STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re:	)	
Request for Regulatory	)	**2000 OAL Determination No. 1**
Determination filed by ED	)	
KUWATCH concerning a form	)	**Docket No. 99-003**
letter revising an existing	)	
provision in the "Driver	)	**January 13, 2000**
Safety Manual" issued by the	)	
DEPARTMENT OF MOTOR	)	**Determination pursuant to**
VEHICLES[1]	)	**Government Code Section 11340.5;**
_____	)	**Title 1, California Code of**
		Regulations, Chapter 1, Article 2

Determination by: **CHARLENE G. MATHIAS, Deputy Director**

HERBERT F. BOLZ, Supervising Attorney
CRAIG TARPENNING, Senior Counsel
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law concludes that the following Department of Motor Vehicles policy is valid because it merely restates existing law: that the Department is only required to grant a hearing to those who face license suspension following an arrest for drunk driving if the hearing request is made within 10 days. However, the related policy of only granting requests for late hearings if such requests are written and provide good cause is a "regulation" which is invalid because it should have been, but was not, adopted pursuant to the Administrative Procedure Act.

DECISION [2, 3, 4, 5, 6]

The Office of Administrative Law ("OAL") has been requested to determine whether a form letter issued by the Department of Motor Vehicles (which contains provisions which differ from existing language in the Department's "Driver Safety Manual") contains "regulations" which must be adopted pursuant to the Administrative Procedure Act ("APA").

The Legislature in 1989 enacted a new statutory scheme intended to quickly suspend the driving privilege of persons arrested for drunk driving who have a blood alcohol concentration of 0.08% or more, or who refuse a chemical test. To implement this legislation, the Department informally added a provision to its Driver Safety Manual providing that a driver arrested for a drunk driving violation has 30 days after receipt of an Administrative Per Se ("APS") suspension/revocation order to request a hearing to contest the action and that after 30 days a hearing will be granted only for good cause. The challenged rule is contained in a subsequent form letter issued by the Department in December of 1998 which provides that ". . . requests for an administrative hearing, must be made within ten (10) days after receipt of the APS order by the driver. . ." but that ". . .the department will continue to accept and to grant any written requests for late administrative hearings from drivers who provide good cause to support such a decision."

OAL has concluded that :

(1) To the extent that the challenged rule requires that requests for an administrative hearing must be made within 10 days after receipt of an APS suspension/revocation order, but that the Department will continue to accept, and may grant, late requests, the challenged rule is merely a restatement of existing law and is not a "regulation."

(2) To the extent the challenged rule specifies that the Department will only grant a hearing for late requests which are "written" and "provide good cause," the challenged rule contains "regulations."

DISCUSSION

I. AGENCY; REQUEST FOR DETERMINATION

The California Department of Motor Vehicles was created in 1931.[7] It is responsible for protecting the public interest and promoting public safety on the state's roads and highways. It also administers and enforces California Vehicle Code provisions concerning the granting, denying, suspending or revoking of drivers' licenses.[8]

In 1989 the legislature passed SB 1623,[9] a comprehensive statutory scheme designed to institute the practice of quickly suspending the driving privileges of persons arrested for drunk driving who have a blood alcohol concentration of 0.08% or more, or who refuse a chemical test. These initial enactments were later amended in 1990 by SB 1150.[10] The statutory scheme provides for the issuance and service on such drivers of an immediate notice of a driving privilege suspension by the arresting officer at the time of arrest. If a hearing is not requested by the driver, the suspension takes effect 30 days after the arrest.[11]

Following these enactments, the Department informally adopted a policy which provided an absolute right to an administrative hearing when a driver requested one within 30 days of receipt of a suspension or revocation order.[12] This policy is reflected in a provision contained in the Department's "Driver Safety Manual."[13] This manual is not part of the California Code of Regulations and has not been adopted pursuant to the APA.[14]

In December of 1998, the Department mailed a letter to attorneys who regularly represent drivers at such hearings announcing a change in policy shortening this period to 10 days.[15] On January 4, 1999, Ed Kuwatch ("requester") submitted this request for determination as to whether this change in policy is a "regulation" that should have been adopted pursuant to the Administrative Procedure Act ("APA"). In a follow up letter dated August 4, 1999, the requester asked that OAL *not* concern itself about whether the preexisting policy of a 30 day time limit was an invalid underground rule, but rather declare the new 10 day time limit to be invalid and allow the time limit revert back to the 30 day limit expressed in the Driver Safety Manual.[16]

II. 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." [Emphasis added.]

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."[17] 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.

In fact, Vehicle Code section 1651 provides:

> "The director [of the Department of Motor Vehicles] may adopt and enforce rules and regulations as may be necessary to carry out the provisions of this [Vehicle] code relating to the department."
>
> "Rules and regulations shall be adopted, amended, or repealed *in accordance with the [APA] . . . .*" [Emphasis added.]

