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 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 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. Former OAL Director Edward Heidig left the agency in January, when his appointment by former Governor Pete Wilson—which had not yet been confirmed by the Senate—was withdrawn by incoming Governor Gray Davis. At this writing, Deputy Director Charlene G. Mathias is serving as OAL's acting director.

**MAJOR PROJECTS**

**OAL Rulemaking**

Effective February 7, OAL adopted new section 8 and made minor technical changes in sections 1, 4, 6, 16, 55, and 100, Title 1 of the CCR, its procedural rules governing the submission and review of regulatory proposals from other agencies. New section 8 sets forth a uniform method agencies are to use to indicate the precise changes being made to existing CCR language. Section 16(a)(1), Title 1 of the CCR, formerly stated that a proposed regulation under OAL review would be presumed not to meet the required standard of clarity if it could be interpreted to have more than one meaning "and the varying interpretations cannot be harmonized by settled rules of construction..." OAL's amendment deletes the quoted portion from its rule. According to OAL, "members of the regulated public should not have to know and apply rules of statutory construction in order to comply with a regulation." The other amendments were technical in nature.

**Regulatory Determinations**

Following is a summary of regulatory determinations issued by OAL between January 1 and April 30, 1999:

- **1999 OAL Determination 1, Docket No. 97-006, January 7, 1999** (request filed January 5, 1995). Requester William T. Mayo, Esq., questioned whether three policy documents of the Veterinary Medical Board (VMB) contain regulations which are without legal effect unless adopted in compliance with the APA. The documents are: (1) "Citation and Fine Guidelines," (2) "Citation Procedures Manual," and (3) "Complaint Procedures."

The initial test for a "regulation" is whether the policy is a "standard of general application." Concerning the first document, VMB asserted that "because the Citation and Fine Guidelines document provides for discretionary application of sanctions, rather than mandatory penalties, it is not a standard of general application." OAL disagreed, stating that standards of general application are "not restricted to statements which contain express language stating they are binding or mandatory. ... [I]t is not necessary that the rule require affirmative conduct by an affected party."

VMB next argued that the other two documents are exempt from the APA's rulemaking requirements under the "internal management" exception in Government Code section 11342(g). Under this exception, regulations which relate only to the internal management of a state agency need not be adopted pursuant to APA rulemaking procedures. Noting that this exception is narrowly construed, OAL found that "Complaint Procedures" contains underground regulations, only one of which could be exempt as internal management: a provision dealing with what information a VMB employee is required to provide in a written report after reviewing a complaint. Similarly, the only exempt policy OAL found in "Citation Procedures Manual" is a provision dealing with the responsibilities of VMB employees in performing their jobs. (See agency report on VMB for related discussion.)

- **1999 OAL Determination 2, Docket No. 97-007, January 7, 1999.** Requester Tri-TAC (a nonprofit professional organization sponsored by the League of California Cities, the California Association of Sanitation Agencies, and the California Water Pollution Control Association) challenged
“Utilities and Infrastructure Policy P-3” (P-3), contained in the Land Use and Resource Management Plan issued by the Delta Protection Commission. P-3 prohibits the siting of new sewage treatment facilities and areas for sewage effluent and sludge disposal in the Sacramento-San Joaquin Delta Primary Zone.

The main issue in this determination was whether the challenged policy amounts to a standard of general application. According to OAL, “the challenged plan applies to a region of the state, rather than the whole, but it applies generally to all lands, and hence landowners, similarly situated within the region. Certain policies of limited application are exempt from APA procedures, however, the Commission’s Regional Plan is not sufficiently limited to qualify for such exemption.” Thus, OAL concluded that at the time of the filing of the request for determination, the policy was an underground regulation; OAL also noted that the Commission has since codified the policy at section 20030, Title 14 of the CCR.

1999 OAL Determination 3, Docket No. 97-008, January 8, 1999 (request filed April 11, 1995). Requester Gaye Welch-Brown questioned various policies of the State Controller’s Office (SCO) governing the discrimination complaint process for its employees. At the outset, OAL considered whether the APA is applicable to quasi-legislative enactments of SCO. Generally, OAL finds APA applicability within the express statutory delegation of rulemaking power to the state agency under consideration. Finding no such statute for SCO, OAL reasoned that because “[t]here is no specific statutory exemption which would permit the SCO to conduct rulemaking without complying with the APA…APA rulemaking requirements generally apply to SCO.”

OAL next found that the policies at issue “pertain to all members of the class of SCO employees. Hence, the rules are a standard of general application.”

