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.

On March 19, the Senate approved Governor Pete Wilson's appointment of John D. Smith as Deputy Director of OAL. At this writing, the Governor's appointment of former state senator Marz Garcia has not been confirmed by the Senate.

MAJOR PROJECTS:

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

–January 13, 1992, OAL Determination No. 1, Docket No. 90-010. OAL was asked to determine whether a Department of Corrections (DOC) memorandum, concerning the transfer of life prisoners to designated correctional institutions to facilitate the processing of parole hearings, is a regulation and without legal effect unless adopted in compliance with the APA. Specifically, a January 22, 1990 memorandum from DOC to all wardens entitled "Housing of Life Commitments" notes that the Board of Prison Terms (BPT) will face an excessive number of parole consideration hearings beginning in 1990; the memo states that DOC would attempt to assist in handling the hearings by "housing Life Commitments at institutions that are clustered in specific regions, thereby reducing to a degree the required travel time for BPT panel members." The memorandum specifies eight institutions "that have been designated to review all Life Commitments for transfer" and states that "Life Commitments are to be reviewed by Classification Committee action and recommended for transfer to an institution consistent with case factors when the inmate is approximately 12–18 months from his/her next BPT Parole Consideration Hearing."

In determining that DOC's policy constitutes a regulation, OAL found that the memorandum establishes a rule or standard of general application which affects all life prisoners eligible for a parole consideration hearing within 12–18 months who are incarcerated in any of the eight remote correctional facilities specified. OAL also found that the memorandum establishes a rule which governs DOC's procedure, noting that DOC's arguments in support of the memorandum do not deny that the challenged policies govern agency procedure. Further, OAL found that the challenged memorandum outlines procedures not covered by existing statute or regulation and, therefore, does not constitute a mere restatement of existing law.

–March 2, 1992, OAL Determination No. 2, Docket No. 90-011. OAL was asked to determine whether a rule issued by the warden of one particular state prison under the control of DOC, limiting the length of outgoing inmate letters to two pages, is a regulation and therefore without legal effect unless adopted in compliance with the APA. Specifically, an inmate at Deuel Vocational Institution challenged the institution's Operation Procedure No. 9, subsection S, subpart 1, which states that "inmates may correspond on any 8-1/2 x 11 inch paper, both sides of the sheet may be written on. Maximum of two sheets may be placed in each envelope for mailing. Letters exceeding this amount will be returned to the inmate." In determining that the challenged policy is not a regulation, OAL found that the policy is not a rule or standard of general application or a modification or supplement to such a rule or standard. Although noting that for an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state, OAL stated that in the context of rules applying to prisoners, the courts have articulated a narrow standard: a rule of general application is one that significantly affects the prison population in the custody of DOC, not simply one institution. Based on its finding that the challenged policy is not a rule or standard of general application to all DOC prisoners, OAL concluded that the rule is not a regulation within the meaning of the APA.

–March 23, 1992, OAL Determination No. 3, Docket No. 90-012. OAL was asked to determine whether specific State Board of Education policy manuals governing the evaluation and adoption of school science textbooks are regulations and without legal effect unless adopted in compliance with the APA. OAL determined that the "Science Framework" and the "Instructional Materials and Framework Adoption: Policies and Procedures" manuals are, at least in part, regulations under the APA. OAL noted that in *Engelmann v. State Board of Education*, the Third District Court of Appeal also found similar Board textbook selection guidelines to be invalid. (*See infra* LEGISLATION [SB 1859] and LITIGATION.) OAL also noted that *Engelmann* has been appealed to the California Supreme Court; since that appeal has not yet been resolved, OAL issued this Determination.

OAL initially reviewed the challenged publications 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 Board or govern the Board's procedure; if both elements are present, then the challenged publications constitute regulations within the meaning of Government Code section 11342. Based on these criteria, OAL determined that both publications are intended for use throughout the state. Because both publications "undoubtedly have impact on all publishers of instructional materials which seek adoption of their materials by the Board," OAL found that the challenged rules "clearly have general application and affect the types of instructional materials to be used in California."

Next, OAL found that the instructional materials manual contains numerous provisions which interpret, implement, or make specific the law requiring (1) the adoption of instructional materials for kindergarten and grades one through eight; (2) the establishment of broad minimum standards and guidelines for the selection of instructional materials; and (3) the development of criteria for evaluating instructional materials submitted for adoption. Regarding the science framework manual, which is mostly informative, OAL found that at least one section meets the definition of a regulation; that section sets forth the amount of weight to be given to various factors in determining the suitability of instructional materials.

