

FILED
In the office of the Secretary of State
of the State of California

MAY 8 1987
At 4:13 o'clock P.M.
MARCH FONG EU, Secretary of State
By *John Bates*
Deputy Secretary of State

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

In re:) 1987 OAL Determination No. 6
Request for Regulatory)
Determination filed by) [Docket No. 86-012]
Patrick L. Splitt, App-)
Tech, Inc., concerning) May 8, 1987
State Energy Resources)
Conservation and Develop-)
ment Commission's Alter-)
native Component Packages)
"D" and "E", and 1-6¹)
Determination Pursuant to
Government Code Section
11347.5; Title 1,
California Administrative Code
Chapter 1, Article 2

Determination by: *Linda Hurdle Stockdale Brewer*
LINDA HURDLE STOCKDALE BREWER, Director

John D. Smith, Chief Deputy Director/
General Counsel

Herbert F. Bolz, Coordinating Attorney
Debra M. Cornez and Kim M. Settles,
Staff Attorneys
Rulemaking and Regulatory
Determinations Unit

THE ISSUES PRESENTED ²

The Office of Administrative Law (OAL) has been requested to determine whether or not eight specified energy conservation packages³ issued by the State Energy Resources Conservation and Development Commission (Commission or CEC) are "regulations" as defined in Government Code section 11342(b). Builders may not obtain permits to build new homes in California unless they meet the kind of energy conservation criteria covered by these "packages."

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THE DECISION 4, 5, 6, 7

- I. The Office of Administrative Law has determined that the CEC properly implemented the Warren-Alquist Act by formally adopting energy conservation packages "D" & "E" as regulations which were approved by the State Building Standards Commission, and became effective January 1, 1987.^{8, 9}

 - II. The Office of Administrative Law finds that Alternative Component Packages 1-6 which were not formally adopted (1) are subject to the requirements of the Administrative Procedure Act (APA), (2) are "regulations" as defined in the APA and (3) are therefore invalid and unenforceable unless adopted pursuant to the APA.¹⁰
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I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The State Energy Resources Conservation and Development Commission was created by the Warren-Alquist Act in 1974.¹¹ The Energy Commission's responsibilities include, among other things, adopting regulations prescribing energy conservation criteria for new residential buildings.¹²

Authority ¹³

The Commission has been granted general rulemaking authority by Public Resources Code section 25213. Section 25213 provides in part:

"The commission shall adopt rules and regulations, as necessary, to carry out the provisions of this division in conformity with the provisions of the [APA]."
[Emphasis added.]

Public Resources Code section 25402 specifically authorizes the Commission to adopt regulations in order to reduce the wasteful, uneconomic, inefficient or unnecessary consumption of energy.

Applicability of the APA to Agency's Quasi-Legislature Enactments

The APA applies to all state agencies, except those "in the judicial or legislative department."¹⁴ Since the Commission is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Commission.¹⁵

Additionally, Public Resources Code section 25213 provides that:

"The commission shall adopt rules and regulations, as necessary, to carry out the provisions of [Division 15] in conformity with the provisions of the [APA]. The commission shall make available to any person upon request copies of proposed regulations, together with reasons supporting their adoption." [Emphasis added.]

As noted by the court in Building Code Action v. Energy Resources Conservation and Development Commission,¹⁶ the Commission is required to observe two special procedural steps (in addition to normal APA procedural requirements):

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"In summary, the foregoing statutes [17] require the Commission to follow this procedure:

- (a) To give notice of proposed regulations and of hearing thereon,
- (b) To make available a summary of reasons for the regulations,
- (c) To hold at least one public hearing, (i) at which any member of the public shall be given the opportunity to be heard to present statements, arguments or contentions in writing, (ii) and may be heard to present the same orally, (iii) and may examine witnesses testifying at the hearing, and
- (d) To consider all the relevant matter presented to it before adopting the regulations.

[Emphasis added; footnote added.]

Background

The following undisputed facts and circumstances have given rise to the present determination.

The Legislature mandated that the Commission play a key role in the reduction of wasteful, uneconomic, inefficient or unnecessary consumption of energy. ~~Public Resources Code section 25402, subdivisions (a) and (b) provide in part that the Commission shall:~~

"(a) Prescribe, by regulation, lighting, insulation climate control system, and other building design and construction standards which increase the efficiency in the use of energy for new residential and new nonresidential buildings. . . . The commission shall periodically update the standards and adopt any revision which, in its judgment, it deems necessary. Six months after the commission certifies an energy conservation manual pursuant to subdivision (c) of Section 25402.1, no city, county, city and county, or state agency shall issue a permit for any building unless the building satisfies the standards prescribed by the commission pursuant to this subdivision or subdivision (b) of this section which are in effect on the date an application for a building permit is filed.