SCO contended that the policies in question are “not within the purview of the laws or rules enforced by the Controller on the citizens,” and made the related argument that the challenged rules do not affect the public and pertain only to internal office management. OAL responded that “the issue of discrimination within state government is a matter of serious consequence involving an important public interest….In addition, if an employee sues a department for discrimination and prevails, the money which must be paid to the employee is taken from the money paid by the taxpayers of the state.”

Finally, SCO argued that its discrimination complaint process policies “fit under the umbrella of the State Personnel Board’s regulation,” thus exempting SCO from undertaking its own APA rulemaking process. OAL countered that “the SPB regulation states that any agency may choose to develop its own written procedure. SCO concedes it did implement its own…pursuant to the authority granted under that SPB regulation…In developing its own procedure SCO greatly amplified the SPB regulation. The authority granted departments to create their own written procedure did not excuse [them] from complying with the rulemaking procedures required by the APA. SPB lacks authority to grant such an exemption.”

OAL held that SCO’s discrimination complaint process policy for its employees contain underground regulations that are without legal effect until adopted in compliance with the APA.

1999 OAL Determination 4, Docket No. 97-009, January 8, 1999 (request filed May 22, 1995). Requester David W. Finney challenged Administrative Directive No. 83/2 of the Board of Prison Terms. That directive provides that life prisoners whose offenses were committed before July 1, 1977 and who have been found suitable for parole under post-1977 guidelines are entitled to have parole dates set under pre-July 1, 1977 guidelines. July 1, 1977 is the effective date of the Uniform Determinate Sentencing Law. With that law, the legislature declared that the purpose of imprisonment is punishment and not rehabilitation, as had been the state’s prior position.

The Board contended that the directive is merely a re-statement of the law established in three court decisions. OAL analyzed those case holdings and found that the directive is more than an amere restatement; rather, it interprets, implements, and in one provision apparently conflicts with the law established in those cases. OAL held that the portions of Administrative Directive No. 83/2 that are more than mere restatements of law are underground regulations and invalid unless adopted according to the APA.

1999 OAL Determination 5, Docket No. 97-010, January 15, 1999 (request filed May 28, 1995). Requester David D. Richards, an inmate at Mule Creek State Prison, questioned whether a Department of Corrections rule denying family visits to certain inmates was an underground regulation. OAL had no trouble determining that the challenged rule meets the test for a regulation: (1) it is a standard of general application that (2) interprets, implements, or makes specific the law enforced or administered by the agency and (3) does not fall within any exception to the APA’s rulemaking requirements. OAL noted that DOC has since adopted the policy in compliance with APA requirements, such that it was invalid only during those times when it had been promulgated but not properly adopted.

1999 OAL Determination 6, Docket No. 97-011, February 17, 1999. Requester Eytan R. Ribner challenged two policies of the Department of Health Services (DHS) pertaining to the Medi-Cal program, whereby DHS: (1) limits opportunities for providers of health care services and supplies under Medi-Cal to submit amended cost reports, and (2) specifies the method for applying increments in the hospital cost index to prior years’ allowable rates.
Under Welfare and Institutions Code section 10725, the DHS Director has general rulemaking powers which must be exercised in accordance with the APA. Welfare and Institutions Code section 14124.5 provides the Director with specific rulemaking powers for the administration of the Medi-Cal program, to be exercised in a manner “not inconsistent with any of the provisions of any statute of this state.” Thus, OAL concluded that the APA is applicable to DHS rulemaking regarding Medi-Cal.

Unchanged since 1980, section 51019, Title 22 of the CCR, states: “An amended cost report may be submitted by a provider and accepted by the Department for the fiscal period or periods for which proceedings are pending.” According to both the requester and DHS, prior to mid-1989 DHS interpreted that section to permit providers to file amended cost reports if proceedings were currently pending. In mid-1989, however, DHS changed its interpretation of the regulation and now permits the filing of amended reports only if an appeal is pending. Relying on Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557 (1996), DHS argued that its administrative interpretation of an existing regulation “does not constitute a new regulation for purposes of compliance with APA procedures.” OAL rejected that argument, noting that the Tidewater court (1) emphasized that the APA defines the term “regulation” “very broadly,” (2) concluded that the agency policy at issue in the case—which also interpreted a regulation—was a “regulation” within the meaning of the APA, and (3) overruled two decisions holding that other agency policies interpreting regulations were not “regulations” within the meaning of the APA. OAL also cited three court of appeal decisions holding that agency policies interpreting CCR provisions are subject to the APA.

