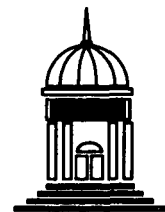


# Office of Administrative Law

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**T**he Office of Administrative Law (OAL) was established in Government Code section 11340 *et seq.* on July 1, 1980, as part of major and unprecedented amendments to the Administrative Procedure Act (APA) made by AB 1111 (McCarthy) (Chapter 567, Statutes of 1979). OAL is charged with the orderly and systematic review of the proposed regulations and regulatory changes of most California agencies against six statutory standards: authority, necessity, consistency, clarity, reference, and nonduplication. The goal of OAL's review is to "reduce the number of administrative regulations and to improve the quality of those regulations which are adopted" (Government Code section 11340.1). OAL is authorized to disapprove or repeal any regulation that, in its determination, does not meet all six standards, or where the adopting agency has not complied with the procedural rulemaking requirements of the APA. OAL is also authorized to review emergency regulations and disapprove those that are not necessary for "the immediate preservation of the public peace, health and safety, or general welfare..." (Government Code section 11349.6).

Under Government Code section 11340.5, OAL is authorized to issue so-called "regulatory determinations" as to whether state agency "underground rules"—which have not been adopted in accordance with the APA rulemaking process—are regulatory in nature and thus legally enforceable only if adopted pursuant to APA requirements. In regulatory determinations, OAL analyzes: (1) whether the agency accused of issuing or enforcing "underground regulations" is subject to the APA; (2) if so, whether the challenged policies are regulatory in nature and are "standards of general application" under Government Code section 11340.5(a); (3) if so, whether the challenged policies implement, interpret, or make specific the law enforced or administered by the agency or govern its procedure, such that they are "regulations" under the APA; and (4) if so, whether the challenged policies are statutorily exempt from the APA's rulemaking requirements.

The regulations of most California agencies are published in the California Code of Regulations (CCR), which OAL is responsible for preparing and maintaining. OAL also publishes the weekly *California Regulatory Notice Register*, which contains agency notices of proposed rulemaking, rulemaking petition decisions, OAL disapproval decisions, regulatory determinations, and other notices of general interest.

The OAL Director is appointed by the Governor and must be confirmed by the Senate. At this writing, OAL has been

functioning without a director since January 1999, when Governor Davis withdrew Governor Wilson's appointment of Edward Heidig before the Senate could confirm it. On January 28, 2000, Governor Gray Davis appointed David B. Judson as deputy director and chief counsel for OAL. From 1990–2000, Judson was deputy legislative counsel for the Office of Legislative Counsel. He served as a deputy attorney general from 1978 to 1990, and as staff counsel for the California State Lands Commission from 1973 to 1978.

## MAJOR PROJECTS

### OAL Seeks to Modify Regulatory Determination Procedure

On February 23, 2001, OAL published notice of its intent to amend sections 121 through 128 and adopt Form 1013, Title 1 of the CCR. The regulatory action would revise OAL's provisions concerning regulatory determinations. OAL proposes to adopt a form to be used by persons wishing to request that OAL determine whether a state agency has engaged in underground rulemaking. Form 1013, "Request for Determination," would require

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the following information: name, address, telephone number, fax number, and email address of the requester; name of the involved state agency; and either a copy of the written rule or a copy of the document created by the agency that articulates or describes the rule being challenged. The form would state that OAL will not accept a request for determination of an alleged rule that cannot be documented with written evidence that comes from the agency.

Form 1013 would require the requester to attach all written information or evidence regarding the rule. It would also require the requester to state whether the issue has been brought to the attention of the head of the state agency involved. If so, the requester must also attach copies of any written communications. The requester must sign a statement on the form, under penalty of perjury, affirming the requester's belief that all the information submitted is true and correct.

Section 123 requires OAL, within five working days after the date of receipt of a request for determination, to transmit a written notification of receipt to the requester. OAL proposes to replace this provision with a requirement that OAL notify the requester within 30 calendar days whether Form 1013 is "complete and has been accepted for filing."

Under the proposal, OAL will not accept any request for determination if the challenged rule: (1) has been superseded;

(2) has expired by its own terms; (3) has been declared by the agency to have been rescinded or no longer in effect; (4) has been nullified by a final court judgment; (5) is contained in a duly adopted regulation; (6) is contained in a statute; (7) is clearly within the scope of an express statutory exemption from the APA; or (8) is the same, or is substantially the same, as a rule from the same state agency on which OAL has already issued a determination.

The proposal would delete the concept of "active consideration" that is currently found in sections 123 and 124 and that defines the point at which OAL begins its 75-day schedule for completing a determination. The schedule itself is retained in the proposal, but its initiation would instead be triggered "as soon as program resources permit" OAL to begin work on the determination; to signal that the timeline has begun, OAL will publish a summary of the request in the *California Regulatory Notice Register* and send a notice to both the requester and the agency.

The proposed action would also make changes to the process by which OAL accepts comments concerning regulatory determinations. The amendment to section 124 would require the published summary of the request to include comment submission requirements along with the deadline for submission. It would delete the existing requirement that a commenter be an "interested" person. Commenters would be required to send copies of their comments to the requester. The proposal would permit OAL to request and consider supplemental information from a commenter.

OAL held a hearing on the matter on April 10, 2001 and, at this writing, is in the process of revising the proposal to address the comments received at that hearing. Upon completion of that revision process, OAL will release the new version of the rulemaking proposal for an additional 15-day period.

## Regulatory Determinations

Following is a summary of regulatory determinations issued by OAL between November 1, 1999 and April 30, 2001.

◆ **1999 OAL Determination No. 26, Docket No. 98-011 (November 3, 1999).** This request for determination, submitted to OAL on November 2, 1998 by the California Taxpayers' Association, questioned whether eight sales and use tax annotations contained in the Business Taxes Law Guide issued by the State Board of Equalization (BOE) are "regulations" that must be adopted pursuant to the APA to be valid. BOE publishes and utilizes sales and use tax annotations as a guide to the application of sales and use tax statutes and regulations to specific transactions. At the outset, OAL established that, because the APA generally applies to all state agencies in the executive branch, its rulemaking requirements are applicable to BOE.

Next, OAL analyzed each of the eight annotations to determine whether they should be considered regulations. The first test of this analysis is whether the challenged provision is either "a rule or standard of general application, or modification or supplement to such a rule." For example, the first

challenged annotation (195.2000) concerns the taxability of paint used in making labels. According to OAL, "[i]t is readily apparent that the codified regulation [section 1589, Title 18 of the CCR] operates generally to make labels exempt from sales and use tax. It is also clear that this section does not mention paint used to make labels on containers....Thus the annotation *interprets* the tax exemption for the sale of labels in a manner broad enough to include the sale of paint to be used for making a label. The annotation is therefore a 'regulation'" (emphasis original).

The next annotation (295.1740) states that sale of structural plans—including engineering fees, postage, labor and handling—is subject to sales tax. OAL found that the provision of the annotation concerning engineering fees is the only legally tenable interpretation of Revenue and Taxation Code section 6012 (such that it is not underground rulemaking), and that section 6012 also exempts "transportation" of structural plans from sales tax. By subjecting "postage" to sales tax, "[t]he annotation thus limits the tax exemption for transportation charges, indicating that it does not apply to postage paid for the shipment of structural plans to persons interested in building their own structures, even when such charges are separately stated. This portion of the annotation is therefore a 'regulation.'"

The third challenged annotation (190.2543) concerns the taxability of stolen construction materials, which is governed by section 1521, Title 18 of the CCR (entitled "Construction Contractors"). After analyzing the regulation and the annotation, OAL concluded that the annotation is a regulation because it interprets section 1521.

According to OAL, the fourth annotation (190.0777) is "designed to penetrate the smoke of a complex subcontracting arrangement between a road mix supplier and a road building contractor." OAL held that "if the annotation simply applies the statutory definition of 'retailer' to a set of facts and does not interpret, implement, or make specific Title 18 of the CCR, section 1521, then the challenged annotation is not a 'regulation.'" However, "if the rule of the annotation makes it necessary for road mix suppliers to collect sales tax on all sales of road mix to contractors, then the annotation would likely make it impossible for contractors to purchase road mix tax free and then act as retailers of road mix. If the annotation is interpreted in this manner, it has the effect of amending section 1521 by excluding contractors from the retailing of road mix, and is a 'regulation.' Without additional information concerning use of the annotation by the Board, it is impossible for OAL to completely resolve the question."

The fifth challenged annotation (110.1440) subjects to taxation the sale of fish to zoos and public aquariums as food for animal inhabitants. Section 1587, Title 18 of the CCR, provides that any form of animal life sold as food for human consumption is not taxed, nor is feed for food animals or non-food animals that are raised to be sold. However, tax does apply to retail sales of non-food animals. "Thus we see that section 1587 does not provide a clear answer to the question of whether sales

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of fish to aquariums and zoos for animal feed are taxable....By definitively resolving these questions, the annotation interprets section 1587 and is therefore a 'regulation.'"

