

99 OCT -8 PM 4: 16

STATE OF CALIFORNIA

*Bill Jones*  
SECRETARY OF STATE

OFFICE OF ADMINISTRATIVE LAW

In re:	)	
Request for Regulatory	)	1999 OAL Determination No. 23
Determination filed by JAMES	)	
D. JENSEN concerning a policy	)	[Docket No. 98-008]
of not addressing contractual	)	
disputes between consumers	)	October 8, 1999
and licensees issued by the	)	
STRUCTURAL PEST CONTROL	)	Determination Pursuant to
BOARD and attributed to the	)	Government Code Section
DEPARTMENT OF CONSUMER	)	11340.5; Title 1, California
AFFAIRS <sup>1</sup>	)	Code of Regulations,
	)	Chapter 1, Article 3

Determination by: CHARLENE G. MATHIAS, Deputy Director

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

SYNOPSIS<sup>2</sup>

The Office of Administrative Law concludes that the record does not contain sufficient facts to definitively answer the question of whether the alleged policy exists. Thus, alternative findings are needed.

(1) If the Board does not have a policy that precludes it from assisting consumers involved in contractual disputes with the Board's licensees, then OAL concludes that the letter alleged to be a "policy" is not a "regulation." (2) If the Board has issued or utilized a general rule that provides the basis for denying assistance to consumers involved in disputes with its licensees when those disputes arise from interpretation of a contract, then the policy is a "regulation" subject to the APA.

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

The Office of Administrative Law (“OAL”) has been requested by James D. Jensen to determine<sup>5</sup> whether a policy described in a letter issued by the Structural Pest Control Board is a “regulation” which is without legal effect unless adopted in compliance with the Administrative Procedure Act (“APA”).<sup>6</sup> The alleged policy states that the cancellation of his pest control contract by Cal-Western Termite and Pest Control (“Cal Western”) is a contract dispute which is not within the jurisdiction of the Board and that the matter cannot be addressed by the Board or the Department of Consumer Affairs.

We do not have sufficient facts to definitively answer the question of whether or not such a policy indeed exists. Thus, we must issue alternative findings.

1. It is possible that the Board does not in fact have a policy that precludes it from assisting consumers involved in contractual disputes with the Board’s licensees. For example, the letter under review may simply reflect an unfortunate choice of words to convey the Board’s conclusion that it was unable to provide further assistance to the consumer in this particular case. Indeed, it appears from the record that, in spite of the words used in the final letter stating that Mr. Jensen’s contract dispute is not within the jurisdiction of the Board, the Board does in fact assist in the resolution of contract disputes.
2. On the other hand, if the Board actually has such a policy, then the policy is a “regulation” which must be adopted in accordance with the APA in order to be valid.

## **DISCUSSION**

### **I. BACKGROUND**

The Structural Pest Control Board dates back to 1935. Business and Professions Code section 8520 provides, in part:

“(a) There is in the Department of Consumer Affairs a Structural Pest Control Board, which consists of seven members.

(b) Subject to the jurisdiction conferred upon the director by Division 1 (commencing with Section 100) of this code, the board is vested with the power to and shall administer the provisions of this chapter [Chapter 14, *Structural Pest Control Operators*].

(c) It is the intent of the Legislature that consumer protection is the primary mission of the board.

(d) . . . .”

Mr. Jensen sought the aid of the Board as a consequence of his dealings with the pest control company known as Cal Western. Although the Board had previously undertaken successful action to secure Mr. Jensen’s rights under a Cal Western pest control agreement at least three times, on the occasion of his complaint in July of 1994, concerning cancellation of the pest control contract, it advised Mr. Jensen in a letter that it could not address his contract dispute.

Mr. Jensen submitted a request for a regulatory determination to OAL on September 19, 1998. OAL published notice of its active consideration of the request for determination on June 4, 1999, initiating a public comment period. No public comments were received. The Board submitted its response to the request for determination to OAL on July 16, 1999.

## **II. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE STRUCTURAL PEST CONTROL BOARD?**

Business and Professions Code section 8525 provides, in part:

“The board, subject to the approval of the director, may, in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, [the APA] adopt, amend, repeal, and enforce reasonably necessary rules and regulations relating to the practice of pest control and its various branches as established by Section 8560 and the administration of this chapter.”

Clearly the APA applies to the Board’s rulemaking. Furthermore, the APA applies to all state agencies, except those “in the judicial or legislative departments.”<sup>7,8</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.]

The Board is in the executive branch of state government. Thus, APA rulemaking requirements generally apply to the Board, except to the extent it has been expressly exempted from the APA.<sup>9</sup> No express exemption has been enacted, and we therefore conclude that the APA is generally applicable to the Board. Its codified regulations are printed in the California Code of Regulations, Title 16, sections 1900 to 1998.