OAL further rejected DHS’ argument that its new interpretation is the only legally tenable interpretation of an existing regulation, noting that the Second District Court of Appeal has already found that DHS’ new interpretation is unreasonable. “It flies in the face of logic to argue that an interpretation found to be unreasonable by the California Court of Appeal is the only legally tenable interpretation. Clearly, the new interpretation of section 51019 is not the only legally tenable interpretation, and given the finding of the Court of Appeal, it is not legally tenable at all” (emphasis original).

The second challenged rule is DHS’ procedure for applying increments in the hospital cost index to prior years' allowable rates when determining the maximum allowable reimbursement. Again, OAL found that the procedure utilized by DHS interprets an existing DHS regulation (section 51536, Title 22 of the CCR), such that it is a “regulation” within the meaning of the APA. OAL rejected DHS’ argument that its interpretation of the regulation is exempt from the APA’s rulemaking requirements under the “internal management” exception, finding that the method selected “could possibly affect the maximum allowable rate of payment.” Thus, the policy is not exempt because of its potential to affect entities outside DHS.


Under the Government Code, state employees facing lay-off due to management-initiated changes are entitled to priority placement in other positions in state civil service. DPA is statutorily authorized to effectuate this program by restricting other state agencies' ability to fill vacant positions in order to give hiring priority to current employees being laid off. The SROA Manual in question outlines the operational procedures of the program.

As a threshold issue, DPA argued that OAL is precluded from issuing a determination because the requester is limited to remedies under the Dills Act (formerly the State Employer-Employee Relations Act). OAL replied that “[t]here simply are no standing requirements connected with filing requests for determination.”

DPA then argued that a “supersession” provision in the Memorandum of Understanding (MOU) between Bargaining Unit 10 (which represented the requester) and DPA had the effect of exempting the rules in question from the APA’s rulemaking requirements. That MOU provision incorporated into the agreement specified Government Code sections along with “all existing rules, regulations, standards, practices and policies which implement” the listed sections. DPA urged that the Dills Act had “impliedly exempted from the APA not only all rules expressly stated in an MOU, but also all existing rules, regulations, standards, practices and policies which implement numerous Government Code sections.” OAL noted that it rejected this same DPA argument nine years ago in 1990 OAL Determination No. 16 (December 18, 1990). For the same reasons, OAL again rejected the argument.

“First, when the APA is read together with the Dills Act and with DPA’s enabling act, it is clear that DPA is mandated both (1) to perform its duties as the Governor’s representative in collective bargaining, and (2) to adopt regulations necessary for personnel administration.” OAL found that the Dills
Act is not meant to supplant the APA; DPA is required to conform its rulemaking actions to two sets of non-contradictory requirements, those of both the APA and the Dills Act.

Secondly, OAL held that the supersession language in the MOU provision under consideration does not satisfy the APA requirement that all exemptions be “express.” Third, OAL noted that “[e]ven assuming for the sake of argument that [the MOU provision] had the effect of exempting the SROA Manual from the APA as that Manual is applied to employees in unit 10, the Manual nonetheless be invalid as applied to employees in the other 20 bargaining units, not to mention as applied to employees who are members of no bargaining unit.” Finally, “the plain language of the Dills Act provision creating the supersession [of certain statutory provisions for purposes of MOUs] procedure...does not exempt anything from the APA, and cannot reasonably be interpreted to create an APA exemption.”

♦ 1999 OAL Determination 8, Docket No. 97-013, March 16, 1999: Requester Mark McGuire challenged the Department of Corrections' Administrative Bulletin 95/1, which limits the publications that inmates are allowed to possess and provides for the confiscation and disposal of unauthorized publications. OAL held that while some of the provisions contained in the Bulletin are merely restatements of existing law or statements of fact, others are underground regulations, and thus invalid unless adopted pursuant to the APA.

The request for determination also questioned the necessity, clarity, legal authority, and consistency with existing law of the policies in the Bulletin. OAL explained that “[i]n the context of a request for determination, OAL’s authority is limited to answering the question of whether the state agency has improperly issued a rule without first putting it through notice and comment and the other procedures mandated by the APA. Once an agency has complied with the APA procedural requirements in adopting a proposed regulation...then OAL will apply the six APA standards during its review of the regulation.”

Requester further contended that the Bulletin is unconstitutional. OAL responded that it lacks jurisdiction to decide that issue.

♦ 1999 OAL Determination 9, Docket No. 97-014, March 25, 1999 (request filed March 11, 1996): Requesters Jon M. and Sam R. Tardino challenged a policy of the State Board of Equalization (SBE) whereby tax was asserted against corporate officers-stockholders of closely held corporations in cases where sales tax had been collected from customers while the corporate powers, rights, and privileges had been suspended by the Franchise Tax Board due to the corporation’s failure to timely pay franchise taxes.

