The Office of Administrative Law (OAL) was established in Government Code section 11340 et seq. on July 1, 1980, during 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 all proposed regulations and regulatory changes 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 does not comply with the procedural rulemaking requirements of the APA.

OAL is also authorized to review emergency regulations and disapprove those which are not “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 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 legally enforceable only if adopted pursuant to APA 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, OAL disapproval decisions, and other notices of general interest. The OAL Director is appointed by the Governor, and must be confirmed by the Senate.

**Major Projects**

**OAL Survives 1998 Legislative Defunding Attempt**

During the summer of 1998, a combination of events led the legislature to attempt to defund OAL. First, OAL failed to meet a legislative deadline imposed by SB 1910 (Johannessen) (Chapter 501, Statutes of 1996) to put the California Code of Regulations on the Internet by July 1, 1998. The Office was also staggering under a seven-year backlog of requests for regulatory determinations, as alleged in the Joint Legislative Staff Task Force on Government Oversight’s May 1998 report entitled The Longest Wait in Government. Criticism of the agency began to mount, and the Senate allocated nothing for OAL in its version of the 1998–99 budget bill.

Following intense negotiations between the Wilson administration and the Democrat-controlled legislature, funding for OAL—including funding to enable it to put the CCR online—was added back into the final version of AB 1656 (Ducheny) (Chapter 324, Statutes of 1998), the 1998–99 budget bill. However, the bill imposed several conditions: OAL must wipe out 50% of its backlog of regulatory determinations existing on July 1 1998, by January 1, 1999; and must eliminate 75% of the existing backlog by April 1, 1999.

At the time of the budget crisis, OAL was already in the process of receiving competitive bids from private companies wanting to put the CCR online, and expects that project to be completed in early 1999. The Office also hired a number of attorneys to help clear out the backlog of petitions for regulatory determination regarding alleged “underground rulemaking” by state agencies; the results of that effort are documented below.

**Regulatory Determinations**

- 1998 OAL Determination 12, Docket No. 91–009, August 5, 1998 (request filed March 27, 1991). Petitioner David Rosenberg questioned whether the Habilitation Services Ratesetting Manual, which had been duly adopted as a regulation by the Department of Rehabilitation, was an invalid and unenforceable underground regulation because it had only been incorporated by reference into the CCR rather than printed there in its entirety. OAL found that Government Code section 11344.6 is “the most directly applicable provision” concerning the issue of incorporation by reference. In relevant part, that section states: “The courts shall take judicial notice of the content of each regulation which is printed or which is incorporated by appropriate reference into the [CCR]....” According to OAL, this section “makes no sense” unless it is assumed that incorporation by reference is valid.

The Requester pointed out that the legislature had deleted a Government Code provision requiring OAL to “provide for the incorporation by appropriate reference of regulations which are impractical to include into the [CCR].” OAL declined to infer that such deletion amounted to a prohibition of the practice. Rather, OAL characterized that 1987 statutory change as “transforming a duty into a power...to provide OAL with the flexibility to deal with changing circumstances and developing technology.”

OAL concluded that “[m]aterial that has been properly incorporated by reference into the CCR is no less valid than material that has been printed in the CCR.”

- 1998 OAL Determination 13, Docket No. 91–010, August 11, 1998 (request filed March 31, 1991). San Quentin inmate Lawrence Bittaker questioned whether certain sections of the Operations Manual of the Department of Corrections contain regulations which are without legal effect unless adopted pursuant to the APA. The challenged sections concern inmate marriage, inmate activity groups, inmate library...
access, inmate recreational and handicraft programs, inmate mail, visitor policy, and inmate property.

Under Penal Code section 5058, the Department of Corrections is permitted to “prescribe and amend rules and regulations for the administration of the prisons” and is required to do so pursuant to the APA. Thus, the APA is applicable to Department of Corrections rulemaking. OAL determined that many of the challenged policies in the Operations Manual are indeed regulations because they meet OAL’s two-pronged test: (1) they are standards of general application that apply (or applied) statewide to all inmates, and (2) they implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency’s procedure.

However, other challenged Operations Manual policies that merely restate existing statutes, regulations, or case law are not regulations and need not be adopted pursuant to the APA. Finally, OAL decided that one of the challenged policies, namely the requirement for a Monthly Library Operations Manual, falls within the “internal management” and “forms” exceptions to the APA rulemaking requirement.

1998 OAL Determination 14, Docket No. 91–011, August 12, 1998. Requester Mary Hughes asked whether various unwritten policies of the Employment Development Department (EDD) concerning the collection of unpaid payroll taxes are regulations and therefore without legal effect unless adopted in compliance with the APA. OAL first found that EDD is subject to the APA’s rulemaking requirements, and then proceeded to consider the “rules” as framed by the Requester.

“Rule 1” states that an EDD tax compliance representative has no responsibility to negotiate a payment plan upon the request of a tax debtor. In its response to Rule 1, EDD stated that it would “only accept a payment plan when the employer does not have sufficient assets to pay the amount due in full as shown by a financial statement.” Because Rule 1 affects taxpayers statewide in determining whether a payment plan may be negotiated, OAL found it is a standard of general application. Further, because Rule 1 implements and makes specific EDD’s tax collection provision in the Unemployment Insurance Code (UIC), it is a regulation that should be adopted pursuant to APA rulemaking procedures.

“Rule 2” states that an EDD tax compliance representative can mandate that tax debts be paid within 60 to 90 days. In its Rule 2 response, EDD admitted that its practice does indeed include a 90-day time limit under certain circumstances. While EDD argued that its policy concerning payment plans is “designed merely to lessen the administrative burden on the Department and the debtor,” OAL concluded that “the rule is nonetheless a standard of general application” and determined that it is also a regulation.

“Rule 3” states that a tax debtor, when meeting with a tax compliance representative, is prohibited from making a tape recording of the meeting. EDD admitted that Rule 3 amounts to a policy of statewide application, but argued that it represents no more than an exercise of discretion in that it does not implement, interpret, or make specific the statutes EDD enforces. OAL disagreed, saying that Rule 3 is “intended to implement or make specific the tax collection functions administered and enforced by EDD... and to govern EDD collection procedures” (emphasis original).

“Rule 4” states that EDD tax compliance representatives have no responsibility to advise tax debtors of any rights the debtor has under EDD’s own regulations or other law, or to provide such information upon request by the tax debtor. “Rule 5” states that EDD does not provide a tax debtor with information on regulations that EDD staff are required to adhere to in doing their jobs, even if the tax debtor specifically asks for this information. “Rule 8” states that EDD tax compliance representatives have no responsibility to respect due process rights of a tax debtor afforded under the fourteenth amendment of the United States Constitution. OAL decided that Rules 4, 5, and 8 each fail to articulate a standard to which the two-pronged analysis could be applied. Rather, these “rules” appear to be more in the nature of complaints about specific inappropriate behavior of EDD’s tax compliance representatives.

