

OFFICE OF ADMINISTRATIVE LAW

Bill Jones
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SECRETARY OF STATE

In re:)	
Request for Regulatory)	1999 OAL Determination No. 11
Determination filed by)	
RICHARD DEMING concerning)	[Docket No. 97-016]
five forms issued by the)	
DEPARTMENT OF PESTICIDE)	April 23, 1999
REGULATION used by)	
applicants to apply for state)	Determination Pursuant to
licenses for pesticide)	Government Code Section 11340.5;
application and pest control)	Title 1, California Code of
aircraft pilots, and for county)	Regulations, Chapter 1, Article 3
registration for pest control)	
aircraft pilots ¹)	

Determination by: CHARLENE G. MATHIAS, Deputy Director

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SYNOPSIS

Office of Administrative Law concluded that application forms issued by the Department of Pesticide Registration for use in licensing of persons working with pesticides contained "regulations" which were invalid because they should have been, but were not, adopted pursuant to the Administrative Procedure Act.

DECISION^{3, 4, 5, 6}

Office of Administrative Law ("OAL") has been requested to determine whether five forms issued by the Department of Pesticide Regulation ("Department") contained "regulations" which must be adopted pursuant to the APA.⁷ These forms are used by applicants to apply for, or renew, state licenses for pesticide application and pest control aircraft pilot, and for county registration for pest control aircraft pilot.

OAL has concluded that at the time the request for determination was filed:

- (1) the requirement that a pilot applicant submit a valid copy of his or her Medical Certificate Card was the only legally tenable interpretation of existing law, and therefore, did not constitute a "regulation";
- (2) some of the requirements in the forms are "regulations," but after the request for determination was filed, the forms were revised and replaced, and these requirements were deleted from the forms; and
- (3) some of the requirements in the forms constitute "regulations."

DISCUSSION

On December 31, 1996, Richard Deming ("requester") requested a determination regarding the requirements in five forms issued by the Department. In his request, he stated:

"On the forms, the wording is such that it appears to be an order, rule and a standard of general application. . . . This wording appears not to be discretionary on the part of the applicant."⁸

In addition to questioning whether the requirements in the forms must be adopted as regulations, the requester contends that the forms constitute an invasion of privacy and that the failure to provide certain information should not justify refusal of a license. OAL cannot decide the two latter issues. The only issue OAL has jurisdiction to decide is whether the forms contain "regulations," which are invalid unless adopted pursuant to the APA.

The five forms challenged in the request for determination are:

1. Renewal Application For: Qualified Applicator License ("**Applicator License**") PR-ENF-187 (Rev. 9-95)
2. Qualified Applicator License Renewal Information Requirement ("**Applicator-Renewal Information**") PR-ENF-142 (REV. 10/96) (This form appeared on the reverse side of the Applicator License form.)
3. Renewal Application For: Journeyman Pilot ("**Journeyman Pilot**") PR-ENF-190 (Rev. 9-95)
4. Pest Control Aircraft Pilot Certificate Renewal Information Requirement ("**Pilot-Renewal Information**") PR-ENF-135 (REV. 10/94) (This form appeared on the reverse side of the Journeyman Pilot form.)
5. Pest Control Aircraft Pilot County Registration ("**Pilot-County Registration**") PR-ENF-009 (EST. 11/94)

In its response, the Department stated that all of the challenged forms have been revised since the requester applied to renew his licenses using the challenged forms listed above.⁹ The Department attached copies of the revised forms to its response.

