



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

OAL Saved From Budget Ax. The 1992-93 Budget Act, as signed by Governor Wilson on September 2, did not include funding for OAL. However, SB 1970 (Roberti), one of the Budget Act's

trailer bills, restored OAL's \$2.5 million allocation; SB 1970 was signed by the Governor on September 14 (Chapter 692, Statutes of 1992).

AB 1013 Determinations. OAL has not published any regulatory determinations since April due to budget constraints.

Garcia's Fourth Rejection of Proposition 103 Regulations Results in His Rejection by Senate Rules Committee. On June 8 and July 15, then-OAL Director Marz Garcia again rejected the Department of Insurance's (DOI) regulations implementing the rate rollback provision of Proposition 103, the insurance reform initiative which was successful on the November 1988 ballot. [12:2&3 CRLR 42, 169-70; 12:1 CRLR 28, 116-17] These actions mark OAL's fourth rejection of DOI Commissioner John Garamendi's attempt to set in motion Proposition 103's rate rollback provision. In response to appeals by Garamendi, Governor Wilson overturned the first two OAL disapprovals. However, in overturning OAL's second disapproval, Wilson 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. Wilson's threat notwithstanding, Garamendi proceeded to exercise his right of appeal under section 11349.5 following OAL's July 15 action. Although admitting that the issues in dispute had not changed since his prior decisions overturning OAL's disapproval, Wilson declined to intervene on grounds that the dispute between OAL and DOI must ultimately be decided by the courts, and that a significant test case has begun to move through the courts. Referring to *20th Century Insurance Company v. Garamendi*, No. BS016789, pending in Los Angeles County Superior Court, Wilson opined that the case contains most of the critical issues in the Proposition 103 debate, and will be extremely important in providing direction concerning the validity of the rollback regulations and procedures established by Commissioner Garamendi." Despite the possibility of prolonged litiga-

tion and subsequent appeals, Wilson concluded that because the dispute is in court, his intervention is no longer necessary or useful. Commissioner Garamendi referred to Wilson's action as placing ongoing rebate hearings on permanent freeze." (See *infra* agency report on DOI for related discussion.)

Two weeks before Wilson decided to reject Garamendi's final appeal, the Senate Rules Committee refused to confirm the Governor's appointment of Marz Garcia as OAL Director. By a 3-2 vote, the Committee found that Garcia's professional credentials were outweighed by his actions involving Proposition 103's implementation. At this writing, Wilson has not yet named his choice to replace Garcia as OAL Director.

LEGISLATION

The following is a status update on bills reported in detail in CRLR Vol. 12, Nos. 2 & 3 (Spring/Summer 1992) at pages 43-44:

AB 3359 (Sher) exempts from the requirements of the Administrative Procedure Act the issuance, denial, or revocation of specified waste discharge requirements and permits, the issuance, denial, or waiver of a water quality certification, the adoption or revision of state policy for water quality control, and the adoption or revision of water quality control plans and guidelines by the state Water Resources Control Board (WRCB) and the California regional water quality control boards, except that any policy, plan, or guideline, or any revision thereof, which WRCB has adopted or which a court determines is subject to review by OAL, after June 1, 1992, shall be required to be submitted to OAL, with certain exceptions. This bill was signed by the Governor on September 28 (Chapter 1112, Statutes of 1992).

AB 2535 (Cannella) would have exempted from the APA standards and orders relating to firefighting equipment adopted by the Occupational Safety and Health Standards Board. This bill was vetoed by the Governor on August 4.

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. This bill expands these notice requirements on state agencies to include all business enterprises, rather than only small business enterprises. This bill was signed by the Governor on September 30 (Chapter 1306, Statutes of 1992).

AB 400 (Margolin) was substantially



amended and is no longer relevant to OAL.

AB 88 (Kelley) would have exempted 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 (*see supra* AB 3359). This bill died in committee.

■ LITIGATION

In *Engelmann v. State Board of Education*, 2 Cal. App. 4th 47 (1991) (certified for partial publication only), the Third District Court of Appeal affirmed the Sacramento County Superior Court's holding that the 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] On March 19, the California Supreme Court denied the Board's petition for review, as well as a request for an order directing full publication.

No petition for review has been filed in *Fair Political Practices Commission v. Office of Administrative Law*, No. C010924 (Apr. 27, 1992), in which the Third District Court of Appeal found that the FPPC's 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 (among other things) created the FPPC. [11:2 CRLR 44]

In other litigation, the state Water Resources Control Board's appeal of the judgment in *State Water Resources Control Board and 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

Californians to Vote on OAG's Future. Proposition 159, authored by Senate Minority Leader Ken Maddy, qualified for the November 3 California ballot. This measure would amend the California Constitution to establish OAG with the mandate to conduct independent, non-partisan, professional audits as required by law or requested by the legislature. This initiative would also exempt OAG from the expenditure limits imposed on the legislature by Proposition 140, and require that not more than 50% of the Joint Legislative Audit Committee be composed of members of the same political party. Because OAG is currently folded into the legislature's budget, and the legislature must cut its budget by 38% under Proposition 140, OAG is subject to the threat of funding decreases or entire elimination. [12:1 CRLR 31]

Also appearing on the November ballot is Proposition 158, authored by Senator Dan Boatwright. This measure

would amend the California Constitution to create an independent Office of California Analyst. While this office currently exists as the Office of the Legislative Analyst, that office is also under the financial auspices of the legislature and faces the same threat of fiscal cutback or elimination as does OAG.

■ RECENT AUDITS

Report No. P-115 (May 1992) analyzes the Department of Corporations' (DOC) management of medical surveys and consumer complaints in its health care service plan division. Pursuant to the Knox-Keene Health Care Service Plan Act of 1975, DOC is responsible for regulating and licensing health care service plans (HCSPs). Among other things, DOC is required to perform various activities to ensure that HCSPs provide quality medical care; these activities include onsite medical surveys of every licensed health plan within specified timeframes. Additionally, DOC assists HCSP members in resolving complaints against their health plans.

As a result of its review, OAG found that DOC has not effectively managed its onsite medical surveys of HCSPs. Although required by law to conduct a survey of each HCSP at least once every five years, DOC told the legislature in 1986 that it attempts to conduct such surveys of most HCSPs every three years. However, OAG found that DOC did not conduct medical surveys every three years for 56% of the state's HCSPs from fiscal year 1987-88 through 1990-91. OAG also found that DOC did not conduct surveys every five years for 10% of the state's HCSPs from fiscal year 1986-87 through 1990-91. As a result, OAG noted that DOC may allow some HCSPs to continue to operate in a manner inconsistent with the law and possibly dangerous to their members' health.

OAG also found that DOC has not effectively managed the release of its medical survey reports. Specifically, OAG found that from fiscal year 1986-87 through 1990-91, 86% of DOC's confidential reports to HCSPs were not issued within the 90-day period established in DOC policy; instead, DOC took an average of 335 days to issue those confidential reports to the health plans. Also, for 78% of the medical surveys for which DOC could provide both the HCSPs' responses and DOC's public reports, DOC did not release the public reports within 45 days of receipt of the HCSPs' responses, as is required by DOC policy; rather, DOC took an average of 164 days to issue those public reports.