SBE conceded that the policy is a regulation within the meaning of the APA. “The Board further asserts, however, that notwithstanding its failure to comply with the APA, the Board has the statutory obligation to collect sales taxes which may not be abrogated nor restricted by the absence of a duly adopted ‘regulation.’” According to SBE’s response, “[a] determination that this [policy, which was adopted by passing a motion during the Board’s June 30, 1980 meeting] is a regulation does not prohibit the Board from making such assessments, for such a prohibition would impinge on the Board’s duty and authority to enforce the Sales and Use Tax Laws.”

OAL responded that under the APA, OAL has jurisdiction to issue determinations as to whether challenged agency policies are regulations, as defined. “OAL will not address in this determination whether or not (1) administrative rulings based upon the challenged rule should be reversed or (2) the Board may make such assessments absent a duly adopted regulation. Those issues are matters for the courts.” Nevertheless, in a three-page endnote, OAL did indeed address those issues. Responding to SBE’s charge that the “only consequence of a determination that a standard of general application is an underground regulation is that the standard is void and is not entitled to any deference,” OAL listed eight other possible consequences: “(1) an injunction barring the agency from using the underground regulation, (2) administrative decisions reversed insofar as based on the underground regulation, (3) matters remanded by the court to the agency for rehearing without reliance upon the underground regulation, (4) assessment of attorney’s fees against the agency, (5) additional litigation, (6) denial of meaningful public participation in the development of agency policy, (7) heightened legislative oversight, and (8) in rare cases, agency liability for damages.” Although admitting that “OAL determinations are only advisory opinions,” the gist of OAL’s note is that it is poor public policy for any agency to purposefully characterize itself as somehow beyond the reach of APA requirements.

SBE also argued that “the Sales and Use Tax Laws are self-implementing and do not require a regulation by the Board to be enforceable.” OAL reasoned that if such were the case, then (1) the legislature would not have delegated rulemaking authority to SBE, and (2) the Board would have had no need to adopt the policy in question. Because the legislature did indeed delegate such power, and SBE did adopt the policy, it is only logical that the statutes are not entirely self-implementing. OAL also found that there is more than one legally tenable interpretation of applicable law, thus necessitating a regulation to prescribe which interpretation will be followed. OAL concluded that the policy under consideration is an underground regulation, and thus void unless adopted pursuant to the APA.

♦ 1999 OAL Determination 10, Docket No. 97-015, March 30, 1999 (request filed October 8, 1996): Requester James J. Milam questioned a “policy decision” of the Board of Podiatric Medicine (BPM). The policy in question provided that “it is inherently misleading for a podiatrist to...”
advertise a specialty certification or other recognition of professional superiority unless [it] is issued or awarded by a specialty board or other organization which is authorized or approved by the Council on Podiatric Medical Education."

BPM argued that the policy was not a regulation because "[i]t was instead a mere policy statement, i.e., an advisory statement...[which] did not constitute an enforceable standard and had never been intended as such. No administrative disciplinary action was, or could have been, founded on a 'violation' of the Policy Decision." Nevertheless, OAL assumed that "the Board's use of 'inherently misleading' in its policy decision means that the Board would find such an advertisement to be misleading to consumers and therefore prohibited under Business and Professions Code section 651." BPM's claim that it did not use the policy for disciplinary purposes was not persuasive to OAL. "It is not required that the state agency actually enforce the standard; just issuing [it] is sufficient to violate the APA."

OAL concluded that at the time the request for determination was filed, the policy amounted to an invalid underground regulation. However, OAL noted that BPM subsequently rescinded the policy decision, and that the legislature has since codified the policy within Business and Professions Code section 651. [16:1 CRLR 80] (See agency report on BPM for related discussion.)


OAL analyzed each of the forms and found that three request more information than is required by existing law. Such a request for additional information amounts to a regulation, and thus is invalid unless adopted pursuant to the APA. Under the same reasoning, OAL held that the "forms" exception to the APA's rulemaking requirements in Government Code section 11342(g) is inapplicable; the three forms were judged to be substantive rather than operational.

DPR claimed that one of the forms, the Pilot-County Registration Form, is not a standard of general application because it is provided as a courtesy to county commissioners. OAL found this fact irrelevant, and repeated its position that actual use or enforcement of the standard in question is unnecessary to a finding that it violates the APA.