“Rule 6” states that EDD can threaten to seize business and/or personal assets to coerce a tax debtor to enter into a repayment agreement. OAL stated: “Merely explaining the operative effect of the applicable law does not further interpret or supplement the law. Explaining the application of the law without further interpretation or supplementation is not a rule or standard of general application.”

“Rule 7” states that EDD can place a lien against a tax debtor, and can place a levy on a tax debtor’s bank accounts, without a hearing which would be subject to court appeal. Under “Rule 9(a),” EDD can say in writing to a tax debtor: “A state tax lien has been filed against you as a result of your continued failure to pay your tax liability. If the amount is not paid immediately, additional involuntary collection action may be initiated, which includes seizure and sale of your business and/or personal property.” Under “Rule 9(b),” an EDD tax compliance representative can verbally state: “This debt must be taken care of in 60 to 90 days.” OAL agreed with EDD that Rules 7 and 9 simply embody compliance with the governing statutes. Although Rule 9(b) is similar to Rule 2 (which was found to be an underground regulation), OAL found that Rule 9(b) is in fact more on the order of a challenge to the behavior of a specific EDD employee rather than an articulation of a generally applicable policy.

1998 OAL Determination 15, Docket No. 91–013, August 11, 1998 (request filed April 22, 1991). Petitioner Center for Public Interest Law (CPIL) challenged a policy of the state Board for Professional Engineers and Land Surveyors (PELS), under which the Board stated that it lacked authority to investigate fee disputes between consumers and engineers or land surveyors. PELS published the policy on its “Consumer Complaint Form” and in the spring 1990 issue of its licensee newsletter. The issue presented to OAL was whether such policy is a regulation which should be adopted pursuant to the APA. Under Business and Professions Code section 6716, the Board’s regulations must be adopted in accordance with the APA.

Subsequent to CPIL’s filing of the request for determination, the Board removed the policy statement in question from its complaint form; the Board argued that the issue has
thereby become moot. CPIL argued that simply removing the written statement does not mean that the Board has discontinued its enforcement of the policy, nor does it prevent the Board from subsequently placing the statement back onto the form. OAL found that it need not reach this mootness issue; under its own regulations, OAL is required to issue a determination on the policy as it stood at the time the request was originally filed.

OAL first determined that the policy is indeed a standard of general application, thus meeting the first prong of the test for a regulation. "The Board's policy, in both... versions, applies by its terms to all consumers and all licensees." OAL next considered the second prong of the two-pronged test: whether the challenged policy interprets, implements, or makes specific the law enforced or administered by the Board, or governs the Board's procedure. OAL found that the Board's policy of refusing to investigate fee disputes interprets and makes specific Business and Professions Code section 6785, which gives the Board the "power, duty, and authority to investigate," and section 6775, which provides that "[t]he board may receive and investigate complaints against [licensees], and make findings thereon."

The Board argued that neither of its enabling acts (Professional Engineers Act and Professional Land Surveyors Act) contains any provisions specifically relating to fees charged by licensees; thus, a policy regarding fee disputes could not logically implement, interpret, or make specific the law administered by the Board. OAL was not persuaded, stating that the Board's primary mission is to protect the public from any licensee misconduct, and "investigating fee disputes may lead to discovery of misconduct well within the Board's specifically enumerated responsibilities." PELS also argued that civil courts provide the proper forum for fee disputes; and reiterated that the Board lacks jurisdiction over such matters. However, the Board admitted that it would investigate fee disputes if included along with other allegations of fraud, misrepresentation, deceit, negligence, incompetence, or failure to perform. OAL countered: "The Board's statements of its own jurisdiction and description of the role of courts... are themselves interpretations of statutes. As [such], these pronouncements also satisfy the definition of 'regulation'...."

Finally, PELS cited a portion of Business and Professions Code section 129 ("[n]othing in this subdivision shall be construed as authorizing or requiring any board to set or to modify any fee charged by a licentiate") as evidence of its statutory lack of jurisdiction over fee disputes. OAL found that the Board's interpretation of the statutory language is too narrow. "While the statute does not authorize or require the Board to set or modify fees, neither does it prevent the Board from investigating misrepresentation, fraud or violation of contract concerning fees."

Having concluded that the challenged policy is indeed a regulation, OAL next considered whether any exceptions to the APA requirements are applicable. The Board advocated that because the policy appeared on a form, it falls within the "forms" exception under Government Code section 11342. OAL disagreed: "An interpretation of the forms language in section 11342 which permits agencies to avoid APA rulemaking requirements by the simple expedient of typing regulatory material into a form would result in the exception swallowing the rule. There would be no limit to the degree to which agencies would be able to avoid public notice and comment, OAL review, and publication in the [CCR]." OAL noted that the forms exception is a narrow one which has been construed to apply only to operational forms. The challenged policy, on the other hand, is substantive in nature. The policy on the form does not "merely instruct the user concerning completion of the form; rather, the Board is specifically directing complaints regarding 'fee disputes' to other forums...." Thus, OAL concluded that the forms exception is not applicable.

Even though the Board did not argue the "internal management" exception, CPIL had argued against it and OAL found that PELS could have presented a sufficiently "tenable" argument to warrant examination. OAL stated that "the scope of the internal management exception is narrow indeed."

OAL went on to hold that because the challenged policy "is a matter of public import, beyond the immediate realm of the Board," it cannot fall within the internal management exception. "Thus, the challenged policy is a regulation which does not fall within any exception to the APA rulemaking requirements, and is thus without legal effect unless and until formally adopted in compliance with the APA."

OAL next analyzed whether the various provisions of the Information Sheet interpret, implement, or make specific laws enforced or administered by FTB, and concluded that some of the provisions are indeed restatements of existing law as claimed by FTB, while others expand upon the law so as to be in the nature of regulations. For example, OAL found that the Sheet's prohibition on videotaping the hearing, its provision setting the time and place of hearing, and its provision assigning responsibility for misconduct at the hearing are all regulations which should be formally adopted in compliance with APA rulemaking requirements. OAL first determined that, under Government Code sections 11000 and 11342, FTB is an agency subject to the APA.

In its response, FTB contended that the Information Sheet contains merely restatements of existing law rather than underground regulations, and that the Sheet is exempt from APA requirements in any event because it is a "form." OAL first concluded that the Information Sheet is a standard of general application; it delineates the rules of procedure for the oral protest hearing and is expressly intended as a guide to any taxpayer who might choose to request such a hearing.

OAL next analyzed whether any exceptions to the Information Sheet interpret, implement, or make specific laws enforced or administered by FTB, and concluded that none of the provisions are indeed restatements of existing law as claimed by FTB, while others expand upon the law so as to be in the nature of regulations. For example, OAL found that the Sheet's prohibition on videotaping the hearing, its provision setting the time and place of hearing, and its provision assigning responsibility for misconduct at the hearing are all regulations which should be formally adopted according to APA requirements. On the other hand, OAL agreed with FTB that the provision concerning physical custody of
the hearing files is a restatement of Revenue and Taxation Code section 19542.

