The Reporter summarizes below the activities of those entities within state government which regularly review, monitor, investigate, intervene, or oversee the regulatory boards, commissions, and departments of California.

OFFICE OF ADMINISTRATIVE LAW
Director: John D. Smith
(916) 323-6221

The Office of Administrative Law (OAL) was established 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 existing and proposed regulations against six statutory standards—necessity, authority, 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.... OAL has the authority to disapprove or repeal any regulation that, in its determination, does not meet all six standards. OAL is also authorized to review all emergency regulations and disapprove those which are not necessary for the immediate preservation of the public peace, health and safety or general welfare. The regulations of most California agencies are published in the California Code of Regulations (CCR), which OAL is responsible for preparing and distributing.

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 are regulatory in nature and legally enforceable only if adopted pursuant to APA requirements. These non-binding OAL opinions are commonly known as “AB 1013 determinations,” in reference to the legislation originally authorizing their issuance.

In April, Governor Wilson reappointed John D. Smith to serve as OAL Director; Smith has served with OAL since 1986 and has served as Director since 1990.

MAJOR PROJECTS

1995 OAL Determinations. On February 22, OAL released 1995 Determination No. 1, Docket No. 90-023, in which OAL considered whether, in ratifying a cleanup and abatement order pursuant to Water Code section 13304, the California Regional Water Quality Control Board for the Los Angeles Region (Regional Board) adopted a regulation required to be promulgated pursuant to the APA. On April 23, 1990, after two hearings, the Regional Board ratified a cleanup and abatement order issued by Board staff on December 18, 1989, pursuant to Water Code section 13304. The abatement order required HR Textron, a manufacturer located within the Board’s jurisdiction, to install a groundwater monitoring well to investigate the extent of pollution caused by a leaking underground storage tank. The California Manufacturers Association alleged that, in ratifying the abatement order, the Regional Board established a general rule of application whereby in any soil contamination case resulting from a release from an underground storage tank of contaminants into soil below grade, groundwater monitoring would automatically be required in a cleanup and abatement order pursuant to Water Code section 13304.

OAL concluded that the record submitted was insufficient to show that the Regional Board established a standard of general application subject to the APA in its action to ratify the abatement order. OAL first determined that the Regional Board is a state board within the meaning of the APA, and that the Board’s policies and procedures for the investigation, cleanup, and abatement of discharges under Water Code section 13304 are subject to APA rulemaking requirements. OAL next determined that the APA rulemaking process only applies to the quasi-legislative decisions of the Board. Finally, OAL determined that all of the testimony and discussion on the record concerned this particular abatement order and site, and that the proceeding at issue was quasi-judicial as opposed to quasi-legislative; therefore, OAL found that the record did not show that the Regional Board established a standard of general application subject to the APA rulemaking procedure.

On April 18, OAL released 1995 Determination No. 2, Docket No. 90-024, in which OAL considered whether the Employment Development Department’s policy listing requirements that employers in the Employment Program Representative (EPR) and Disability Insurance Program Representative (DIPR) classes must meet in order to be eligible for a time base change from permanent intermittent to full-time work is a regulation and therefore without legal effect unless adopted in compliance with the APA.

OAL found that the Department’s quasi-legislative enactments are generally subject to the APA, and that the challenged time base change policy is a regulation as defined in the key provision of Government Code section 11342(g). However, OAL found that the time base change policy falls within the “internal management exception” to the APA rulemaking requirements because the policy at issue does not concern matters of serious consequence involving an important public interest, and therefore does not violate Government Code section 11340.5(a). OAL thus concluded that the policy, although a “regulation,” is nonetheless exempt from the APA because it falls within the internal management exception.

On April 26, OAL released 1995 Determination No. 3, Docket No. 90-026, in which OAL considered whether or not a Department of Corrections rule prohibiting inmates from possessing electric typewriters is a regulation and is therefore without legal effect unless adopted in compliance with the APA. On March 19, 1992, after the filing of this Request for Determination, the Department notified OAL that as of January 7, 1992, it had rescinded the rule. Nonetheless, OAL found that the Department’s quasi-legislative enactments are generally required to be adopted pursuant to the APA; the Department’s Operations Manual section 54030.4.3.2, which prohibits inmates from possessing electric typewriters, is a “regulation” as defined in Government Code section 11342(g); no exceptions to the APA rulemaking requirements apply; and, for the time period that section 54030.4.3.2 was in effect, it violated Government Code section 11340.5(a). OAL thus concluded that the rule prohibiting inmates from possessing electric typewriters was without legal effect.

