's state law boundaries, including all of the Santa Barbara Channel. The federal law boundaries would have precedence only if the operation of federal law were at issue, as for example if federal law conflicted with state law. (*Id.* at p. 670.)

Moreover, even if California had not defined (or could not define) its boundaries more broadly than does federal law, nothing precludes a state from regulating conduct beyond its borders. (*Smith v. United States* (1993) 507 U.S. 197, 213 [122 L.Ed.2d 548, 561-562, 113 S.Ct. 1178]; *Skiriotes v. Florida* (1941) 313 U.S. 69 [85 L.Ed. 1193, 61 S.Ct. 924]; *Weeren, supra*, 26 Cal.3d at p. 666.) *Skiriotes* involved a Florida law prohibiting the use of *566 certain diving equipment in taking commercial sponges from the Gulf of Mexico. The trial court convicted Lambiris Skiriotes of violating this law. Skiriotes argued on appeal that he used the equipment more than three miles from the coast and therefore outside Florida's boundaries as defined in certain federal treaties. Florida asserted that Skiriotes's activities were within its boundaries because, regardless of federal treaties, its boundaries extended nine nautical miles from the coast. The high court thought the dispute over Florida's boundaries irrelevant, stating: "Even if it were assumed that the *locus* of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the

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described divers' equipment at that place." (*Skiriotes v. Florida, supra*, 313 U.S. at p. 76 [85 L.Ed. at p. 1200].) "[W]e see no reason why the State of Florida may not ... govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.... [T]he State of Florida has retained the status of a sovereign." (*Id.* at p. 77 [85 L.Ed. at p. 1200].) Similarly, regardless of its boundaries, California can govern employment of its residents on the high seas, provided there is no conflict with federal law.

2. Federal law does not conflict with or otherwise preempt state regulation of seamen's overtime pay

In a reprise of the argument OMSA and Tidewater made to the federal courts, plaintiffs here argue that the FLSA conflicts with or otherwise preempts state regulation of the overtime pay of seamen, including Tidewater's and Zapata's employees in the Santa Barbara Channel. Of course, the Ninth Circuit's decision finding no preemption binds OMSA and Tidewater, who were parties to the federal action. (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807 [122 P.2d 892].) Zapata does not persuade us that the Ninth Circuit's decision was wrong.

As discussed above, the FLSA requires employers engaged in "commerce" to pay overtime wages to their employees (29 U.S.C. § 207), but the FLSA includes an express exemption for seamen. (29 U.S.C. § 213(b)(6).) Zapata asserts that this exemption is not merely the absence of federal regulation under the FLSA, but an affirmative preemption of state regulation. In support of this assertion, Zapata argues that regulating the overtime of seamen would be impractical because of the variable and unpredictable nature of their workdays. Zapata also argues that general principles of federal admiralty law regulate the hours and working conditions of maritime workers, including a right to "a reasonable amount of extra wages" for *567 overtime. (See *Bender v. Waterman S. S. Corporation* (E.D.Pa. 1946) 69 F.Supp. 15, 19, affd. (3d Cir. 1948) 166 F.2d 428; *The Carrier Dove* (N.D.Wash. 1899) 98 Fed. 313, 314; *The Lakme* (N.D.Wash. 1899) 93 Fed. 230, 232.) Zapata asserts that the FLSA's exemption for seamen is part of the fabric of federal admiralty law, which, in the interest of uniformity, generally preempts state law. (See *Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205 [61 L.Ed. 1086, 37 S.Ct. 524] [federal admiralty law

preempts state workers' compensation law]; see also *Offshore Logistics, Inc. v. Tallentire* (1986) 477 U.S. 207 [91 L.Ed.2d 174, 106 S.Ct. 2485]; *Oil Workers v. Mobil Oil Corp.* (1976) 426 U.S. 407 [48 L.Ed.2d 736, 96 S.Ct. 2140]; *Knickerbocker Ice Co. v. Stewart* (1920) 253 U.S. 149 [64 L.Ed. 834, 40 S.Ct. 438, 11 A.L.R. 1145].)

