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STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

Bill Jones  
SECRETARY OF STATE

In re: )  
 Request for Regulatory )  
 Determination filed by ) 1999 OAL Determination No. 15  
 HOWARD A. "BUZZ" )  
 SPELLMAN concerning "Policy ) [Docket No. 97-020]  
 Resolution #96-10 Regarding )  
 Fields of Expertise for ) May 13, 1999  
 Geologists and Civil )  
 Engineers," issued by the ) Determination Pursuant to  
 BOARD FOR PROFESSIONAL ) Government Code Section  
 ENGINEERS AND LAND ) 11340.5; Title 1, California  
 SURVEYORS <sup>1</sup> ) Code of Regulations,  
 ) Chapter 1, Article 3

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Determination by: CHARLENE G. MATHIAS, Deputy Director

HERBERT F. BOLZ, Supervising Attorney  
DAVID POTTER, Senior Staff Counsel  
Regulatory Determinations Unit

SYNOPSIS<sup>2</sup>

The Office of Administrative Law concludes that the memorandum "Fields of Expertise" issued by the Board for Professional Engineers and Land Surveyors is a "regulation" which is invalid because it should have been, but was not, adopted pursuant to the Administrative Procedure Act.

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## DECISION<sup>3, 4</sup>

The Office of Administrative Law (OAL) has been requested by Howard A. "Buzz" Spellman, consulting geologist, to determine<sup>5</sup> whether the memorandum entitled "*Fields of Expertise*" issued by Board for Professional Engineers and Land Surveyors ("Engineering Board") is a "regulation" which is without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").<sup>6</sup> *Fields of Expertise* was prepared by the Engineering Board to "clarify and differentiate between the responsibilities and duties of registered civil engineers and geologists."<sup>7</sup>

OAL has concluded that the Engineering Board's challenged memorandum is a "regulation" which must be adopted in accordance with the APA in order to be valid.

## DISCUSSION

### **I. BACKGROUND**

In 1929, the Legislature created the State Board of Registration for Civil Engineers.<sup>8</sup> Through the next several decades, the Legislature renamed the Engineering Board and expanded the scope of the original Board's powers to oversee not only civil engineers but other professional engineers as well. From 1983 through 1998 the Engineering Board was known as the Board of Registration for Professional Engineers and Land Surveyors.<sup>9</sup> Recently the name was changed again to become the Board for Professional Engineers and Land Surveyors.<sup>10</sup> Pursuant to the Professional Engineers Act,<sup>11</sup> the Engineering Board is responsible for the registration, certification, and oversight of professional engineers in California. The Engineering Board is under the jurisdiction of the Department of Consumer Affairs.<sup>12</sup>

On October 18, 1996, the Engineering Board adopted Policy Resolution #96-10, entitled *FIELDS OF EXPERTISE*. It then proceeded to distribute a seven page memorandum containing the policy resolution by publishing it in the Professional Engineers' *Board Bulletin*,<sup>13</sup> which is mailed to all professional engineers licensed in California. In February, 1997, the requester asked OAL to determine whether *FIELDS OF EXPERTISE* is an underground regulation. OAL published notice of

its active consideration of the request on January 15, 1999, initiating a public comment period.<sup>14</sup> OAL received comments from six geologists opposed to both the substance of the standards contained in *FIELDS OF EXPERTISE* and the manner in which they were promulgated by the Engineering Board.

## **II. IS THE APA GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS?**

The APA applies to all state agencies, except those “in the judicial or legislative departments.”<sup>15, 16</sup> For purposes of the APA, Government Code section 11000 defines the term “state agency” as follows:

“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.” [Emphasis added.]

Since the Engineering Board is in the executive branch of state government, APA rulemaking requirements generally apply to the Engineering Board, unless it is expressly exempted from the APA.<sup>17</sup> No specific exemption has been enacted and we therefore conclude that the APA is generally applicable to the Engineering Board. Furthermore, Business and Professions Code section 6716, provides, in part:

“The board may adopt rules and regulations consistent with law and necessary to govern its action. *These rules and regulations shall be adopted in accordance with the provisions of the Administrative Procedure Act . . .*” [Emphasis added.]