Finally, OAL rejected the Board's argument that statutory construction requires the reading of an exemption for the challenged publications from APA procedures, noting that Government Code section 11346 specifically states that APA requirements are applicable to any exercise of quasilegislative power unless *expressly* exempted by the legislature. OAL also rejected the Board's argument that the separation of powers doctrine precludes application of the APA, stating that the Board's constitutionally-delegated authority is not all-encompassing and compliance with APA procedures would not impair the Board's exclusive authority over the ultimate selection of textbooks. OAL also determined that none of the regulations fall within any established general exception to APA requirements.

–March 25, 1992, OAL Determination No. 4, Docket No. 90-013. OAL was asked to determine whether a rule issued by the chief deputy warden of one particular state prison under the control of the Department of Corrections, prohibiting inmates from wearing red or blue colored clothing, is a regulation and without legal effect unless adopted in compliance with the APA. OAL concluded that the challenged rule is not a regulation, and therefore, not subject to APA requirements. OAL based its decision on the same legal reasoning cited in OAL Determination No. 2, Docket No. 90-011 (*see supra*). Specifically, because the challenged policy affects only those inmates at California Medical Facility South, OAL determined that the policy is not a rule or standard of general application as to all DOC inmates, and therefore does not constitute a regulation.

–April 6, 1992, OAL Determination No. 5, Docket No. 90-014. In this determination, OAL considered a challenge by Long Beach hearing aid dispenser Robert Hughes to a variety of policies allegedly adopted and actions taken by the Medical Board's Hearing Aid Dispensers Examining Committee (HADEC) and the Speech-Language Pathology and Audiology Examining Committee (SPAEC) concerning the use of hearing tests and examination procedures for hearing aid dispensers.

OAL first reviewed a number of actions taken by HADEC through the Medical Board's Division of Allied Health Professions. Most of these actions relate to the Division's interpretation and enforcement of existing HADEC regulations regarding the supervision of hearing aid dispenser trainees by licensed hearing aid dispensers, specifically Hughes and his wife. OAL found that the Division was merely applying the provisions of existing law to the Hugheses, and acknowledged that whether the Division applied the law correctly is not for OAL to decide.

Hughes also challenged the validity of a joint HADEC/SPAEC statement regarding acoustic immittance testing ("tympanometry statement"), a legal opinion regarding the authority of the Division over HADEC and SPAEC, and a legal opinion regarding the advertising of hearing tests, all of which were published in the minutes of HADEC's January 27, 1990 meeting. *[11:4 CRLR 101; 10:2/3 CRLR 111]* OAL rejected Hughes' challenge, finding that all three statements are merely restatements of existing law.

Next, Hughes challenged practically every provision contained in HADEC's examination information material, which describes the two parts of the licensing exam (a written portion and a practical skills portion), specifies that a minimum of 70% must be scored in each part in order to pass, and lists and describes the various sections of the exam. OAL found that HADEC's instructions for its written examination are regulations in that they establish the amount of time given to take the test, the number and type of questions which make up the test, and the minimum score a candidate must get in each section of the written test in order to pass. With regard to HADEC's instructions for its practical skills portion, OAL found that they exceed existing law by requiring that an applicant receive an overall score of 70% and demonstrate competence on several "critical skills areas" which have been designated by HADEC; thus, they are regulations and must be adopted pursuant to the APA.

Finally, OAL also found the following examination rules or policies to be regulations within the meaning of the APA: (1) a rule requiring licensure applicants to bring an audiogram from a test performed on the applicant with specified threshold readings of specified frequencies; (2) a rule requiring applicants to bring to the examination their own audiometer which meets ANSI 1969 standards and a written certification that the audiometer has been calibrated within the past twelve months; (3) a rule prohibiting an applicant from using another applicant's audiometer at the examination; (4) a rule requiring applicants to bring a hearing aid which meets listed specifications to the examination; and (5) a rule requiring fingerprint verification and payment of a $19.50 fee for such verification.

Governor Again Overrules OAL Rejection of Emergency Regulations Implementing Proposition 103 Rebates. Last October, in response to an appeal from Insurance Commissioner John Garamendi, Governor Pete Wilson overruled OAL's disapproval of the Department of Insurance's (DOI) emergency regulations implementing the rate rollback provisions of Proposition 103, the insurance reform initiative which was successful on the November 1988 ballot. *[12:1 CRLR 28, 116–17]* In rejecting OAL Director Marz Garcia's finding that DOI failed to demonstrate that the emergency regulations were "necessary for the immediate preservation of the public peace, health and safety or general welfare," Governor Wilson stated that, among other things, 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.