LEGISLATION

AB 486 (Wayne), as amended April 5, sponsored by the California Law Revision Commission, would make two major changes in the APA's rulemaking provisions. First, the bill would prescribe a procedure under which an agency could render, upon request by interested persons, a nonbinding advisory interpretation of statutes, regulations, agency orders, court decisions, or other legal provisions enforced or administered by the agency. Under the bill's provisions, any interested person would be able to request in writing that OAL review such an advisory interpretation pursuant to specified procedures. The requester would also be able to obtain a judicial declaration as to the validity of the advisory interpretation by bringing an action for declaratory relief in superior court.

The bill would also create a new procedure for agency adoption of regulations determined to be noncontroversial. Under that procedure, "consent regulations" would be exempt from normal APA rulemaking procedure and would be subject to a shorter adoption process. No proposed regulation could be adopted as a consent regulation if any adverse comment about it is received by the agency. [A. Appr]

AB 1295 (Firebaugh). Existing law exempts the Department of Personnel Administration from the APA with respect to regulations that apply to state employees in State Bargaining Unit 5, 6, 8, 16, or 19, and provides alternative procedures for DPA to use in the adoption, amendment, or repeal of regulations applicable to those state employees. As introduced February 26, this bill would instead exempt DPA, except as specified, from the regulation and rulemaking provisions of the APA with respect to regulations that apply to (1) state employees who are excluded from the Ralph C. Dills Act, and (2) state employees for whom a memorandum of understanding has been agreed to by the state employer and the recognized employee organization. This bill would provide that the Department's regulations are subject to the APA's requirement that regulations meet the standards of necessity, authority, clarity, consistency, reference, and nonduplication, and that existing regulations be reviewed. [A. PERet&SS]

LITIGATION

In Kings Rehabilitation Center, Inc. v. Premo, 69 Cal. App. 4th 215 (January 13, 1999), the Third District Court of Appeal upheld the practice of "incorporation by reference"—that is, the identification of specified material within a regulation and its incorporation by reference into the regulation, rather than actual inclusion of the incorporated material in the regulation.

The Department of Rehabilitation administers "habilitation" programs and reimburses providers of "work-activity" programs. The Department issued a ratesetting manual, which includes formulas for reimbursing providers. Rather than including the provisions of the ratesetting manual in its official regulations, the Department adopted a regulation stating that "[t]he Habilitation Services Ratesetting Manual dated July 1, 1983, and revised July, 1996...is hereby incorporated by reference and made a part of these regulations." Plaintiff attacked the practice of incorporation by reference as "antithetical to the letter and spirit of the APA." [16:1 CRLR 199]

The court rejected plaintiff's claim, stating that no statute either authorizes or prohibits the practice. However, the court noted that OAL has approved the practice through its adoption of section 20, Title 1 of the CCR, which states that "where a regulation which incorporates a document by reference is approved by OAL and filed with the Secretary of State,
the document so incorporated shall be deemed to be a regulation subject to all provisions of the APA. "The court also found relevant Government Code section 11344.6, which allows judicial notice to be taken of regulations either printed or “incorporated by appropriate reference.” According to the court, “[t]here is no reason to judicially notice illegal regulations, therefore we assume the Legislature has agreed with OAL’s determination that incorporation by reference can, in some cases, further the purposes of the APA.”

The court noted that the California APA’s counterpart federal statute expressly provides for incorporation by reference. Even though there is no parallel California provision, according to the court “the point is that the process...is not inherently inimical.”

Bureau of State Audits

State Auditor: Kurt Sjoberg ♦ (916) 445-0255 ♦ Whistleblower’s Hotline—(800) 555-5207 ♦ Website: www. bsa.ca.gov

C reated 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 Reporting of Improper Governmental Activities 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.

MAJOR PROJECTS

State Agency Readiness for the Year 2000

In Year 2000 Computer Problem: The State’s Agencie Are Progressing Toward Compliance but Key Steps Remain Incomplete (No. 98116; February 1999), BSA reported for the second time on state agencies’ progress in resolving problems with their computer systems caused by the year 2000. In August 1998, BSA reported—among other things—that agencies were prematurely declaring their critical projects complete that have not been thoroughly tested. [16:1 CRLR 212] In its latest report, BSA found that although state agencies are making progress toward correcting critical computer systems to ensure the uninterrupted delivery of essential services to Californians, many of the fourteen agencies that provide the most critical services are still not finished. Further, eleven agencies have not completely tested their computer systems, and seven have not corrected or replaced the embedded chips that control certain of their systems’ computerized activities.

BSA reported for the second time on state agencies’ progress in resolving problems with their computer systems caused by the year 2000.