### **III. DOES THE ALLEGED 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>10</sup> the California Court of Appeal upheld OAL's two-part test<sup>11</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>12</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>13</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>14</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>15</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>16</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 it 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>17</sup>

#### **A. IS THE ALLEGED 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>18</sup> In the case of this request we are faced with a complex situation.

The requester contends that an underground rule was utilized by the Board to deny him the assistance he believes ought to have been provided. On the other hand, the Board answers that it has no such policy. The documentation in the record does not clearly show whether or not the Board’s letter to Mr. Jensen actually constitutes a rule or policy. The uncertainty in this regard confounds any attempt to determine whether the statements in the letter apply to anyone other than Mr. Jensen.

The fact that the Board assisted Mr. Jensen with his earlier contractual disputes is consistent with the Board’s response to this request for determination: that the Board has no such general policy.

At this point, it will be helpful to look at the communications Mr. Jensen received from the Board.

In part, the Board's August 10, 1995, letter provides as follows:

"It is my understanding that your complaint alleges that Cal-Western transferred your control service agreement to another company. After receiving a legal opinion on this question, the SPCB [Structural Pest Control Board] advised Cal-Western that it could not transfer its contract to another licensee without the consumer's consent. Thereafter, Cal-Western resumed responsibility for the control service agreement, but subcontracted the work to another company. The subcontracting of pest control work to another company is lawful. Cal-Western subsequently advised you that they were cancelling your control service agreement because necessary control services had not been performed upon your property. The SPCB advised you that *the cancellation of your agreement was a contractual dispute which was not within their jurisdiction* and suggested that recourse should be made in the appropriate civil court.

"The DCA and the SPCB have provided you with assistance to the extent of their jurisdictional limits. Specifically, the SPCB intervened on your behalf to require Cal-Western to resume responsibility for your control service agreement. *The fact that Cal-Western cancelled your control service agreement based upon a provision of your agreement is a contractual dispute which cannot be addressed by the DCA or the SPCB.* (Emphasis added.)

....

"I regret that this matter has not been resolved to your satisfaction. Both the DCA and the SPCB have provided the full extent of assistance possible within our jurisdiction and must consider this matter closed."

It is impossible for OAL to determine whether the Board's communication to Mr. Jensen is simply a statement of the rationale for the decision not to assist him in his dispute with Cal Western, or whether the letter is evidence of a broader Board

policy, based upon a narrow view of the Board's authority, that limits the assistance it provides to consumers involved in contractual disputes with the Board's licensees. OAL has no power to investigate the matter and make findings of facts. For purposes of this determination, we will endeavor to answer the inquiry based upon certain assumptions, and our findings are necessarily limited by them.

The language describing the cancellation of the pest control agreement as a matter "*which cannot be addressed by the DCA or the SPCB*" is susceptible to two significantly different interpretations. If we infer that the SPCB meant that it could not address the matter *because* it involved a contractual dispute, then the letter announces a standard that could be applied generally. If the Board did indeed have a policy of not addressing contractual disputes between consumers and licensees, then the policy was a standard of general application, affecting all consumers seeking the aid of the Board in their contractual relations with the Board's licensees throughout the state.

Another possibility is that after investigation, the Board decided Cal-Western's cancellation of Mr. Jensen's pest control contract was not a dispute it should take time to pursue further. The Board had learned that the cancellation was based upon the licensee's allegation that Mr. Jensen breached the contract. The Board's description of the cancellation of Mr. Jensen's pest control agreement as a contractual dispute, is no doubt correct. If the decision not to afford Mr. Jensen further assistance was based upon the particulars of Mr. Jensen's case and perhaps his history with the Board, then the letter is just the determination in his case, and not evidence of a standard that would be applied in other contractual disputes. The statement that the pest control contract cancellation "*cannot be addressed by the DCA or the SPCB*" may just be an indirect way of saying "we have determined that we cannot help you further," in other words, a final *administrative* determination. An alternative interpretation of the italicized phrase is that it constitutes the issuance of a standard of general application. Which of these two possibilities better fits the Board's letter is open to debate.

The history revealed in Mr. Jensen's correspondence with the Board clearly shows that the Board did involve itself in the ongoing Jensen - Cal Western contract disputes. It assisted Mr. Jensen in January, 1993, when he objected to Cal Western's assignment of the contract to another pest control company.<sup>19</sup> Maureen Sharp, Deputy Registrar of the Board, wrote to Cal Western explaining that it could not assign the burden of the contract without the customer's consent. Evidently

only shortly thereafter, upon the death of Mr. Jensen's mother, Cal Western sought to cancel the contract based upon the transfer of ownership of the home to Mr. Jensen. After examining the contract's provision relating to transfers, and determining that Mrs. Jensen's heir, as the new owner, was entitled to have the pest control agreement transferred, the Board again intervened in a contractual dispute on Mr. Jensen's behalf. The Board assisted Mr. Jensen a third time in March of 1994, when Cal Western attempted to increase the fee for his annual pest inspection from \$96.00 to \$110.00. After investigating the matter, Maureen Sharp, Deputy Registrar, wrote to Cal Western, instructing the company to correct the paragraph of the service agreement that specified the annual pest inspection fee and mail copies of the corrected agreement to Mr. Jensen and the Board.