Both the sixth (195.0360) and seventh (195.1480) challenged annotations deal with egg containers. "The limitation which denies tax exempt status when a container is first used for transporting eggs to processors, even if the container is later used in a tax exempt manner, is found neither in Revenue and Taxation Code section 6364...nor in section 1589 of Title 18 of the CCR. It interprets these laws by specifying the applicability of sales and use tax in a situation they do not address. Similarly, the rule on repurchase of containers and its 50 percent limitation are not contained in the applicable statutes or regulations properly adopted pursuant to the APA. The annotation is therefore an interpretation of law and a 'regulation.'"

The final challenged annotation (120.0660) concerns the taxability of electronic files transferred on computer disks. OAL noted the general rule that sales tax applies only to the sale of tangible property, not to services. Thus in computer programs, the taxability analysis usually focuses on whether the software is acquired by means of a tangible product, such as a disk, or through an intangible medium, such as an Internet download. OAL concluded that the annotation had "an effect different from the regulation, although it may be that we do not fully understand section 1502 [Title 18 of the CCR]. In any event, the...annotation interprets the confusing rules on the taxability of computer programs." Thus, OAL found the eighth annotation to be an underground regulation.

Finally, OAL considered whether the challenged annotations fall within the "legal rulings of counsel" exemption (Government Code section 11342(g)) to the APA's rulemaking requirements. OAL concluded that the annotations lack the indicia of legal rulings of counsel. "The requester has noted, and the Board has not disagreed, that all the challenged annotations lack legal analysis, that some are not supported by documentation identifying the context in which they were issued, and at least one was not prepared by an attorney. The Board is in the process of adopting a regulation to specify the necessary elements in a legal ruling of counsel. In its reply, the Board acknowledges that the annotations do not contain all of the elements that would be required under the proposed regulation. The Board is in the process of deleting all eight of the challenged annotations from the Business Taxes Law Guide."

◆ **1999 OAL Determination No. 27, Docket No. 99-001 (November 30, 1999).** Requester Carl D. McQuillion, a life prisoner whose commitment offense occurred prior to July 1, 1977, challenged two unwritten policies of the Board of Prison Terms pertaining to parole. The first policy questioned by Mr. McQuillion is that the Board denies parole release to all life prisoners sentenced under the Indeterminate Sentencing Law (ISL) and most (99.97% according to the requester's statistics, which the Board did not challenge in its response) life prisoners sentenced under the Uniform Determinate Sentencing Act (DSL). According to the request for determination, the Board

accomplishes this systematic denial of parole "by applying extremely strong presumptions that such prisoners are unsuitable for parole and that any parole dates previously granted to such prisoners were improvidently granted...."

The second unwritten policy challenged by Mr. McQuillion is that the Board intentionally fails "to set new parole dates for life prisoners...whose parole date had been rescinded, and [applies] an all but irrefutable presumption in rescheduling the hearing that it is not reasonable to expect that parole would be granted to such prisoners if a hearing were held during the following year(s)." Penal Code sections 3041 and 3041.5 require the Board to set a release date and mandate an annual parole hearing after a hearing in which parole has been denied unless "the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following year," in which case the board may delay the hearing for two years. If the prisoner has been convicted of murder, then under section 3041.5(b)(2)(B) the Board may delay the next parole hearing up to five years upon the appropriate finding of unsuitability by the Board.

OAL cited Penal Code section 5076.2 for its conclusion that the Board is subject to APA rulemaking requirements. Next OAL reminded the parties of its role: "OAL makes no finding as to the existence or nonexistence of the alleged unwritten policies and practices. OAL is legally mandated to determine whether the challenged agency policies and practices, if they exist, constitute 'regulations' which are without legal effect unless adopted pursuant to the APA." OAL also noted that it possesses "no authority in the determination arena to find whether alleged policies or practices of the Board, or duly adopted regulations of the Board, are inconsistent with statute and should be invalidated."

Regarding the threshold test, OAL held that "challenged rule no. 1 as alleged applies extremely strong presumptions to all ISL and DSL life prisoners in California, and, therefore, is a standard of general application. Challenged rule no. 2 as alleged applies to all life prisoners in California...whose parole date was rescinded and, therefore, also is a standard of general application." OAL also found that the alleged policies do not fall within the internal management exemption to the APA's rulemaking requirements, nor within any other exemption.

Concerning the first alleged policy, OAL held that an unwritten practice of "denying parole release to almost all...life prisoners by denial of suitability and systematic rescission of previously granted parole dates by applying extremely strong presumptions that such prisoners are unsuitable for parole and that any parole dates previously granted to such prisoners were improvidently granted would interpret [Penal Code section 3060 and sections 2450 and 2451 of Title 15 of the CCR] as well as Penal Code section 3041 and would amend sections 2281 and 2402 of Title 15 of the California Code of Regulations. Since the alleged policy, if it exists, meets both parts of the statutory two-part test, OAL concludes it is a 'regulation.'" Similarly, OAL found that "challenged rule no. 2, if it exists, is not merely a restatement of existing law but rather interprets sections 3041.5

and 3041 of the Penal Code." Hence, OAL held that the second policy, if it exists, is also an underground regulation.

♦ **1999 OAL Determination No. 28, Docket No. 99-002 (December 23, 1999).** Requester Daniel Jester, a California Men's Colony-East inmate, challenged four separate rules issued by the Department of Corrections (DOC) and the warden of the prison in which Jester is incarcerated.

OAL held that the "Operations Manual Supplement for Volume VI" issued by the warden contains regulatory material, but it is not subject to the APA because of the "special express APA exception for rules applying solely to a particular prison....However, to the extent this document restates provisions in the 'Close Custody Guide for Male Inmates' issued by the Department of Corrections, the specified statutory conditions are not met and the 'local rule' exception does not apply....The 'Close Custody Guide for Male Inmates'...contains 'regulations' and should have been adopted in accordance with the APA."

OAL delineated the necessary analysis for the local rule exception: "When a challenged rule superficially appears to be a local prison rule, OAL must determine whether it actually qualifies under this statutory APA exception....If the action is not only of local concern, but of statewide importance, it qualifies as a regulation despite the fact it is called 'resolutions,' 'guidelines,' 'rulings,' and the like....The APA is not so limited that its reach can be avoided by the simple expedient of directing local prisons to adopt standardized rules."

Concerning the Close Custody Guide, DOC argued that "non-mandatory guidelines were provided by [the Department], but the scheme envisioned implementation via local rules formulated by the facilities." In the almost identical 1999 OAL Determination No. 22 [17:1 CRLR 219], the Department had advanced the same reasoning, urging that "non-mandatory rules are not 'regulations' subject to APA rulemaking requirements." OAL responded by quoting its previous opinion: "The statutory definition of 'regulation' does not restrict the term 'regulation' to agency rules that are binding and mandatory....Apparently anticipating that state agencies would make creative legal arguments in an effort to avoid APA compliance, the statute prohibits not only enforcement, attempted enforcement, and utilization of rules subject to the APA, but also the mere issuance of such rules."

Regarding the second challenged document, the "Close Custody B Criteria Chart," OAL found that the Chart "for the most part restates provisions contained in the 'Close Custody Guide for Male Inmates.'...To the extent that challenged rule no. 2 restates the centrally issued standard it contains regulations that should have been adopted pursuant to the APA because the statutory conditions have not been met and the 'local rule' exception does not apply."

OAL held that a memo entitled "Security Enhancements" issued by the warden contains regulations, but that those regulations fall within the local rule exemption to APA rulemaking procedures. The memo contains changes to the custody arrangements for California Men's Colony inmates.

The fourth item challenged by the requester is a memo entitled "CMC Appeal Log #E-98-1067, Second Level Review, Action Requested: Be Returned to Diet Kitchen Assignment." OAL determined that the memo, which includes three provisions from the *Department of Corrections Operations Manual*, contains some restatements of existing law, some regulatory material to which the local rule exemption applies, and some underground regulations that should have been adopted in accordance with APA rulemaking procedure.

♦ **2000 OAL Determination No. 1, Docket No. 99-003 (January 13, 2000).** On January 4, 1999, Ed Kuwatch, Esq., requested a determination regarding a policy of the Department of Motor Vehicles (DMV) announced in a letter mailed to members of the drunk driving defense bar in December 1998. The policy concerns a statutory scheme that permits an arresting officer to serve upon a drunk driver an immediate notice of driving privilege suspension. As stated in DMV's letter, the policy provides that a request for an automatic administrative hearing on the suspension must be made within ten days after the driver receives the notice; however, DMV "will continue to accept and grant any written requests for late administrative hearings from drivers who provide good cause to support such a decision."

OAL first determined that under Vehicle Code section 1651, DMV is expressly required to adopt regulations in accordance with the APA. Next, OAL concluded that because the policy applies to the class of all those arrested for drunk driving who have been issued an "Administrative Per Se Order" of suspension, revocation, or temporary endorsement, it is a standard of general application.

