INTERNAL GOVERNMENT REVIEW OF AGENCIES

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 (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 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.

Effective August 31, 1990, Linda Hurdle Stockdale Brewer resigned as Director of OAL to accept a position in the private sector. Governor Deukmejian subsequently appointed John D. Smith, former OAL chief counsel, to replace Brewer as Director.

MAJOR PROJECTS:

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

-November 2, 1990, OAL Determination No. 12, Docket No. 89-019. OAL determined that the Department of Finance's (DOF) "Fiscal Impact Statement" form and its related instructions are "regulations" required to be adopted in compliance with the APA, except for certain provisions which OAL concluded simply restate existing law. Consistent with DOF's statutory duty to control costs to state governments which are likely to result from the adoption of regulations by state administrative agencies, the form requires state agencies to indicate the fiscal effect of proposed regulations on (1) state and local governments and (2) federal funding of state programs. The accompanying instructions describe what sort of agency rules must be formally adopted as regulations, define budgetary terms, and tell how to complete the form.

In its defense, DOF argued that the challenged form and the instructions for completing it (1) are not rules or standards of general application; (2) do not implement, interpret, or make specific the law enforced by DOF; and (3) in any event, are exempt from the APA under both the "internal management" and "forms" exception.

First, OAL rejected DOF's argument that the challenged form and accompanying instructions do not constitute regulations because they are not "standard[s] of general application" as defined by Government Code section 11347.5(a). OAL determined that, at a minimum, the challenged rules apply to all state agencies engaging in rulemaking under the APA. OAL also found support for this conclusion in DOF's Agency Response, in which DOF conceded that the challenged provisions are part of a "process by which the promulgating agency informs itself and the public of the fiscal consequences of its actions." OAL also found that most—if not all—of the provisions implement, interpret, or make specific the law enforced or administered by DOF. OAL further found that the provisions did not qualify for the "internal management" exception, since the rules (1) affect not only DOF employees, but also all state rulemaking agencies and, in some respects, members of the regulated public; and (2) concern a matter of serious consequence involving important public interests. Finally, OAL found that the rules do not qualify under the "forms" exception to APA requirements since the rules contain uniform, substantive provisions which in essence make new laws.

-November 2, 1990, OAL Determination No. 13, Docket No. 89-020. In this Determination, OAL ruled invalid a policy of the Board of Registration for Professional Engineers and Land Surveyors (PELS) which mandated that registered civil engineers have certain experience in order to qualify to take the examination for licensure as a land surveyor. (*See infra* agency report on PELS for further information on this Determination.)

Business and Professions Code section 8742(a)(3) states that a land surveyor applicant who is a registered civil engineer must have "two years of actual experience in land surveying." Subdivisions (a)(1) and (a)(2) of section 8742, which apply to non-engineers and describe alternative minimum requirements, each include the requirement of "one year of responsible field training and one year of responsible office training."

Without engaging in the rulemaking process set forth in the APA, the Board has imposed the requirement of "one year of responsible field training and one year of responsible office training" on registered civil engineers attempting to satisfy the "two years of actual experience in land surveying" requirement of section 8742(a)(3). The Board attempted to defend its policy by arguing that its interpretation of the requirement in section 8742(a)(3) is based upon "the more specific [statutory] description of the two years of land surveying experience" contained in subdivisions (a)(1) and (a)(2) of section 8742; thus, its policy is not a "regulation" but merely a restatement of existing law.

Initially, OAL found that the rule is a standard of general application, since the qualification requirements contained in the challenged policy are applied generally to all civil engineers who apply for the examination for licensure as a land surveyor. Further, OAL determined that because the Board's policy requires that a registered civil engineer's "two years of actual experience" consist of "one year of responsible field training and one year of responsible office training,"the policy implements, interprets,

and makes specific section 8742(a)(3). OAL disagreed with the Board's argument, finding no express or implied legislative intent that civil engineer applicants for a land surveyor's license be held to the same strict experience requirements as are non-civil engineer applicants.

-November 2, 1990, OAL Determination No. 14, Docket No. 89-021. In this Determination, OAL reviewed whether specified sections of two Department of Corrections manuals concerning transfer of the location of parole are regulations required to be adopted in compliance with the APA. The Department's regulations have been adopted pursuant to the APA and are known as the "Director's Rules." The two Department manuals containing the challenged provisions—the Parole and Community Services Division (PCSD) Operations Manual and the Case Records Manual—are part of a group of six "procedural" manuals which contain additional statewide rules supplementing the Director's Rules.