Concerning the forms exception, OAL explained: “In the vernacular, a ‘form’ is something to be filled out according to instructions. A ‘form’ is not typically an informative document. Instructions which may tell how to complete a ‘form’ may accompany it, but the sheet in this instance is neither a form to be filled out, nor an instruction on how to complete a form.” In concluding that the provisions of the Information Sheet do not fall under the forms exception, OAL stated: “[E]ven if the...sheet were treated as a ‘form,’ it contains ‘uniform substantive’ rules...which must be adopted independently pursuant to the APA.”

1998 OAL Determination 17, Docket No. 91–015, August 20, 1998. The Prisoners Rights Union questioned whether three policies (one written, two unwritten) employed by the Department of Corrections in reviewing inmate requests to transfer parole to Sacramento County are underground regulations. OAL determined that under Penal Code section 5058, the APA applies to the Department, and then concluded that the policies are standards of general application because they apply to any prisoner in the state who seeks parole transfer to Sacramento County.

Penal Code section 3003 provides the statutory criteria for determining parole location. The challenged written rule purported to delete three of the discretionary criteria of section 3003 and add additional language to three others. The two unwritten rules also interpreted and made specific the provisions of section 3003. Thus, all three policies were found to be regulations which lack validity until adopted according to APA rulemaking procedures.

1998 OAL Determination 18, Docket No. 91–016, August 20, 1998. San Quentin inmate Lawrence Bittaker questioned whether nineteen sections of the Operations Manual of the Department of Corrections contain underground regulations. The challenged sections concern media access to inmates. After reiterating that the Department is subject to the APA under Penal Code section 5058, OAL found that “[t]he challenged sections apply to the public, the media, or inmates statewide. Consequently, [they] are standards of general application.” Further, OAL found that “[s]etting limits on who may make contact with the media, how and when the media may enter facility grounds, and for what purpose, interprets and makes specific the Department’s authority to supervise, manage and control the state’s prisons...[and] to restrict visitation for security reasons.” OAL thus concluded that the “challenged sections” are “regulations” within the meaning of Government Code section 11342.

In conducting its analysis concerning whether any exceptions apply to the challenged sections, OAL stated that it is “obliged to consider both the state of the law at the time the request was filed, and the state of the law as of the date this determination is issued.” Even though after the request was filed the Department’s enabling act was amended to include several express exemptions from the APA rulemaking requirement, OAL determined that none are applicable to the challenged sections at hand.

OAL next concluded that six of the challenged sections fall within the general internal management exception. Those sections contain the following topics: designation of Public Information Officers, guidelines for media information practices, general inquiries, authority of employees to contact the media, designation of the person who is to inform the Director of events likely to attract media, and designation of the person who is to be responsible for updating the “Public Information” sections of the Operations Manual.

All but one of the remaining sections were subsequently adopted by the Department according to proper APA procedure. That section, entitled “Media Representatives,” defines who qualifies as a member of the media and then provides the basis for granting preferences. OAL concluded that this remaining section is a regulation and thus has no legal effect until adopted in compliance with the APA.

1998 OAL Determination 19, Docket No. 91–019, August 31, 1998. John R. Witmyer, an inmate at the California Correctional Center at Susanville in Lassen County, questioned whether “Operational Procedure No. 800–Inmate Medical Services” (OP800) contains underground regulations which are without legal effect unless adopted with APA rulemaking procedures.

The most difficult issue presented to OAL in this determination was whether the exception to the definition of “regulation” found in Penal Code section 5058(c)(1) is applicable. OP 800, concerning the provision of medical services to inmates, appears to have been promulgated by the warden of the California Correctional Center at Susanville to be applied not only to that facility, but also to the sixteen camps of the North Coast Conservation Center, also under the warden’s supervision. The Penal Code exemption states that rules are not to be considered regulations when they apply “solely to a particular prison or other correctional facility...” OAL noted that if a court were to address this issue, it would conduct factfinding to ascertain the degree to which the Susanville complex and the dispersed camps should be considered as one unit. However, OAL’s own charge is not to make such factual findings. Rather, OAL held that policy considerations dictate application of the presumption that “any doubt as to the applicability of the APA’s requirements should be resolved in favor of the APA...Therefore, absent any statutory authority which defines the camps as branches... OAL must conclude that each camp is a separate prison as defined in Penal Code section 6082. Consequently, OAL concludes that to the extent that Operational Procedure No. 800 applies to the camps, it contains standards of general application.”

OAL went on to determine: (1) to the extent provisions in OP 800 apply only to the correctional facility at Susanville, they are “local rules” which need not be adopted as regulations; (2) to the extent provisions apply to the camps as well, but are mere restatements of existing law, APA rulemaking procedures are also not required; but (3) those portions which apply to the camps and which interpret, implement, or make specific existing law are regulations which are without legal effect unless adopted according to the APA.
For the same reason, OAL also denied PLF’s suggestion that
mitigation measures to be undertaken by those planning Cen­
effect on the habitat of the Swainson’s hawk, previously de­
required and, even if there were, the Guidelines do indeed

ded “threatened” by the Fish and Game Commission un­
The Guidelines have been revised since the request for determi­
the determination take into account changes made to the

detract from the fact that they are standards.
DGF also argued that the Guidelines cannot be consid­

tions are not standards of general application. DGF argued that rules of general application must be
intended to be mandatory and phrased in mandatory language. OAL countered that in general there is no such limiting re­
requirement and, even if there were, the Guidelines do indeed contain mandatory terms and the “fundamental premise...that
substantial compliance with the criteria is necessary to avoid criminal prosecution....”
DGF also argued that the Guidelines cannot be consid­

equations, is based upon current law.”
In its discussion of the APA’s applicability to DHS, OAL noted that “most of the written materials that are alleged to be regulations...were issued by Blue Cross under the Department’s authorization, direction, and control.” OAL concluded that the APA is applicable; if the publications in question are found to contain regulatory material, adoption employing APA procedures is necessary.
OAL ruled that 18 of the documents contain regulations which do not fall within any APA exception and are thus with­
underground regulations which are without legal effect un­
less adopted according to APA procedure.

1998 OAL Determination 21, Docket No. 91–021, Sep­
tember 22, 1998. Attorney Diane S. Campbell challenged 27 different administrative bulletins issued by the Department of Health Services (DHS) between December 24, 1970, and Au­
gust 5, 1987, concerning the scope of Medi-Cal benefits at long­
care facilities. OAL’s analysis was “guided by the requester’s interest in the use of bulletins and other notices to identify what is included in the long-term care per diem rate.” Thus, matter contained in the documents in question that did not pertain to this subject was not reviewed by OAL. OAL considered Medi-Cal law in effect both at the time of issuance of the documents in question and at the time of the filing of the request for determination in 1991, “but the discussion of the Administrative Procedure Act, and its express prohibition of underground regulations, is based upon current law.”