In its response, DMV claimed that the policy found in the letter merely restates existing law. OAL agreed that the issue for this determination is whether the challenged policy is a restatement of the law or, instead, whether it implements, interprets, or makes specific existing law. OAL held that, for the most part, the challenged rule restates existing law found in several sections 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...statutes. These limitations make specific the more general language in section 14103 of the Vehicle Code and thus are 'regulations.'"

♦ **2000 OAL Determination No. 2, Docket No. 99-004 (January 18, 2000).** Requester John K. Reiss, Esq., challenged one bulletin and five directives issued by the state Employment Development Department (EDD) regarding the Job Training Partnership Office (JTPO). This is Mr. Reiss's second challenge to EDD's procedures under the federal Job Training Partnership Act (JTPA). On June 16, 1998, OAL issued 1998 OAL Determination No. 6, which held that "State Grievance and Hearing Procedures Under the Job Training Partnership Act" in EDD's JTPO Policy/Procedure Bulletin #84-8 (June 18, 1984) was an underground regulation. Reiss had filed the re-

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quest for that determination in December of 1990; the request for this determination was filed in January 1999.

The threshold determination is always whether the issuing agency is subject to the APA. Government Code section 11000 broadly defines "state agencies," but the APA narrows its scope of coverage by excluding those agencies in the legislative and judicial branches. In this determination, OAL stated: "Clearly, EDD is a 'state agency' within the meaning of the APA. Further, EDD has not called our attention to nor have we located any statutory provision expressly exempting EDD rules from the APA. OAL, therefore, concludes that APA rulemaking requirements generally apply to EDD."

The challenged policies are: (1) EDD Policy/Procedure Bulletin 84-13 on audit resolution, (2) EDD Directive No. D97-11 on debt collection, (3) EDD Directive D98-9 on debarment of indebted service providers, (4) EDD Directive No. D97-6 on procurement, (5) EDD Directive No. D98-11 on confidential information, and (6) EDD Directive No. D98-5 on reporting requirements. EDD freely admitted that each of these six policy publications contains regulatory material, and even took the additional step of highlighting the specific areas that EDD itself had identified as having characteristics of underground rules. Nevertheless, EDD claimed that the rules in question fall under Government Code section 11343(a)(3), which provides an exemption for rules "directed to a specifically named person or group of persons and which do not apply generally throughout the state."

OAL disagreed with EDD's contention. "If OAL were to accept the Department's argument that the group of persons listed on the memo fell within the 'specifically named person or group of persons' exemption, then to issue a memo to 'All California Residents' would also qualify as a 'specifically named person or group of persons.' EDD also ignores the second part of Government Code section 11343, subdivision (a)(3) which states '...and does not apply generally throughout the state.' Clearly,...each of the six directives applies generally throughout the state...." Accordingly, OAL held that each of the challenged directives contains underground regulations that are without legal effect because EDD has not adopted them in compliance with the APA.

◆ **2000 OAL Determination No. 3, Docket No. 99-005 (February 2, 2000).** Requester California State Employees Association (CSEA) challenged two job production standards of the State Board of Equalization (BOE) concerning hourly key stroke and daily machine time minimums for key data operators employed by the Board.

In its response, BOE first contended that the challenged standards are not regulations because they are not rules of general application, arguing that "even under the most liberal construction," the term "general application" could not pertain to "a rule that applies only to a select few employees in a single section of a single agency....Here the challenged policy applies to approximately 30 employees....None of the rules apply to all, or even a substantial portion of the 4,000-plus employees of the BOE."

OAL responded that while it is true that the affected group of employees is small, "the size of the group to which rules apply is not the pivotal legal issue. According to the California Court of Appeal, the issue is whether or not the rules apply generally to all members of a class, kind, or order. In the matter at hand, the work production standards apply to all members of the class of key data operators employed by the Board. The standards are thus 'standards of general application.' From the legal perspective, the number of persons in the group is not determinative: indeed, a rule could be drafted in such a way as to in fact apply to only one person or entity."

Next, BOE asserted that the standards in question should not be considered regulations because they do not implement the law enforced by the Board. BOE stated in its response: "Clearly, the matters presented to OAL have nothing to do with the implementation or interpretation of the tax laws under the authority of the Board...." Again OAL did not agree, citing two Government Code sections that are implemented, interpreted, or made specific by the challenged standards. Section 15606(a) directs BOE to "prescribe rules for its own government and for the transaction of its business." Section 11152 permits the heads of each state governmental department to "adopt such rules and regulations as are necessary to govern the activities of the department...." Consequently, OAL held that the challenged standards are regulations.

BOE next argued that the challenged policies are exempt from APA rulemaking requirements under the "internal management" exemption in Government Code section 11342(g). The analysis as to whether the APA's internal management exception applies is dual: the regulation at issue must (1) affect only the employees of the issuing agency, and (2) not address a matter of serious consequence involving an important public interest. Regarding the first prong, OAL stated: "We do not agree with CSEA's contention that the standards affect 'the general population of the state for any party interested in applying for employment with the Board.' The standards have no effect on anyone other than those current employees of the Board working as key data operators." Consequently, OAL found that the first test for the internal management exception had been met.

The test that OAL will apply in determining whether a regulation addresses a matter of serious consequence involving an important public interest is neither clearly defined nor easily predictable. From its response, it is apparent that BOE had gleaned from previous regulatory determinations that rules concerning employee discipline were more likely to be judged by OAL as serious and important than rules simply providing employee standards. Thus, even though this case was originated by a BOE key data operator (whose bargaining agent is CSEA) who was disciplined by the Board for her failure to meet the standards at issue here, BOE nevertheless attempted to characterize the challenged standards as non-disciplinary in nature. According to the Board, "while production standards may be considered in subsequent decisions concerning

the employee's job, these rules are clearly not a part of the disciplinary process."

On this point, OAL was persuaded by BOE. "Routine unit rules concerning quantity and quality of work are not matters of serious consequence involving an important public interest....These are the sorts of internal agency rules which the Legislature intended to exempt from rulemaking requirements by enacting the internal management exception." Finding the internal management exception applicable, OAL held that the challenged standards are not subject to APA rulemaking requirements.

◆ **2000 OAL Determination No. 4, Docket No. 99-006 (February 2, 2000).** In January 1999, John K. Reiss, Esq., filed two requests for determination with OAL challenging policies of EDD's Job Training Partnership Office (JTPO) under the Job Training Partnership Act (JTPA), resulting in 2000 OAL Determination No. 2 (see above) and this Determination No. 4. Here, Reiss questioned the validity of four additional documents: (1) JTPA Directive No. D98-6, reporting fraud and abuse; (2) EDD Directive D87-7, glossary of terms; (3) EDD Information Bulletin B98-2, data validation; and (4) EDD Interim Directive 94-16, allowable cost principles.

EDD asserted that the definitions contained in D87-7 are not regulations because, as mere definitions, they have no regulatory effect. According to EDD's argument, "the regulatory effect (if there is any regulatory effect) will occur when [the definitions] are used in other EDD administrative documents." OAL countered that "EDD's argument cannot stand in light of the direct language contained in directive 87-7. It mandates implementation and adoption of the definitions contained in the glossary. Directive D87-7 therefore imparts more than definitional information. It requires action...."

Applying the same logic as it did in Determination No. 2, OAL found that: (1) the APA applies to EDD; (2) the challenged documents "all contain rules which have general applicability and make specific the terms of the JTPA, federal regulations, and Unemployment Insurance Code sections"; (3) no APA exemptions apply; and (4) the rules established by the four documents, except those which are restatements of existing state or federal law, are not valid because they have not been adopted according to APA rulemaking procedure.

◆ **2000 OAL Determination No. 5, Docket No. 99-007 (February 24, 2000).** In February 1999, requester Healthdent of California, Inc. challenged the method utilized by the Department of Corporations for calculating the number of enrollees in health plans for the purpose of assessing annual fees.

The Knox-Keene Health Care Service Plan Act of 1975 provides for the regulation of California health care service plans (also called "health plans" or "health maintenance organizations"). Prior to July 2000, each licensee plan paid an annual fee to the Department of Corporations; now they pay annual fees to the Department of Managed Health Care. The purpose of the fee is to reimburse the Department for the costs associated with administering the Knox-Keene Act. The

amount of the fee is assessed by the Commissioner based on the number of enrollees in the plan.

Healthdent is a licensed health plan. It arranges for its subscribers to receive dental care through contracts with other dental providers, and it also operates its own dental care facilities. At these facilities, Healthdent provides services to its own subscribers as well as to subscribers of other health care service plans. In determining Healthdent's annual assessment, the Commissioner counted not only Healthdent's own subscribers, but also "enrollees obtained through contracts with other plans."

OAL first noted that under Corporations Code section 25614, APA rulemaking requirements are applicable to the Department. Next, OAL found that "the requirement for paying an annual assessment or fee applies generally to member of a 'class, kind or order.' That class would encompass all Knox-Keene health care service plans licensed by the Commissioner....Therefore, the Commissioner's method of determining the amount of annual fees to be paid by health care service plans is a standard of general application."