The Engineering Board's regulations are set out in Title 16, California Code of Regulations (“CCR”), Chapter 5, sections 400-474.5.

## **III. DOES THE CHALLENGED POLICY CONSTITUTE A "REGULATION" 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*,<sup>18</sup> the California Court of Appeal upheld OAL's two-part test<sup>19</sup> 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" and 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.*” [Emphasis added.]<sup>20</sup>

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. . . .”<sup>21</sup> 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. . . .”<sup>22</sup>

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)<sup>23</sup> 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.<sup>24</sup> 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.]*<sup>25</sup>

**A. IS THE CHALLENGED POLICY A "STANDARD OF GENERAL APPLICATION"?**

For an agency rule or standard to be “of general application” within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>26</sup>

The Engineering Board has described the reason the document *FIELDS OF EXPERTISE* was prepared. Its purpose was “to clarify and differentiate between the responsibilities and duties of registered civil engineers and geologists.”<sup>27</sup> Introductory language in the document announces that the policies and guidelines are not intended to be rules or standards of application rigidly adhered to without discretion. Despite this built-in flexibility, it is readily apparent, nevertheless, that the guide was prepared for the Engineering Board’s general use in its administration of the Professional Engineers Act, and not for a particular case or decision under its jurisdiction. The challenged policy applies to the professional activities of all civil engineers, and ostensibly, geologists as well. It is therefore a standard of general application.

**B. DOES THE CHALLENGED POLICY INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?**

The Engineering Board administers the Professional Engineers Act. For jurisdictional purposes, it has to be able to discriminate between the activities lawfully performed by some of its licensees and similar or even identical professional activities performed by licensees of the State Board of Registration for Geologists and Geophysicists (“Geology Board”), and activities performed illegally by unlicensed persons. The *FIELDS OF EXPERTISE* document indicates that there is a “gray’ area where civil engineering and geology overlap.” It attempts to describe the separate areas of responsibility of civil engineers and geologists, and the work in the “gray area” which may be performed by members of either profession.

Business and Professions Code sections 6731, 6731.1, 6731.2 and 6731.3 set forth the activities which constitute Civil Engineering. Interestingly, the Engineering Board has not been granted authority by the Legislature to further define by regulation the scope of civil engineering.<sup>28</sup> The challenged *FIELDS OF EXPERTISE* document, nevertheless, does contain interpretations of the above mentioned statutory standards. Under the headings “Registered Civil Engineer” and “Both” it lists the types of work civil engineers may perform. In the column “Registered Geologist” it lists activities which are, by inference, outside the scope of civil engineering. The activities are subdivided into 17 categories, many of which are not mentioned in Business and Professions Code sections 6731 through 6731.3.

While some of the activities described in *FIELDS OF EXPERTISE* are simply restatements of the law describing the scope of civil engineering as applied to a particular type of work, this is not always the case. For example, in the challenged memorandum, the Board has defined the terms “*qualitative*” and “*quantitative*” and uses these words to distinguish between the work of civil engineers and geologists. These terms are not mentioned in the statutes pertaining to civil engineering or geology. The Engineering Board has decided the important distinguishing characteristic is that civil engineers *measure* phenomena, while geologists *assess* phenomena *without measurement*. The Engineering Board utilizes this principle to separate the work of the two professions. *FIELDS OF EXPERTISE* indicates that in matters relating earthquakes and ground vibrations, qualitative ground vibration analysis is suitable solely for registered geologists, while quantitative ground vibration analysis calls for a civil engineer. By establishing this principle concerning assessment and measurement, and by further specifying its application to particular classifications of work, the Board has made Business and Professions Code sections 6731 through 6731.3 more specific.