The fact that the forms have been revised does not relieve OAL of its duty to issue a determination on the forms challenged in the request for determination. OAL is required to consider all written information or evidence submitted in compliance with title 1, California Code of Regulations ("CCR"), sections 122, 124 and 125 in regards to a request for determination and to issue a written determination, along with the reasons supporting the determination, as to whether the challenged state agency rule was a "regulation" at the time the request for determination was filed.¹⁰

The Department further states that the Applicator-Renewal Information form (PR-ENF-142) and the Pilot-Renewal Information form (PR-ENF-135) have been replaced with "Employment Status Information" form (PR-ENF-067 (EST. 10/98)). To the extent the information required on the two previous forms is now

required on the new form, OAL's analysis would logically apply to that part of the new form. In regards to the new form, "Employment Status Information," the Department forthrightly states:

". . . [Food and Agricultural Code] section 14091 requires certified applicators to state on renewal applications their names, addresses, and other information required by the Director.^[11] However, no regulations have been adopted prescribing the other information. *It appears that the form requests more information than the law allows.* Therefore, before the form is reprinted, we will redesign it. If we decide we want to continue to collect Section A information that is not already authorized by law or regulations, we will adopt regulations covering that information. [Emphasis added.]"¹²

The following is OAL's analysis regarding the five challenged forms as they existed at the time the request for determination was filed with OAL. Where the requirements in the challenged forms also appear in the *revised* forms, OAL's analysis and conclusion would logically apply to those requirements in the revised forms as well. Any requirements in the revised forms that did not appear previously in the forms at issue are not considered part of the request for determination and thus will not be addressed by OAL in this determination.

I. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE DEPARTMENT?

Government Code section 11000 states:

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

The APA narrows the definition of "state agency" from that in Section 11000 by specifically excluding "an agency in the judicial or legislative departments of the state government."¹³ The Department is in neither the judicial nor legislative branch of state government. There is no specific statutory exemption which would permit the Department to conduct rulemaking without complying with the APA at this time.

OAL notes that Food and Agricultural Code section 11456 provides in part:

"The director may do all of the following:

"(a) *Adopt regulations* which are reasonably necessary to carry out the provisions of this code *which the director is required or authorized to administer or enforce.*

"(b)

"(c) Notwithstanding any other provision of law, *provide, by rule or regulation, for the issuance and renewal* on a two-year basis of licenses, certificates of registration, or other indicia of authority issued pursuant to the provisions of this code which the director is required or authorized to administer or enforce. . . . [Emphasis added.]"

Food and Agricultural Code section 11502 states that "[t]he director shall adopt regulations which govern the conduct of the *business of pest control.*" (Emphasis added.) Additionally, section 11502.5 provides that:

"The director may adopt regulations to establish the minimum requirements of . . . training, experience, and examination for applicants for *any* license or certificate, or *renewal of any* license or certificate issued by the director pursuant to this division [Division 6 commencing with section 11401] or Division 7 (commencing with Section 12500). [Emphasis added.]"

OAL, therefore, concludes that APA rulemaking requirements generally apply to the Department.¹⁴

II. DO THE CHALLENGED FORMS CONTAIN "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

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

". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make

specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

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

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

In *Grier v. Kizer*,¹⁵ the California Court of Appeal upheld OAL's two-part test¹⁶ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

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

Second, has the challenged rule been adopted by the agency to either:

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

If an uncodified rule satisfies both parts of the two-part test, OAL must conclude that it is a "regulation" subject to the APA. In applying the two-part test, OAL is mindful of the admonition of the *Grier* court:

". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view

that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*¹⁷ [Emphasis added.]"

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

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "a statutory scheme which the Legislature has [already] established. . . ." ¹⁸ But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ." ¹⁹

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon" in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)²⁰ held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation.²¹ Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

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

" . . . the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* . . . [Emphasis added.]" ²²

A. DO THE CHALLENGED FORMS CONTAIN "STANDARDS OF GENERAL APPLICATION"?

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to members of a class,

kind, or order.²³ The Department's forms must be filled out by all applicants for license or license renewal for pesticide application or pest control aircraft pilot in the state of California. The Department's forms apply to all members of the class of applicants for license or renewal of license. The forms are, therefore, standards of general application.

The Pilot-County Registration form is also a standard of general application even though the Department argues that the form is provided to the county commissioners as a courtesy to them. The form is provided, i.e., "issued," by the Department to all of the counties statewide. The fact that the form is provided as a courtesy does not prevent it from constituting a rule or standard of general application. All pest control aircraft pilots are required to register in the county in which they intend to work.²⁴ It appears that all counties use the Pilot-County Registration form for such registration. Even if an individual county chose not to utilize the form, the fact remains that the form was issued by the Department for statewide use. Hence, OAL finds that the Pilot-County Registration form is also a standard of general application.