(b) Prescribe, by regulation, energy conservation design standards for new residential and new nonresidential buildings. The standards shall be performance standards and shall be promulgated in terms of energy consumption per gross square foot of

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floorspace, but may also include devices, systems, and techniques required to conserve energy. . . . The commission shall periodically review the standards and adopt any revision which, in its judgment, it deems necessary. A building that satisfies the standards prescribed pursuant to this subdivision need not comply with the standards prescribed pursuant to subdivision (a) of this section. The commission shall comply with the provisions of this subdivision before January 1, 1981." (Emphasis added.)

The Commission adopted interim standards for residential buildings in 1977 and additional standards in 1978. In 1981, the Commission adopted extensive revisions to the standards, codified in Title 24, CAC, sections 2-5351 and 2-5352.

Public Resources Code section 25402.1 authorizes the Commission to adopt prescriptive alternative methods for compliance with the standards described in Public Resources Code section 25402. In compliance with Public Resources Code section 25402.1 (and Health and Safety Code sections 18930 and 18935), ACP's "D" and "E" were formally adopted by the Commission and approved by the State Building Standards Commission (SBSC). These two ACP's became effective January 1, 1987.

The APA generally requires state agencies to submit proposed regulations to OAL for approval.¹⁸ However, the APA and certain provisions of the Health and Safety Code provide that proposed "~~building standards~~" regulations will be reviewed by SBSC rather than OAL.¹⁹

Government Code section 11356 states:

"(a) The provisions of Article 6 (commencing with Section 11349) [the six substantive standards] shall not be applicable to any building standards subject to the approval of the State Building Standards Commission.

(b) The provisions of Article 5 (commencing with Section 11346) [procedural requirements] shall be applicable to those building standards, except that the office shall not refuse to publish any notice of proposed building standards which has been approved by, and submitted to, [OAL] by the State Building Standards Commission pursuant to Section 18935 of the Health and Safety Code." [Emphasis added.]

Health and Safety Code section 18935 provides in part:

"If the [Building Standards Commission] determines that the adopting agency has complied with the provisions of Article 5 (commencing with Section 11346) of the [APA], the commission shall approve the notice and initial

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statement of reasons for proposed building standards, and submit them to [OAL] for the sole purpose of inclusion in the California Administrative Notice Register."

Public Resources Code section 25402.2, the specific statute pertaining to CEC energy-conservation building design rules, states:

"Any standard adopted by the [Energy Commission] pursuant to Section 25402 and 25402.1 which is a building standard as defined in Section 25488.5 shall be submitted to the State Building Standards Commission for approval pursuant to, and is governed by, the provisions of the State Building Standards Law, Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code and Section 25216.4 of this code. Such building standards adopted by the commission and published in the State Building Standards Code shall be enforced as provided in Sections 25402 and 25402.1." [Emphasis added.]

On October 27, 1986, Patrick L. Splitt, President of APP-TECH, Inc., filed a Request for Determination concerning eight specified energy conservation packages issued by the Commission.

II. PRELIMINARY ISSUE

~~In its Response to the Request for Determination, the Commission raises the following issue:~~

whether two of the eight energy conservation packages ("D" & "E") have been formally adopted by the CEC, approved by the State Building Standards Commission, and incorporated into Title 24, CAC, section 2-5351.

As stated previously, packages "D" and "E" were formally adopted by the CEC as regulations, were approved by the State Building Standards Commission, and became effective January 1, 1987.^{20, 21}

III. DISCUSSION OF DISPOSITIVE ISSUES

There are two main issues before us:²²

- (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.

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

In pertinent part, Government Code section 11342(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:

"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 application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter" [Emphasis added.]

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

First, is the informal rule either

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

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the Department or
- o govern the Department's procedure?

Here, the challenged rules are ACP's 1-6 (see Appendix B).

The Commission has adopted procedural regulations purportedly implementing the substantive building standards mandated by Public Resources Code sections 25402 and 25402.1 and contained in Title 24, CAC sections 2-5342 and 2-5351. Title