OAL, therefore, concludes that APA rulemaking requirements generally apply to the Department.[18]

III. DOES THE CHALLENGED RULE 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*,[19] the California Court of Appeal upheld OAL's two-part test[20] 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*
- 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, we are 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.*[21] [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. . . ."[22] 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. . . ."[23]

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)[24] 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.[25] 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.]"[26]

A. DOES THE CHALLENGED RULE CONSTITUTE A "STANDARD 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.[27]

The challenged form letter was mailed to attorneys who regularly represent drivers at Administrative Per Se ("APS") hearings.[28] As introduced in the form letter, the challenged rule applies to ". . . driver[s] arrested for a DUI violation and issued an APS Order of Suspension/Revocation/Temporary Endorsement by the arresting officer. . . ."[29] It applies to all drivers in the described class and, therefore, is a standard of general application.

Having concluded that the challenged rule is a standard of general application, OAL must consider whether the challenged rule meets the second prong of the two-part test.

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

The Department states that the challenged rule in the form letter attacked by the requester does not implement, interpret, or make specific the law administered by the Department, but rather merely restates it:

> "The Request for Determination claims that the Department, in a letter issued to members of the defense bar in December of 1998, announced a new rule that should be considered as a regulation, and therefore be stricken as not approved according to relevant statutes. The . . . Department has not announced a new 'rule' or has not 'amended' any existing rule. Sections 13558, 14100, 14101, and 14103 are existing statutes. Restating such statutes or paraphrasing them in a letter in order to provide a notice of a form revision is not a rule, regulation, order, or standard adopted by the Department to implement, interpret, or make specific the law administered by it. Therefore, such content of the form letter at issue should not be declared to be a regulation pursuant to Government Code section 11342, subdivision (g)."[30]

In 1989,[31] OAL, in addressing a similar argument, explained:

> "In general, if the agency does not add to, interpret, or modify the statute, it may legally inform interested parties in writing of the statute and 'its application.' Such an enactment is simply 'administrative' in nature, rather than 'quasi-judicial' or 'quasi-legislative.' If, however, the agency makes new law, i.e., supplements or 'interprets' a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power."

Citing an earlier OAL Determination, OAL went on to explain:

> "If a rule simply applies an *existing* constitutional, statutory or regulatory requirement that has only *one* legally tenable 'interpretation,' that rule is not quasi-legislative in nature—no new 'law' is thereby created."[32] [Emphasis added.]

The issue is whether the challenged rule merely restates existing law.

In 1987, OAL determined that the "Driver Safety Manual" is not a "regulation" as defined in the APA and is not subject to the requirements of the APA insofar as it reiterates existing statutes, regulations, or case law.[33] However, OAL also determined that provisions of the "Driver Safety Manual" which establish rules and procedures that implement, interpret, or make specific existing statutes, regulations, or case law are "regulations" as defined in the APA and are invalid unless adopted as regulations in accordance with the APA.[34]

Sections 13353 and 13353.2 of the Vehicle Code provide for the suspension of driving privileges of persons arrested for drunk driving who have a blood alcohol concentration of 0.08% or more, or who refuse a chemical test. Section 13558 of the Vehicle Code provides in part:

> "(a) *Any person, who has received a notice of an order of suspension or revocation of the person's privilege to operate a motor vehicle* pursuant to Section 13353, 13353.1, 13353.2, 13388, 23612, or 13382 or a notice pursuant to Section 13557, *may request a hearing on the matter pursuant to Article 3 (commencing with Section 14100) of Chapter 3,* except as otherwise provided in this section."

"(b) If the person wishes to have a hearing before the effective date of the order of suspension or revocation, the request for a hearing shall be made within 10 days of the receipt of the notice of the order of suspension or revocation. . . ." (Emphasis added.)

Section 14100 of the Vehicle Code provides in part:

"(a) Whenever the department has given notice, or has taken or proposes to take action under Section 13353, 13353.2, 13950, 13951, 13952, or 13953, *the person receiving the notice or subject to the action may, within 10 days, demand a hearing which shall be granted, except as provided in Section 14101*."

. . .

"(c) The fact that a person has the right to request an administrative hearing within 10 days after receipt of the notice of the order of suspension under this section and Section 16070, and that the request is required to be made within 10 days in order to receive a determination prior to the effective date of the suspension shall be made prominent on the notice. . . ." (Emphasis added.)

Section 14101 of the Vehicle Code provides:

" *A person is not entitled to a hearing* in either of the following cases:

(a) If the action by the department is made mandatory by this code.

(b) *If the person has previously been given an opportunity with appropriate notice for a hearing and failed to request a hearing within the time specified by law*." (Emphasis added.)

Section 14103 of the Vehicle Code provides:

"*Failure to respond to a notice given under this chapter within 10 days is a waiver of the right to a hearing*, and *the department may* take action without a hearing or may, upon request of the person whose privilege of driving is in question, or at its own option**,** reopen the question, take evidence, change,

> or set aside any order previously made, or *grant a hearing*." (Emphasis added.)