Having concluded that each of the five challenged forms contain standards of general application, OAL must consider whether the requirements contained in the forms meet the second prong of the two-part test.

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

Forms 1 and 2: Renewal Application For: Qualified Applicator License ("Applicator License") PR-ENF-187 (Rev. 9-95) and Qualified Applicator License Renewal Information Requirement ("Applicator-Renewal Information") PR-ENF-142 (REV. 10/96) (This form appeared on the reverse side of the Applicator License form.)

The requester specifically identified, and objected to, the following requirements on these two forms:

Applicator License form: Provide the applicant's social security number.

Applicator-Renewal Information form: Provide the following information:

- (1) name and address of applicant's employer;
- (2) general occupational information regarding with whom the applicant is employed, e.g., governmental agency, maintenance gardener pest control business (incidental pest control for hire); pest control business (pest control for hire); special government district; grower/rancher; or private business whose pest control is performed on their own property;
- (3) specify classification of pesticide that applicant uses or supervises the use of; and
- (4) answer the following question, "yes" or "no": "During the last three years, have you had any administrative, civil, or criminal action taken against you for violation of any state or federal law, relating to the application or use of pesticides that resulted in disciplinary actions or in which any disciplinary action is now pending?" If "yes," "(State explanation on a separate sheet of paper.)"

Food and Agricultural Code section 11502.5 states that:

"The director may adopt regulations to establish the minimum requirements of . . . training, experience, and examination for applicants for *any* license or certificate, or *renewal of any* license or certificate, issued by the director pursuant to this division [Division 6 commencing with section 11401] or Division 7 (commencing with Section 12500). [Emphasis added.]"

Food and Agricultural Code section 12201 states in part:

"An application for a *qualified applicator license* shall be in a *form prescribed by the director*. Each application shall state the name and address of the applicant specified on the application *and any other information required by the director*. . . . [Emphasis added.]"

Section 12202 of the same Code provides in part:

"(a) All licenses issued pursuant to this chapter [chapter 8, titled "Qualified Applicator License"] . . . may be *renewed* annually by the date of expiration

through application *in a form prescribed by the director* [Emphasis added.]"

Title 3, California Code of Regulations ("CCR"), section 6502 states:

"Application for a license or certificate shall be made on a form *prescribed by the director* [Emphasis added.]"

Title 3, CCR, section 6534 states in part:

"A qualified applicator certificate or license may be refused, revoked, or suspended by the director for any of the following:

"(a)

"(b) Failure to comply with any applicable provision of Divisions 6 [commencing with section 11401] or 7 [commencing with section 12500] of the Food and Agricultural Code, or regulations adopted pursuant to such provisions;

"(c) Making any false or fraudulent record or report."

Food and Agricultural Code section 11704, subdivision (a), provides:

"(a) A person who is *regularly engaged in the business* of maintenance gardening and who desires to engage in pest control for hire *incidental to that business* shall qualify for a pest control business license in the maintenance gardener category by passing the certified commercial applicators examination in both the laws and regulation and the landscape maintenance categories. [Emphasis added.]"

The Department does not argue that existing law requires an applicant or licensee to provide the specific information required by the Applicator's License form or the Applicator-Renewal Information form. Section 12201 of the Food and Agricultural Code does require the applicant to provide his or her name and address, but OAL was not able to locate any other provision of law that requires the applicant to provide any of the other specific information (identified above by the requester) as required by the forms.

In its response concerning the revised "Employment Status Information" form, the Department states:

". . . [Food and Agricultural Code] section 14901 requires certified applicators to state on renewal applications their names, addresses, and *other information required by the Director*. However, no regulations have been adopted prescribing the other information. It appears that the form requests more information than the law allows. Therefore, before the form is reprinted, we will redesign it. If we decide we want to continue to collect Section A information [on the new revised Employment Status Information form] that is not already authorized by law or regulations, we will adopt regulations covering that information. [Emphasis added.]"