In pressing these arguments, Zapata skirts the analytical framework generally applicable to preemption questions. (3) In determining whether federal law preempts state law, "our sole task is to ascertain the intent of Congress." (*California Federal S. & L. Assn. v. Guerra* (1987) 479 U.S. 272, 280 [93 L.Ed.2d 613, 623, 107 S.Ct. 683] (*Guerra*.) Moreover, this intent must be "clear and manifest." (*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230 [91 L.Ed. 1447, 1459, 67 S.Ct. 1146].) Preemption may occur in three situations: (1) where the federal law expressly so states, (2) where the federal law is so comprehensive that it leaves "no room" for supplementary state regulation, or (3) where the federal and state laws "actually conflict []." (*Guerra, supra*, 479 U.S. at pp. 280-281 [93 L.Ed.2d at p. 623].)

(1c) Here, not only does the FLSA leave "room" for supplementary state regulation of overtime, the FLSA expressly indicates that it does *not* preempt this regulation. The FLSA includes a "savings clause," which provides: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any ... State law or municipal ordinance establishing ... a maximum workweek lower than the maximum workweek established under this chapter" (29 U.S.C. § 218(a).) The federal courts that have addressed this question have interpreted this savings clause as expressly permitting states to regulate overtime wages. (See, e.g., *Overnite Transp. Co. v. Tianti* (2d Cir. 1991) 926 F.2d 220, 222 ["state overtime wage law is not preempted by ... the FLSA"]; *Pacific Merchant Shipping Ass'n v. Aubry, supra*, 918 F.2d at p. 1422 ["Congress has specifically allowed states to enforce overtime laws more generous than the FLSA," citing the savings clause]; *Pettis Moving Co., Inc. v. Roberts* (2d Cir. 1986) 784 F.2d 439, 441 [savings clause "explicitly permits states to set more stringent overtime provisions than the FLSA"]; and *Williams v. W. M. A. Transit Company* (D.C. Cir. 1972) 472 F.2d 1258, 1261 [savings clause "permits state laws to operate even as to workers exempt from FLSA"].) *568

Moreover, no provision of the FLSA "actually

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conflicts” with California law. The FLSA does not expressly preclude states from regulating the overtime wages of seamen, and the legislative history of the FLSA does not suggest an implicit preclusion. The legislative history indicates that Congress added the exemption for seamen at the request of labor unions representing seamen. The unions were concerned that regulating the employment of seamen under the FLSA would conflict with other federal laws protecting seamen. (29 C.F.R. § 783.29 (1996) [describing legislative history of the FLSA's seaman exemption].) Thus, the seamen exemption appears to have had no purpose other than to negate the regulatory effect the FLSA would otherwise have had on the employment of seamen, not to create an affirmative bar against state regulation of that employment. In sum, we find no evidence that Congress intended the FLSA's seamen exemption to preempt state law.

Having determined that federal law permits California to regulate maritime employment in the Santa Barbara Channel, we next consider whether California exercised this power by way of IWC wage orders Nos. 4-89 and 9-90. (4) Of course, the DLSE's Operations and Procedures Manual addresses this question, and we must “accord[] great weight and respect” to a valid administrative construction of a controlling statute or regulation. (*International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 931, fn. 7 [163 Cal.Rptr. 782, 609 P.2d 11].) Thus, before construing the applicable legal provisions on our own, we must determine whether the DLSE's construction of those provisions is valid and therefore entitled to deference.

B. The DLSE's Policy for Determining Whether IWC Wage Orders Apply to Maritime Employers Is Void for Failure to Follow the APA

The APA establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action (Gov. Code, § 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Gov. Code, § 11346.2, subs. (a), (b)); give interested parties an opportunity to comment on the proposed regulation (Gov. Code, § 11346.8); respond in writing to public comments (Gov. Code, § 11346.8, subd. (a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov. Code, §

11347.3, subd. (b)), which reviews the regulation for consistency with the law, clarity, and necessity (Gov. Code, §§ 11349.1, 11349.3).

(5) One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation (**569 Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr. 1, 583 P.2d 744] (*Armistead*)), as well as notice of the law's requirements so that they can conform their conduct accordingly (*Ligon v. State Personnel Bd.* (1981) 123 Cal.App.3d 583, 588 [176 Cal.Rptr. 717] (*Ligon*)). The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. (See *San Diego Nursery Co. v. Agricultural Labor Relations Bd.* (1979) 100 Cal.App.3d 128, 142-143 [160 Cal.Rptr. 822].)