Thus we see that, although the Board did make the statement that it could not address Mr. Jensen's contract dispute, the Board did not always apply a policy of refusing to assist consumers involved in contract disputes with its licensees. In its reply to the request for determination the Board's legal counsel, Donald Chang makes this point as follows:

"The statements at issue do not accurately reflect the policies and procedures of the Board[.] The Board[. . .] acts pursuant to Sections 108, 8620 and 8621 which require it to address any complaint which alleges or reveals a violation of the Act, without regard to whether it originates from a contract or otherwise. The Board has jurisdiction over complaints based upon contractual disputes *provided they involve a violation of the Act. The Board does not have a policy that precludes it from handling contractual disputes.*" (Emphasis added.)<sup>20</sup>

In his request for determination, Mr. Jensen conceded that the Board did assist him in his earlier contract disputes with Cal Western. He wrote:

"In spite of its continuing application to my grievance against Cal-Western, the standard regarding contractual disputes denotes a departure from previous state agency practice. In fact, there are several documents that record both the DCA and the SPCB address of contractual disputes. An interagency memorandum, dated December 15, 1992, advised the SPCB of a DCA legal opinion regarding the disputed sale of the Carnell Street property control service agreement. Another interagency memorandum, dated June 15, 1993, advised the

SPCB of a DCA legal opinion about the disputed transfer rights of this same service agreement.

“The SPCB addressed contractual disputes in two letters to the Cal-Western licensee. In its letter of January 20, 1993, the SPCB addressed the aforementioned sale of the Carnell Street property service agreement and instructed the licensee to secure the account back from the purchaser. In its letter of March 3, 1994, the SPCB addressed the licensee’s subcontracting of my control services and instructed the licensee to correct the disputed increase of the annual service fee.”<sup>21</sup>

The statement made by the Board in connection with Mr. Jensen’s complaint in July of 1994, concerning cancellation of the pest control contract is susceptible to an interpretation believed by Mr. Jensen to be an underground regulation utilized by the Board, at times, to avoid its responsibility to assist consumers. As noted above, if the Board has a policy that precludes it from assisting consumers involved in contractual disputes with the Board’s licensees, then the policy is one of general application. Even though the record indicates that the alleged policy was not utilized in every contractual dispute brought to the Board’s attention, use of such a policy, even on a sporadic basis, would constitute use of a standard of general application.

If, on the other hand, the Board’s statement to Mr. Jensen does not represent a policy of the Board, and is, for example, only an unfortunate choice of words to convey that, in this case, the Board cannot help Mr. Jensen further, then the Board did not issue, utilize, or enforce the alleged standard of general application.<sup>22</sup>

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

As previously noted, Business and Professions Code section 8520, subdivision (b), invests the Board with the power to administer the provisions of Structural Pest Control Act.<sup>23</sup> Business and Professions Code section 108 provides:

“Each of the boards comprising the department exists as a separate unit, and has the functions of setting standards, holding meetings, and

setting dates thereof, preparing and conducting examinations, passing upon applicants, *conducting investigations of violations of laws under its jurisdiction*, issuing citations, and holding hearings for the revocation of licenses, and the imposing of penalties following such hearings, in so far as these powers are given by statute to each respective board.” [Emphasis added.]

Business and Professions Code section 129, subdivisions (b) and (c), establish the general procedure for investigation of complaints by boards within the Department. They provide:

“(b) Each board shall, upon receipt of any complaint respecting a licentiate thereof, notify the complainant of the initial administrative action taken on his complaint within 10 days of receipt. Each board shall thereafter notify the complainant of the final action taken on his complaint. There shall be a notification made in every case in which the complainant is known. If the complaint is not within the jurisdiction of the board or if the board is unable to dispose satisfactorily of the complaint, the board shall transmit the complaint together with any evidence or information it has concerning the complaint to the agency, public or private, whose authority in the opinion of the board will provide the most effective means to secure the relief sought. The board shall notify the complainant of such action and of any other means which may be available to the complainant to secure relief.

“(c) The board shall, when the board deems it appropriate, notify the person against whom the complaint is made of the nature of the complaint, *may request appropriate relief for the complainant*, and may meet and confer with the complainant and the licentiate in order to mediate the complaint. Nothing in this subdivision shall be construed as authorizing or requiring any board to set or modify any fee charged by a licentiate.” [Emphasis added.]