In discussion of the APA’s applicability to DHS, OAL noted that “most of the written materials that are alleged to be regulations...were issued by Blue Cross under the Department’s authorization, direction, and control.” OAL concluded that the APA is applicable; if the publications in question are found to contain regulatory material, adoption employing APA procedures is necessary.
OAL ruled that 18 of the documents contain regulations which do not fall within any APA exception and are thus with­
underground regulations which are without legal effect un­
less adopted according to APA procedure.

1998 OAL Determination 22, Docket No. 91–024, Sep­
tember 22, 1998. Attorney Diane S. Campbell challenged 27 different administrative bulletins issued by the Department of Health Services (DHS) between December 24, 1970, and Au­
gust 5, 1987, concerning the scope of Medi-Cal benefits at long­
care facilities. OAL’s analysis was “guided by the requester’s interest in the use of bulletins and other notices to identify what is included in the long-term care per diem rate.” Thus, matter contained in the documents in question that did not pertain to this subject was not reviewed by OAL. OAL considered Medi-Cal law in effect both at the time of issuance of the documents in question and at the time of the filing of the request for determination in 1991, “but the discussion of the Administrative Procedure Act, and its express prohibition of underground regulations, is based upon current law.”

In discussion of the APA’s applicability to DHS, OAL noted that “most of the written materials that are alleged to be regulations...were issued by Blue Cross under the Department’s authorization, direction, and control.” OAL concluded that the APA is applicable; if the publications in question are found to contain regulatory material, adoption employing APA procedures is necessary.
OAL ruled that 18 of the documents contain regulations which do not fall within any APA exception and are thus with­
underground regulations which are without legal effect un­
less adopted according to APA procedure.

1998 OAL Determination 23, Docket No. 91–028, Sep­
tember 28, 1998 (request filed August 29, 1991). Pelican Bay State Prison (PBSP) inmate Barry William Allen questioned whether three rules governing inmates at PBSP are regula­
which must be adopted pursuant to APA procedure in order to be valid. Those rules set forth: (1) a limitation on visitation to twelve hours per week on Saturdays and Sun­
days, (2) a 15-cents-per-page charge for legal copying, and (3) the ability of PBSP officials to confiscate “unapproved” personal inmate property. The Requester argued that the rules conflict with the Department of Corrections’ Operations Manual, which he believed apply to all California inmates. OAL responded that its authority does not “extend to deter­

ting whether the challenged rule is consistent with [the Manual],” and concluded that local prison rules such as the ones under consideration are not regulations subject to the APA because they lack the element of general applicability to prisoners statewide.
1998 OAL Determination 24, Docket No. 91-029, October 1, 1998. Mikael A. Schiold, an inmate at Mule Creek State Prison in Ione, alleged that the Board of Prison Terms had an unwritten policy of precluding the transfer of alien inmates to prisons in their home countries until those inmates had received parole release dates, and contended that the policy constitutes underground rulemaking in violation of the APA. In response, the Board denied having any such policy. However, from the evidence submitted, including two official statements by the Board itself referring to the “policy” and a superior court finding that such policy exists, OAL concluded that “[f]or purposes of this determination,...OAL will assume the policy exists—or at least did exist on the date the request for determination was filed.”

OAL established that, under Penal Code section 5076.2, the Board is subject to the APA. Because the policy is intended to apply to all members of the class of prisoners seeking transfer to foreign prisons, OAL found the policy to be a rule of statewide application.

Government Code section 12012.1 gives the “Governor or his designee”—and the Governor has designated the Chair of the Board of Prison Terms—discretion to approve this type of prisoner transfer. The policy in question was found to implement, interpret, and make specific section 12012.1. Thus, OAL concluded that—as of the time of the request—the policy was an underground regulation.

Next, OAL turned to the issue of whether the policy, if it still exists, continues to be a regulation at the time of this determination in light of intervening legislation. Penal Code section 2912 was added in 1994 to state the legislature’s intent regarding the Foreign Prisoner Transfer Program. OAL held that the policy in question remains an underground regulation in that it interprets section 2912 as well as Government Code section 12012.1.

1998 OAL Determination 25, Docket No. 91-030, October 1, 1998 (request filed August 13, 1991). Richard P. Herman, Esq. questioned whether the Board of Corrections’ application of former section 1107, Title 15 of the CCR, to the remodeling of existing jails is an amendment of that regulation and therefore without legal effect unless adopted according to APA rulemaking procedures.

Former section 1107 concerned certain jail construction projects; the Board could grant “pilot project” status to certain projects in order to permit departure from building regulations for the purpose of experimenting with new building systems or designs. The Requester contended that the use of the phrase “whenever a city, county, city and county, or any combination thereof intends to develop a facility” in section 1107 clearly referred to the construction of new jails; thus granting pilot project status to renovations of existing jails amounted to an amendment of that regulation. OAL, on the other hand, agreed with the Board’s response that “the wording of the regulation was deliberate to allow it to be applied to existing buildings or new designs.” Therefore, application of section 1107 to remodeling projects on existing jails was not an amendment or variance of the regulation; and no additional rulemaking in accordance with the APA was required.

1998 OAL Determination 26, Docket No. 92-001, October 2, 1998 (request filed January 14, 1992). Rose Pothisher, Esq. challenged a policy of the Department of Corporations (DOC) which prohibits the use of irrevocable letters of credit in lieu of a surety bond by an applicant for an escrow agent license.

Effective January 1, 1986, Financial Code section 17202 was amended to substantially increase the amount of the surety bond required of an applicant for an escrow agent license, and to permit an applicant or licensee to “obtain an irrevocable letter of credit approved by the commissioner in lieu of the bond.” In 1991, DOC published notice of its intent to adopt section 1727, Title 10 of the CCR, a regulation implementing the new statute. [11:2 CRLR 117] However, DOC abandoned the rulemaking in 1992 [12:1 CRLR 114], finding that “the language currently contained in the letter of credit format does not comply with the statute of limitations provided by [Financial Code] section 17205, and that a bank would not be able to provide a letter of credit with acceptable provisions because federal banking laws would prohibit such language.” Further, “the federal banking laws prohibit banks from acting as a surety.”

On December 23, 1991, DOC announced by letter to all interested parties that “effective February 1, 1992, the Department will no longer approve or accept letters of credit in lieu of a surety bond.” DOC concluded the proposed rule conflicted with FDIC provisions of banking law and “that there is an inherent conflict of interest between the intent of the statute that the letter of credit function like a surety bond and the law prohibiting FDIC insured banks from writing surety bonds.” Additionally, DOC found that “the proposed rule also conflicts with banking law by requiring that the letter of credit be automatically extended for at least two years from any expiration date to satisfy any claims which may be made against the escrow company for violations of the Escrow Law occurring prior to the date of expiration...this automatic extension provision would be violative of federal banking laws.” Following correspondence with DOC on behalf of 250 independent escrow agent corporations, Rose Pothisher submitted this request for determination to OAL.