The Department asserted that "there is no rule because whatever assessment is made is the consequence or result of transactions occurring between various health care plans." OAL disagreed, stating: "Of regulatory necessity, the Commissioner must determine who is an 'enrollee' for purposes of assessing these fees....The Commissioner has done this....The rule essentially states that 'enrollees' in health care service plans may be 'acquired' through subcontracts with other plans. That is the 'regulation' which interprets, implements or makes specific the term 'enrollees' as it is used in the statute."

Next, the Department argued that "the procedure followed by the Commissioner to calculate the annual assessment for Healthdent is a direct application of Health and Safety Code section 1356(b)," prompting OAL to consider whether the Department's interpretation of the statutory requirement is the only legally tenable one. "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 created." OAL found that the Department's claim that it is merely following the statutory mandate by "counting all the enrollees in every plan" amounts to a circular argument "because the term 'enrollees' means anyone so labeled by the Department." OAL looked to Health and Safety Code section 1345(c), which defines "enrollee" as a "person who is enrolled in a plan and who is a recipient of services from the plan" (emphasis added by OAL). "The Department's 'only tenable' interpretation appears to ignore or even obliterate the separate elements necessary for enrollment found in the statute. In doing this, the Department introduces the concept of acquiring enrollees through subcontracts." Finding that the Department's interpretation is not the only tenable one, and perhaps not even the most reasonable one under the existing statutory and regulatory scheme, OAL concluded that the Commissioner's

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method of calculation of the number of enrollees amounts to an underground regulation that is invalid unless adopted according to APA requirements.

◆ **2000 OAL Determination No. 6, Docket No. 99-008 (March 13, 2000).** Bruce Dear, Placer County Assessor, filed a request for this determination on February 16, 1999 on behalf of the California Assessors' Association. Dear questioned two separate property tax exemption policies for multi-specialty medical clinics and religious organization housing published in the *Assessors' Handbook*, promulgated by the State Board of Equalization.

In its response, BOE cited its enabling act, Government Code section 15606, and argued that the legislature has made a distinction between its subsection (c) duty to "prescribe rules and regulations to govern local boards of equalization when equalizing, and assessors when assessing..." and its subsection (e) duty to "prepare and issue instructions to assessors designed to promote uniformity throughout the state and its local taxing jurisdictions in the assessment of property for the purposes of taxation." BOE reasoned that if OAL holds the "instructions" in the *Handbook*, which the Board characterized as non-binding, to be binding regulations, then the statutory distinction between BOE's two separate duties would be rendered meaningless and the intent of the legislature confounded.

OAL disagreed: "Had the Legislature wished to exempt 'instructions' issued by the Board from the APA, it could easily have done so. Government Code section 11342, subdivision (g), exempts from the definition of a 'regulation' subject to the APA 'legal rulings of counsel issued by the...State Board of Equalization.' Noticeably absent from this exemption is the phrase 'instructions of the Board.' The fact that the Board is given an express exemption as to legal rulings of counsel, clearly reinforces the fact that every other Board activity (including its 'instructions') is subject to review under the APA....The Board's argument is premised on the misconception that the existence or non-existence of a 'regulation' is determined by its enabling legislation." Thus, OAL held that the challenged provisions were subject to OAL scrutiny under the APA.

Next, BOE argued that "the essential issue in determining whether an instruction is a regulation as defined in the APA is whether the instruction is enforceable." OAL restated this argument: "Put another way, if a 'regulation' is not 'binding' in the first instance, it makes no sense for it to subsequently be declared 'unenforceable' for failure to comply with the APA." However, OAL again disagreed: "[E]nforceability is not the linchpin for determining whether or not a 'regulation' exists under the APA....The Board's argument confuses *legal* enforceability with whether *in fact* the agency enforces the particular rule. The two concepts are not the same. A determination by either OAL or a court that a 'regulation' is *legally* unenforceable does not depend on whether the regulation was *in fact* enforced by the agency" (emphasis original). The Board's theoretical argument aside, OAL also

pointed out that the *Handbook* provisions are "couched in language which strongly implies the Board intends its policies to be applied uniformly throughout the State."

OAL's analysis of the challenged provisions observed that, by their own terms, both apply on a statewide basis. Thus, OAL easily concluded that the provisions are standards of general application. OAL found that in both provisions, BOE has gone beyond existing law to interpret or make specific. Finally, BOE did not contend, nor did OAL discern, the presence of any applicable APA exemption. As a consequence, OAL held that the challenged provisions are underground regulations that should be adopted according to APA rulemaking procedures.

◆ **2000 OAL Determination No. 7, Docket No. 99-009 (April 17, 2000).** Just as in *2000 OAL Determination No. 3* (above), CSEA filed this request for determination to challenge various employee work production standards used by BOE's Taxpayer Records Unit, Cashiers Unit, and Return Processing Unit. Following the identical logic of *Determination No. 3*, OAL found that the standards are "regulations" as defined by the APA; however, they are exempt under the "internal management" exception. CSEA argued against application of the APA's internal management exception by asserting that the standards touch upon matters of serious consequence involving important public interests in that the rules "have led to increased repetitive motion injuries, including permanent damage to employees" and are also ultimately associated with the threat of discipline and dismissal. Nevertheless, OAL held that "routine unit rules concerning quantity and quality of work are not matters of *serious* consequence involving an *important* public interest. Prior determinations where the 'internal management' exception was found not to apply typically involved independent matters of important public policy....Therefore, the challenged standards, though 'regulations,' are nonetheless exempt from the APA because they relate solely to the internal management of the Board of Equalization" (emphasis original).

◆ **2000 OAL Determination No. 8, Docket No. 99-010 (April 20, 2000).** Requester David William Finney originally challenged 28 "administrative directives" of the Board of Prison Terms. Subsequently, the Board rescinded all but six; at Finney's request, OAL addressed only the remaining six in this determination.

As was established in *1999 OAL Determination No. 27* (above), the Board of Prison Terms is subject to the APA under Penal Code section 5076.2. OAL also concluded that each of the six directives in question are standards of general application. "All of the directives either pertain to or govern the administration of prisoner parole or sentencing on a statewide basis."

Directive No. 81/4 deals with the situation in which the court issues an amended abstract of judgment that alters the prisoner's sentence. According to OAL, the directive implements and makes specific Penal Code section 1170.2(b); "it appears to set additional time limits for situations not specifi-



cally addressed in this statute. It creates special procedures for situations involving amended abstracts...which are suspected to be in error."

Penal Code section 3000(a) authorizes the Board to waive parole "for good cause." Directive No. 82/15 provides the criteria the Board utilizes in determining whether to waive parole. OAL concluded that "Directive No. 82/15 thus adds detailed procedures not found in either the Board's enabling legislation or its regulations."

Directive No. 85/1 addresses the issue of the timing of a parole consideration hearing when there is a change in the prisoner's minimum eligible parole date. OAL found that this directive clearly makes specific and implements existing statutory and regulatory requirements.

According to OAL, "Directive No. 85/2 creates an additional procedural exception to the normal parole hearing schedule." The directive explains the procedure to be employed in order to avoid holding both a documentation hearing and a parole hearing within a relatively short time period. OAL held that the directive interprets and implements existing statutes and regulations.

Directive No. 85/7 states: "The Board of Prison Terms has approved a program which allows life term prisoners to waive their formal parole consideration hearing, stipulate to unsuitability or to request a postponement/continuance of their hearing." According to OAL, this directive "appears to significantly supplement existing rules or procedures governing parole consideration hearings for life term prisoners." As such, certain provisions of the directive are regulations that must be adopted pursuant to the APA.

Directive 86/3 was issued in response to *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985), which authorizes prisoners to make claims for damages for excessive custody. The directive creates a Due Process hearing entitled a "Legal Status Review Hearing." The directive establishes: "(1) criteria prisoners/parolees must meet in order to be entitled to a hearing; (2) procedures for filing a petition; (3) requirements for contents of the petition; (4) when a petition can be dismissed for failure to exhaust administrative remedies; (5) procedures for notice to the prisoner, timing and conduct of the hearing; and (6) the prisoner's appeal rights." OAL concluded that the directive goes far beyond a mere explanation of the law of the case itself by providing the procedure for its implementation; as such, it is a regulation.

The Board did not advocate, nor did OAL's research disclose, any applicable exemptions. OAL held that each of the six challenged directives contains regulatory material that is invalid unless adopted pursuant to APA rulemaking requirements.

♦ **2000 OAL Determination No. 9, Docket No. 99-0011 (May 18, 2000).** Requester Kathleen Kenny challenged six California Coastal Commission policies; the request arises from Ms. Kenny's application for a coastal development permit (CDP). In addressing the threshold issue, OAL pointed

out that "Public Resources Code section 30333 makes the APA expressly applicable to the Commission."

