



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

Acting Auditor General: Kurt Sjoberg (916) 445-0255

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-



INTERNAL GOVERNMENT REVIEW OF AGENCIES

lature . . . concerning the state audit . . . revenues and expenditures. . . ." (Government Code section 10501.) OAG may "only conduct audits and investigations approved by" JLAC.

Government Code section 10527 authorizes OAG "to examine any and all books, accounts, reports, vouchers, correspondence files, and other records, bank accounts, and money or other property of any agency of the state . . . and any public entity, including any city, county, and special district which receives state funds . . . and the records and property of any public or private entity or person subject to review or regulation by the agency or public entity being audited or investigated to the same extent that employees of that agency or public entity have access."

OAG has three divisions: the Financial Audit Division, which performs the traditional CPA fiscal audit; the Investigative Audit Division, which investigates allegations of fraud, waste and abuse in state government received under the Reporting of Improper Governmental Activities Act (Government Code sections 10540 *et seq.*); and the Performance Audit Division, which reviews programs funded by the state to determine if they are efficient and cost effective.

MAJOR PROJECTS:

Ongoing Audit. At this writing, OAG continues its examination of the Public Utilities Commission's (PUC) intervenor compensation program. Several consumer groups which usually participate in PUC proceedings on behalf of ratepayers, including Public Advocates, TURN, the Utility Consumers' Action Network, and the Center for Public Interest Law, agree that the PUC's present system is overly lengthy and inadequate. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 1 for background information.) According to OAG, the audit will examine the number of compensation requests handled by the PUC, its rules for determining compensation amounts, and the time lag between request and payment. OAG's report was anticipated in early January.

Conflict of Interest Code Revisions Sought. OAG is currently seeking revisions to its conflict of interest code pursuant to Government Code sections 87302 and 97306. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 47 for background information.) The code will designate OAG employees who must disclose certain investments, income, and interests in real property and business positions, and disqualify themselves from making or participating in governmental decisions affecting those interests. At this

writing, the proposed changes are awaiting review and approval by the Fair Political Practices Commission.

RECENT AUDITS:

Report No. P-014 (October 1991) concerns the Department of General Services' (DGS) oversight of state agencies that award contracts. DGS is responsible for ensuring that state agencies that award contracts do so in compliance with state laws and regulations. To evaluate DGS' effectiveness, OAG identified and reviewed 21 OAG audit reports issued from January 1986 through April 1991 pertaining to state contracting issues. In 20 of the reports, OAG found that the state agency involved did not always follow contracting laws or regulations. OAG cited instances in which state agencies allowed contractors to begin work on contracts prior to receiving DGS approval; failed to review the evaluations of contractors maintained by the Department before awarding contracts; and, in instances where contractors had not previously contracted with the state, failed to provide résumés for the contractors' major personnel in the original contracts. OAG also found that state agencies consistently failed to obtain three competitive bids or proposals for each contract, as is generally required by state contracting laws and regulations.

OAG determined that DGS is not taking the appropriate action to ensure agency compliance with state contracting laws and regulations; DGS is not conducting prompt or thorough audits of all state agencies' contracting programs; and the effects of DGS' lack of oversight include the state's exposure to liability for work performed before contract approval, the possibility of contracting with unreliable vendors, and lack of protection against fraud, favoritism, and overpriced contract work.

OAG recommended that DGS take the following actions to improve its effectiveness:

- Ensure that state agencies follow contracting laws and regulations during the review and approval process of contracts and take action, such as auditing an agency's contract program or revoking an agency's delegation authority, when an agency consistently fails to follow state contracting requirements.

- Consider increasing the number of agencies audited per year so all agencies are audited within three years.

- Develop a comprehensive audit program for reviewing state agencies' procurement activities based on generally accepted auditing standards.

Report No. P-122 (October 1991) is OAG's second report concerning

whether the Department of Corrections (DOC) has implemented the tasks in DOC's December 1989 report to the legislature entitled *Substance Abuse Treatment and Education Services for Inmates and Parolees*. These tasks were designed to enable DOC to achieve its goal of establishing substance abuse treatment and education programs for all inmates and parolees over a three-year period. OAG found that DOC has implemented 51 (82%) of the 62 tasks it was scheduled to complete by July 1991. The 11 remaining tasks include amending regulations, expanding its pre-release program, and establishing a curriculum to educate inmates and parolees about drug abuse. OAG noted various reasons why some tasks have not been completed, such as budget constraints, lack of program procedures, and construction delays.

OAG noted that completion of the remaining tasks would enable DOC to provide inmates and parolees with earlier intervention and more treatment services to assist them in their recovery from addiction. OAG recommended that DOC reschedule the completion dates of the unmet goals, taking into consideration the effects of budget and other resource restrictions.

Report No. F-132 (October 1991) concerns the status of costs identified and reimbursed for the State Legalization Impact Assistance Grants (SLIAG) program. This federal program assists states in providing health, public assistance, and educational services to persons seeking legal residency under the Immigration Reform and Control Act of 1986. The purpose of OAG's audit was to report the status of costs identified and claimed for reimbursement under the program, and to identify reasons for any delays in the claiming of costs.

OAG found that as of June 30, 1991, the state had identified and paid almost \$1.15 billion in costs for the SLIAG program and received reimbursements from the federal government for approximately the same amount. As of the same date, almost \$310 million of the federal grant remained unclaimed; however, OAG expects that those funds will be claimed by the end of fiscal year 1991-92. OAG noted that California has improved its ability to identify and claim costs under the SLIAG program. In fiscal year 1987-88, for example, the state identified only .2% of costs charged to that year, compared with 68% of costs identified for fiscal year 1990-91.

