STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

In re:	)	
	)	DECISION OF DISAPPROVAL
CONTRACTORS STATE LICENSE BOARD	)	OF REGULATORY ACTION
	)	
REGULATORY ACTION:	)	(Gov. Code, sec. 11349.3)
	)	
Title 16, California Code of Regulations	)	OAL File No. 00-1127-03 S
ADOPT SECTIONS: 895, 895.1, 895.2, 895.3, 895.4, 895.5, 895.6, 895.7, 895.8, 895.9	)	

DECISION SUMMARY

This regulatory action sets out requirements and procedures for the industry expert program which allows the Contractors State License Board ("Board" or "CSLB") to contract with licensed professionals for the site investigation of consumer complaints. On January 10, 2001, the Office of Administrative Law ("OAL") notified the Board that OAL had disapproved the regulatory action because it did not comply with the "consistency," "clarity" and "necessity" standards contained in Government Code section 11349.1.

BACKGROUND

The Initial Statement of Reasons explains that

> "Section 7019 of the Business and Professions Code authorizes the Contractors State License Board (CSLB) to contract with licensed professionals for the site investigation of consumer complaints.

> Senate Bill 857, Chapter 812, Statutes of 1997, enacted as Business and Professions Code section 7019.1, directs the CSLB to create administrative regulations concerning the reporting requirements of industry experts. These [proposed] regulations will address the legislative directive given in Business and Professions Code section 7019.1 which is scheduled to become inoperative on July 1, 2000. A review of the entire industry expert program indicated that regulations were needed to increase state-wide uniformity in the CSLB governance of the industry expert program."

Specifically, Section 11 of SB 857, chapter 812 of Statutes of 1997, provides:

> "The Contractors' State License Board shall, before January 1, 1999, consult with representatives of the industry it regulates, with consumer groups, and with other parties that have demonstrated an interest in the operation of the program of licensing contractors, and evolve in conjunction with those discussions, a potential administrative regulation or regulations that the board believes would best serve the interests of the public, and the affected parties for the *definition, administration, governance, and implementation of a program such as that provided in Section 7019.1 of the Business and Professions Code*, as that program might be continued after July 1, 2000." (Emphasis added.)

All references to "sections" in this decision refer to the proposed sections for Title 16 of the California Code of Regulations ("CCR") unless otherwise noted.

A. CONSISTENCY

Government Code section 11349.1, subdivision (a)(d), requires that OAL review all regulations for compliance with the "consistency" standard. Government Code section 11349, subdivision (d) defines "consistency" to mean " . . . being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."

The Board has failed to comply with the Permit Reform Act of 1981 (Government Code sections 15374-15378), which requires that all state agencies who issue permits specify identified criteria by regulation.

Government Code section 15375(a) defines a “permit” as “. . . any license, certificate, registration, permit, or any other form of authorization required by a state agency to engage in a particular activity or act.”

Section 895.2 states that the Board may continuously accept applications for experts to be included in the industry expert program. Section 895.3 sets out the qualifications which an applicant must meet in order to qualify for the program. When an expert on the list is chosen, performs an inspection, and expresses an opinion, the Board compensates him or her for the time and expertise provided. Experts must apply and meet the Board’s requirements and obtain the authorization of the Board in order to engage in these inspections. Thus, the Permit Reform Act applies to this procedure.

Government Code section 15374 requires that the agency specify:

> “(a) A period dating from the receipt of a permit application within which the agency must either inform the applicant, in writing, that the application is complete and accepted for filing, or that the application is deficient and what specific information is required.
> (b) A period dating from the filing of a completed application within which the agency must reach a permit decision.
> (c) The agency's median, minimum, and maximum times for processing a permit, from the receipt of the initial application to the final permit decision, based on the agency's actual performance during the two years immediately preceding the proposal of the regulation.”