OAL notes that, in regards to an application, the language "*in a form prescribed by the director*" (emphasis added) or similar language appears twice in the statutes and once in the regulation set forth above. This language does not give the Director of the Department carte blanche to use any form containing any requirements he or she desires. Whether the challenged forms fall within the "forms" exemption, and therefore, are not required to be adopted pursuant to the APA, will be addressed below, under the heading III., B. Suffice it to say, however, that if a form "is needed to implement the law under which the form is issued,"²⁵ then the form and its requirements are interpreting and implementing the law, and therefore must be adopted in compliance with the APA. The Department does not have the power to exempt itself from the APA by adopting a regulation.

In regards to the "Social Security Number" requirement, the Department further stated (again in reference to the *revised* forms which also require a Social Security Number) that it

". . . intended to include the following provision in item number three on the revised forms, regarding the applicant's Social Security number, however, it was inadvertently omitted:

Note: The Department requests your Social Security Number as an alternate method of applicant identification. This is not public information and will not appear on any publication. Providing your Social Security Number is voluntary in accordance with the Privacy Act of 1974 [PL 93-579].)"

The Department also explained that the "voluntary" Social Security Number ("SSN") provision will be added to the forms before they are reprinted and that the provision is included in applicant's packet. The Department further noted that the requester's application for renewal of his license was not rejected for his failure to provide his SSN. This latter fact, however, is of no legal consequence in considering whether the challenged rule is a "regulation" subject to the APA. Government Code section 11340.5 prohibits any state agency from "issuing" a rule or standard of general application unless that rule or standard has been adopted pursuant to the APA. It is not required that the state agency actually enforce the standard; mere issuance of the rule or standard is sufficient to violate the APA.

OAL concludes that at the time the request for determination was filed with OAL, the Applicator's License form and the Applicator-Renewal Information form contained requirements that were not mandated by existing law. OAL, therefore, concludes that these two forms contained "regulations" which interpret and implement the laws, specified above, that are administered and enforced by the Department. This conclusion would also apply to the SSN requirement on the revised form, "Employment Status Information," until the "voluntary" or "optional" provision is added to the form, and would apply to any of the four Applicator-Renewal Information requirements, listed above, that continue to be required on the revised form.

Forms 3 and 4: Renewal Application For: Journeyman Pilot ("Journeyman Pilot") PR-ENF-190 (Rev. 9-95) and Pest Control Aircraft Pilot Certificate Renewal Information Requirement ("Pilot-Renewal Information") PR-ENF-135 (REV. 10/94) (This form appeared on the reverse side of the Journeyman Pilot form.)

The requester specifically identified, and objected to, the following requirements on these two forms:

Journeyman Pilot form - Provide Social Security Number and submit a valid Medical Certificate Card

Pilot-Renewal Information form - Provide the following information:

(1) name and address of applicant's employer; current employment

status;

(2) provide journeyman pilot's name, if applicant is an apprentice pilot;

(3) indicate the type of pest control aircraft the applicant will be using;

(4) indicate the county(ies) where the applicant will be working; and,

(5) answer the following question, "yes" or "no": "During the last three years, have you had any administrative, civil, or criminal action taken against you for violation of any state or federal law, relating to the application or use of pesticides that resulted in disciplinary actions or in which any disciplinary action is now pending?" If "yes," then "State explanation on a separate sheet of paper."

For the reasons stated above in regards to the Applicator-Renewal Information form, OAL finds that requiring the Social Security Number on the Journeyman Pilot form is also a "regulation."

The Journeyman Pilot form also required the applicant to submit a copy of a valid Medical Certificate Card.

Food and Agricultural Code section 11901 provides:

"It is unlawful for any person to operate any aircraft in pest control unless the pilot operating the aircraft holds a valid pest control aircraft pilot's certificate issued by the director and an appropriate and valid commercial pilot's certificate and a *current appropriate medical certificate issued by the Federal Aviation Administration*. [Emphasis added.]"