Preliminarily, OAL found that DOC is fully subject to the rulemaking requirements of the APA. OAL also found that the policy asserted in DOC’s December 23, 1991 letter is a “regulation” as that term is defined in Government Code section 11342, because it implements the legislature’s mandate to consider letters of credit in lieu of surety bonds with applications for escrow agents’ licenses. OAL rejected DOC’s argument that its blanket prohibition of irrevocable letters of credit is the only legally tenable interpretation of the statutory scheme created in Financial Code sections 17202 and 17205, finding that the federal regulations relied upon by DOC are merely advisory in nature; OAL further rejected the Department’s argument that the legislature impliedly repealed Financial Code section 17202 in 1994 when it enacted Civil Code section 2787. Through its policy precluding the use of irrevocable letters of credit, “the Department has modified the intent of the statute and abrogated the duty delegated to it...
by the Legislature. Accordingly, the challenged rule was adopted to interpret the specific law enforced by the agency. The prohibition is a ‘regulation’ within the meaning of Government Code section 11342....”

- **1998 OAL Determination 27, Docket No. 92-002, October 20, 1998.** Folsom Prison inmate Louis R. Fresquez questioned two policies contained in a memorandum issued by the warden of the California State Prison at Folsom. The first lists items which are permitted to be sent in quarterly packages to inmates; the second requires the inmate, as well as the sender, to provide written consent to the confiscation and destruction of unauthorized items sent in the packages.

   The Department’s rules relevant to inmate personal property are contained within the Department Operations Manual (DOM). In 1991, a number of provisions in the DOM were invalidated by a court because they were “regulatory” and had not been adopted pursuant to the APA’s rulemaking requirements; in 1992, the Department responded to that case by issuing a bulletin stating that parts of the DOM could not be used until adopted pursuant to the APA, and noting that it planned to adopt them by June 1993. According to OAL, the Department has not yet adopted a significant number of those provisions, including several dozen sections regarding inmate personal property.

In this determination, the Department argued that Folsom’s policy is a “local rule” which does not constitute a standard of general application and therefore does not require rulemaking under the APA. OAL took the opportunity presented by this determination to chastise the Department for its failure to undertake timely rulemaking following the court order, and for its apparent efforts to bypass the rulemaking requirement: “It appears at this point in time that the Department is mandating continued, expansive, statewide use of ‘local rules’—in lieu of adopting the invalidated DOM provisions pursuant to the APA. Such widespread use of the local rule exception is inconsistent with legislative intent to limit the use of ‘local rules’ to specified circumstances. To allow the unlimited use of ‘local rules’ to regulate matters of ‘statewide importance’ would allow the ‘local rules exception’ to swallow the rule requiring compliance with the APA.”

OAL then analyzed both policies to ascertain whether they had prison-specific content. OAL concluded that there is sufficient reason to believe that the list of permitted items in the first policy is specific to Folsom; thus, the policy was found to be a local rule and not subject to APA adoption procedures. Concerning Folsom’s confiscation policy, however, OAL referred back to its 1998 OAL Determination 23 (see above) to find evidence that the same policy also was in effect at Pelican Bay State Prison. “Since the confiscation rule (1) was in use in at least two prisons, (2) was not limited to the unique circumstances of one institution, and (3) involves a topic covered by a statewide DOM provision, it is apparent that this rule is not only of local concern but of statewide importance. Therefore, the confiscation rule is a standard of general application.”

OAL concluded that the confiscation policy interprets section 3147, Title 15 of the CCR (as it existed at the time of the filing of the request for determination), and thus is an underground regulation which does not fall within any exception to the APA.

- **1998 OAL Determination 28, Docket No. 93–001, October 22, 1998** (request filed January 21, 1992). Inmate Linda Tharp questioned a policy of the Department of Corrections’ California Institution for Women (CIW) which prohibited, with certain exceptions, inmates from corresponding with other inmates or certain former inmates. OAL recited its own history with the policy: “The challenged rule restricting correspondence was essentially the same as a proposed regulation [by the Department of Corrections] previously disapproved by OAL, in 1990, for failure to comply with the substantive and procedural standards of the Administrative Procedure Act. The challenged rule was also virtually identical to a rule held to be invalid in a determination issued by OAL later that same year.” [11:2 CRLR 42]

OAL held that the policy is not a local rule of CIW, but rather a rule of general statewide application; OAL was aware of at least two prisons where the policy was being utilized. OAL noted that the Department of Corrections itself considered the matter to be of statewide importance, as evidenced by, among other pronouncements, the Department’s “Guidelines for Implementation of Director’s Rule 3139/3140” which were issued to all facilities and contained a stated policy almost identical to the one in issue here.

OAL concluded that the policy is an underground regulation, without legal effect unless adopted in compliance with the APA. As a part of the holding of this Determination, OAL stated: “A ‘regulation’ adopted by the Department, issued to institutions as a ‘guideline,’ and subsequently reviewed and disapproved by OAL, should not be issued or implemented by local institutions under the guise of a ‘local rule’ in order to circumvent the APA.”

- **1998 OAL Determination 29, Docket No. 93–002, October 29, 1998** (request filed February 13, 1992). The California Correctional Peace Officers Association (CCPOA) challenged a policy of the State Personnel Board (SPB) requiring job applicants to disclose all prior employment dismissals (including any set aside by legal action) as an underground regulation which is invalid and unenforceable until adopted according to APA procedures.

OAL first established that the SPB possesses legislatively delegated rulemaking power which is subject to the APA. Next, OAL determined that the policy is a standard of general application because it applies to anyone who might seek employment or promotion in the California civil service system.

The portion of the SPB policy requiring disclosure of those dismissals that have been set aside by court action was
transmitted in the form of a letter sent by SPB’s assistant executive officer to the CCPOA in response to CCPOA’s request for clarification of the requirement. Thus, SPB claimed that the policy was not intended as a standard of general application, but rather was merely an “advisory opinion.” OAL was unpersuaded, stating that “there is no ‘automatic’ APA exemption for advisory opinions.” In order to qualify for such an exemption, “the regulation must be directed to a specific person or group...and not apply generally throughout the state (emphasis original). OAL found this particular policy to have statewide application.

In a curious bit of circuitous logic, the SPB urged that for a policy to be of general application, it must be adopted as a regulation. Because the policy in question had not been so adopted, “logically” it lacks the requisite general application. OAL rejected SPB’s premise on this point. SPB also argued that the letter “did not clearly set forth a mandate,” and therefore cannot be considered a policy of general application. OAL responded that “the statutory test...does not require that the agency rule be phrased in mandatory terms.” Finally, SPB stated that the question in the application requiring the disclosure of past dismissals was part of a form, and thus falls under the forms exception to the APA. Noting the narrow construction of the claimed exception limiting it to operational forms, OAL determined that the exception is not applicable in this situation.

OAL concluded that the portion of the policy requiring disclosure of prior dismissals and the portion further requiring disclosure of even those dismissals which have been legally overturned are both underground regulations.


OAL found that the manual contains standards of general application. “The standards of eligibility for grant requests made to the Department apply to all cities, all counties and all appropriate districts which desire to participate in the...Program” (emphasis original). OAL then cited four examples in the manual where the law administered by DPR is interpreted, implemented, or made specific: (1) schedules and due dates, (2) evaluation criteria, (3) monetary grant minimum and maximum, and (4) obligations of grant recipients.

