

Comments re Status of Coastal Commission Regional Interpretive Guidelines –
South Coast Region/Los Angeles County (RIG)

1. Status According to the Coastal Act (Public Resources Code §§30000 et seq. - PRC) and RIG.

A. PRC §30620 (a) and (b):

“(a) By January 30, 1977, the commission shall . . . prepare interim procedures . . . [which] shall include . . . (3) Interpretive guidelines designed to **assist local governments, the commission, and persons subject to this chapter in determining how the policies of this division shall be applied in the coastal zone** prior to the certification . . . of local coastal programs. However, the guidelines shall not supersede, enlarge, or diminish the powers or authority of the commission or any other public agency.” [Emphasis added.]

“(b) No later than May 1, 1977, the commission shall, after public hearing, adopt permanent procedures that include the components specified in subdivision (a). . . .”

http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PRC&division=20.&title=&part=&chapter=7.&article=2

B. Preface to the RIG:

“The Los Angeles County Interpretive Guidelines were adopted by the California Coastal Commission to supplement the Statewide Guidelines. Both the regional and statewide guidelines, pursuant to Section 30620 (b) of the Coastal Act, are ‘designed to assist local governments, the regional commissions, the commission, and persons subject to the provision of this chapter in determining how the policies of this division shall be applied in the coastal zone prior to certification of local coastal programs.’

“The guidelines should **assist in applying various Coastal Act policies to permit decisions; they in no case supersede the provisions of the Coastal Act nor enlarge or diminish the powers or authority of the Commission or other public agencies.**” [Emphasis added.]

C. Introduction to the RIG:

“The Regional Interpretive Guidelines have been developed for use in the permit process in the application of the policies in Chapter 3 of the Coastal Act to individual projects. **It is the intent of the Commission that the guidelines be used in a flexible manner with consideration for local and regional conditions, individual project parameters and constraints and individual cumulative impacts on coastal resources.**” [Emphasis added.]

http://archives.venicenc.org/files/CCC_Reg_Guidelnz.pdf

2. Status of Other Interpretive Guidelines.

A. Coastal Commission Statewide Interpretive Guidelines:

“These statewide Interpretive Guidelines were adopted by the California Coastal Commission pursuant to Public Resources Code Section 30620 (b) and are ‘designed to assist local governments, the commission, and persons subject to the provisions of this chapter in determining how the policies of this division shall be applied to the coastal zone prior to certification of local coastal programs.’

“The guidelines should **assist in applying various Coastal Act policies to permit decisions; they in no case supersede the provisions of the Coastal Act nor enlarge or diminish the powers or authority of the Commissions or other public agencies.**” [Emphasis added.]

https://www.marincounty.org/~media/files/departments/cd/planning/local-coastal/ccc_select_interpretive_guidelines.pdf

B. *Coastal Commission “Public Access” Interpretive Guidelines:*

Pacific Legal Foundation v. California Coastal Commission, 33 Cal.3d 158 (1982) [California Supreme Court decision]:

“The coastal commission was directed to prepare a set of guidelines **explaining its interpretation** of the public access provisions of the Coastal Act (Pub. Resources Code, § 30620, subd. (a)(3)). . . . The guidelines are the formulation of a general policy intended to govern future permit decisions, rather than the application of rules to the peculiar facts of an individual case. . . . **The guidelines are not mandatory. They do not require the Commission to impose access conditions in any particular circumstances, but rather adopt a flexible approach;** the Commission is to determine the appropriateness of access exactions on a case-by-case basis.” [Emphasis added.] 33 Cal.3d at 163, 168, 174.

[https://scholar.google.com/scholar_case?case=8305159083790619702&q=pacific+legal+foundation+v+california+coastal+com&hl=en&as_sdt=2006#\[2\]](https://scholar.google.com/scholar_case?case=8305159083790619702&q=pacific+legal+foundation+v+california+coastal+com&hl=en&as_sdt=2006#[2]).

C. *Coastal Commission “Wetlands” Interpretive Guidelines:*

“Guidelines should be **used as a tool** in reviewing coastal permit applications . . . [T]he guideline is a **valuable tool, but only a tool**, to be used in conjunction with permit and planning decisions.” [Emphasis added.] See link under Sec. 2.A above.

D. *Skilled Nursing/Nursing Homes Interpretive Guidelines (under Medicare/Medicaid law):*

“The Interpretive Guidelines serve to interpret and clarify the Conditions (or Requirements for SNFs and NFs). The Interpretive Guidelines **merely define or explain the relevant statute and regulations and do not impose any requirements that are not otherwise set forth in statute or regulation.**” [Emphasis added.]