Section 11910 of the Food and Agricultural Code states in part:

"The *director may refuse to issue* a certificate to any pest control aircraft pilot and may revoke or suspend the certificate of any such pilot, after a hearing, upon finding . . . that the pilot does not hold an appropriate and valid commercial pilot's certificate and a *current appropriate medical certificate issued by the Federal Aviation Administration* [Emphasis

added.]"

OAL notes that the Director may not refuse, revoke or suspend a certificate until *after* a hearing, but the Department cannot reach that phase in the process without first requiring the applicant to submit the Medical Certificate Card.

OAL concludes that the Department is merely applying the law without further interpreting or implementing it. There appears to be no other way for the Department to know whether the pest control aircraft pilot is in compliance with section 11901 before issuing or renewing the pilot's license. The requirement that a current Medical Certificate Card be submitted with the application does not meet the second prong of the two-part test, and therefore, is not a "regulation."

The Pilot-Renewal Information form also requires the applicant to provide information regarding employment status, type of pest control aircraft, name and pilot certificate number of an apprentice pilot's supervising journeyman pilot,²⁶ county registration, and past history of any administrative, civil, or criminal action. (See list above.) After completing its own research, OAL concludes that no legal mandate exists that requires an applicant to provide this specific information in order to renew his or her license. OAL notes that the Department did not argue that such law exists. In fact, the Department acknowledges that some of these requirements do not appear on the "Employment Status Information" form, which has replaced the Pilot-Renewal Information form.

OAL, however, finds that at the time the request for determination was filed, all of these requirements interpret and implement the laws, specified above, administered and enforced by the Department, and therefore, are "regulations." This conclusion would also apply to any of the requirements that continue to be required on the replacement "Employment Status Information" form, e.g., employment status information.

Form 5: Pest Control Aircraft Pilot County Registration ("Pilot-County Registration") PR-ENF-009 (EST. 11/94)

On the Pilot-County Registration form, the requester objects specifically to the requirement that the applicant pilot give the name and address of the pilot's employer.

Food and Agricultural Code section 11920 states:

"It is unlawful for any person to act as a pest control aircraft pilot in any county without first registering with the appropriate county agricultural commissioner."

Section 11921 of the same Code requires the following:

"Each pest control aircraft pilot shall register in person with the agricultural commissioner of the county where he intends to work or with the director if the county does not have an agricultural commissioner. Registration in any additional county may be made in person or by mail *on prescribed forms* which may be obtained and processed in the county where personal registration is made. [Emphasis added.]"

Title 3, CCR, section 6542, subsection (a) requires:

"Each pest control aircraft pilot who registers as an apprentice pilot in any county *shall include on the registration form the name of the journeyman pilot* responsible for providing supervision of the pest control activities of such apprentice. The journeyman pilot named on the apprentice pilot's county registration must be currently registered with that county. [Emphasis added.]"

The Department did not point out, nor did OAL find, any provision of law that requires a pest control aircraft pilot to provide the name and address of the pilot's *employer*. Though the requester did not specifically object to the form's requirement to provide the name of the apprentice pilot's supervising journeyman pilot, OAL notes that Title 3, CCR, section 6542, does require an apprentice pilot to provide *on the registration form* the name of his or her supervising journeyman pilot; however, section 6542 does not require the name and address of the pilot's employer. The requirement to provide the name and address of the pilot's employer interprets and supplements section 6542, and sections 11920 and 11921 of the Food and Agricultural Code.

The fact that the Department explains that the Pilot-County Registration form is provided to the county commissioners as a courtesy to them is of no legal consequence. Whether an agency action "constitutes a regulation does not depend on the designation of the action, but rather on its effect and impact on the public."²⁷ *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* ("*SWRCB v. OAL*") (1993)²⁸ made clear that

reviewing authorities focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency.

