



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

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The Office of Administrative Law (OAL) was established on July 1, 1980, during major and unprecedented amendments to the Administrative Procedure Act (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. The regulations of most California agencies are published in the California Code of Regulations (CCR), which OAL is responsible for preparing and distributing.

OAL also has the authority 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.

Under Government Code section 11347.5, OAL is authorized to issue determinations as to whether state agency "underground" rules which have not been adopted in accordance with the Administrative Procedure Act (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 authorizing their issuance.

MAJOR PROJECTS:

AB 1013 Determinations. The following determinations were issued and published in the *California Regulatory Notice Register* in recent months:

-October 3, 1991, OAL Determination No. 6, Docket No. 90-008. OAL

was asked to determine whether the Department of Developmental Services' (DDS) Regional Center Operations Manual (RCOM), five Regional Center Operations (RCO) memoranda (RCOs 89-26, 89-8, 89-3, 88-3, and 88-30), and one Community Services Division memorandum (CSD 89-2) are regulations and without legal effect unless adopted in compliance with the APA.

OAL noted that only rules adopted by state agencies may be subject to the APA; the definition of "state agency" does not include private entities even if they are "agents" or instrumentalities of the state. Consistent with a prior ruling, OAL concluded that DDS is a state agency subject to the APA, but that regional centers operated by private nonprofit community agencies under contract with DDS are not. (*See infra* LITIGATION; *see also* CRLR Vol. 11, No. 3 (Summer 1991) pp. 45 and 47 for background information.) To determine which rules must comply with APA requirements, OAL distinguished those portions of the challenged policies issued and adopted by DDS from any issued and adopted by the individual regional centers. OAL found that all of the challenged policies were issued and adopted by DDS.

OAL then reviewed the challenged policies to determine whether they establish rules or standards of general application or modify or supplement such rules or standards, and whether they interpret, implement, or make specific the law enforced or administered by the agency or govern the agency's procedure; if both elements are present, then the challenged rules constitute regulations within the meaning of Government Code section 11342. Based on these criteria, OAL determined that RCO 89-3 does not contain a regulation subject to APA procedures; refrained from making a determination for RCOs 89-8 and 88-30 due to insufficient information; and determined that the RCOM, RCO 89-26, RCO 88-31, and CSD 89-2 all contain regulations which must be adopted pursuant to APA procedures. Finally, OAL determined that none of the regulations

fall within any established general exceptions to APA requirements.

-November 22, 1991, OAL Determination No. 7, Docket No. 90-009. OAL was asked to determine whether Administrative Bulletin 87/12 of the Department of Corrections (DOC), which permits institutional plans of operation to be implemented and/or changed without prior approval of the Director of Corrections, is a regulation and without legal effect unless adopted in compliance with the APA. OAL determined that the challenged bulletin is a regulation which in substance attempts to amend duly-adopted provisions of the CCR without first complying with legislatively-mandated public notice and comment requirements provided under the APA. OAL concluded that the challenged bulletin does not fall within any established general exception to the APA requirements.

Governor Overrides OAL Disapproval of Department of Insurance Emergency Regulations for Proposition 103 Rebates. On August 23, the Department of Insurance (DOI) submitted to OAL proposed emergency regulations to implement the rate rollback provisions of Proposition 103, the insurance reform initiative which was successful on the November 1988 ballot. In a decision which generated heated controversy, OAL disapproved the emergency regulatory action on September 3. Newly-appointed OAL Director Marz Garcia rejected the proposal on grounds that the Department failed to demonstrate that the proposed amendments are "necessary for the immediate preservation of the public peace, health and safety or general welfare," as required by Government Code section 11346.1. (*See infra* agency report on DOI; *see also* CRLR Vol. 11, No. 4 (Fall 1991) pp. 45 and 131-32 for background information.)

On October 7, in response to an appeal from Insurance Commissioner John Garamendi, Governor Pete Wilson overruled OAL's disapproval. According to Wilson, the public interest would not be served by further administrative delay, questions concerning the viability of the initiative's rollback and ratemaking provisions are more properly addressed by the courts, and the proposed regulations were derived from numerous hearings during which public participation was substantial.

In addition, the Governor's decision addressed OAL's concern regarding DOI's excessive reliance on emergency regulations. The decision notes that, thus far, the prior approval and rollback provisions of Proposition 103 have been implemented, if at all, solely through emergency regulations. However, the



Governor acknowledged the inherent difficulty in creating an entirely new system of regulation and noted that every aspect of Proposition 103's administrative implementation has been challenged by the insurance industry and subjected to judicial scrutiny.

Finally, the Governor's decision reaffirmed the Insurance Commissioner's contention that the California Supreme Court's decision in *Calfarm v. Deukmejian*, 48 Cal. 3d 805 (1989), authorizes the Insurance Commissioner to promulgate the regulations in question. The Governor's decision concludes that claims concerning the Commissioner's rulemaking authority, the constitutional validity of the regulations, and their consistency with the intent of the initiative are more properly addressed by the courts.

LEGISLATION:

AB 400 (Margolin) would subject the Division of Industrial Accidents and the Workers' Compensation Appeals Board to the provisions of the APA; this two-year bill is pending in the Senate Governmental Organization Committee.