LEGISLATION

AB 250 (Baldwin, Woods), as introduced February 2, would require OAL and the Secretary of the Trade and Commerce Agency, or on or before January 1, 1997, to recommend to the legislature the suspen-
sion or repeal of all state regulations determined by OAL and the Secretary to be more stringent than federal regulations on the same subject. The bill would also provide that its provisions shall become inoperative on July 1, 1997 and, as of January 1, 1998, shall be repealed, unless a later enacted statute that becomes effective on or before January 1, 1998 deletes or extends the dates on which it becomes inoperative and is repealed. [A. CPGE&ED]

AB 1135 (Morrissey), as amended April 26, would require, until January 1, 1999, all state agencies within the Trade and Commerce Agency as of July 1, 1995, proposing to adopt or substantially amend any administrative regulation to consider the cumulative impact of all regulations that became effective on and after January 1, 1990 on specific private sector entities that may be affected by the proposed adoption or amendment of the regulation, and to include this information in the notice of proposed action. The bill would also require such an agency to permit public comment on the cumulative impact of regulations that became effective on and after January 1, 1990 and, if the agency determines that the impact of these regulations and the proposed regulation on the same affected private sector entity is significant and adverse, to determine whether an alternative regulation that would be less harmful to that private sector entity and the economy in general should be adopted, and would require the agency to permit public comment on this alternative regulation. [A. Floor]

AB 1179 (Bordonaro). The APA specifies that no administrative regulation adopted on or after January 1, 1993, that requires a report shall apply to businesses, unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to business. As amended May 4, this bill would instead specify that no administrative regulation adopted after January 1, 1996, shall apply to businesses, unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses, that the intended benefits of the regulation justify its costs, and the proposed regulation is the most cost-effective of available regulatory options.

The APA requires state agencies to submit specified information to OAL concerning regulations adopted by that agency; OAL is required to review and approve all regulations adopted pursuant to the APA and submitted for publication in the California Regulatory Code Supplement, based on specified standards. OAL is further required to return a regulation to the adopting agency under specified circumstances. Existing law requires the Secretary of the Trade and Commerce Agency to evaluate the findings and determinations required of any state agency that proposes to adopt regulations under the APA, and to submit comments into the rulemaking record in regard to the impact of the regulations on the state’s business, industry, economy, or job base. This bill would revise the Secretary’s duties in this regard. It would require adopting agencies to submit specified information to OAL that is pertinent to the Secretary’s comments, objections, or recommendations. It would also require OAL to return regulations to the adopting agency under certain additional circumstances. [A. Aprr]

AB 1160 (Morrissey), as introduced February 23, would require OAL and the Secretary of Trade and Commerce, on or before January 1, 1998, to recommend to the legislature the suspension or repeal of all state regulations determined by OAL and the Secretary to be more stringent than federal regulations on the same subject. This bill would make this provision inoperative on July 1, 1998, and would repeal it on January 1, 1999. [A. CPGE&ED]

SB 452 (Johannesen), as amended May 11, would prohibit enforcement of any regulation filed with the Secretary of State unless the regulation has been made available to the public for thirty days, as specified; require that a regulation be declared invalid by a court if it has not been made available to the public for thirty days or if an agency has failed to mail written copies of new regulations within ten days after receipt of any written or oral request for these copies; and provide that if a regulation is declared invalid because of a failure to comply with the thirty-day availability requirement, the adopting agency would not be required to reinitiate adoption, review, and approval procedures for that regulation in accordance with the APA, but instead the regulation would be deemed valid and enforceable upon the agency’s compliance with the availability requirement. [A. CPGE&ED]

AB 1857 (Brewer). The APA authorizes departments, boards, and commissions within Cal-EPA, the Resources Agency, and the Office of the State Fire Marshal to adopt regulations that are different from regulations contained in the Code of Federal Regulations addressing the same issues upon a finding by the public entity adopting the regulations that certain justifications exist. As introduced February 24, this bill would broaden this authorization to permit all state agencies to adopt regulations that are different from regulations contained in the Code of Federal Regulations. It would also require a state agency, prior to adopting any “major regulation” (as defined) to evaluate alternatives to the requirements of the proposed regulation and consider whether there is a less costly alternative or combination of alternatives that would ensure full compliance with statutory mandates in the same amount of time as the proposed regulatory requirements. [A. CPGE&ED]

AB 1659 (Woods), as amended May 11, would require specified state agencies (including agencies within Cal-EPA and the Resources Agency and the Office of the State Fire Marshal, the Office of Emergency Services, the Division of Drinking Water and Environmental Management, and the State Lands Commission) to determine whether a proposed regulatory change would be a “major regulation” (as defined) prior to publishing notice of the proposed action, and to provide for public comment on that determination. It would require these agencies to provide specified related information and findings in the statement of reasons submitted with the notice of proposed action and with the adopted regulation. The bill would provide that in the event the agency cannot make specified findings required in this regard, it shall notify OAL that it has removed the proposed regulatory change from active consideration. [A. Floor]