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

Though the counties may use the registration form by choice, the registration form appears, on its face, to be a state agency form requiring certain information--in particular, the form requires the name and address of the pilot's employer. At the top of the form it states:

"PEST CONTROL AIRCRAFT PILOT COUNTY REGISTRATION STATE OF CALIFORNIA
PR-ENF-009 (EST. 11/94) DEPARTMENT OF PESTICIDE REGULATION
PESTICIDE ENFORCEMENT BRANCH"

The Department's argument that the form is provided to the counties as a courtesy does not prevent the Pilot-County Registration form from constituting a standard of general application that implements or interprets the law enforced or administered by the Department. Government Code section 11340.5 prohibits any state agency from "issuing" a rule or standard of general application that implements or interprets law administered or enforced by the state agency unless that rule or standard has been adopted pursuant to the APA. It is not required that the state agency actually use or enforce the standard; merely issuing the rule or standard is sufficient to violate the APA.

OAL finds that the requirement to provide the name and address of the pilot's employer on the Pilot-County Registration form meets the second part of the two-part test.

OAL, therefore, concludes that, at the time the request for determination was filed with OAL, the requirements specifically identified by the requester in each of the forms are "regulations" which are subject to the requirements of the APA, *except* the requirement that an applicant provide a valid Medical Certificate Card.

III. DO THE CHALLENGED FORMS FOUND TO BE “REGULATIONS” FALL WITHIN ANY RECOGNIZED EXEMPTION FROM APA REQUIREMENTS?

Generally, all “regulations” issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.²⁹ In *United Systems of Arkansas v. Stamison* (1998),³⁰ the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA.

According to the *Stamison* Court:

“When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language. (See, e.g., Gov. Code, section 16487 [‘The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.’]; Gov. Code, section 18211 [‘Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act’]; Labor Code, section 1185 [orders of Industrial Welfare Commission ‘expressly exempted’ from the APA].) [Emphasis added.]”³¹

Express statutory APA exemptions may be divided into two categories: special and general.³² *Special* express statutory exemptions typically: (1) apply only to a portion of one agency’s “regulations” and (2) are found in that agency’s enabling act. *General* express statutory exemptions typically: (1) apply across the board to all state agencies and (2) are found in the APA. An example of an express *special* exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example of an express *general* exemption is Government Code section 11342, subdivision (g), part of which exempts “internal management” regulations of all state agencies from the APA.

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

The Department does not contend that any special statutory exemption applies.

Our independent research having also disclosed no special statutory exemption, we conclude that none applies.

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

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.³³ Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.³⁴

FORMS AND INSTRUCTIONS

The Department does not contend that any general statutory exemption applies. However, OAL did consider whether the challenged forms used to apply for licenses for pesticide application and pest control aircraft pilot, and for registration with the counties, fall within the forms exemption from the APA.

Government Code section 11342, subdivision (g), provides in part:

“‘Regulation’ does not mean . . . *any form* prescribed by a state agency or any instructions relating to the use of the form, *but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.* [Emphasis added.]”

This statutory provision contains a significant restriction on the use of the “forms” exemption. In a previous determination, OAL addressed the “forms exemption” from the APA:

“According to the leading case, *Stoneham v. Rushen*, the [statutory] language quoted directly above creates a ‘statutory exemption relating to *operational forms.*’ (Emphasis added.)³⁵ An example of an operational form would be as follows: a form which simply provides an operationally convenient space in which, for example, applicants for licenses can write down information that existing provisions of law already require them to furnish to the agency, such as the name of the applicant.”

“By contrast, if an agency form goes beyond *existing legal requirements*, then, under Government Code section 11342, subdivision (b), a formal regulation is ‘*needed to implement the law under which the form is issued.*’ For example, a hypothetical licensing agency form might require applicants to fill in marital status, race, and religion--when none of these items of information was required by existing law. The hypothetical licensing agency would be making new law: i.e., ‘no application for a license will be approved unless the applicant completes our application form, i.e., furnishes his or her name, marital status, race, and religion.’ [Emphasis added.]”

“In other words, according to the *Stoneham* Court, if a form contains ‘uniform substantive’ rules which are used to implement a statute, those rules must be promulgated in compliance with the APA. On the other hand, a ‘regulation is *not* needed to implement the law under which the form is issued’ (emphasis added) insofar as the form in question is a simple operational form limited in scope to *existing* legal requirements. [Emphasis original.]”³⁶

OAL concludes that the "forms exemption" does not apply to the forms at issue in this determination because the requirements contained in the forms go beyond existing legal requirements, except the requirement to submit a valid Medical Certificate Card.