It is clear from the foregoing statutes that a person who has received a notice of an order of suspension in this regard shall be granted a hearing, and that hearing shall be held before the effective date of the order of suspension, if the person requests a hearing within 10 days of receipt of the notice of suspension. Vehicle Code section 14103 also makes it clear that failure to make such a request within the 10 day period constitutes a waiver of the right to a hearing and that the Department has complete discretion as to whether to grant a hearing if the request is made after the 10 day period has expired.

The challenged rule in the form letter issued by the Department provides in part:

> ". . . requests for an administrative hearing, must be made within ten (10) days after receipt of the APS order by the driver. . . ."
>
> ". . . the department will continue to accept and grant any written requests for late administrative hearings from drivers who provide good cause to support such a decision. . . ."

For the most part, the challenged rule is merely a restatement of provisions contained in the Vehicle Code sections cited above. Although the challenged rule requires that requests for an administrative hearing must be made within 10 days after receipt of the APS order, it also provides that the department will continue to accept, and may grant, late requests for such hearings. To this extent, the challenged rule is no different from the existing law provided in sections 13358, 14100, 14101 and 14103 of the Vehicle Code. However, to the extent the challenged rule specifies that the Department will only grant a hearing for late requests which are "written" and "provide good cause," the challenged rule is not restating provisions in the foregoing statutes. These limitations make specific the more general language in section 14103 of the Vehicle Code and thus are "regulations."

IV. DOES THE CHALLENGED RULE 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.[35] In *United Systems of*

Arkansas v. Stamison (1998),[36] 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.]"[37]

Express statutory APA exemptions may be divided into two categories: special and general.[38] *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 a *general* express 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 RULE 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. DOES THE CHALLENGED RULE 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.[39] Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.[40] The challenged rules do not fall within any general express statutory exemption from the APA.

CONCLUSION

(1) To the extent that the challenged rule requires that requests for an administrative hearing must be made within 10 days after receipt of an APS suspension/revocation order, but that the Department will continue to accept, and may grant, late requests, the challenged rule is merely a restatement of existing law and is not a "regulation."

(2) To the extent the challenged rule specifies that the Department will only grant a hearing for late requests which are "written" and "provide good cause," the challenged rule contains "regulations."

DATE: January 12, 2000

HERBERT F. BOLZ
Supervising Attorney

CRAIG S. TARPENNING
Senior Counsel

Regulatory Determinations Program
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

ENDNOTES

1. This request for determination was filed by Ed Kuwatch, Attorney at Law, 1325 Hilltop Drive, Willits, CA 95490. The agency was represented by Marilyn Schaff, Deputy Director/Chief Counsel, Department of Motor Vehicles, 2415 First Avenue, Sacramento, CA 95814.

2. This determination may be cited as "**2000 OAL Determination No. 1.**"

   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.

3. 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.

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 and 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 l996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (l996) 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* (l990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer.*

6. *OAL Determinations Entitled to Great Weight in Court*

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, disapproved on other grounds in *Tidewater*. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL 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. The *Grier* court concurred with OAL's conclusion, stating that:

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted for its consideration in the case, the court further 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* (l990) 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).

7. Stats. 1931, c. 478, sec. 1.

8. See Division 6 (Drivers' Licenses), sections 12500-15028 of the Vehicle Code.

9. Stats. 1989, Chap. 1460, operative July 1, 1990.

10. Stats. 1990, Chap. 431, operative July 26, 1990.

11. Request for determination, p. 1.

12. Agency response, p. 1.

13 Request for determination, Exhibit "C."

14. **1987 OAL Determination No. 17** (Department of Motor Vehicles, December 18, 1987, Docket No. 87-006), CRNR 88, No. 1-Z, January 1, 1988, p. 88.

15. Agency response, p. 2.

16. Letter from Ed Kuwatch to Herbert F. Bolz, Office of Administrative Law, dated August 4, 1999, p. 3.

17. Government Code section 11342, subdivision (a).

18. The APA would apply anyway. 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).

19. (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* (l996) 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* (l997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (l973) 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* (l997) 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.*

20. 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, l996, p. 292.

21. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (l998) 63 Cal.App.4th 1001,1010, 74 Cal.Rptr.2d 407, 412, review denied.

22. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.

23. *Id.*

24. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.

25. *Id.*

26. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

27. *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).

28. Request for determination, page 3; Agency response, page 2.

29. Request for determination, Exhibit "D".

30. Agency response, page 5.

31. **1989 OAL Determination No. 15** (Department of Fair Employment and Housing, October 10, 1989, Docket No. 89-002), CRNR 89, No. 42-Z, October 20, 1989, p. 3029, 3031.

32. **1986 OAL Determination No. 4** (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-15, typewritten version, p. 12.

33. **1987 OAL Determination No. 17** (Department of Motor Vehicles, December 18, 1987, Docket No. 87-006), CRNR 88, No. 1-Z, January 1, 1988, p. 88.

34. **1987 OAL Determination No. 17** (Department of Motor Vehicles, December 18, 1987, Docket No. 87-006), CRNR 88, No. 1-Z, January 1, 1988, p. 88.

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* (l981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself).

39. Government Code section 11346.

40. 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.