Ms. Kenny first questioned the Commission's requirement that she submit plans signed by a licensed landscape architect. OAL acknowledged the Commission's authority to impose special conditions on a case-by-case basis pursuant to Public Resources Code section 30607. In addition, section 13156(c), Title 14 of the CCR, is a duly adopted regulation that allows the Commission to mandate specific conditions within a development permit. Thus, with respect to this issue, OAL concluded that the Commission's requirement does not constitute a "regulation" because it is not a rule of general application; rather, the Commission's action was directed specifically at Ms. Kenny's particular case.

Kenny next questioned the Commission's policies of: (1) requiring that applicants for CDPs submit certificates of approval from local health and fire departments, and (2) delaying the Commission's own approval until all other agency permits have been issued. OAL found both of these policies to be direct applications of valid, existing Commission regulations.

Ms. Kenny alleged that the Commission maintains a policy of charging a \$200 fee to add or change a name on a CDP application. However, OAL found no evidence of the existence of such a rule. Rather, the \$200 fee to which Kenny's request referred appeared to OAL to be the balance due on the \$500 application fee provided for in section 13055(a)(2), Title 14 of the CCR.

According to OAL, "the Commission's policy requiring submission of geology and soils reports for all Santa Monica Mountains developments is a rule of general application." In its response, the Commission asserted that "requirements concerning geology and soils reports are not underground regulations because they are authorized by both the Coastal Act and Permit Streamlining Act, as well as the Commission's regulations that implement both of these laws." OAL acknowledged the Commission's authority to impose such requirements. "However, whether the Commission has the authority for its actions is not a factor in determining whether the Commission has issued, utilized or enforced a rule, guideline or policy which has not been adopted pursuant to the APA in order to implement, interpret or make specific the Coastal Act or existing regulations." OAL held that the Commission's policy of requiring geological reports is an underground regulation.

Finally, Ms. Kenny challenged a policy requiring applicants, as a condition of Commission approval, to give permission for Commission staff to inspect the development site at any time during construction, subject only to 24-hour advance notice. The Commission responded that this "standard condition at issue is not an underground regulation because the Commission adopts it in individual permits as part of its quasi-judicial action on coastal development permits." OAL countered that "the Commission's response indicates that it intends that the noticed inspection condition be applied generally to every applicant seeking a coastal development permit. The Commission's action in imposing general conditions



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is not adjudicatory, but quasi-legislative,” and thus is an underground regulation.

After analyzing the APA exemption found in Public Resources Code section 30333 for “interpretive guidelines” promulgated by the Commission, OAL concluded that none of the policies challenged in this determination fall within that exemption. (OAL mentioned in a footnote that the request for determination had included a challenge to an interpretive guideline. “OAL, however, did not accept this part of the request based on the existence of this APA exemption.”) OAL indicated that the “mandatory nature” of the policies disqualify them for consideration as interpretive guidelines. At the same time, OAL also reiterated its principle that “the critical factor is not whether the ‘regulation’ is characterized as mandatory or binding, but rather, its ‘effect and impact on the public.’”

◆ **2000 OAL Determination No. 10, Docket No. 99-012 (June 6, 2000).** Requester Lawrence Fafarman challenged the following statement appearing on the Web site of the Bureau of Automotive Repair (BAR): “Do not add additional emissions control equipment to your federally certified vehicle in order to bring it to California. Do not attempt to make a federal vehicle conform to California standards.” OAL pointed out that under Business and Professions Code section 9882, BAR is subject to the rulemaking requirements of the APA. OAL observed that while it is possible to read the statement as having a meaning inconsistent with existing law, the “website message, however, should not be read in isolation.” Taking into consideration other information available on BAR’s site, OAL held that the message in question, “while perhaps not a model of clarity, does not appear to constitute a departure from or addition to...existing legal authorities.” As such, the statement is a restatement of existing law and does not constitute underground rulemaking.

◆ **2000 OAL Determination No. 11, Docket No. 99-013 (July 21, 2000).** Requester Scott Dunn challenged two Franchise Tax Board (FTB) documents: (1) “Agreement on Coordination of Tax Administration (Revision One),” a written agreement between FTB and the federal Internal Revenue Service establishing methods for their exchange of taxpayer information; and (2) “Guidelines for Implementation of the Agreement on Coordination of Tax Administration, California Franchise Tax Board—Internal Revenue Service, Revision One,” which describes “the mechanics for the continuous exchange of tax information....” OAL discovered that both challenged documents had been superseded by second revisions adopted before June 9, 1999, the date the request for determination was accepted by OAL. Thus OAL held that the issues as presented by the request were moot and that the subsequently adopted documents had “not been properly brought before OAL, and therefore, are not subject to OAL’s review at this time.”

◆ **2000 OAL Determination No. 12, Docket No. 99-014 (July 21, 2000).** Public Employees for Environmental Responsibility (PEER) asked OAL to determine whether testing procedures and standards utilized by the Department of Toxic

Substances Control (DTSC) in the certification of an aerosol can recycling device known as the Katec Aerosolv® Model 6000 are underground regulations. Health and Safety Code section 25106 makes the APA applicable to the Department.

PEER asserted that many of the objectives, criteria, standards, protocols, and procedures DTSC used to certify the device amount to regulatory precedents that DTSC would continue to employ in testing other disposal and recycling technologies. Nevertheless, OAL found “nothing in the record to indicate that the Department has done anything other than establish a particular set of criteria...specifically for the purpose of certifying the Katec aerosol spray technology. Admittedly, establishing sampling techniques, numerical standards defining efficiency levels, and statistical confidence limits has a distinct ‘regulatory’ impact, particularly in the absence of pre-existing standards....But as the Department noted,...‘although protocols are developed using core scientific principles, each protocol is specific to the device being tested.’”

According to OAL, “[o]ne could argue as PEER essentially has that in future cases, the Department might apply the same standards it used with respect to the Katec Aerosolv system. We cannot, however, base a finding concerning a standard of general application on unknown, future contingencies.” Consequently, OAL held that the challenged criteria have specific rather than general application, and therefore are not underground regulations.

◆ **2000 OAL Determination No. 13, Docket No. 99-015 (July 21, 2000).** Requester Marc Schachter questioned three rules contained in a memorandum entitled “Rules and Regulations for the Facility D Gym at Corcoran State Prison” that was promulgated under the auspices of the Department of Corrections. The rules concern inmate eating, visiting, and use of bunks in the named facility. OAL held: “There is no evidence or assertion by Mr. Schachter that [the rules] were issued or implemented at any other prison facility....We agree with the Department’s position that [the rules] come within the express ‘local rules’ exception and are therefore not subject to the APA.”

◆ **2000 OAL Determination No. 14, Docket No. 99-016 (July 28, 2000).** CSEA challenged two policies of the State Compensation Insurance Fund (SCIF). The policies require SCIF employees to record a reason for absence from work on an attendance report form and define such “reason” to mean “the exact nature of an illness.” OAL held that SCIF is exempt from the APA under Insurance Code section 11873. That section provides in part that SCIF “shall not be subject to the provisions of the Government Code made applicable to state agencies generally or collectively....” OAL followed the reasoning of *Courtesy Ambulance Service of San Bernardino v. Superior Court*, 8 Cal. App. 4th 1504 (1992), in concluding that this statutory provision amounts to an express exemption from the APA.

◆ **2000 OAL Determination No. 15, Docket No. 99-017 (October 24, 2000).** Crusader Insurance Company challenged Department of Insurance (DOI) rules requiring insurers to

file all underwriting eligibility guidelines and to reduce all such guidelines to writing. OAL made the threshold finding that "the Department is an executive branch state agency that has not been expressly exempted by statute. Thus, the APA rulemaking requirements generally apply" to DOI. Regarding the next test in the analysis, OAL noted that DOI "applies these rules to all insurers where applicable; therefore, they are rules of general application."

Concerning the requirement of filing all eligibility guidelines with DOI, OAL held that the rule is a "broad restatement of existing law that encompasses many provisions of the Department's regulations...and, therefore, does not constitute a 'regulation'" subject to the APA. OAL concluded that the requirement that guidelines be in writing is the only legally tenable interpretation of various existing requirements: "Unless documents are reduced to writing, it makes it virtually impossible to 'attach' documents to forms that are required to be filed, to 'maintain' documents in sufficient detail 'to determine the appropriate rating plan for the insured,' or to be subject to examination to ensure compliance with the Insurance Code. As the Department points out in its response, 'Crusader does not offer a plausible alternative construction.'" Thus, OAL held that, as the only legally tenable interpretation of existing law, the second challenged rule need not be adopted by DOI pursuant to APA rulemaking procedures.

◆ **2000 OAL Determination No. 16, Docket No. 99-018 (October 31, 2000).** Rosalie Dvorak-Remis and the Sacramento Little Pocket Neighborhood Association requested OAL to consider a California Department of Transportation (Caltrans) interpretation of the exclusive public use restriction found in surplus right-of-way property deeds.