In its response, DPR creatively argued that the manual is tantamount to a “request for proposals” under the California Public Contracts Code and therefore exempt from the APA. OAL disagreed with this logic: “There is no express statutory language which provides that agency rules placed in contract provisions are exempt from the APA...In addition, it appears the Legislature intended that there be no exemption for contract provisions....[T]he 1947 Legislature considered and rejected the idea....” Because the policies contained in the manual meet both prongs of the test for APA applicability, OAL concluded that they are indeed regulations, and thus invalid until adopted in accordance with the APA.

♦ 1998 OAL Determination 31, Docket No. 93-006, October 30, 1998 (request filed August 2, 1992). Folosm Prison inmate Louis R. Fresquez again (see Determination 27) questioned Folosm Prison policies concerning incoming packages. Fresquez challenged two policies: The first policy at issue limits the items that inmates are permitted to order from outside vendors, and the second requires inmates to consent to confiscation of unauthorized items sent to them.

Again, the pivotal issue for OAL was whether the policies can be construed as local rules (not subject to the APA), or are instead standards of general application (hence meeting the first prong of the two-pronged test for underground regulations). “In determining whether a ‘local rule’ of the Department of Corrections is a standard of general application, OAL determines whether the rule, though officially designated as addressing a matter of only local concern, in reality addresses an issue of statewide importance. Being labeled a ‘local rule’ is not dispositive....According to the California Court of Appeal: ‘[i]f the action is not only of local concern, but of statewide importance, it qualifies as a regulation despite the fact that it is called ‘resolutions,’ ‘guidelines,’ ‘rulings’ and the like.’”

OAL nevertheless construed the first policy (concerning items that inmates are allowed to order) as a local rule, not of statewide application, and thus not subject to APA rulemaking procedures. OAL reasoned that an inmate’s ability to possess, for example, a television is dependent upon the particular facility in which the inmate is housed.

In deciding the second issue, OAL referred back to Determination 23 (see above) to find an almost identical policy at Pelican Bay State Prison requiring prior inmate consent to confiscate unauthorized sent items. This time, however, because at least two facilities were now known to be enforcing the policy, OAL concluded that it is a policy of statewide application rather than a local rule. Finding that the prior consent to confiscation rule interprets the law administered by the Department of Corrections, and further finding no applicable exemptions, OAL concluded that the policy amounts to an underground regulation, invalid and unenforceable until promulgated according to the APA.

♦ 1998 OAL Determination 32, Docket No. 93-008, November 3, 1998 (request filed August 25, 1992). Frederic N. Von Glahn, an inmate at the Department of Corrections’ Sierra Conservation Center (SCC), questioned whether the 1992 “Guidelines For Movie Screening Committee” and the “Movie Screening Committee Ballot” issued by the Department of Corrections through the SCC constitute underground regulations.

OAL began its analysis by noting that, in 1996, DOC promulgated regulations concerning movie screening standards at state correctional facilities pursuant to Penal Code section 10006(b), which was added in 1994. Although DOC argued that such action renders the issue moot, OAL reiter-
On the issue of general application, OAL found it highly relevant that a previously invalidated (for lack of appropriate APA adoption) provision of the statewide Operations Manual was essentially the same as the "local" policies in question. Further, the regulation eventually adopted was also substantially similar. Also, DOC did not meet the burden placed on it by OAL to show how the challenged guidelines were a response to a unique condition at SCC. DOC argued that "the 'climate' of each institution is unique and may change at any given time...."[1] It serves a legitimate penological interest to keep the final decision as to whether...a movie will be shown with the institution head...." OAL responded: "This argument makes a reasonable point, but this does not bear on the legal issue of the validity under the APA of the generic movie guidelines currently under review."

OAL concluded that the movie guidelines and ballot were indeed underground regulations which were invalid for that period before the statewide regulations were adopted according to APA procedures.

**1998 OAL Determination 33, Docket No. 93-009, November 4, 1998.** The Community Psychiatric Centers challenged two related policies of the State Board of Control and its administration of the Victims of Crime Program. The first policy requires hospitals to submit clinical psychiatric histories of crime victims before the Board will consider reimbursement; the second reduces reimbursement based on preexisting mental health conditions of the crime victims.

OAL answered the threshold question of whether the Board is subject to the APA in the affirmative. Government Code section 13968(a) states that the Board is authorized to make all needful rules and regulations consistent with the law...." OAL read the phrase "consistent with the law" to mean, *inter alia*, that the Board's regulations must be adopted in conformity with the APA.

In its response, the Board noted that the policies in question were non-binding on either the Board or the public, and they were not always applied. Rather, they were more in the nature of "guidelines" for staff to consider in obtaining claim verification and, therefore, they do not constitute standards of general application. OAL rebutted: "It is clear that a guideline is one type of policy which the Legislature sought to prohibit...insofar as it contains 'regulations'...." OAL held that the policies appear to apply to hospitals statewide seeking reimbursement for mental health treatment of crime victims, making the policies standards of general application.

Government Code section 13962 gives the Board discretion in verification of claims. OAL held that the first policy routinely requiring hospitals to submit records interprets that section by specifying when the Board would exercise its discretion. Therefore, the first policy is a regulation, invalid unless adopted according to the APA.

OAL identified the key issue in this determination as being whether the Guidelines fall within the internal management exception to the general requirement of APA rulemaking procedures.

Under duly adopted Board regulations, reimbursable services are only those required "as a direct result of the crime." The Board argued that the second policy is merely a restatement of that regulation because it is the only reasonable interpretation of the quoted phrase. OAL agreed with the Requester that there is more than one reasonable interpretation of the term "direct result"; the Board's policy is one "interpretation" and thus is an underground regulation.

**1998 OAL Determination 34, Docket No. 93-011, November 9, 1998 (request filed September 29, 1992).** Inmate Martin K. Maurer challenged a policy adopted by the warden of the Correctional Training Facility-North in response to a directive from the Director of the Department of Corrections. The policy mandated that in order to minimize the potential for manipulation and abuse, inmates who are assigned work positions designated as clerical are to be rotated to different positions after two years. In this case, both OAL and DOC agreed that the policy is one of general statewide application, which interprets and makes specific DOC's statutory authority to assign and reassign inmates to jobs. Further, both agencies agreed that this reassignment policy should have been adopted in compliance with the APA.

**1998 OAL Determination 35, Docket No. 95-001, November 13, 1998 (request filed June 18, 1993).** Pelican Bay State Prison inmate Steve M. Castillo questioned two policies of the Department of Corrections: (1) a presumption that gang-affiliated inmates, if released from segregated security housing into the general prison population, would severely endanger the safety of others and the security of the institution; and (2) a requirement that gang-affiliated inmates in such security housing not be released into the general prison population until they complete a "debriefing" process that verifies they have dropped out of the gang.