The Labor Code includes regulatory procedures analogous to those in the APA, but applicable only to the IWC. For example, the IWC must hold a public hearing when it investigates the adequacy of wages or employment conditions in a given industry. (Lab. Code, § 1178.) It must then select a wage board composed equally of employer and employee representatives and designate a nonvoting chairperson. The wage board reports a recommendation (Lab. Code, § 1178.5, subs. (a), (b)), and after the IWC receives that report, it prepares proposed regulations. In most cases, the IWC must hold a public hearing in three cities in the state. (Lab. Code, § 1178.5, subd. (c).) The IWC must give notice of these public hearings by advertising in newspapers throughout the state and mailing notice “to each association of employers or employees which, in the opinion of the commission, would be affected by the hearing.” (Lab. Code, § 1181, subs. (a), (b).) The IWC must also publish any action that it takes in newspapers throughout the state (Lab. Code, § 1182.1) and mail copies of new regulations to affected employers (Lab. Code, § 1183). Any aggrieved person may apply within 20 days for a rehearing. (Lab. Code, § 1188.) Finally, the public has a right to petition the IWC to adopt new regulations. (Lab. Code, §§ 1176.1, 1176.3.)

In light of these comprehensive procedural protections applicable to IWC rulemaking, the

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Legislature no doubt concluded that compliance with the APA would be largely redundant and might create confusion as to which procedures applied in a particular circumstance. Thus, the Legislature provided that IWC regulations promulgated in accordance with the Labor Code are “valid and operative” and expressly exempted from the APA. (Lab. Code, § 1185.)

The DLSE's primary function is enforcement, not rulemaking. (Lab. Code, §§ 61, 95, 98-98.7, 1193.5.) Nevertheless, recognizing that enforcement requires some interpretation and that these interpretations should be *570 uniform and available to the public, the Legislature empowered the DLSE to promulgate necessary “regulations and rules of practice and procedure.” (Lab. Code, § 98.8.) The Labor Code does not, however, include special rulemaking procedures for the DLSE similar to those that govern IWC rulemaking, nor does it expressly exempt the DLSE from the APA. (1d) At issue in this litigation is whether the Legislature intended to make the DLSE's regulations subject to the APA, and if it did, whether the DLSE policy at issue here constitutes a regulation.

The APA provides that “[n]o 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 ... , 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.” (Gov. Code, § 11340.5, subd. (a), italics added.) The APA applies “to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted,” and the APA's provisions “shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.” (Gov. Code, § 11346, italics added.) These broad statements of scope suggest the APA applies to the DLSE.

Defendants argue that applying the APA to the DLSE's interpretations of IWC wage orders would undermine the IWC's exemption from the APA. For example, the DLSE argues: “Clearly, in deliberately excluding the wage order promulgation process from the procedures and oversight of the APA, the Legislature could not have intended the very wage orders it had specifically excluded from the APA to be rescreened and examined under the APA when

interpreted.” Of course, the wage order is not “rescreened and examined under the APA”; rather, the DLSE's policy interpreting the wage order is so examined. Moreover, the Legislature created comprehensive rulemaking procedures that apply to the IWC in lieu of the APA. No such procedures apply to the DLSE.

The APA provides that “[n]o state agency shall issue, utilize, enforce, or attempt to enforce ... a regulation” without complying with the APA's notice and comment provisions. (Gov. Code, § 11340.5, subd. (a), italics added.) The exception that covers the IWC is expressly limited to the IWC and makes specific reference to the comprehensive rulemaking procedures that apply to the IWC. (Lab. Code, § 1185.) In the absence of textual support or some other persuasive indication of legislative intent, we will not assume the Legislature intended the DLSE to adopt regulations without any public *571 participation or procedural safeguards. Thus, we find no basis for exempting the DLSE from the requirements of the APA.