<https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/GuidanceforLawsAndRegulations/index.html>

3. Legislative (Substantive) Rules vs. Interpretive Rules – Analysis.

A. *U.S. Supreme Court [Explanation of “interpretive rules” in the context of rulemaking under the federal Administrative Procedures Act (APA)].*¹

Perez v. Mortgage Bankers Association, 135 S.Ct. 1199 (2015) [op. Sotomayor; unanimous]:

“[T]he critical feature of interpretive rules is that they are ‘issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.’ . . . **Interpretive rules ‘do not have the force and effect of law and are not accorded that weight in the adjudicatory process’** [citation].” 135 S.Ct. at 1204. [Emphasis added.]

https://scholar.google.com/scholar_case?case=2794976277986275248&q=perez+v+mortgage+bankers+ass%27n&hl=en&as_sdt=2003

B. *Commentary related to Perez:*

“Courts differentiate two types of agency rules. Legislative rules, issued according to the [APA’s] notice-and-comment requirements, bind regulated parties with ‘the force and effect of law.’ Interpretive rules, in contrast, do not ‘purport to impose new obligations or prohibitions,’ and are exempt from the APA’s rulemaking procedures. Nevertheless, the regulatory impact of

¹ California has also enacted an APA, which is administered by the Office of Administrative Regulation. <https://oal.ca.gov/>. The California APA contains notice-and-comment requirements, as does the federal APA, for administrative regulations (i.e., “legislative rules” which have the force and effect of law).

interpretive rules can be substantial . . . [T]hey can impose ‘massive liability’ on regulated parties without the protections of notice and opportunity for comment.” [Footnotes/citations omitted.]

<http://harvardelr.com/wp-content/uploads/2016/03/Smith.pdf>.

“Two kinds of rules are relevant here. The Supreme Court has said that a ‘legislative’ or ‘substantive’ rule ‘binds’ the public, and, like a statute, has the “force and effect” of law The public-comment process matters because it sometimes significantly influences the content of legislative rules. ¶ Interpretive rules are treated differently It is often said that an interpretive rule differs from a legislative rule because it does not bind the public or have the force and effect of law; instead, it states only the agency’s interpretation of its governing laws or regulations. Interpretive rules include many agency pronouncements, with varying indicia of formality, such as guidance documents and interpretive bulletins and memos. Federal agencies operate under thousands of interpretive rules that do not go through notice-and-comment rulemaking.”²

<http://www.scotusblog.com/2015/03/opinion-analysis-the-court-slays-the-d-c-circuits-paralyzed-veterans-doctrine-leaving-bigger-issues-for-another-day/>

4. **Indicia that the RIG Are “Interpretative” Rather than “Legislative.”**

- Express language of the Coastal Act, the Statewide Guidelines and RIG (RIG intended to “assist” in determining policy and application of provisions of the Coastal Act, not to “supersede” the Act, and not to “enlarge” or “diminish” the authority of the Commission; RIG intended to be “used in a flexible manner” in consideration of local conditions, individual project parameters and impacts).
- Similar interpretive guidelines under the Coastal Act found to be “not mandatory,” and to require the Commission to “adopt a flexible approach.” (*Pacific Legal, supra*).
- Other interpretive guidelines (re Medicare/Medicaid law) are deemed to “merely define or explain” relevant federal laws and not to impose requirements beyond what is in the laws.
- Other interpretive bulletins (“ZI Bulletins”) promulgated by the Planning Dept. and LADBS provide guidance about Code provisions or other relevant regulations, but are not generally considered to have the “force of law.”
- RIG are not included as “regulations” in the CA Code of Regulations.

*Chris Spitz, PPCC Chair/President Emeritus and LUC member
February 18, 2018³*

² Although PRC §30620 required a “public hearing” before RIG adoption, it is unknown whether any hearing (or a notice-and-comment process) actually took place almost 40 years ago when the RIG were promulgated (legislative history, including researching extensive Coastal Commission files, may be necessary to ascertain whether this occurred); certainly in the ensuing 4 decades it does not appear that any further opportunities were provided for public notice or comment. Even if an initial hearing did occur, that is not dispositive of whether the RIG are “legislative rules” (i.e., law). In fact, the Coastal Commission “Sea Level Rise Policy Guidance” was promulgated after a notice-and-comment process, yet states: “This Guidance is advisory and not a regulatory document or legal standard of review for the actions that the Commission or local governments may take under the Coastal Act.”

<https://www.coastal.ca.gov/climate/slrguidance.html>. In addition, the “Wetlands” Interpretive Guidelines (described as a “tool” used in conjunction with permit applications, not as law) were enacted after hearings and an opportunity for public comment (*see link in Sec. 2.A above*). The RIG are also not included in the California Code of Regulations: [https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=IAA26DA40D48711DEBC02831C6D6C108E&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=IAA26DA40D48711DEBC02831C6D6C108E&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)).

³ Note: this document is based on limited informal research and is not intended to be an exhaustive survey (formal legal research has not been conducted); it is not a legal opinion and is intended solely for informational purposes as needed in connection with discussions by the PPCC LUC and/or PPCC board.