CONCLUSION

For the reasons set forth above, OAL concludes that at the time the request for determination was filed with OAL, the pesticide application, pest control aircraft pilot and the county registration forms issued by the Department contained "regulations" subject to the APA, except the requirement to submit a valid Medical Certificate Card.

DATE: April 23, 1999


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ENDNOTES

1. This request for determination was filed by Richard D. Deming, 2160 N. Douty Street, Hanford, CA 93230. The agency response was submitted by James W. Wells, Director, Department of Pesticide Regulation, 830 K. Street, Sacramento, CA 95814-3510, (916) 445-4000.
2. Cindy Parker, Administrative Law Judge on Special Assignment, contributed substantially to this determination.
3. This determination may be cited as “**1999 OAL Determination No. 11.**”

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

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

“Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published [in the California Regulatory Notice Register].”

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

4. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.
5. OAL does not review alleged underground regulations for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations were proposed by the Department under the APA, OAL would review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 & 11349.1.)
6. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121 (a), provides:

"*Determination*" means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which

is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA. [Emphasis added.]”

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

7. According to Government Code section 11370:

"*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with Section 11400, and *Chapter 5* (commencing with Section 11500) constitute, and may be cited as, *the Administrative Procedure Act*. [Emphasis added.]"

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

8. Request for determination, p. 2.

9. ". . . The forms on the reverse sides of the qualified applicator and journeyman pilot renewal applications (PR-ENF-135 and PR-ENF-142) are no longer used. They have been replaced with a new form entitled "Employment Status Information," PR-ENF-067 (Est. 10/98)." Department's response, p. 2.

10. Title 1, CCR, sections 122, 123, 124, 125, and 126.

11. The requester points out, and OAL acknowledges, that Food and Agricultural Code section 14901 applies to private applicators, and not commercial businesses.

12. Department's response, p. 3.
13. Government Code section 11342, subdivision (a).
14. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746-747 (unless “expressly” or “specifically” exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).
15. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it “disapproved” of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to “the two-part test of the Office of Administrative Law,” citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

16. The *Grier* Court stated:

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

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

17. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 412, review denied.
18. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.
19. *Id.*
20. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
21. *Id.*
22. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.
23. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
24. Food and Agricultural Code section 11921.
25. See Government Code section 11342, subdivision (g).
26. OAL notes that Food and Agricultural Code section 11908 requires that:

"Each applicant for an apprentice certificate shall satisfy the director, *through documentary evidence or other suitable information*, that the applicant shall conduct pest control activities only under the direct and personal supervision of a person that holds a journeyman's certificate. [Emphasis added.]"

Section 11908 does not specify that providing the supervising journeyman pilot's name and pilot certificate number on an apprentice pilot's application would qualify as sufficient "documentary evidence." It is, therefore, clear that requiring the journeyman's name and pilot certificate number interprets and implements section 11908.

27. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
28. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.
29. Government Code section 11346.
30. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.
31. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.
32. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the

APA itself).

33. Government Code section 11346.
34. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)
 - c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1); emphasis added.)
 - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
 - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, pp. 168-169, 175-177, CRNR 91, No. 43-Z, October 25, 1991, p. 1458-1459, 1461-1462. In *Grier v. Kizer* ((1990) 219 Cal.App.3d 422, 437-438, 268 Cal.Rptr. 244, 253), the court reached the same conclusion as OAL did in **1987 OAL Determination No. 10**, pp. 25-28 (summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 63); complete determination published on February 23, 1996, CRNR 96, No. 8-Z, p. 293, 304-305), rejecting the idea that *City of San Joaquin* (cited above) was still good law.
35. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.
36. **1993 OAL Determination No. 5** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, Volume 2-Z, January 14, 1994, p.61, 105; typewritten version, p. 266.