OAG concluded that several factors contribute to the state's delay in identifying and claiming costs, including the following:



-The complexity of the grant program itself makes prompt implementation difficult.

-The federal government failed to promptly provide services or essential information, such as the promulgation of regulations for claiming costs and the processing of aliens' applications for temporary residency status.

-State decisions regarding budgeting and approving costs to be charged to the program have contributed to delays.

-Some counties lack information about requirements for claiming costs and fail to act on available information.

-Finally, for most programs, aliens have little or no incentive to identify themselves as eligible to have the costs of services reimbursed under the SLIAG program, since no additional benefits accrue to them for doing so.

Report No. F-426.1 (October 1991) concerns the actions of the Department of Toxic Substances Control (DTSC) in billing responsible parties and recovering approximately \$222 million in costs incurred by DTSC from fiscal year 1981-82 through 1989-90 in monitoring and cleaning up hazardous waste sites. Although state law requires DTSC to recover such costs from those responsible for the hazardous waste, the Department has billed responsible parties for only \$45 million and has collected just \$16 million. According to OAG, the statute of limitations may prevent DTSC from recovering \$31 million of the costs incurred for fiscal years 1981-82 through 1984-85. However, DTSC estimates that approximately \$85 million of the \$135 million in costs incurred from fiscal years 1985-86 through 1988-89 may be collected; the Department has not yet determined the collectibility of the \$56 million of costs incurred in fiscal year 1989-90.

OAG found that some costs cannot be recovered because DTSC cannot identify the responsible parties. In addition, some responsible parties that are identified are either bankrupt or financially unable to repay all of the costs.

To improve DTSC's ability to recover the public funds spent cleaning and monitoring toxic waste sites, OAG recommends that the Department ensure that all costs that can be billed to responsible parties are billed promptly, and account for all clean-up costs, including costs that DTSC has determined it cannot bill to responsible parties or cannot collect.

Report No. P-054 (November 1991) is a review of the California State University's (CSU) disabled student

services. The CSU Chancellor's Office allocated \$7.9 million in fiscal year 1990-91 to the twenty CSU campuses to provide services for disabled students. OAG found that the twenty campuses spent \$600,000 less than they were allocated for disabled students, including \$400,000 in funds budgeted for employee benefits. Also, two campuses paid approximately \$75,000 to employees on the disabled student services payroll who did not work with disabled students, but in career counseling and international student programs. CSU's Northridge campus provided benefits to students without verification of their disabilities because the school lacks a system to identify those students receiving services who have not provided documentation of their disabilities.

OAG concluded that the Chancellor's Office should establish a system to monitor the campuses' disabled students services program to ensure that all funds allocated for disabled student services are budgeted by the campuses to provide those services, campuses spend disabled student services funds only on services for disabled students, and campuses promptly verify each student's disability.

Report No. F-864 (December 1991) reviews the usefulness of Domestic Disclosure Spreadsheets to the Franchise Tax Board (FTB). The spreadsheets disclose financial information on the operations of multinational banks and corporations and their affiliates in each state; FTB anticipated using this information to ensure compliance with California tax laws. OAG found that FTB has only recently trained its auditors to use the spreadsheets and that they have reviewed only a small percentage of the spreadsheets filed by these corporations. As a result, OAG made no definitive conclusion about the usefulness of the spreadsheets to FTB's audits. Preliminary responses from FTB auditors ranged from positive comments regarding the usefulness of the spreadsheets to comments that the spreadsheets are unnecessary. OAG noted that FTB has assessed penalties of approximately \$1.8 million against corporations that failed to file, filed late, or filed incomplete spreadsheets.

LEGISLATION:

SB 1132 (Maddy), as introduced March 8, would require the Auditor General to complete audits in accordance with the "Government Auditing Standards" issued by the Comptroller of the United States. This bill is pending in the Senate Rules Committee.

LITIGATION:

On October 10, the California Supreme Court upheld the constitutionality of Proposition 140, the term limits initiative approved by voters in November 1990. In *Legislature v. Eu*, No. S019660, the court rejected arguments that the initiative improperly infringes on the voters' right to their choice of candidates or the candidates' right to run for public office. Although the court struck down a provision of Proposition 140 that abolished the legislature's pension system, it upheld the initiative's mandated 38% cut in the legislature's operating budget. Legislative leaders, including Assembly Speaker Willie Brown, had threatened to eliminate OAG and the Office of the Legislative Analyst if the budget cuts were upheld. Following the court's decision, however, Speaker Brown stated that the legislature will probably find a way to make the cuts without eliminating those offices. For example, the legislature may authorize OAG to bill state agencies for the costs of federally-required audits. Legislation on this issue is expected during 1992. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 49 and Vol. 11, No. 3 (Summer 1991) pp. 49-50 for background information.)

COMMISSION ON CALIFORNIA STATE GOVERNMENT ORGANIZATION AND ECONOMY (LITTLE HOOVER COMMISSION)

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The Little Hoover Commission was created by the legislature in 1961 and became operational in the spring of 1962. (Government Code sections 8501 *et seq.*) Although considered to be within the executive branch of state government for budgetary purposes, the law states that "the Commission shall not be subject to the control or direction of any officer or employee of the executive branch except in connection with the appropriation of funds approved by the Legislature." (Government Code section 8502.)

Statute provides that no more than seven of the thirteen members of the Commission may be from the same political party. The Governor appoints five citizen members, and the legislature appoints four citizen members. The balance of the membership is comprised of