Defendants argue the DLSE policy at issue here is not a regulation subject to the APA. The APA, however, defines “regulation” very broadly to include “every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency.” (Gov. Code, § 11342, subd. (g).) (6) A regulation subject to the APA thus has two principal identifying characteristics. (See Union of American Physicians & Dentists v. Kizer (1990) 223 Cal.App.3d 490, 497 [272 Cal.Rptr. 886] [describing two-part test of the Office of Administrative Law].) First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. (Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 630 [167 Cal.Rptr. 552].) Second, the rule must “implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure.” (Gov. Code, § 11342, subd. (g).)

Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar

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subsequent cases. (*Bendix Forest Products Corp. v. Division of Occupational Saf. & Health* (1979) 25 Cal.3d 465, 471 [158 Cal.Rptr. 882, 600 P.2d 1339]; *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 309-310 [118 Cal.Rptr. 473, 530 P.2d 161]; *Taye v. Cove* (1994) 29 Cal.App.4th 1339, 1345 [35 Cal.Rptr.2d 27]; *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 28 [285 Cal.Rptr. 515] (*Aguilar*)). Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. (Gov. Code, § 11343, subd. (a)(3), 11346.1, subd. (a).) Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations. (Cf. Lab. Code, § 1198.4 [implying that some "enforcement policy statements or interpretations" are not subject to the notice provisions of the APA].) A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes.

Examples of policies that courts have held to be regulations subject to the rulemaking procedures of the APA include: (1) an informational "bulletin" *572 defining terms of art and establishing a rebuttable presumption (*Union of American Physicians & Dentists v. Kizer, supra*, 223 Cal.App.3d at p. 501); (2) a "policy of choosing the most closely related classification" for determining prevailing wages for unclassified workers (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 128 [270 Cal.Rptr. 75]); and (3) a policy memorandum declaring that work performed outside one's job classification does not count toward qualifying for a promotion (*Ligon, supra*, 123 Cal.App.3d at p. 588). In contrast, examples of policies that courts have held not to be regulations include: (1) a Department of Justice checklist that officers use when administering an intoxilyzer test (*People v. French* (1978) 77 Cal.App.3d 511, 519 [143 Cal.Rptr. 782]); (2) the determination whether in a particular case an employer must pay employees whom it requires to be on its premises and on call, but whom it permits to sleep (*Aguilar, supra*, 234 Cal.App.3d at pp. 25-28); (3) a contractual pooling procedure whereby construction tax revenues are allocated among a county and its cities in the same ratio as sales tax revenues (*City of San Joaquin v. State Bd. of Equalization* (1970) 9 Cal.App.3d 365, 375 [88

Cal.Rptr. 12]); and (4) resolutions approving construction of the Richmond-San Rafael Bridge and authorizing issuance of bonds (*Faulkner v. Cal. Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 [253 P.2d 659]).

(1e) The policy at issue in this case was expressly intended as a rule of general application to guide deputy labor commissioners on the applicability of IWC wage orders to a particular type of employment. In addition, the policy interprets the law that the DLSE enforces by determining the scope of the IWC wage orders. Finally, the record does not establish that the policy was, either in form or substance, merely a restatement or summary of how the DLSE had applied the IWC wage orders in the past. Accordingly, the DLSE's enforcement policy appears to be a regulation within the meaning of Government Code section 11342, subdivision (g), and therefore void because the DLSE failed to follow APA procedures.

(7) Defendants cite *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 978-979 [38 Cal.Rptr.2d 549] (*Bono Enterprises*) and *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 252-253 [211 Cal.Rptr. 792] (*Skyline Homes*) in support of their assertion that the DLSE's enforcement policy is not a regulation. In *Skyline Homes*, the court considered the propriety of an employer's method of calculating overtime pay for salaried employees who worked a fluctuating workweek. The employer calculated an employee's hourly wage by dividing the employee's weekly salary by the number of hours the employee actually *573 worked in a particular week. Thus, if an employee with a weekly salary of \$500 worked 50 hours in a particular week, the employer calculated a base hourly wage of \$10 and paid an additional \$5 per hour for every hour of overtime. The DLSE, on the other hand, had a written policy of calculating an employee's hourly wage by dividing the employee's weekly salary by 40 hours (regardless of how many hours the employee actually worked) and not applying any of the base salary to overtime. Thus, if we use the same example as above, the DLSE would calculate an hourly wage of \$12.50 (\$500 / 40 hours) and require an additional \$18.75 per hour for every hour of overtime.