The Board has failed to satisfy the requirements of the Permit Reform Act. Please note that when the Board makes the required changes to conform with the Act, adding time periods to the text and material to the record, it must also comply with the requirements of Government Code sections 11346.8 and 11347.1 and section 44, Title 1, CCR, regarding making related, substantial text changes and additional documents available to the public for comment.

B. CLARITY

Government Code section 11349.1, subdivision (a)(3) requires that OAL review all regulations for compliance with the “clarity” standard. Government Code section

11349, subdivision (c) defines "clarity" to mean ". . . written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them."

Section 16 of Title 1 of the CCR declares as follows:

> "In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:
> (a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:
> (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
> (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or
> (3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
> (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
> (5) the regulation presents information in a format that is not readily understandable by persons "directly affected;" or
> (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.
> (b) Persons shall be presumed to be "directly affected" if they:
> (1) are legally required to comply with the regulation; or
> (2) are legally required to enforce the regulation; or
> (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
> (4) incur from the enforcement of the regulation a detriment that is not common to the public in general."

1. Section 895 defines an "industry expert" as a "licensed professional as described in Section 7019 of the [Business and Professions] Code who offers his or her services to the Registrar as a consultant. Business and Professions Code section 7019(b) defines "licensed professionals" as meaning, but not limited to, "engineers, architects, landscape architects, and geologists licensed, certificated, or registered pursuant to this division." The regulations as a whole indicate that the program will rely both on

the types of professionals described specifically in the statute, who are licensed by other entities, and on qualified contractors, licensed by the Board. It is unclear whether the definition is trying to capture the idea that an "industry expert" is a licensed professional who has been accepted into the program to act as an expert, or is merely a professional who holds an appropriate license and is *eligible* to apply to be included on a list of qualified experts.

Several sections use the phrase "licensed professionals" rather than the defined term "industry expert," and it is not clear if the Board is making an intentional distinction. For example, the first sentence of section 895.2 refers to applications of "licensed professionals," which suggests that perhaps they don't become "industry experts" until the Board accepts their applications and places them on a list. The phrase "who offers" his or her services to the Registrar as a consultant" does not necessarily indicate whether it is someone who applies to be or someone who has applied and been accepted to be on the expert list.

Section 895.3 is entitled "Industry Expert Qualifications." Subdivision (a) provides that:

> "Each *industry expert* must be eligible to be qualified as an expert witness pursuant to Evidence Code section720." (Emphasis added.)

But subdivision (b), which contains seven more qualifications, states:

> "Each *licensed contractor acting as an industry expert* shall meet the following minimum qualification: . . . " (Emphasis added.)

Does the Board mean that all the additional minimum qualifications apply only to licensed contractors, and that other professionals, such as architects and engineers, are not required to hold a license, be able to communicate effectively, or complete the Board's training course? As written, the proposed regulation limits the additional minimum requirements to licensed contractors

only. In contrast to the limitation of the introductory language at subdivision (b), subdivision (b)1. seems to refer to all the licensed professionals of Business and Professions Code section 7019(b) which clearly includes architects, landscape architects, and so on.

Subdivision (c) permits the Board to temporarily waive the training requirement, but states that if "the industry expert continues in the program, the expert must be assigned" to training. This requirement appears inconsistent with subdivision (b) which only applies the training requirement to "licensed contractors acting as industry experts," but not any other kind of licensed professional who has met subdivision (a) and qualified to be an industry expert.

It is also unclear whether the term "be assigned" indicates any more formal process than simply a requirement that the expert be required to "attend" the next training.

2. Section 895.2, as discussed above under Consistency, is unclear as well as inconsistent with the Permit Reform Act. It indirectly sets out an application requirement but nowhere specifies the application procedure or any of the time lines for the application process. It also raises the question as to whether the Board requires a particular application form. If the Board does have a form and additional specific requirements or time lines beyond those required by the Permit Reform Act, it should make them explicit in the regulation.

