

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

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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 May 1, John D. Smith, appointed Director near the conclusion of Governor Deukmejian's term and then designated Interim Director by Governor Wilson when Wilson first entered office, was formally appointed Deputy Director by Governor Wilson. Smith has assumed

the dual roles of Interim (Acting) Director and Deputy Director until Governor Wilson appoints a Director.

MAJOR PROJECTS:

AB 1013 Determinations. The following determinations were issued in recent months; however, at this writing, OAL has not yet published these determinations in the *California Regulatory Notice Register* pursuant to Government Code section 11347.5, which requires that OAL publish a summary of its determination in the *Notice Register* within 15 days of the date of issuance.

-March 28, 1991, OAL Determination No. 2, Docket No. 90-004. OAL was presented with the issue of whether two policies of a private, nonprofit corporation (a "regional center" under contract to a state agency) concerning (1) "vendorization" and (2) preference for single-building housing arrangements are regulations, and without legal effect unless adopted in compliance with the APA. OAL also reviewed whether the Department of Developmental Services (DDS, the contracting agency) has in effect "adopted" these policies and, if so, whether the policies should be deemed to be regulations. Under the Lanterman Developmental Disabilities Services Act, DDS funnels funding through 21 regional centers to private nonprofit community agencies which provide residential care facilities to developmentally disabled individuals as an alternative to institutionalization.

OAL determined that a regional center is not a state agency, nor is it an agent of the state; therefore, the regional center is not required to comply with the rulemaking requirements of the APA. OAL rejected the argument that DDS' pervasive control over regional centers, as manifested by the terms of existing contracts and statutory and regulatory provisions, demonstrates the existence of an agency relationship, finding that any control which DDS has over the regional centers is, at best, of a general nature.

OAL determined that DDS is a state agency subject to the requirements of the APA. However, OAL concluded that the

record did not demonstrate that DDS has specifically adopted the regional center's stated preference for single-building residential housing, and that DDS had previously adopted the "vendorization" policy pursuant to the APA. (See *infra* LITIGATION for further information on this matter.)

-March 28, 1991, OAL Determination No. 3, Docket No. 90-005. OAL reviewed whether the Board of Prison Terms' alleged policy, which permits the Department of Corrections (DOC) to make decisions about changing the county of parole for prisoners previously sentenced under the Indeterminate Sentencing Law, is a regulation subject to the APA. Penal Code section 3003 provides that an inmate who is released on parole shall be returned to the county from which he/she was committed. Section 3003 further provides that if the Board decides on a return to different county, it shall place its reasons in writing in the parolee's permanent record. The Requester, attorney Paul W. Comiskey, alleged that the Board has adopted no regulations to govern its procedure on this matter and has simply allowed DOC to make these determinations. Mr. Comiskey claimed that such a policy amounts to an invalidly adopted regulation.

OAL initially determined that the Board is a state agency subject to the rulemaking requirements of the APA. However, OAL determined that, based on the information submitted in the request for determination and the Board's response to the request, it is unable to conclude that the alleged policy actually exists and/or has been adopted by the Board. However, OAL noted that any doubt as to the existence of the challenged rule must be resolved in favor of the Requester.

OAL next determined that the challenged policy does in fact constitute a regulation, as it applies to all members of a class, kind, or order, and interprets and implements Penal Code section 3003. OAL further found that the challenged policy is not exempt from the requirements of the APA. OAL thus concluded that a policy which delegates to DOC the Board's authority to determine the appropriate placement of prisoners on parole would be invalid unless adopted pursuant to the APA.

-April 1, 1991, OAL Determination No. 4, Docket No. 90-006. In this proceeding, which was also requested by Mr. Comiskey, OAL determined that DOC's policy of refusing to send notices of its proposed regulatory actions to inmates who request them is a regulation which must be adopted pursuant to the



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APA. Government Code section 11346.4(a) requires that, at least 45 days prior to the scheduled hearing and close of the public comment period on the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be mailed to every person who has filed a request for notice of regulatory action with the state agency. Prior to the spring of 1990, DOC decided that it was not possible to mail individual notices to inmates and staff, and adopted a policy of posting such notices in institutions at least 45 days prior to scheduled hearings.