On December 11, DOI's emergency regulations expired; on that day, the Department filed them with OAL as permanent rules (known as ER-19B) and also refiled the emergency regulations for another 120-day period (ER-19A) pending OAL's review and approval of the

permanent rules. On January 10, OAL disapproved both ER-19A and ER-19B. Among the reasons provided by OAL for its disapproval were that several statutes are inappropriately cited as "authority" or "reference"; to the extent that the adoption of section 2643.4 purports to authorize the Commissioner to require or authorize one line and coverage of insurance to subsidize another based only on "sound public policy," the section extends the scope of the authority conferred on the Commissioner by Insurance Code sections 1861.01 and 1861.05; to the extent that section 2646.1 abridges or overrides any rights established by sections 11500 through 11525 of the Government Code, section 2646.1 is inconsistent with DOI's duty established by Insurance Code section 1861.08 to conduct rate hearings under Proposition 103; and necessity was not demonstrated for a number of provisions that have no regulatory effect and for the filing fee schedule established by section 2647.1. (*See infra* agency report on DOI for related discussion.)

Following negotiations with OAL, DOI filed an amended version of the emergency regulations (known as ER-19C) on January 15; OAL disapproved ER-19C on January 23, stating that the regulations do not satisfy the authority, consistency, clarity, and necessity standards of Government Code section 11349.1(a). Additionally, OAL opined that the regulations are inconsistent with the insurers' right, established in *Calfarm v. Deukmejian*, 48 Cal. 3d 805 (1989), to a fair and meaningful rate hearing. On January 30, Commissioner Garamendi appealed OAL's action to Governor Wilson, attacking OAL's decision as "at best, misguided and confused, and at worst a deliberate effort to undermine the voter-approved insurance reform initiative."

On February 14, Governor Wilson, "[f]or reasons that in no way affirm the merits of the Commissioner's appeal, but rather in order to hasten final adjudication of substantive as well as procedural questions arising from Proposition 103," overruled OAL's decision once again. Despite his findings that (1) DOI had clearly abused the emergency filing exemption; (2) the *Calfarm* decision provides substantial support for OAL's analysis; (3) there was no evidence of any improper bias in OAL's repeated rejection of the Commissioner's filings; and (4) OAL's analysis was consistent with the primary statute and the expressed preference of the legislature, Governor Wilson stated he was compelled to overrule OAL's decision "because the process prescribed by the law permits unlimited appeals by the Commissioner and interminable delay for the public in reaching needed resolution by the courts" of the important questions concerning Proposition 103's implementation. Governor Wilson also announced that "no further appeals on Proposition 103 regulations will be considered by this Office," in effect denying DOI the administrative appeal route mandated by Government Code section 11349.5; this action will force DOI to turn to the courts to overturn any future unfavorable OAL decisions regarding Proposition 103.

LEGISLATION:

SB 1893 (Kopp), as amended March 24, would abolish OAL and repeal existing law which requires OAL to review and approve, or order the repeal of, all regulations adopted by state agencies in accordance with specified criteria and procedures. SB 1893 was sent to interim study on April 7.

SB 1503 (Russell), as amended March 23, would have made a variety of changes to the APA, the most important of which would have permitted state agencies to petition OAL to file "interim regulations" with the Secretary of State pending full compliance with the APA's rulemaking procedure. This process would be in addition to the standard and emergency rulemaking procedures now in existence. An agency adopting an "interim regulation" would be required to publish both its notice of proposed rulemaking and its petition in the *California Regulatory Notice Register*; the petition must include a description of specific facts showing that the need for interim operation or repeal of the regulation outweighs the need for full compliance with the APA before the regulation takes effect. SB 1503 would provide for a 7-day comment period, and require OAL to review the rulemaking file of the adopting agency within 7 working days after the close of the comment period. OAL shall reject an interim regulation if (1) the notice of proposed rulemaking has not been filed; (2) the regulation fails to meet the authority, consistency, or reference standards in Government Code section 11349.1(a); or (3) the need for interim operation does not outweigh the need for compliance with the full rulemaking process. Interim regulations would be effective for 150 days, during which time the agency is expected to comply with the standard APA rulemaking procedures. SB 1503 was rejected by the Senate Governmental Organization Committee on March 31.