AB 88 (Kelley), as amended May 21, would exempt from the APA the Water Resources Control Board's (WRCB) adoption or revision of state policy for water quality control and water quality control plans and guidelines; the issuance of waste discharge requirements, permits, and waivers; and the issuance or waiver of water quality certifications. The bill would require WRCB and its regional boards to provide notice to specified persons and organizations, to prepare written responses to comments from the public, and to maintain an administrative record in connection with the adoption or revision of state policy for water quality control and water quality control plans and guidelines. This two-year bill is pending in the Senate Agriculture and Water Resources Committee.

AB 1736 (Campbell), as amended May 1, would specify that no exemption to any provision of the State Contract Act, whether by statute, regulation, or in the State Administrative Manual, shall apply to any action taken by OAL to have the CCR or updates to the CCR compiled, printed, or published by anyone other than a state agency. This bill is pending in the Assembly Ways and Means Committee.

AB 2060 (Polanco), as amended May 15, would require state agencies and air pollution control districts to adopt rules and regulations creating a variance process, whereby an individual or private entity may apply for relief from regula-

tions adopted by that governmental agency, and would require every such agency to adopt a procedure for an appeal of any decision that leads to orders, sanctions, or fines being given to private individuals or entities, including the denial of a variance. This bill is pending in the Assembly Ways and Means Committee.

LITIGATION:

In *Engelmann v. State Board of Education*, Nos. C008318 and C008701 (Dec. 26, 1991), the Third District Court of Appeal affirmed the Sacramento County Superior Court's holding that the governing procedures and criteria used by the State Board of Education in selecting textbooks for use in public schools must be adopted pursuant to the APA. The court rejected the Board's argument that the rulemaking provisions of the APA, by their own terms, apply only to statutorily delegated legislative authority—not to substantive constitutionally-based authority such as that delegated to it by the state Constitution. Rather, the court held that "the fact that the Board has self-executing authority under the Constitution does not preclude the legislature from enacting laws delineating that authority." The Board also argued that subjecting it to the APA violates the separation of powers doctrine, as OAL's review of its regulations would constitute an interference with the Board's constitutional authority to select textbooks. The court rejected this contention, finding that application of the APA would entail "no substantive interference with the Board's power. . . . All the APA ensures is that the Board's regulations are authorized by the Education Code and are consistent with that code and other provisions of law."

OAL's appeal of the Sacramento County Superior Court's March 1991 judgment in *Fair Political Practices Commission (FPPC) v. Office of Administrative Law, et al.*, No. C010924 (Third District Court of Appeal), is still pending. The lower court held that FPPC regulatory actions are subject to review under the APA only as it existed at the time of the electorate's 1974 approval of the Political Reform Act which, *inter alia*, created the FPPC. OAL, its authority to review agency regulations, and the six criteria upon which its review is based were not created until 1980. (See CRLR Vol. 11, No. 2 (Spring 1991) p. 44; Vol. 11, No. 1 (Winter 1991) p. 38; and Vol. 10, No. 4 (Fall 1990) p. 39 for background information.)

In other litigation, the State Water Resources Control Board (WRCB) and the Regional Quality Control Board have

filed a notice of appeal challenging the final judgment in *State Water Resources Control Board (WRCB) and the Regional Quality Control Board, San Francisco Region v. Office of Administrative Law*, No. 906452 (San Francisco County Superior Court). In a judgment favorable to OAL, the court held that the wetland rules at issue are regulations within the meaning of the APA; the rules are not exempt from the APA; and since the rules were not adopted pursuant to the APA, they are unenforceable. (See CRLR Vol. 11, No. 2 (Spring 1991) p. 44; Vol. 11, No. 1 (Winter 1991) p. 39; and Vol. 10, No. 4 (Fall 1990) p. 164 for background information.)

Finally, a settlement was reached in *Weber v. Smith*, No. 366633 (Sacramento County Superior Court). Weber, who had filed a request for determination from OAL in 1990, was not satisfied with the limited scope of the determination handed down by OAL in March 1991, which concluded that a regional center contracting with the Department of Developmental Services (DDS) is neither a state agency nor an agent of the state, and—as such—is not subject to the requirements of the APA. (See *supra* MAJOR PROJECTS; see also CRLR Vol. 11, No. 3 (Summer 1991) pp. 45 and 47 for background information.) Specifically, Weber challenged OAL's finding and declaration that it is beyond OAL's jurisdiction to subject the practices and policies of a regional care center contracting with DDS to compliance with APA provisions, even though DDS would be prohibited from enforcing those practices and policies without satisfying APA requirements.

The terms of the settlement include OAL's written agreement to vacate its March 1991 determination and accept another request for determination filed by Weber challenging DDS' Vendorization Procedure Manual.

OFFICE OF THE AUDITOR GENERAL

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The Office of the Auditor General (OAG) is the nonpartisan auditing and investigating arm of the California legislature. OAG is under the direction of the Joint Legislative Audit Committee (JLAC), which is comprised of fourteen members, seven each from the Assembly and Senate. JLAC has the authority to "determine the policies of the Auditor General, ascertain facts, review reports and take action thereon . . . and make recommendations to the Legis-