As noted above, OAL determined that DOC is a state agency subject to the APA's requirements. OAL determined that because the challenged policy (1) applies to a class of persons, specifically all persons requesting written notice of DOC's rulemaking changes, and (2) clearly interprets and implements section 11346.4(a), it is a regulation subject to the APA's requirements. Finally, OAL found that the challenged policy is not exempt from the APA.

OAL noted, however, that as of spring 1990, DOC's policy has been to place on its mailing list for notices of proposed rulemaking those inmates who make a written request. Although this action in effect rescinds DOC's previous policy, OAL proceeded with this determination to invalidate the previous policy and to "deter the Department from again implementing such a policy."

CPIL Files Request for Determination. On April 22, Center for Public Interest Law (CPIL) intern William J. Braun submitted a request for determination to OAL; the request concerns the Board of Registration for Professional Engineers and Land Surveyors' (PELS) stated position that it is not authorized to regulate fee disputes between professional engineers and consumers. CPIL contends that PELS' enabling statute provides it with broad authority to regulate the professions of land surveying and engineering, and that its policy of disclaiming authority over engineering fee disputes interprets Business and Professions Code section 6775(b) and thus constitutes a regulation. On May 5, OAL notified CPIL that it has accepted the request for determination.

LEGISLATION:

SB 310 (Dills), as introduced February 7, would subject the California State Lottery Commission's rulemaking to the provisions of the Administrative Procedure Act (APA), including review of the proposed adoption, amendment, or repeal of regulations by OAL. This bill

is pending in the Assembly Governmental Organization Committee.

AB 1395 (Speier), as amended May 7, would provide that, commencing January 1, 1992, all rules and regulations of the State Board of Control shall be adopted in accordance with the APA, including review by OAL. This bill is pending on the Assembly floor.

AB 400 (Margolin), as introduced February 4, would similarly subject the Division of Industrial Accidents and the Workers' Compensation Appeals Board to the provisions of the APA; this bill is pending in the Senate Governmental Organization Committee.

SB 327 (Hill). Existing law permits any interested person to submit a petition to a state agency proposing the adoption, amendment, or repeal of an administrative regulation; the agency may, either in whole or in part, grant or deny the petition. As amended April 22, this bill would require every agency decision to be in writing, and to be transmitted to OAL for publication in the *Notice Register* at the earliest practicable date.

Existing law requires every state agency to maintain a rulemaking file for each regulatory action, which is deemed to be the record for that rulemaking procedure; the file is required to contain specified documents. This bill would require the file to contain a copy of any decision granting, in whole or in part, a petition for the adoption, amendment, or repeal of an administrative regulation. This bill, which would take effect immediately as an urgency statute, is pending in the Assembly Committee on Consumer Protection, Governmental Efficiency, and Consumer Protection.

AB 88 (Kelley), as amended May 21, would exempt from the APA the Water Resources Control Board'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 the Board and regional water 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 bill is pending in the Assembly Ways and Means Committee.

AB 1100 (Lee). Existing law, the Used Oil Collection Demonstration Grant Program Act of 1990, requires the California Integrated Waste Management and Recycling Board (CIWMB) to

develop and administer a used oil grant program, and to adopt regulations therefor by July 1, 1991. As amended April 22, this urgency bill would instead require CIWMB to adopt guidelines to administer the program, and would exempt these guidelines from APA requirements and OAL review. This bill passed the Assembly on May 29 and is pending in the Senate Governmental Organization Committee.

The following is a status update on bills reported in detail in CRLR Vol. 11, No. 2 (Spring 1991) at page 44:

AB 1736 (Campbell), as amended May 1, would specify that no exemption, whether by statute, regulation, or in the State Administrative Manual, to any provision of the State Contract Act 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 regulations adopted by that governmental agency. This bill would also 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.