The employer in *Skyline Homes* asserted that the DLSE's policy for calculating overtime was a regulation within the meaning of the APA and therefore void because the DLSE did not adopt it in

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accordance with the APA. The Court of Appeal disagreed, reasoning that the policy was merely an interpretation precedent to enforcement. (*Skyline Homes, supra*, 165 Cal.App.3d at p. 253.) The only case the Court of Appeal cited in support of its holding was *Bendix Forest Products Corp. v. Division of Occupational Saf. & Health, supra*, 25 Cal.3d 465, which involved the interpretation of a regulation in the context of a specific adjudication, not a blanket interpretation that the agency memorialized in a policy manual, intending to apply it in all cases of a particular class or kind.

The policy for calculating overtime pay at issue in *Skyline Homes* was a regulation within the meaning of the APA because it was a standard of general application interpreting the law the DLSE enforced and because it was not merely a restatement of prior agency decisions or advice letters. We acknowledge that the employer challenged the policy in the context of a particular adjudication, but this fact does not alter its character as a policy of general application and thus a regulation. We disapprove *Skyline Homes* to the extent that it concludes otherwise.

In *Bono Enterprises*, the employer challenged a DLSE policy that required the employer to pay its employees if they had to remain on its premises during lunch break. The DLSE's policy interpreted an IWC wage order that required employers to pay for "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." [Citation.] (*Bono Enterprises, supra*, 32 Cal.App.4th at p. 971.) The employer asserted, among other things, that the DLSE's policy was a regulation within the meaning of the APA and therefore void because the DLSE had not adopted it in accordance with the APA. (*Id.* at p. 978.) *574

The Court of Appeal disagreed, describing the policy as an interpretation of a regulation, not a new regulation, and citing *Skyline Homes, supra*, 165 Cal.App.3d 239. (*Bono Enterprises, supra*, 32 Cal.App.4th at p. 978.) The court noted that the DLSE had to have discretion to interpret the IWC regulation in particular factual contexts. (*Ibid.*) The court added that it would not declare generally invalid a policy that appeared reasonable "on its face"; instead, the court would "assume decisions are fairly made on a case-by-case basis." (*Id.* at p. 979.)

The court in *Bono Enterprises* seems not to have

appreciated the thrust of the employer's argument. The issue was not the DLSE's power to interpret the IWC regulation on a case-by-case basis or the reasonableness of its interpretation. The issue was the DLSE's power to interpret the regulation in an enforcement policy of general application without following the APA. Because the DLSE's policy interpreted the wage order, applied generally to a class of similar cases, and did not merely restate or summarize the DLSE's prior decisions or advice letters, it was a regulation within the meaning of the APA. We disapprove *Bono Enterprises* to the extent that it concludes otherwise.

(1f) Defendants also argue that the DLSE's interpretation of the IWC wage orders "is the only reasonable interpretation," and therefore it does not constitute a regulation, but rather a direct application of the law. (See *Liquid Chemical Corp. v. Department of Health Services* (1991) 227 Cal.App.3d 1682, 1696, 1698 [279 Cal.Rptr. 103]; cf. *Union of American Physicians & Dentists v. Kizer, supra*, 223 Cal.App.3d at p. 498.) We disagree. Indeed, if the DLSE's interpretation of the IWC wage orders were the only reasonable interpretation, then the DLSE would not need to state the interpretation in a policy manual in order to "achieve some measure of uniformity from one office to the next."

Professor Michael Asimow, as an amicus curiae, suggests that interpretive regulations, such as the DLSE policy at issue here, are consistent with the APA because full APA rulemaking requirements apply only "to the exercise of any quasi-legislative power." (Gov. Code, § 11346, italics added.) Professor Asimow argues interpretive regulations are not "quasi-legislative" because an agency does not adopt them pursuant to delegated legislative power, and they do not have the force of law. (See generally, Asimow, *California Underground Regulations* (1992) 44 Admin. L.Rev. 43.)

We disagree. A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the *575 agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law. Professor Asimow argues that interpretive regulations are nonlegislative because, though courts should give them "deference," "[c]ourts need not follow them; [and] members of the public may choose to follow them but are not legally bound to do so." (See *International Business Machines v. State Bd. of Equalization, supra*, 26