OAL found that both policies are standards of general application in that they apply to all gang-affiliated prisoners housed in the various segregated security units throughout the state. OAL next proceeded to discuss whether the policies interpret, implement, or make specific the law enforced or administered by the DOC. OAL held that under a California court of appeal ruling, presumptions such as the one embodied in the first policy are indeed regulations. This one makes more specific DOC regulations concerning release from segregation. Like wise, the second policy implements various Penal Code provisions relating to the custody, treatment, and classification of prisoners. Therefore, OAL concluded that both provisions are underground regulations.

**1998 OAL Determination 36, Docket No. 96-001, November 19, 1998.** The California State Employees Association (CSEA) questioned whether "Attendance Restriction Guidelines" issued by the Department of Motor Vehicles contain underground regulations. The Guidelines applied to DMV...
employees and place various conditions on the use of sick leave. Specifically, the Requester sought determination of those policies requiring verification of illness by health care providers and delineating the possible adverse consequences resulting from an employee's failure to produce acceptable substantiation. OAL identified the key issue in this determination as being whether the Guidelines fall within the internal management exception to the general requirement of APA rulemaking procedures.

Vehicle Code section 1651 permits the DMV Director to adopt and enforce regulations "as may be necessary to carry out the provisions of this code relating to the department." The section goes on to require adoption, amendment, and appeal in accordance with the APA. OAL found that because the Guidelines apply to all DMV employees statewide who might have attendance problems, they are standards of general application. "OAL concludes that because the challenged Guidelines go beyond a simple restatement of (1) the sick leave statute, (2) the sick leave CCR provision [by the Department of Personnel Administration], and (3) applicable provisions of the MOU [the Memorandum of Understanding resulting from the collective bargaining process and approved by the Legislature] and, instead, interpret the means and manner of "substantiating" sick leave, the Guidelines contain "regulations.""

OAL next defined the two-part test for application of the internal management exception: (1) whether the regulation affects only the employees of the issuing agency; and (2) whether the regulation "addresses a matter of serious consequence involving an important public interest." OAL quickly answered the first part in the affirmative and then moved on to analyze the second. OAL identified two important public interests affected by the Guidelines: (1) "Having fair and appropriate standards governing the suspension, demotion, and dismissal of public employees," and (2) "Privacy of medical history and records...." Thus OAL concluded that the Guidelines do not fall within the internal management exception and are invalid until formally adopted according to the APA.

* 1998 OAL Determination 37, Docket No. 96–003, November 19, 1998. This request filed by the California State Employees Association concerns another DMV policy relating to employee vehicle registration. The policy (1) requires DMV employees to comply with vehicle registration laws, (2) states that DMV employee parking areas will be periodically checked to determine compliance, and (3) subjects employees to adverse personnel actions for Vehicle Code licensing and registration violations. Because the policy affects DMV employees statewide, OAL found it to be a standard of general application.

OAL found that the first portion of the policy requiring employee compliance with state law simply restates existing law. However, the second and third portions of the policy are regulations in that they implement and make specific various provisions of the Vehicle Code. OAL noted that the portion of the policy assigning adverse employment consequences could also be construed as an interpretation of Government Code section 19572(t), which states that behavior that "discredits" the Department is a cause for discipline of a state employee.

OAL held that the periodic inspections rule falls within the internal management exception to APA rulemaking requirements, because the rule concerns only agency employees and does not involve an important public interest. According to OAL, "all owners of motor vehicles, including Department employees, should expect inspections as a part of the privilege of owning a motor vehicle."

Nevertheless, OAL found that adverse personnel actions resulting in employment status adjustment were a "matter of serious consequence involving an important public interest." As such, this portion of the policy was found to be an underground regulation which falls under no exception and thus requires adoption according to APA procedures in order to be valid and enforceable.


As with many of the reported determinations involving the Department of Corrections, the key issue here was whether the hard cover book prohibition was a PBSP "local rule" or, instead, applied to the statewide prison population. OAL's analysis of this question was somewhat loose. "The requester seems to assert that it is a department-wide rule" (emphasis added). And "[n]owhere in the agency response does it state that the prohibition on hard cover books is limited to PBSP...." OAL thus appears to have placed the burden on DOC to prove that the policy does not have statewide application. DOC failed to do so; therefore, OAL concluded that the policy is a regulation which does not fall within the "local prison rule" or any other exception to the requirement of APA adoption.

* 1998 OAL Determination 39, Docket No. 96–006, November 25, 1998 (request filed June 1, 1993). Dana K. Ferrell, president of West Coast General Corporation, questioned unwritten, alleged practices by the Division of Labor Standards Enforcement (DLSE), which enforces various Labor Code provisions, including those involving compliance with prevailing wage standards by recipients of public works contracts. DLSE's Bureau of Field Enforcement (BOFE) investigates suspected violations of these prevailing wage requirements. The Requester, whose corporation contracted with San Diego County to build Sweetwater Regional Park and was subsequently issued a "notice to withhold" and a "notice of wages owed" by BOFE, alleged that (1) DLSE maintained an unwritten policy regarding the selection of evidence to be used by BOFE investigators in calculating the amount of unpaid prevailing wages which would be withheld from payment to the contractor, and (2) the amount withheld was routinely inflated 20%–25% over the amount of wages actually due based on the suspected wage violations.

OAL noted that this matter went to litigation which had been settled. During trial, a BOFE investigator had testified to the existence of the challenged practices. However, for this determination, DLSE claimed that the Requester's characterization misstated the actual nature of the existing practices.
The Requester claimed that with regard to the selection of evidence to be used in calculating the amount to be withheld, "[t]here was no consistent hierarchy of documents." DLSE agreed, stating that "it is imperative that the BOFE of evidence to be used in calculating the amount to be with­

contested evidence ... . " There being no disagreement on this point, OAL concluded that the first policy does not "reflect a standard of general application for purposes of application of the APA" because no articulable standard was being applied.

DLSE entirely denied the existence of the 20%–25% augmentation policy, and OAL declined to decide the question of whether it was actually a utilized practice. Rather, OAL concluded that if such a policy did exist, it would constitute an interpretation of a statute and thus would be an under­

ground regulation.


The pivotal preliminary question was whether OAL possess­
ses jurisdiction to issue a determination regarding the PST Retirement Plan. DPA contended that Government Code section 19999.21 exempts the Plan from all APA requirements, including Government Code section 11340.5, which author­
izes OAL to issue determinations. Section 19999.21 provides in relevant part: "The regulations [for the Plan] shall not be subject to the review and approval of the Office of Adminis­

trative Law...." Citing the Government Code section 11346 requirement that all exemptions from the APA must be express, OAL held that the section 19999.21 exemption is limited to APA Article 6 “Review of Proposed Regulations” and does not foreclose an OAL determination at this stage.