AB 2061 (Polanco), as amended May 15, would require state agencies proposing to adopt or amend any regulation to actively consider the potential for adverse economic impact on California small business enterprises and individuals. This bill would authorize a court to declare a regulation invalid if a declaration by the adopting state agency that the regulation will not have a significant adverse economic impact on small business is in conflict with evidence in the record. This bill is pending in the Assembly Ways and Means Committee.

LITIGATION:

On April 11, OAL filed its notice of appeal of the trial court's March 5 judgment in *Fair Political Practices Commission (FPPC) v. Office of Administrative Law, et al.*, No. 512795 (Sacramento County Superior Court). 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 on this case.)

All parties have finally reached a settlement 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). The parties were 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. On February 1, the court approved a settlement between BCE and the California Medical Association (CMA), which required BCE to adopt new section 302 on an emergency basis; OAL approved the emergency rule on April 4. Other parties and intervenors—including the California chapter of the American Physical Therapy Association, the Medical Board of California, and the Physical Therapy Examining Committee—initially objected to the settlement agreement and the proposed regulation, because it includes the practice of physical therapy within the scope of practice of a chiropractor. However, BCE later agreed to amend the proposed regulation to include an acceptable definition of the physical therapy which may be practiced by a chiropractor. BCE was scheduled to hold a regulatory hearing on the proposed adoption of revised section 302 on June 20. (See *infra* agency report on BCE for related discussion.) Thus, this lengthy case ended with no disposition as to OAL's 1987 "approval in part and disapproval in part" of section 302, which many critics believe is outside OAL's scope of authority. (See CRLR Vol. 7, No. 4 (Fall 1987) pp. 11, 30, and 100 for background information.)

On May 29, final judgment was entered 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), the court holding 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; see *supra*

LEGISLATION for AB 88 (Kelley), which would remove some of WRCB's rulemaking proceedings from the requirements of the APA.)

A new lawsuit, *Weber v. Smith*, No. 366633 (Sacramento County Superior Court), was filed against OAL on April 25. 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 on March 28. OAL Determination No. 2 (March 28, 1991, Docket No. 90-004) 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 that such regional centers are not subject to the requirements of the APA. (See *supra* MAJOR PROJECTS.) Weber is challenging OAL's finding and declaration that it is beyond OAL's jurisdiction to prevent such privately-owned and operated community-based care centers from embracing and implementing practices and policies which DDS would be prohibited from enforcing without satisfying the APA's requirements.

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.

RECENT AUDITS:

Report No. F-005 (March 1991) contains the results of OAG's review of the state's control of its financial activities and its compliance with federal grant requirements and state regulations; this review was made as part of OAG's examination of the state's general purpose financial statements. (See CRLR Vol. 11, No. 2 (Spring 1991) p. 45 for background information.) The report found that, although California has corrected some of the weaknesses in its internal controls identified by OAG in recent years, it has many more weaknesses to correct. The state continues to lose millions of dollars each year because agencies do not promptly identify and collect amounts owed to the state; do not effectively control expenditures; and do not manage cash to maximize benefits to the state. According to the report, for fiscal year 1989-90, 20 of the 24 agencies audited had weaknesses in the controls over their financial activities.

Among other recommendations, OAG suggested that the state uniformly prepare its budget based on generally accepted accounting principles (GAAP); GAAP is the preferred method of accounting because it is a nationally recognized set of standards which improves accountability by recognizing costs when they occur, not when they are paid for.

Report No. P-049 (April 1991) concerns the processing of complaints against physicians and other health practitioners by the Medical Board of California (MBC), the Office of the Attorney General, and the Office of Administrative Hearings (OAH). MBC is responsible for protecting consumers from incompetent, grossly negligent, unlicensed, or unethical medical practitioners. In addition to licensing physicians, MBC investigates complaints against its licensees and those of the committees and boards of the Division of Allied Health Professions. According to MBC, as of June 30, 1990, 155,734 licenses were in effect. During fiscal year 1989-90,