We note that *FIELDS OF EXPERTISE* describes many more work activities under the headings “Registered Civil Engineer” and “Both” than under the heading “Registered Geologist.” In the fields of (1) Surface Waters, (2) Embankment Fill, (3) Interpretation and Installation of Instrumentation, (4) Geosynthetics, and (5) Ground and Water Contamination, no activities are listed for geologists. Perhaps further development of the classification scheme by the Geology Board was anticipated. In any event, by listing some activities as suitable only for geologists,

the Engineering Board's policy resolution circumscribes the practice of civil engineering.<sup>29</sup> For example, in the area of Project Planning, under the challenged guideline, a civil engineer can perform economic studies and evaluate the effects of geologic conditions on proposed projects, but only a geologist should develop geologic parameters and report on geologic feasibility. This rule is not set out in existing law, and by issuing it as Policy Resolution #96-10, the Engineering Board has proceeded to officially, but informally, interpret Business and Professions Code section 6731, subdivision (a), which provides that civil engineering includes studies of:

“[t]he economics of, the use and design of, materials of construction and the determination of their physical qualities.”

The Engineering Board's interpretation may be a reasonable one, but it is not simply a restatement of existing law.

Although the Engineering Board did not submit an agency response<sup>30</sup> to the request for determination, in the challenged document itself the Engineering Board appears to have anticipated the possibility of concern regarding the status of the document, and speaks in its own defense.

“These policies and guidelines are not intended to be rules or standards of application rigidly adhered to without discretion. Likewise, such policies are not intended to implement, interpret, or make specific the law enforced or administered by either Board, and are not intended to govern either Board's procedures. The foregoing policies are merely recommendations which incorporate the collective opinion of both Boards at a particular moment in time. Consequently, the foregoing guidelines are informational and are not regulations. The guidelines have no force of law and are not intended to set standards of practice. Language used has been carefully gleaned of mandatory requirements.”

These contentions unmistakably reveal the Engineering Board's intention of avoiding the requirements of the APA, but do not persuade us that *FIELDS OF EXPERTISE* is not a “regulation.”

Contention that the document is informational; not law

If *FIELDS OF EXPERTISE* is informational, we have to recognize that this “information” has been issued by the board responsible for enforcement of laws intended to prevent engineering practice by unqualified persons. A public proclamation describing the scope of practice of civil engineering by the Engineering Board can be reasonably be assumed to be its statement of what is permitted under the law. A statement by the Engineering Board generally describing the scope of civil engineering practice can be fairly characterized as “information” only if it correctly repeats or describes the existing law, without further interpretation. As noted above, *FIELDS OF EXPERTISE* includes definitions and concepts for distinguishing between the work of the two professions which are not currently established in California law. While the Engineering Board’s disclaimer that *FIELDS OF EXPERTISE* lacks the force of law is correct, it does not legitimize issuing and using the document and the standards it contains in the administration of the Professional Engineers Act.

Contention that the document is only opinion or recommendation and that the intended application will not be rigid or mandatory

No statute authorizes the Engineering Board to issue generally applicable opinions or recommendations as a substitute for regulations. The Engineering Board’s apparent willingness to depart from *FIELDS OF EXPERTISE* in appropriate circumstances may be indicative of the difficulty of crafting good regulations to fit a variety of conditions, but does not excuse the standards from the APA requirements. The definition of “regulation” found in Government Code section 11342, subdivision (g), is not restricted to statements which contain express language stating they are binding or mandatory. According to the California Court of Appeal, it is not necessary that the rule require affirmative conduct by an affected party.<sup>31</sup> The statutory test requires only that the statement contain a general rule which implements, interprets, or makes specific the law the agency enforces. Thus, an agency rule which defines the term “wetlands” should be found to violate the APA, even if the definition standing alone lacks express mandatory language.<sup>32</sup> More important than the agency’s characterization of the challenged rule is the nature of the effect and impact of the rule on the public.<sup>33</sup>

Public comments submitted by six geologists and organizations acting on behalf of geologists contend that *FIELDS OF EXPERTISE* has been used by others for a number of improper purposes. Glenn A. Brown states that due to the widespread distribution of the memorandum, “attorneys involved private dispute litigation are using Policy #96-10 to qualify, or disqualify expert witnesses.” John Wolfe observed:

“[a]lthough BORPELS [Board of Registration for Professional Engineers and Land Surveyors] may claim it is not a standard or guideline, its action, making it a policy resolution, along with approximately nine other very official looking resolutions that year, could very well suggest to the rest of the world, it and some or all of the other nine are legal guidelines to be followed. The entire document is very unclear and in my opinion misleading.”