SB 329 (Campbell), as introduced February 10, would prohibit a state agency, commencing January 1, 1996, from adopting any regulation in an area over which a federal agency has jurisdiction, unless the state agency notifies each house of the legislature thirty days prior to the effective date of the regulation. The bill would also declare that it is the intent of the legislature that the rules of each house shall ensure that a bill prohibiting the adoption of a particular regulation may be acted upon by both houses within the thirty-day period specified above. [S. GO]

AB 1142 (Baldwin), as introduced February 23, would prohibit all regulations adopted by a state agency that has been determined by OAL to have a substantial adverse job creation impact from remaining in effect for more than four years from the date of its filing with the Secretary of State. [A. CPGE&ED]

SB 690 (Mountjoy), as amended March 30, would exempt the Department of Personnel Administration from the APA and instead provide alternative procedures for the Department to use in the adoption, amendment, or repeal of a regulation. The alternative procedures include, among other things, a public comment period,
preparation of specified information rela-
tive to the proposed rule action, public
notice, a public hearing, and publication
in the California Code of Regulations.
This bill would require Department poli-
cies, guidelines, rules, and documents not
subject to these rulemaking procedures to
be made reasonably available to state agen-
cies, state employees and their representa-
tives, and other interested parties. This pro-
vision, rather than the APA, would also
apply to the state Personnel Board for the
purposes of adopting, amending, and repeal-
ing civil service classifications in accor-
dance with the California Constitution.
This bill would continue all Department
regulations, policies, guidelines, rules,
and documents in effect on the effective
date of this article until they are amended
or repealed, as specified. [S. GO]
SB 235 (Hughes). Existing law estab-
lishes procedures for the enforcement of
child support obligations through the courts
and through state and local agen-
cies. Under existing law, the state Depart-
ment of Social Services is the administra-
tor of the state plan for securing child and
spousal support and determining patern-
ity. Existing law requires each county to
maintain a unit in the office of the district
attorney for the same purposes. As intro-
duced February 7, this bill would establish
the Division of Child Support Enforce-
ment in OAL, and would provide for the
administrative adjudication of child sup-
port obligations. The bill would establish
procedures for hearings to establish child
support and paternity, the enforcement
and modification of support obligations so
established, and for judicial review of
final orders issued by an administrative
law judge. [S. Jud]

BUREAU OF
STATE AUDITS
State Auditor: Kurt Sjoberg
(916) 445-0255

C
created by SB 37 (Maddy) (Chapter
12, Statutes of 1993), the Bureau of
State Audits (BSA) is an auditing and in-
vestigative agency under the direction of
the Commission on California State Gov-
ernment Organization and Economy (Lit-
tle Hoover Commission). SB 37 delegated
to BSA most of the duties previously per-
formed by the Office of Auditor General,
such as examining and reporting annually
upon the financial statements prepared by
the executive branch of the state, perform-
ning other related assignments (such as per-
formance audits) that are mandated by
statute, and administering the Reporting
of Improper Governmental Activities Act,
Government Code section 10540 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 avail-
able. BSA is headed by the State Auditor,
appointed by the Governor to a four-year
term from a list of three qualified individ-
uals submitted by JLAC.

The Little Hoover Commission reviews
reports completed by the Bureau and makes
recommendations to the legislature, the
Governor, and the public concerning the
operations of the state, its departments, sub-
divisions, agencies, and other public entities;
oversees the activities of BSA to ensure its
compliance with specified statutes; and re-
views the annual audit of the State Audit
Fund created by SB 37.

MAJOR PROJECTS

The Department of Health Services' Infor-

mation On Drug Treatment Author-
ization Requests (February 1995) is the
fourth in a series of semiannual reports by
BSA concerning the way the Department of
Health Services (DHS) processes drug
treatment authorization requests (TARs)
for certain prescribed drugs under the
Medi-Cal program [14:4 CRLR 15; 14:2&3
CRLR 13; 14:1 CRLR 15]; this report fo-

cuses on drug TARs processed from June
1994 through November 1994. During
this six-month period, DHS processed
214,303 drug TARs, a 177% increase in
requests since the first six-month period
reviewed; according to BSA, this increase
is largely due to changes in the governing
code. BSA found that DHS was not able
to process the drug TARs in a timely man-
ner and a backlog of 2,344 requests devel-
oped by November 1994. Ten pharmacists
contacted by BSA reported experiencing
processing delays, but also reported that
patient care was not affected because the
pharmacists filled the patients' prescrip-
tions in advance of receiving the TAR
approval. Also, 79 new positions were
added in DHS' drug TAR processing units
in October 1994 due to the increase of
drug TARs received during this period.

Orange County: Treasurer's Invest-

ment Strategy Was Excessively Risky

and Violated the Public Trust (March
1995) is BSA's audit of the Orange County
Treasurer's Office; the County Treasurer
was appointed by the Governor to a four-year
term from a list of three qualified individ-
uals submitted by JLAC to the extent that
funding is available. BSA is headed by the
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