3. Section 985.4 sets out two sets of conditions under which an expert "shall" or "may" be disqualified, but does not indicate what process is involved, what notification it will give the expert, whether the expert has the opportunity to rebut a proposed disqualification, or present mitigating factors to consider if the condition which occurred is one of the permissive rather than a mandatory one. If the Board has particular factors in mind which would determine when the potentially disqualifying factors would indeed disqualify an expert, it should add them to Section 895.4(b) to make clear under what circumstances in addition to the listed ones (at (b)1.-4.), the Board "may" (or may not) remove an expert from the list.

4. Section 895.4(a)3. should specify which project the financial interest is in, parallel to subdivision (a)2. which specifies "any work that is the subject of his or her inspection." Is there a difference between the "project" (in 3.) and the "work" (in 2.)?

5. Section 895.4(b)3. is unclear but probably means that the expert will be disqualified if, unless he or she is subject to a subpoena, the expert provides any information as specified without the approval of the Registrar. The sentence should be rewritten to make this permissive disqualification clear. Must the approval be written, or is any form acceptable?

6. Section 895.5 states that the Registrar will "intermittently conduct regional training sessions to ensure the availability of a pool of qualified industry experts." The Board should clarify at least an upper limit of the amount of training it requires. In a telephone conversation, the Board's contact person suggested that eight hours might be the maximum. As noted above, the Board should take note of the requirements of section 44, Title 1, CCR and Government Code sections 11346.8 and 11347.1 when it makes changes to the text and the record.

7. Section 895.6(b) states "[u]pon request by either party involved in an arbitration proceeding, the Registrar may appoint one industry expert, pursuant to Section 7085 et seq. [sic] of the Code. It is unclear what section 7085 refers to, unless it is the word "arbitration" in the first phrase ("upon request…". It does not shed any light on what variable circumstances the Registrar will consider when determining whether to appoint an industry expert after a party has requested an appointment.

8. Section 985.7 apparently addresses the requirement of Business and Professions Code section 7019(a) (last sentence) which states that "all reports shall be completed on a form prescribed by the registrar." The section does not identify a required form, if there is one, but sets out what must be in the report. Subdivision (a) reflects what must be in a report prepared by an industry expert "appointed for his or her expertise as a licensed contractor." Subdivision (c) sets out the requirements for a report of an

industry expert who is not a licensed contractor. Subdivision (c) makes no reference to the site investigation or inspection which appears to be the heart of Business and Professions Code section 7019. In contrast to subdivision (a), it requires only a "statement of the expert's opinion including the matter upon which his or her opinion is based and the reasons for his or her opinion." It is unclear what the expert is supposed to base this opinion on, and almost appears inconsistent with Business and Professions Code section 4019 which permits a site investigation under appropriate circumstances.

Subdivision (b) begins: "If one or more complaint item is identified as a problem . . . , the report shall also include but not be limited to: . . . . " Does subdivision (b) apply to the reports of both types of experts or just to the experts engaged because of their expertise as licensed contractors? Also, subdivision (a)5. requires a "list of the complaint items identified by the investigating deputy . . . " but there is no parallel section in (c). Does that mean that the "problems" referenced in subdivision (b) apply only to (a)?

Finally, subdivision (d) permits a waiver of "any of the report requirements" without specifying what circumstances or conditions might support a waiver. Subdivision (d) also does not suggest whether there is any procedure for this waiver, or what rights a complainant or licensee might have to ask for or obtain a full report even if the other party is willing to waive some of the required contents.

9. Section 895.8(a) states that a report "may not be released" until the Registrar has determined that it is accurate and complete, and that it meets one of several specified conditions. The provision also allows but does not require the Registrar to disclose "relevant contents of the report" to the licensee fro rebuttal. Subdivision (b) states in part that

> "Upon a determination by the Registrar that the conditions of release are met, the Registrar shall, upon request, furnish a copy of the report to the complainant and the licensee against whom the complaint was made."

If the Registrar has not chosen to release information to the licensee before the report was complete and ready for release, how would the licensee know to request a copy of the completed report? Perhaps there should be a notification provision in this section. On the other hand, if there is an additional process during which the licensee receives notices that the expert is going out to make a site investigation, perhaps that procedure should be in the regulations.