Caltrans is authorized to sell property that was previously acquired for highway purposes but for which it no longer has use. The California Transportation Commission establishes the conditions and restrictions governing these sales. The deed for such a conveyance in 1975 from Caltrans to the City of Sacramento included a reversion clause requiring the property to be used "exclusively for public purposes." When the city contemplated leasing the property for a development known as the "Captain's Table Project," the requesters had several meetings with Caltrans representatives concerning the meaning of the "exclusively for public purposes" deed provision. Those representatives indicated the restriction would be satisfied as long as "the public is not barred from the premises." The issue for determination in this case was that interpretation of the public purpose restriction.

OAL first found that "Caltrans is in neither the judicial nor legislative branch of state government, nor has it been expressly or specifically exempted by statute from complying with the APA. OAL concludes, therefore, that APA rulemaking requirements generally apply to Caltrans."

Caltrans admitted that the requesters' characterization of its interpretation of the public purpose deed provision is accurate, but denied that the interpretation constitutes a regulation on several grounds. First, Caltrans maintained that it does

not have authority to issue such regulations; the Commission has that particular authority. OAL responded that "the test for the existence of a 'regulation' is not whether there is sufficient authority or legal capacity, but rather the 'effect and impact on the public' of the agency action....Thus any lack of authority to adopt regulations would not nullify the existence of a rule or policy that may contravene the APA."

Secondly, Caltrans asserted that the issue is moot because restrictive use clauses of the type in this case are no longer being included in deeds for the sale of excess lands. Because the provision remains in existing deeds, however, OAL was not persuaded by that argument.

Finally, Caltrans claimed that the interpretation enunciated to the requesters is not a standard of general application, but is rather an opinion limited to the specific property at issue. According to OAL, "While the comments attributed to the Caltrans employees do suggest the existence of a standard of general application, we think the unequivocal official statement of the management of Caltrans that the interpretation in question is not one that is applied generally, and, in this case, is limited to the deed in question, is sufficient to persuade us that there is no interpretation of deed language that is generally applied rising to a level of a 'regulation' that must be adopted in accordance with APA procedures."

On December 1, 2000, OAL published notice that, effective November 27, 2000, it had granted a request by Ms. Dvorak-Remis and the Little Pocket Neighborhood Association for reconsideration and had withdrawn its original determination. At this writing, OAL has not yet published a revised determination.

◆ **2000 OAL Determination No. 17, Docket No. 99-019 (November 6, 2000).** The California Coalition of Travel Organizations challenged criteria established by the California Trade and Commerce Agency for potential providers of online and toll-free telephone lodging reservation services.

The Trade and Commerce Agency, and specifically the Division of Tourism within that Agency, promotes tourism in California. One way the Agency seeks to do so is by developing a centralized lodging reservation system that provides direct links with private reservation services through both the Internet and a toll-free telephone number. According to OAL, the Division of Tourism operates these reservation systems "by utilizing private business organizations that provide the lodging and reservation services. To do this, the Agency established criteria to be used to select these private entities. In the case of the toll-free telephone number, the Agency also established contractual standards any selected entity must meet. These criteria and standards are the subject of this regulatory determination."

The Agency argued that because the standards for the telephone linkage system were adopted by means of a request for proposals process, they should not be considered regulatory in nature. OAL countered that a "fundamental objective of the APA is to ensure that when a state agency implements a statute by specifying the process to be used in the

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selection of persons who will receive benefits from the government, the agency must first provide those same members of the public with notice and an opportunity to participate in the policy development process....The fact that a rule or criteria may have been issued or utilized as part of a bidding and proposal process does not insulate them from scrutiny under the APA."

OAL found that the criteria and standards under consideration "establish the rights, responsibilities, and obligations of entities who wish to be directly linked....These criteria have the effect of implementing and making specific the provisions of the Tourism Marketing Act and related enabling legislation of the Agency." Thus, OAL determined that the criteria and standards amount to regulations that should be adopted according to APA rulemaking procedures.

On January 5, 2001, OAL published notice that, effective December 17, 2000, it had granted a request by the Department of General Services for reconsideration and had withdrawn its original determination. At this writing, OAL has not published a revised determination.

◆ **2001 OAL Determination No. 1, Docket No. 99-021 (February 7, 2001).** Inmate Lenzie L. Jackson questioned the method used by the Department of Corrections to recalculate post-sentence conduct and work credits pursuant to *People v. Romero*, 13 Cal. 4th 497 (1996).

In 1995, following a conviction for the sale of marijuana, Mr. Jackson was sentenced to 25 years to life under the "Three Strikes" law (Penal Code sections 667 and 1170.12). Less than a year later, the California Supreme Court's *Romero* decision had the effect of authorizing trial judges to strike prior felony conviction allegations in Three Strikes cases. Thus, on August 15, 1997, the Sacramento County Superior Court struck one of Jackson's two prior felony convictions and, accordingly, modified his sentence to only an eight-year term. In that ruling, the court noted that Jackson's post-sentence conduct and work credits were to be determined by the Department. In making its determination of the amount of credits to award Mr. Jackson, the Department followed the procedure outlined in its "Instructional Memorandum CR/96/27."

As identified by OAL, the "key issue for this determination is whether the Department's policy is merely a restatement of current law or whether it further implements or interprets the law governing the manner in which an inmate's sentencing time is computed." If the policy in question merely restates existing law, or states the sole legally tenable interpretation of existing law, then it is not an underground regulation. In making the point that there was evidently more than one interpretation of current law concerning calculation of post-sentencing credit, OAL noted requester Jackson's allegation that the Instructional Memorandum applied the law of *Romero* incorrectly. Aside from any judgment as to legal correctness, Jackson's allegation demonstrates that there is indeed more than one possible interpretation. OAL held that "the procedure established by the Department...in *Romero* situations, whether consistent with the law or not, implements,

interprets, or makes specific the law with respect to the calculation of credits....Thus, we conclude that the policy employed by the Department is a 'regulation' and is subject to the APA...."

◆ **2001 OAL Determination No. 2, Docket No. 99-022 (March 19, 2001).** The Union of American Physicians and Dentists questioned whether the Department of Health Services (DHS) could "amend" an existing regulation simply by issuing a memorandum purportedly permitting clinical psychologists to order physical restraint or seclusion for their patients in health facilities.

In 1978, the legislature enacted Health and Safety Code section 1316.5, which authorizes clinical psychologists to "carry professional responsibilities consistent with the scope of their licensure and their competence" in health facilities. The section also provides that where a health facility offers a service that both licensed physicians and clinical psychologists are permitted by law to perform, "the service may be performed by either, without discrimination." In response to this legislation, and contrary to its intent, DHS promulgated regulations (sections 70577, 71545, 72461, 73409, and 79315, Title 22 of the CCR) prohibiting licensed psychologists from exercising primary responsibility in providing diagnosis and treatment of patients in health facilities licensed by DHS. Specifically, one regulation identified physicians as the only persons authorized to order physical restraint or seclusion for such patients.

Subsequently, these regulations were challenged in *California Association of Psychology Providers v. Rank*, 51 Cal. 3d 1 (1990). The California Supreme Court agreed with the plaintiff psychologists that by enacting section 1316.5, the legislature had manifested its intent to allow clinical psychologists to take primary responsibility for the treatment and care of patients and to be able to function without the need for supervision by physicians. As a result of this holding, the California Psychological Association filed a petition with DHS requesting that the regulations in question be amended to be consistent with *Rank* and section 1316.5.

DHS agreed with the petition and, in 1994, issued a memorandum stating "Regulatory amendments will be promulgated and filed at a later time....However, effective immediately, the Department agrees to implement its intent to permit psychologists...to order restraint and/or seclusion in the same manner as a physician." DHS failed to follow through with its pledge and never initiated formal rulemaking procedures to properly amend the regulations.

In its determination opinion, OAL noted that the issue in *Rank* was whether clinical psychologists should be allowed to take primary responsibility for patients; the decision did not directly address whether clinical psychologists may order physical restraints or seclusion. Because the court had not expressly decided this specific issue, DHS was precluded from arguing that the challenged amendment-by-memo to the physical restraint and seclusion regulation amounted to a "change without regulatory effect." In other words, the *Rank*

opinion had not already judicially amended the particular regulation in question; the regulation remained valid and potentially enforceable as originally adopted.

DHS next argued that its 1994 memorandum was tantamount to a blanket grant of "program flexibility." Health and Safety Code section 1276 authorizes DHS to grant "program flexibility" to facilities to enable them to use alternate approaches, other than those specifically required by regulation, as long as statutory requirements are still met. However, OAL noted that specific statutory procedures must be followed by applicants and licensees when submitting requests to DHS for program flexibility. OAL determined that program flexibility was intended for use by individual health facilities, after submission of a written request with supporting evidence, and on a case-by-case basis. OAL stated: "We believe section 1276 was not intended to allow the Department to issue general rules applicable to several facilities across the board, thereby skirting the requirements of the APA." Thus OAL found DHS' program flexibility argument inapplicable.