OAL concluded that because the Plan applies to all part­

time, seasonal, or temporary state workers, it contains policies of general statewide application. OAL also found that, to the extent the Plan implements and interprets existing regu­

lations, it is invalid unless adopted in accordance with APA procedures (with the limited exception of elimination of the OAL review and approval step).


mate John Rease Butts, Jr. challenged an unwritten, alleged policy of the Board of Prison Terms (BPT) to automatically rescind the previously-granted parole dates of life prisoners originally sentenced under the Indeterminate Sentencing Law (ISL) in the wake of the new state policy embodied in the Determine Sentencing Law.

OAL stated: "It is clear that the alleged policy constitutes a standard of general application because it applies to all California life prisoners whose parole dates, which were previously granted under the ISL, have been rescinded." OAL next explained: "The alleged policy is not that the Board decides to rescind ISL parole dates based upon sub­

sequent conduct or other new information in each case, but that the Board presumes generally that parole has been improvidently granted to all ISL life prisoners and schedules rescission hearings for all of [them], resulting in the rescis­

sion of [their] ISL parole dates..." (emphasis original).

Provisions of the Penal Code grant the BPT discretion to determine whether good cause exists to rescind parole dates, but only on a case-by-case basis. Because no generalized pre­

sumption is expressed in the statutes, OAL concluded that the BPT policy is an interpretation, and thus an underground regulation which is invalid unless formally adopted according to the APA requirements.


mates and senders of packages to consent in advance to the donation, destruction, or return to the sender (at the inmate’s expense) of all unauthorized items sent to inmates.

As with similar determinations, the key issue is whether the policy is a local rule, thus exempt from APA adoption requirements, or a policy of general statewide application. OAL outlined the factors it considers in making such a determination: "(1) whether the rule is one of statewide importance, (2) whether the rule applies at more than one correctional institution, and (3) whether the rule is required by unique circumstances at one particular correctional institution. No single factor is dispositive. Being labeled a ‘local rule’ by the issuing agency is not control­

ling." OAL continued: "The rule involves a topic covered by a statewide DOM [Department of Corrections Opera­

tions Manual] which has not been incorporated into the duly adopted regulations, and appears to apply throughout the state.... It applies to at least two prisons...." OAL con­

cluded that the policy is indeed one of general application, and further that it interprets the law administered and enforced by DOC. Consequently, the policy in question is an under­

ground regulation.


mate Richard Pittman questioned a policy requiring all out­

going prisoner mail to be stamped with the words “state prison.” Although it was fairly clear that this policy is one of general application implementing the law enforced by the Department of Corrections, DOC claimed that the issue had become moot because the policy had been subsequently valid­

ly adopted as a regulation. OAL replied that it retains a duty to determine the issue according to the law extant at the time of the request for determination. OAL concluded that the policy was invalid until its subsequent adoption in com­

pliance with the APA.

OAL concluded that the kitchen rules concern matters unique to PBSP. "They do not constitute rules or standards of general application, and are thus not 'regulations.'"

While OAL found the credit forfeiture for razor blade possession to be a standard of general application, it is also a restatement of existing law, and thus is not a regulation requiring separate adoption according to APA standards. "The challenged rule is only the reasonable interpretation of an existing regulation."


Initially, OAL determined that the APA is applicable to the Department of Justice because the APA applies to all state agencies except those in the judicial or legislative branches. DOJ is part of the executive branch. Next, OAL found that because the policies in the Bulletin apply to all firearms dealers who might offer the BFSC course (as well as all people who might take such a course), they are standards of general application. Finally, OAL concluded that the provisions in the Bulletin interpret, implement, and make specific various portions of Article 8, "Basic Firearms Safety Instruction and Certificate," Penal Code sections 12800–12809. Thus, the Bulletin contains underground regulations which are invalid unless adopted pursuant to the APA.


OAL initially found that the policies are "standards of general application because they apply to all DWR employees identified as having attendance problems."

In a novel argument, DWR stated: "The Department succeeds to and is vested with all of the powers, duties, purposes, responsibilities, and jurisdiction in matters pertaining to water or dams.... The department is not the enforcement agency for state employment issues. Additionally, the substantiation [of absence due to illness] requirement is not remotely related to water or dams." In other words, DWR claimed that it could not possibly promulgate underground regulations concerning employment issues because it has no jurisdiction to do so. OAL disagreed, finding that DWR's legislatively delegated rulemaking power is not limited to matters pertaining to water and dams, but also covers the activities of its own employees.

Employing logic very similar to that in Determination 36 above, OAL reached a similar conclusion, holding that the internal management exception is applicable for the following rules which do not involve an important public interest: (1) a rule requiring employees to submit requests for expected absences at least one day in advance, (2) a rule requiring employees to submit requests for routine medical and dental appointments two days in advance, and (3) a rule requiring employees to call in to work by a certain time and leave a contact phone number when unexpectedly ill. However, "the challenged rules that implement and interpret the applicable statutes and regulations concerning the verification of DWR employee usage of sick leave do involve a matter of serious consequence involving an important public interest, namely, consequences which could result in adjustments to the employment status of DWR employees." Just as in Determination 36, OAL held that the challenged policies requiring employees to reveal specific medical information involved the important public interest of privacy of medical records. Therefore, those portions of DWR policy requiring verification and disclosure were found to be regulations not exempt under the internal management exception and thus invalid and unenforceable until adopted in accordance with the APA.

- 1998 OAL Determination 47, Docket No. 97–005, December 17, 1998 (request filed November 18, 1994). Inmate Brian K. Barnett questioned whether his placement and retention by the Department of Corrections in administrative segregation pending receipt of his file at the California Medical Facility and California State Prison–Solano are underground regulations.

OAL determined that despite the Requester's generous use of the terms "policy," "practice," and "rule," he was challenging only his personal retention in administrative segregation. That being the case, OAL found that the DOC actions in question do not rise to the level of standards of general application, and are therefore not underground regulations.

Legislation

SB 779 (Calderon). Existing law generally exempts the Public Utilities Commission from the APA's provisions relating to the adoption of regulations, the review of regulations by OAL, and judicial review of regulations. As amended August 28, this bill requires amendments, revisions, or modifications by the Commission of its Rules of Practice and Procedure after January 1, 1999, to be submitted to OAL for review in accordance with Government Code sections 11349, 11349.1(a) and (b), 11349.2, 11349.3, 11349.4, 11349.5, 11349.6, and 11350.3. If the Commission adopts an emergency revision to its Rules of Practice and Procedure based upon a finding that the revision is necessary for the preservation of the public peace, health and safety, or general welfare, this emergency revision shall be reviewed by OAL in accordance with Government Code section 11349.6(b) to (d), inclusive. Such an emergency revision shall become effective upon filing with the Secretary of State and shall remain in effect for no more than 120 days.

SB 779 clarifies that the PUC is not required to comply generally with the APA's rulemaking requirements when it adopts substantive quasi-legislative pronouncements related to its regulation of utilities; it is only intended to provide for OAL review of procedural Commission decisions relating to Commission's Rules of Practice and Procedure, and not General Orders, resolutions, or other substantive regulations. This bill was signed by the Governor on September 26 (Chapter 886, Statutes of 1998).