The Engineering Board’s Policy Resolution #96-10 is a collection of contradictory elements. It describes the limits of civil engineering and geological practice, and warns individual professionals to limit their practice to the fields of expertise in which they are competent. At the same time, it claims the guidelines are informational rather than regulatory. It is not surprising that the commenters find *FIELDS OF EXPERTISE* confusing. The confusion is the fruit of the Engineering Board’s attempt to influence the behavior of the regulated professional engineers and geologists while avoiding the APA. Several of the commenters also stated that the document misrepresents the expertise of geologists and added that the Geology Board has unanimously rejected *FIELDS OF EXPERTISE*.<sup>34</sup>

For the reasons set forth above, OAL concludes that the distinctions between civil engineering and the professional practice of geology, and the classifications developed by the Engineering Board and described in *FIELDS OF EXPERTISE* implement, interpret, and make specific Business and Professions Code sections 6731 through 6731.3. Therefore, *FIELDS OF EXPERTISE* meets both parts of the two-part test, and is a “regulation.” OAL must now determine whether it falls within any exemptions to the requirements of the APA.

#### **IV. DOES THE CHALLENGED POLICY FOUND TO BE A “REGULATION” 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.<sup>35</sup> In *United Systems of Arkansas v. Stamison* (1998),<sup>36</sup> 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.]”<sup>37</sup>

Express statutory APA exemptions may be divided into two categories: special and general.<sup>38</sup> *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 a *special* express 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. DOES THE CHALLENGED POLICY DECISION FALL WITHIN ANY *SPECIAL* EXPRESS APA EXEMPTION?**

Since our research has disclosed no special statutory exemption, we conclude that none applies.

**B. DOES THE CHALLENGED POLICY DECISION FALL WITHIN ANY *GENERAL EXPRESS* APA EXEMPTION?**

Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.<sup>39</sup>

INTERNAL MANAGEMENT

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

“‘Regulation’ means 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, *except one that relates only to the internal management of the state agency.*” [Emphasis added.]

*Grier v. Kizer* provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states:

“*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee’s withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was ‘designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board’s internal affairs. [Citation.] ‘Respondents have confused the internal rules which may govern the department’s procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . .*’ [Fn. omitted.]’ . . . [Citation; emphasis added by *Grier* court.]

“*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The

*Poschman* court held: ‘Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.’ . . . [Citation.][<sup>40</sup>]

“Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections’ adoption of a numerical classification system to determine an inmate’s proper level of security and place of confinement ‘extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,]’ and embodied ‘a rule of general application significantly affecting the male prison population’ in its custody. . . .

“By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead*’s holding that an agency’s personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . .”<sup>41</sup>

Although the Engineering Board has not submitted a response arguing that *FIELDS OF EXPERTISE* relates only to its own internal management, OAL will analyze whether the exemption applies because this defense is suggested by language in the challenged memorandum itself. Introductory language in *FIELDS OF EXPERTISE* indicates that the memorandum

“was prepared to assist the Board of Registration for Professional Engineers and Land Surveyors and the Board of Registration for Geologists and Geophysicists to clarify and differentiate between the responsibilities and duties of registered civil engineers and geologists.”

The introduction further provides:

“The following tables may be used to assist *either* Boards’ staff when a dispute or complaint is filed, and can be used or modified depending on the circumstances.” [Emphasis added.]