In summary, these statutes authorize the Board to administer the Structural Pest Control Act, and as part of that activity, to investigate complaints such as Mr. Jensen’s and request appropriate relief. The Board is obliged to advise a complainant of the action it has taken on his or her complaint, and advise the

complainant of other means available when it is unable to satisfactorily dispose of a complaint. If the Board has issued or utilized a standard of general application that provides the basis for denying assistance to consumers involved in disputes with its licensees when those disputes arise from interpretation of a contract, then the alleged policy is one that interprets the laws administered by the Board.

As noted above, we do not have sufficient facts to reach a definitive conclusion. However, if the alleged rule identified above exists, then it meets both parts of the two-part test and is a “regulation.” OAL must now determine whether the “regulation” (assuming it in fact exists) falls within any exemption to the requirements of the APA.

#### **IV. DOES THE ALLEGED 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>24</sup> In *United Systems of Arkansas v. Stamison* (1998),<sup>25</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>26</sup>*

Express statutory APA exemptions may be divided into two categories: special and general.<sup>27</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 ALLEGED POLICY DECISION FALL WITHIN ANY *SPECIAL EXPRESS* APA EXEMPTION?**

No express exemption has been claimed, and none applies. In the Board’s response, its attorney, Donald Chang acknowledges that both the Board and Department of Consumer Affairs are subject to the APA.

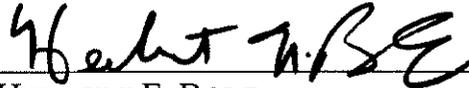
**B. DOES THE CHALLENGED POLICY DECISION FALL WITHIN ANY *GENERAL EXPRESS* APA EXEMPTION?**

Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.<sup>28</sup> The Board does not argue that a general express exception applies. Our independent research having disclosed none, we conclude that no general express APA exemption is applicable.

CONCLUSION

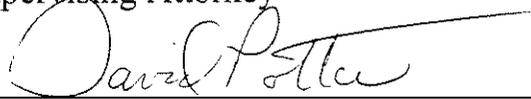
If the Board does not have a policy that precludes it from assisting consumers involved in contractual disputes with the Board's licensees, then OAL concludes that the letter alleged to be a "policy" is not a "regulation." If the Board has issued or utilized a general rule that provides the basis for denying assistance to consumers involved in disputes with its licensees when those disputes arise from interpretation of a contract, then the policy is a "regulation" subject to the APA.

DATE: October 8, 1999



HERBERT F. BOLZ

Supervising Attorney



DAVID POTTER

Senior Staff Counsel

Regulatory Determinations Unit

**Office of Administrative Law**

555 Capitol Mall, Suite 1290

Sacramento, California 95814

(916) 323-6225, CALNET 8-473-6225

Telecopier No. (916) 323-6826

Electronic mail: [staff@oal.ca.gov](mailto:staff@oal.ca.gov)

i:\9923.wpd

## ENDNOTES

1. This request for determination was originally received from James D. Jensen, 8550 Catalina Avenue, Whittier, CA 90605, (916) 327-1194, on September 24, 1998. The request was incomplete, but was supplemented by Mr. Jensen on or about October 13, 1998, and accepted by OAL on October 29, 1998. The agency response, dated July 16, 1999, was submitted by Donald Chang, Legal Counsel for the Structural Pest Control Board, Department of Consumer Affairs Legal Office, 400 R Street, Suite 3090, Sacramento, CA 95814 (916) 445-4216.
2. This determination may be cited as “**1999 OAL Determination No. 23.**”
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. Government Code section 11342, subdivision (a).
8. 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).

9. Government Code section 11346; Title 1, CCR, section 121 (a)(2).
10. (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*.

11. 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.

12. (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.

13. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.
14. *Id.*
15. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
16. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.
17. (1993) 12 Cal.App.4th 697, 702, 16 Cal. Rptr.2d 25, 28.
18. *Id.*
19. Attempted assignment to Gaston Termite and Pest Control.
20. Agency response, p. 7.
21. Request for determination dated September 19, 1998, page 2.
22. Mr. Jensen, in his writings to the Board, and OAL, has argued that the he did not breach the pest control agreement, and that Cal Western's cancellation of the agreement was improper. The Board determined that Cal Western's cancellation was based upon the claim that necessary control services had not been performed on the property. The performance of such services was identified as a condition under the contract. Mr. Jensen has produced evidence to show that all conditions had been fulfilled. He has attempted to show that the cancellation was a violation of the agreement, and as such, a matter appropriate for further action by the Board. In response to these concerns, OAL emphasizes that it has no authority to review the correctness of Board decisions involving the investigation of complaints. Our review authority is limited to making a determination of whether the Board violated the APA's prohibition against issuing, using, and enforcing underground regulations.
23. Business and Professions Code section 8500 et seq.
24. Government Code section 11346.
25. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.
26. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.
27. 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).
28. 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).)