AB 3359 (Sher), as introduced February 21, would exempt the San Francisco Bay Conservation and Development Commission's San Francisco Bay Plan from the requirements of the Administrative Procedure Act (APA), and would also exempt from the APA the adoption of specified waste discharge requirements and permits and the adoption of state policy for water quality control and water quality control plans and guidelines by the state Water Resources Control Board (WRCB) and the California regional water quality control boards. *[A. CPGE&ED]*

AB 2535 (Cannella), as introduced February 6, would exempt from the APA standards and orders relating to firefighting equipment adopted by the Occupational Safety and Health Standards Board. *[A. W&M]*

AB 3511 (Jones). The APA requires state agencies proposing to adopt or amend any regulation to assess the potential for adverse economic impact on California small business enterprises and individuals, and to give notice of any adverse economic impact. As amended April 21, this bill would expand these notice requirements on state agencies to include all business enterprises, rather than only small business enterprises. *[A. W&M]*

SB 1859 (Morgan), as amended April 6, provides that, until January 1, 1995, the selection and adoption of instructional materials, including related activities, such as the approval of curriculum frameworks and instructional materials criteria, are not subject to the APA, and specifies that any instructional materials, curriculum frameworks, and related standards and criteria adopted by the state Board of Education prior to the effective date of the bill are deemed in compliance with the APA. This bill also requires the Board, on or before January 1, 1993, to report to the Governor and the legislature regarding the costs and benefits of fully conforming the selection and adoption process with the APA. This urgency measure was signed by the Governor on May 13 (Chapter 58, Statutes of 1992).

This bill reverses—at least temporarily—the Third District Court of Appeal's decision in *Engelmann v. State Board of Education*, 2 Cal. App. 4th 47 (1991), which held that the governing procedures and criteria used by the Board of Education in selecting textbooks for use in public schools must be adopted pursuant to the APA (*see infra* LITIGATION). *[12:1 CRLR 29]*

The following is a status update on bills reported in detail in CRLR Vol. 12, No. 1 (Winter 1992) at page 29:

AB 400 (Margolin) would subject the Division of Industrial Accidents and the Workers' Compensation Appeals Board to

the provisions of the APA. *[S. GO]*

AB 88 (Kelley) would exempt from the APA the WRCB's 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, prepare written responses to comments from the public, and 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. *[S. AWR]*

AB 1736 (Campbell) would have specified 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 died in committee.

AB 2060 (Polanco), as amended May 15, would have required 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 regulations adopted by that governmental agency, and would have required 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 died in committee.

LITIGATION:

In ***Engelmann v. State Board of Education***, 2 Cal. App. 4th 47 (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. *[12:1 CRLR 29]* The Board's petition for review is presently pending before the California Supreme Court.

On April 27, the Third District Court of Appeal affirmed the trial court's holding in ***Fair Political Practices Commission (FPPC) v. Office of Administrative Law, et al.***, No. C010924. In an unpublished decision, the Third District upheld the lower court's finding 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. *[12:1 CRLR 29]*

In other litigation, the state Water Resources Control Board's appeal of the final judgment in ***State Water Resources Control Board and the Regional Quality Control Board, San Francisco Region v. Office of Administrative Law***, No. A054559, is still pending in the First District Court of Appeal. In a judgment favorable to OAL, the trial 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. *[12:1 CRLR 29]*

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 Legislature...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:

Conflict of Interest Code Revisions Approved. OAG's revisions to its conflict of interest code, which were reviewed and approved by the Fair Political Practices Commission, were approved by the Office of Administrative Law on March 19. *[12:1 CRLR 30]* The revised code designates 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.

RECENT AUDITS:

Report No. P-069 (January 1992) examines the Public Utilities Commission's (PUC) intervenor compensation program, which was established in Public Utilities Code section 1801 *et seq.* to promote public involvement in proceedings involving utility companies by compensating certain intervenors for their participation and contribution. The audit was conducted in response to a request from Senator Robert Presley, who has received numerous complaints from public interest group intervenors that the PUC's interpretation of the statutes creating the intervenor compensation mechanism actually stifles public participation in Commission proceedings rather than encouraging it. *[12:1 CRLR 23, 30, 186–87; 11:4 CRLR 206; 10:1 CRLR 1]*

Under the statutory scheme, public interest intervenors are required to participate in sometimes years-long proceedings with no assurance that they are even eligible for intervenor compensation. This approach works hardships on intervenor groups, which must wait until the conclusion of the proceeding to learn whether, in the eyes of the Commission, they have made a "substantial contribution" to a PUC decision on one or more issues. Then they must file a detailed, itemized compensation request, and wait months or even years for a PUC ruling on the request. One of the chief complaints of intervenors is the lengthy delay between participation, the decision on the merits of the proceeding, and the decision on the compensation request. OAG's report noted that the PUC is required by law to make a decision on the merits of an intervenor's compensation request within specified time limits. However, in 32 of the last 38 compensation decisions completed during the last three fiscal years, the PUC exceeded the