10. Clarity of display: Throughout the regulation sections, the Board uses different styles for the subsections. For example, the first few sections use "(a)," "(b)," and so on, enclosing the letters in parentheses, but then in section 895.4, the style reverts to a single parenthesis ("a)"). In addition, several sections such as 895.3 indicate the level below "(a)" as "1." Rather than "(1)" and so on, unlike the existing Board regulations in Title 16.

C. NECESSITY

Government Code section 11349.1, subdivision (a)(1) requires that OAL review all regulations for compliance with the "necessity" standard. Government Code section 11349, subdivision (a) defines "necessity" to mean that "...the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation. . . ." In order to demonstrate by "substantial evidence" the need for a regulatory provision, information must be present which explains why each regulatory provision is needed to carry out the described purpose of the regulatory provision. When the explanation is based on policies, conclusions, speculation, or conjecture, the rulemaking record must include supporting facts, studies, expert opinion, or other information. (Cal. Code Regs., tit. 1, sec. 10.)

1. The rulemaking record does not contain any detailed or specific necessity for any of the proposed regulations, although the record does demonstrate the need for regulations generally regarding the industry expert program. The record must also demonstrate why each regulatory provision is necessary to carry out the purpose of the regulatory provision. In fact, a more complete description of the rationale for the particular aspects of the proposed regulations might have answered some of the

clarity issues which arose in the absence of any explanation (such as the distinctions between the reports of licensed contractors and others or the report release provisions.

2. An additional necessity concern is that the Initial Statement of Reasons (ISOR) referred to

"Underlying Data:

"Reports from the Attorney General's Office regarding the efficacy of the experts and the experts' reports at hearing as well as inconsistencies by region and by district concerning the expert's role in the investigatory process indicated the program differed in its implementation state-wide."

If there were reports, interviews, or other studies regarding these observations, those items should have been part of the rulemaking record. If there were no reports, then this description should have made that clear.

3. In the Final Statement of Reasons (FSOR), the Board tried to add some of the basis for each regulatory provision but still failed to provide the rationale for each provision, instead simply describing what each proposed provision does. The Board must provide in the record its explanation as to "why each regulatory provision is needed to carry out the described purpose of the regulatory provision."

D. OTHER OBSERVATIONS

OAL must review rulemaking records submitted to it in order to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code, sec. 11349.1, subd. (a).) In the course of the review, we noted several minor items which would not have resulted in disapproval but which should be resolved when the Board resubmits this regulatory filing.

1. The Form 400 lacked the subject of the regulations in B.1. Also, the Board requested an early effective date ("effective on filing") but failed

to include a written request demonstrating good cause for an earlier effective date in the record. Government Code 11343.4(d).

2. Several provisions use the phrase "et seq." which should have a period after "seq." as it is an abbreviation.
3. As the Board pointed out in the ISOR and as quoted above, Business and Professions Code section 7019.1 is no longer in effect. Therefore the Board should not cite it as a reference (for example, see sections 895.7, 895.8, and 895.9).
4. It is not clear why the Board does not consider licensed contractors and most other licensed professionals (architects and landscape architects are exempt from the small business analysis as defined by Government Code section 11342.610(b)) to be small businesses under appropriate circumstances, but the Board made such a finding. Please note for future compliance that the plain English and small business finding requirements have been revised. See revised section 4, Title 1, CCR
5. Government Code section 11346.9, subdivision (a)(3) requires that the FSOR includes:

> "A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action."

The FSOR had a very impressive system for identifying and organizing a large number of detailed public comments and responses.

When the Board revises some of the regulatory provisions to reflect the issues raised above, it should revise and update its responses to the comments as well, if appropriate.

CONCLUSION

For the reasons set forth above, OAL has disapproved the proposed adoption of sections 895 through 895.9 of Title 16 of the California Code of Regulations. If you have any questions, please contact me at (916) 323-6805.

January 17, 2001

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