OAL initially determined that the APA rulemaking requirements apply to the Department's quasi-legislative enactments. Next, OAL found that all of the challenged provisions are intended to apply to all members of a class—specifically, all inmates seeking parole to a county other than that of commitment, as well as those inmates the Department seeks to parole to a different county.

OAL next reviewed whether the challenged provisions establish rules which interpret, implement, or make specific the law enforced or administered by the Department, and found that specific parts of some of the challenged provisions were merely explanatory, such as provisions which restate the applicable statute. Therefore, those policies do not constitute regulations as defined by Government Code section 11342(b). However, OAL found that other challenged policies do in fact interpret, implement, or make specific the law administered by the Department. For example, one challenged policy requires consideration of six enumerated factors in determining if parole to another county is justified, while the applicable statute merely permits their consideration.

OAL next examined the policies which constitute regulations to determine whether they fall within any established general exceptions to the APA requirements, such as the "internal management" exception. OAL noted that, in evaluating whether the regulations fall within the internal management exception, one factor is whether the challenged portions represent a "rule of general application significantly affecting the male prison population in the custody of the Department." If so, then the regulation does not fall within the internal management exception. Based on this test, OAL determined that several of the challenged provisions do in fact fall under the internal management exception, and need not be adopted pursuant to the APA.

-November 9, 1990, OAL Determination No. 15, Docket No. 89-022. The California Dental Hygienists Association (CDHA) submitted a Request for Determination to OAL, challenging a "position statement" drafted by the Board of Dental Examiners (BDE) and published in a September 1989 letter disseminated to all BDE licensees. The position statement declared unlawful any dentist's use of dental auxiliaries to "perform dental treatment procedures on a new patient without specific instructions and prior to the patient having been examined by the dentist," and ordered that such practice be discontinued. CDHA alleged that the statement lacks statutory basis and constitutes an underground regulation. (*See infra* agency report on BDE and CRLR Vol. 10, No. 4 (Fall 1990) p. 71; Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 85; and Vol. 9, No. 4 (Fall 1989) p. 54 for extensive background information on this issue.)

OAL determined that the challenged policy statement established a rule which interprets, implements, or makes specific the law enforced or administered by BDE. For example, the position statement states in part that "California law requires the dentist to examine and diagnose all new patients prior to delegating to auxiliaries those general supervision duties which involve treatment...." However, OAL found no California statute, regulation, or judicial opinion that imposes such a requirement.

OAL found further support for its determination in BDE's own rulemaking record prepared several years ago in connection with the Board's plans for adopting new section 1066 to its regulations in Title 16 of the California Code of Regulations. Among other things, section 1066 would have provided that it is unprofessional conduct for a dentist to require or permit an auxiliary to perform any procedure on a patient not previously seen by that dentist unless certain conditions were met. In its rulemaking file on the proposed regulation, BDE argued that such a section was necessary because existing law does not "specify whether a dentist must examine a patient before a dental auxiliary may perform any of the functions permitted by law to be assigned to such auxiliary." In May 1989, the proposed section was disapproved by the Director of the Department of Consumer Affairs.

LITIGATION:

A ruling is expected shortly in *Fair Political Practices Commission (FPPC) v. Office of Administrative Law, et al.*, No. 512795 (Sacramento County Superior Court). In this action, the FPPC challenges OAL's authority to review FPPC regulations under the APA as it has been amended since 1974. The FPPC contends that its regulations 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 (PRA), which, *inter alia*, created the FPPC. OAL was not created until 1980. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 39 and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 47 for background information.)

At the conclusion of oral argument at a November 9 hearing, at which extensive arguments were presented by both parties, the judge requested further briefing on the question of statutory reference, including specific rather than general assertions. This issue was not addressed in the briefs by either party. The judge stated that she would issue a ruling following submission and review of the supplemental briefs, which were filed on November 30. At this writing, no ruling has been issued.

In *California Chapter of the American Physical Therapy Ass'n et al. v. California State Board of Chiropractic Examiners, et al.*, Nos. 35-44-85 and 35-24-14 (Sacramento County Superior Court), a negotiated settlement is expected shortly; for that reason, the oft-postponed status conference (which was last postponed and rescheduled for October 5) was postponed indefinitely. The parties are litigating the validity of the Board of Chiropractic Examiners' (BCE) adoption and OAL's approval of section 302 of BCE's regulations, which defines the scope of chiropractic practice. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 39; Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 47; Vol. 9, No. 4 (Fall 1989) p. 127; and Vol. 9, No. 3 (Summer 1989) p. 118 for background information on this case.)