The use contemplated above would affect the management of the Engineering Board, but it is not solely *internal* management. For example, note that use of *FIELDS OF EXPERTISE* as a guide by the staff of the *Geology* Board would be beyond the limited exemption. More importantly, the Engineering Board's decisions affecting its investigation and prosecution of unlawful conduct, guided by the challenged rule, serve the important governmental interest of public safety, and affect the private rights of civil engineers and, in some instances, geologists. *FIELDS OF EXPERTISE* concerns important rights of these professionals under the applicable statutes. As such, *it does not meet the criteria for the internal management exception to the APA.*

No other exemptions apply.

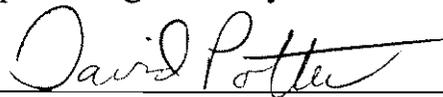
### CONCLUSION

For the reasons set forth above, OAL concludes that the Board for Professional Engineers and Land Surveyors' Policy Resolution #96-10, entitled *FIELDS OF EXPERTISE*, is a "regulation" subject to the APA.

DATE: May 13, 1999



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## ENDNOTES

1. This request for determination was filed by Howard A. "Buzz" Spellman, Consulting Geologist, 1236 Oakglen Avenue, Arcadia, CA 91006, (818) 357-7972. Although invited to respond, the Board for Professional Engineers and Land Surveyors did not submit a response.
2. This determination may be cited as "**1999 OAL Determination No. 15.**"
3. *OAL Determinations are Entitled to Great Weight in Court*

In *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, disapproved on other grounds in *Tidewater*, the California Court of Appeal considered whether the Department of Health Services' use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (g). OAL had previously issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10**, CRNR 96, No. 8-Z, February 23, 1996, p. 293. Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted for its consideration in the case, the court found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of [a statute] by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*" [*Id.*; emphasis added.]

See also *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4**, California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384, at p. 391 (reasons for according due deference consideration to OAL determinations).

4. 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.)

5. 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*.

6. 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.*

7. Board of Registration for Professional Engineers and Land Surveyors, Policy Resolution #96-10, Approved October 18, 1996, *FIELDS OF EXPERTISE*, page 1.

8. Statutes of 1929, chapter 801, page 1645, section 2.
9. Stats. of 1983, c. 150, sec. 4., (Business and Professions Code section 6710.)
10. Stats. of 1998, c. 59, sec. 7., (Business and Professions Code section 6710.)
11. Business and Professions Code, chapter 7, sections 6700-6799.
12. Business and Professions Code section 6710.
13. Board Bulletin No. 21, Spring 1997.
14. Comments on this request for determination were received from:
 

John Wolfe	Registered Geologist No. 7
Glenn A. Brown,	Consulting Geologist
David C. Seymour,	Certified Engineering Geologist
Michael D. Lawless,	CPG and Chair of the American Institute of Professional Geologists Subcommittee on Professional Practice
David Sadoff,	CPG and President of the California Section of the American Institute of Professional Geologists
James A. Jacobs,	R.G.
15. Government Code section 11342, subdivision (a).
16. 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).
17. Government Code section 11346; Title 1, CCR, section 121 (a)(2).
18. (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*.

19. 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.

20. (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.
21. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.
22. *Id.*
23. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
24. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.
25. (1993) 12 Cal.App.4th 697, 702, 16 Cal. Rptr.2d 25, 28.
26. *Id.*
27. Board of Registration for Professional Engineers and Land Surveyors, Policy Resolution #96-10, Approved October 18, 1996, *FIELDS OF EXPERTISE*, page 1.

28. Business and Professions Code section 6717 provides:

“The board may, by regulation, define the scope of each branch of professional engineering other than civil engineering for which registration is provided under this chapter.”
29. Similarly, by listing some activities as suitable only for engineers, the Engineering Board’s policy has an ostensible effect on the scope of geology practice.
30. Title 1, California Code of Regulations ("CCR"), subsection 125 (b).
31. *Grier v. Kizer*, 268 Cal.Rptr. at 253.
32. Cf. *State Water Resources Control Board v. Office of Administrative Law* (1990) 12 Cal.App.4th 697.
33. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
34. Board of Registration for Geologists and Geophysicists, October, 1997 meeting minutes.
35. Government Code section 11346.
36. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.
37. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.
38. 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).
39. 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.
40. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
41. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.