OAL concluded that the amendments to the regulation found in DHS' memorandum were indeed rules. To be effective, DHS must adopt them pursuant to APA rulemaking procedures.

♦ **2001 OAL Determination No. 3, Docket No. 99-023 (March 28, 2001).** This is another request filed by PEER challenging a decision made by the Department of Toxic Substances Control (see *2000 OAL Determination No. 12*, above). Safety Kleen Systems, Inc. proposed to dispose of photochemical waste by reducing it to a distiller sludge and distilled water with ammonia and less than .05 ppm silver; the water mixture would then be used to irrigate non-food potted plants. DTSC determined that this subsequent use of the water would qualify for an exemption as recyclable material pursuant to Health and Safety Code section 25143.2(c)(2). PEER claimed that in so doing, the Department had created an underground regulation by promulgating an interpretation of the term "recycling."

OAL explained that "[i]t is well-settled that the specific interpretation and application of the law to one particular party under peculiar facts and circumstances is not a rule or standard of general application....Thus, the Department's interpretation of 'recycling,' as it applied solely to Safety Kleen and to the circumstances...is not a rule or standard of general application, and therefore, is not a 'regulation' subject to the APA." OAL also pointed out that the question of whether DTSC is actually correct in its decision regarding the waste water is "not an appropriate issue to be addressed by OAL in a determination."

♦ **2001 OAL Determination No. 4, Docket No. 99-024 (April 11, 2001).** Inmate Jamall Baker challenged a Department of Corrections policy of treating juvenile adjudications

and charged but un-convicted offenses as "convictions" for purposes of determining inmates' classifications. The Department uses this classification system to assign prisoners to "the institution of the appropriate security level" (Penal Code section 5068). Under a duly adopted Department regulation, section 3375.2(b)(25), Title 15 of the CCR, inmates with current or prior convictions are required to be placed in facilities with higher levels of security.

OAL found sufficient evidence to conclude that the policy in question is applied broadly, and not just specifically to Mr. Baker's particular case. Therefore, OAL held that the policy constitutes an underground regulation to which no APA exemption applies.

♦ **2001 OAL Determination No. 5, Docket No. 99-025 (April 11, 2001).** Inmate Richard A. Mongeon challenged a Department of Corrections policy—known as "mandatory yard call"—that requires inmates to remain outside their housing units each weekday between 8:00 a.m. and 10:00 a.m. in order to facilitate routine cleaning. Under Penal Code section 5058(c)(1), Department rules that apply solely to one particular correctional facility are not considered regulations. Because OAL found no evidence to suggest that the challenged policy applies anywhere other than the Susanville Correctional Center, OAL held that the local prison exemption is applicable; thus the challenged rule is not a regulation subject to the rulemaking procedures of the APA.

## 2000 LEGISLATION

**AB 1822 (Wayne)**, as amended August 23, 2000, makes various revisions to the rulemaking provisions of the Administrative Procedure Act. The bill: (1) provides for the use of electronic communication in the delivery and publication of notices and rulemaking documents, but specifies that such electronic communication is not to be the exclusive means by which the documents are published or distributed; (2) authorizes state agencies to consult with interested persons before initiating regulatory action; (3) revises the provisions governing preliminary determinations made by state agencies with respect to certain notices of proposed actions; (4) requires certain additional reports on findings regarding businesses that are to be included in rulemaking notices; (5) requires the use of plain English in all regulations, and revises the definition of the term "plain English"; (6) requires state agencies to permit oral testimony at public hearings on proposed regulations, subject to reasonable limitations; (7) changes the manner in which a state agency may respond to repetitive or irrelevant comments in its statement of reasons for a regulatory action; (8) modifies the provisions governing the availability and content of the rulemaking file; (9) revises certain rulemaking provisions to apply to a proposed repeal of a regulation as well as a proposed adoption or amendment of a regulation; (10) creates an exception to the APA's rulemaking re-

**AB 1822 (Wayne), as amended August 23, 2000, makes various revisions to the rulemaking provisions of the Administrative Procedure Act.**

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quirements for a regulation that establishes criteria or guidelines to be used by the staff of a state agency in performing an audit, investigation, examination, or inspection, in settling a commercial dispute or negotiating a commercial arrangement, or in the defense, prosecution, or settlement of a case, subject to specified conditions; (11) creates an express exception to the rulemaking requirements for a state agency rule that is the only legally tenable interpretation of an existing law; (12) revises the APA's standards for demonstrating the necessity of a proposed regulation by a state agency; (13) clarifies that the period for review of a proposal to make an emergency regulation permanent is 30 working days, rather than 30 days; (14) provides for judicial review of an order of repeal of a regulation as well as a regulation, and expands the types of evidence that a court may consider as part of the review proceeding; (15) changes the name of the California Regulatory Code Supplement to the California Code of Regulations Supplement; (16) revises the format required for State Water Resources Control Board policies, plans, and guidelines submitted to OAL; (17) requires a state agency under specified circumstances to deliver to OAL for publication in the *California Regulatory Notice Register* notice of its decision not to proceed with a proposed action; and (18) makes various other technical and clarifying changes to the APA. AB 1822 was signed by Governor Davis on September 30, 2000 (Chapter 1060, Statutes of 2000).

**AB 505 (Wright)**, as amended August 28, 2000, enacts the Small Business Regulatory Reform Act of 2000. The bill revises various provisions of the APA with respect to the duties of OAL and state agencies in the adoption, amendment, and repeal of regulations. Incorporating many provisions included within AB 1822 (Wayne) (see above), AB 505: (1) authorizes state agencies and OAL to extend the time period for public comment in specified circumstances; (2) modifies the information that a state agency is required to submit along with the notice of the proposed regulatory action to include (a) the text of the proposal drafted in "plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style," (b) a notation listing both the specific authorizing statutes and the provisions of law being implemented, interpreted, or made specific, (c) a statement of the specific purpose of each action and why it is necessary, (d) identification of any studies or reports supporting the regulatory action, (e) a description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives, and (f) facts, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse economic impact on business; (3) recasts the provisions concerning the various pieces of information required to be included in the notice of proposed regulatory

action in order to make the nature and effect of the action more understandable for both small businesses and the general public; (4) revises the method a state agency must utilize to make a determination as to whether a regulatory proposal has the potential for significant, statewide adverse economic impact directly affecting California business enterprises; (5) modifies the procedure for notifying interested persons of the proposed adoption, amendment, or repeal of a regulation; (6) imposes additional requirements on state agencies issuing regulations in order to make the regulatory process more user-friendly and improve communications between the parties in the regulatory process; and (7) requires each state agency to designate at least one person to serve as a small business liaison. Additionally, this bill requires OAL to post the *California Regulatory Notice Register* on its Web site by January 1, 2002, and moves the Office of Small Business Advocate from the state Trade and Commerce Agency to the Governor's Office of Planning and Research. Governor Davis signed AB 505 on September 30, 2000 (Chapter 1059, Statutes of 2000).

**AB 2877 (Thomson)**, as amended June 15, 2000, is an omnibus budget trailer bill concerning public health programs. Section 70 of the bill adds section 14105.17 to the Welfare and Institutions Code, which declares that hospitals designated by DHS as critical access hospitals shall be eligible for supplemental payments for Medi-Cal covered outpatient services rendered to Medi-Cal eligible persons. Because payments made under this provision are contingent upon federal funding, the section directs DHS to promptly seek any necessary federal approvals. Subsection (e) states that DHS' initial emergency regulations and the first readoption of those regu-

lations to implement this new section will be "deemed to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare," and are thus exempt from OAL review.

Section 106 of the bill, which was not tied to any specific code section, utilizes similar language to authorize DHS to "adopt emergency regulations to implement the applicable provisions of this act...." Which provisions are "applicable" was not specified; the act made revisions in the Education, Government, Health and Safety, Insurance, and Welfare and Institutions Codes. Just as in section 14105.17, emergency regulations adopted pursuant to this provision, along with their first readoption, are deemed to be an emergency and necessary and are exempt from OAL review.

The Governor signed AB 2877 on July 6, 2000 (Chapter 93, Statutes of 2000) and it went into effect as urgency legislation on the following day.

**AB 1098 (Romero)**, as amended August 25, 2000, directs DHS to establish standards for the registration of Medi-Cal "billing agents." These standards are to be adopted as emergency regulations. The bill provides that both their adoption and readoption are deemed to be necessary and are ex-

**AB 505 (Wright), as amended August 28, 2000, enacts the Small Business Regulatory Reform Act of 2000. The bill revises various provisions of the APA with respect to the duties of OAL and state agencies in the adoption, amendment, and repeal of regulations.**

empt from OAL review. Similarly, the bill authorizes DHS to "adopt, readopt, repeal, or amend" regulations on an emergency basis "to prevent or curtail fraud and abuse" in the Medi-Cal system. Such regulations are also automatically deemed necessary and are exempt from OAL review. Governor Davis signed this bill on September 5, 2000 (Chapter 322, Statutes of 2000).