Attorneys representing several parties each report that all parties involved have reached agreement on proposed revised language to the contested regulation. By mid-January, BCE and one cluster of plaintiffs, including the California Medical Association, were expected to file a proposed settlement agreement. Attorneys involved in the case report that

accord on release language contained in the proposed settlement agreement (which is intended to prevent future litigation on the matter) remains to be reached before settlements can be reached between the remaining plaintiffs and BCE.

Upon the conclusion of this litigation, BCE will submit the revised proposed regulation to OAL, which has agreed to review and either approve or reject it promptly.

A two-line ruling issued in late November by the court 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), favors OAL. Plaintiffs seek a writ of mandate ordering OAL to vacate its Determination No. 4 (Docket No. 88-006). In that ruling, OAL found that certain WRCB amendments to the San Francisco Bay Plan, which define "wetlands" and set forth certain criteria for permit discharges to wetlands, are regulations which must be adopted in compliance with the APA. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 164 and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) pp. 196-97 for background information.)

The plaintiffs argued that since the contested amendments to the San Francisco Bay Plan were accomplished and approved by a regional arm of WRCB, WRCB's ratification and adoption of that local entity's actions is not subject to the APA. The terse ruling handed down by the court thus far rejects the plaintiffs' position; however, it is not possible at this point to determine whether the ruling will lead to invalidation of the amendments. A more definitive and complete ruling was expected to be issued by the court after January 15. The outcome of this case may be significant, because it bears upon the administrative rulemaking procedures and powers of several state boards and agencies which conduct activities and enforcement procedures via local arms or local enforcement agencies and regional policy boards.

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 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.

RECENT AUDITS:

Report No. P-032 (October 1990) is OAG's preliminary review of the Martin Luther King, Jr. (MLK) Community Plaza project in Oakland, in order to determine the extent of work needed for a full-scope audit. Since 1982, the City of Oakland has been in the process of attempting to develop the MLK project, which will be a community center for office, cultural, retail, health, education, and recreation activities. The project will be located on the site of University High School, which consists of a main building, an auditorium, and a gymnasium. In 1987, the city issued a request for developer qualifications (RFQ), and subsequently selected a developer whose site plan called for demolition of all of the buildings on the site.

OAG's preliminary review focused on five issues. These issues and OAG's findings include the following:

-OAG determined that it appears to be economically feasible for Oakland to refurbish the main building and auditorium; however, OAG cautioned that it did not have sufficient time to review the building codes and regulations that would govern different types of construction or uses, or to conduct a thorough cost analysis.

-Regarding whether the property is adequately protected from vandals and deterioration, OAG concluded that the lack of documentation regarding the condition of the buildings when the city acquired them severely limited any analysis of deterioration or neglect.

-OAG found that the developer's ability to complete the contract is primarily a legal question related to corporations, and therefore is beyond the scope of OAG's audit.

-OAG concluded that there was insufficient time to determine whether it would be in the best interest of the city to grant more time to the developer, to issue a new RFQ, or to sell the property. However, OAG noted that the city had already spent over $1.9 million on the project as of August 31, 1990, and the project manager estimated that the project will cost an additional $840,000 over the next four years, not including the cost of construction.

-Finally, OAG found that it could not determine whether the city's process for selecting its developer was adequate because of the lack of records providing necessary information.

As a result of this preliminary review, OAG recommended to the Joint Legislative Audit Committee that it amend the approved audit to focus on only two areas: whether it is economically feasible to refurbish the main building and the auditorium, and whether it is it in the best interest of the city to grant more time to the develop to complete the project, to issue a new RFQ, or to sell the property.

Report No. P-979 (November 1990). The purposes of this audit were to review procedures of the Los Angeles County Department of Mental Health (Department) for selecting contractors and granting contracts for the provision of mental health services for fiscal year 1989-90; determine whether the Department adequately reviewed its contractors for mental health services; and determine whether the Department adequately followed up to ensure that contractors correct deficiencies identified during program and fiscal reviews. In the course of its audit, OAG found that the Department continued to pay contractors that did not provide services in fiscal years 1987-88 and 1988-89; and determined that during fiscal years 1985-86 and 1986-87, the Department paid rates of more than $200 per unit of service to contracted providers of mental health