**AB 1295 (Firebaugh)**, as introduced, would have modified the way in which the Department of Personnel Administration (DPA) is partially exempted from the rulemaking requirements of the APA. [17:1 CRLR 222] However, the bill was amended on June 19, 2000 so that it no longer pertains to DPA or the APA.

## 2001 LEGISLATION

**SB 561 (Morrow)**, as amended April 30, 2001, would repeal Government Code section 11340.8 and revise and consolidate its provisions into section 11340.85. Existing section 11340.85 provides that public comments and petitions regarding agency regulations may be submitted by electronic means "if the agency has expressly indicated a willingness to receive" them that way. This bill would delete that condition for comments, instead requiring agencies to accept public comments submitted by electronic communication. The provision for petitions would remain conditioned upon the agency's express willingness. [S. Jud]

**SB 563 (Morrow)**, as introduced February 22, 2001, would revise and recast the statutory provisions pursuant to which the Director of the Department of Corrections may adopt regulations concerning temporary pilot programs and situations involving imminent danger without complying with the requirements of the APA. [A. Appr]

**SB 402 (Ortiz)**, as amended March 29, 2001, would exempt from OAL review the initial adoption of emergency regulations by DHS pursuant to Welfare and Institutions Code section 14005.7(d)(2)(a). That provision states that, on and after January 1, 2002, any 19- or 20-year-old who qualifies as a medically needy family person should have an additional monthly income deduction equal to the difference between the amount required for maintenance and an amount equal to 100% of the applicable federal poverty level. The bill would also exempt from OAL review emergency regulations as initially adopted by the Managed Risk Medical Insurance Board that have the purpose of securing federal approval to extend the coverage of the Healthy Families program to those ages 19 and 20. [S. Appr]

**AB 422 (Diaz)**, as amended April 4, 2001, would exempt from OAL review emergency regulations adopted by DHS to implement the Childhood Lead Poisoning Safety Act of 2001. [A. Health]

**AB 321 (Vargas)**, as amended April 16, 2001, would require the Secretary of the Business, Transportation and Housing Agency to create and implement a program to award grants to public agencies to develop public use facilities associated with transit stations as part of proposed projects that

will increase rail or bus transit ridership in a cost-effective manner. The bill would direct the Secretary to adopt implementing regulations. Under the bill's provisions, those regulations would not be subject to OAL review.

This bill would also establish the Congestion Relief Transportation Trust Fund, 10% of which would be placed in the Transit Capital Account for allocation by the California Transportation Commission to projects that extend light and commuter rail lines, build fueling stations, purchase rolling stock and buses, construct other transit facilities, and to purchase rights of way. The bill would require the Commission to allocate Account funds based on cost-effectiveness criteria that prioritize projects that reduce vehicle miles traveled or growth in vehicle miles traveled. Such criteria are to be adopted by the Commission through regulations; under the bill's provisions, these regulations would not be subject to OAL review. [A. Trans]

**AB 1666 (Keeley)**. Existing law requires the Department of Social Services (DSS) to license community care facilities participating in transitional housing placement programs to provide supervised apartment living services for certain 17- and 18-year-old persons who are in out-of-home placements under the supervision of the county department of social services or the county probation department and who are participating in an independent living program. Existing law also requires DSS to adopt regulations to govern transitional housing placement facilities, including regulations establishing a ratesetting system. As introduced on February 23, 2001, this bill would permit DSS to adopt emergency regulations to implement such a ratesetting system. The initial emergency regulations and the first readoption of those regulations would be exempt from review by OAL. [A. HumanS]

**AB 950 (Wright)**, as amended April 23, 2001, would direct the Department of Developmental Services to mandate a training program for direct care staff employed in licensed, regional center funded community care facilities for persons with developmental disabilities. The bill would require the Department to adopt emergency regulations to implement the training program. Such regulations, along with the first readoption thereof, would be statutorily deemed necessary and would be exempt from OAL review. [S. RIs]

**AB 767 (Goldberg)**, as amended April 25, 2001, would provide that persons convicted of specified felonies related to controlled substances are ineligible for aid under CalWORKs, non-health-care general assistance benefits, or food stamps unless they meet specified conditions related to drug treatment. The bill would require DSS to adopt implementing regulations by no later than January 1, 2003. The bill would permit DSS to implement drug screening provisions for convicted drug felons "through all county letters or similar instructions from the director." Further, the bill would provide that the initial emergency regulations adopted pursuant to the act are exempt from OAL review. [A. Floor]

**SB 526 (Sher)**. The existing Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 requires the State

## STATE OVERSIGHT AGENCIES

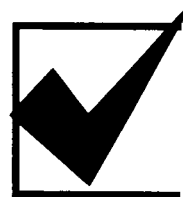
Water Resources Control Board to adopt implementing regulations; the Board is authorized to adopt regulations on an emergency basis concerning the requirements for demonstrating financial responsibility and establishing corrective action requirements. As amended March 26, 2001, this bill would withdraw the Board's specific authority to adopt such emergency regulations to implement those provisions. [*S. Appr*]

**AB 969 (Chan)**, as introduced February 23, 2001, would establish an additional deduction from income to reduce the share of cost requirements in the Medi-Cal medically needy program for individuals and families. The bill would provide

for work incentive deductions and deductions for conservatorship and other fees for medically needy individuals in long-term care. AB 969 would also amend the Medi-Cal program for aged and disabled individuals who have income up to 100% of the federal poverty level by increasing the couple income deduction from \$310 to \$425, and increasing both the individual and couple deductions annually, beginning January 1, 2004, for cost of living adjustments. DHS would be required to adopt emergency implementing regulations which, along with their first readoption, would be exempt from OAL review. [*A. Health*]

## Bureau of State Audits

State Auditor: Elaine M. Howle ♦ (916) 445-0255 ♦ Whistleblower's Hotline: (800) 952-5665 ♦  
Internet: [www.bsa.ca.gov](http://www.bsa.ca.gov)



Created by SB 37 (Maddy) (Chapter 12, Statutes of 1993), the Bureau of State Audits (BSA) is an auditing and investigative agency which operates under the administrative oversight of the Milton Marks Commission on California State Government Organization and Economy (also known as the "Little Hoover Commission"). In Government Code section 8543 *et seq.*, SB 37 delegates to BSA most of the duties previously performed by the Auditor General's Office, such as examining and reporting annually upon the financial statements prepared by the executive branch of the state, performing other related assignments (such as performance audits) that are mandated by statute, and administering the California Whistleblower Protection Act, Government Code section 8547 *et seq.* BSA is also required to conduct audits of state and local government requested by the Joint Legislative Audit Committee (JLAC) to the extent that funding is available. BSA is headed by the State Auditor, appointed by the Governor to a four-year term from a list of three qualified individuals submitted by the JLAC.

On August 3, 2000, Governor Davis announced his appointment of Elaine M. Howle as State Auditor. Howle, formerly the deputy state auditor, has been with BSA since 1993. She previously worked for the Employment Development Department from 1992-93 and for the Office of the Auditor General from 1983-92. She is a certified public accountant and a certified government financial manager.

## MAJOR PROJECTS

### Performance Audit of State Bar

In 1997, then-Governor Wilson vetoed a bill providing the California State Bar—the state's attorney regulatory agency—with its primary source of revenue; the veto led to the Bar's layoff of almost 500 employees during 1998 and a

near-shutdown of the entire agency, including its attorney discipline system. In 1999, Governor Davis signed SB 144 (Schiff and Hertzberg) (Chapter 342, Statutes of 1999), which once again authorized the Bar to collect licensing fees from its members but restricted the Bar's use of those fees and required BSA to conduct a performance audit of the Bar's operations between July and December 2000 (see agency report on STATE BAR for related discussion).

In compliance with SB 144, BSA reviewed several aspects of the Bar's operations and released *State Bar of California: It Has Improved Its Disciplinary Process, Stewardship of Members' Fees, and Administrative Practices, but Its Cost Recovery and Controls Over Expenses Need Strengthening* in April 2001. BSA's findings in these areas are as follows.

- *State Bar Disciplinary Process.* When the Bar was forced to lay off its discipline staff in 1998, it had about 4,400 open complaints in its enforcement inventory; during the shutdown, it accumulated an additional 3,000 complaints against attorneys—resulting in an enormous backlog of uninvestigated complaints. To reduce the backlog, the Bar implemented a plan to prioritize cases so that the most serious complaints receive attention first; cases alleging minor violations are now mediated in the Bar's intake unit, dismissed, or referred to other remedies. BSA found that this prioritization system enables the Bar's investigators to focus most of their attention on serious cases that will likely result in discipline, and lessens the number of cases flowing forward for prosecution, hearing, and review by the State Bar Court. According to BSA, "the data indicate that the priority system is enabling the State Bar to use its resources better than in 1995."

BSA also reported that the Bar has revised the cost model on which its "cost recovery" system is based to increase the