



to Chapters 2, 3, and 4 of the San Francisco Bay Plan are not subject to the provisions of the APA. The boards have also requested the court to declare that the regional and state boards are not required to comply with the procedures of the APA when the boards are engaged in the formulation and adoption of water quality control plans under the Porter-Cologne Act. Finally, the boards also request recognition of the fact that the California legislature has exempted the water quality planning process from the requirements of the APA. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 143 and Vol. 9, No. 3 (Summer 1989) pp. 27 and 114-15 for background information.)

In *California v. Federal Energy Regulatory Comm'n*, No. 89-333, 90 D.A.R. 5598 (May 21, 1990), the U.S. Supreme Court held that minimum flow rates established by WRCB are preempted by the Federal Power Act (FPA). (See CRLR Vol. 9, No. 4 (Fall 1989) pp. 124-25 for background information on this case.)

In 1983, the Federal Energy Regulatory Commission (FERC) issued a license authorizing the operation of the Rock Creek project. The license required the project to maintain interim minimum flow rates of 11 cubic feet per second (cfs) during the summer months and 15 cfs during the rest of the year. In 1984, WRCB issued a permit that conformed to FERC's interim minimum flow requirements but reserved the right to set different permanent minimum flow rates. Subsequently, WRCB demanded that the licensee maintain minimum flow rates of 60 cfs during the summer months and 30 cfs during the remainder of the year.

After FERC issued a declaratory order directing the licensee to comply with the minimum flow requirements of the federal permit, WRCB intervened to seek a rehearing of FERC's order. FERC denied the rehearing request, on the grounds that FERC held exclusive jurisdiction to determine minimum flow rates.

Relying on *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), the Court held that California's actions were preempted by the FPA. The Court stated: "Adhering to *First Iowa's* interpretation of § 27 [of the FPA], we conclude that the California requirements for minimum instream flows cannot be given effect and allowed to supplement the federal flow requirements. A state measure is 'pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'"

The Court agreed with FERC that the California requirements interfere with its comprehensive planning authority and found that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would "constitute a veto of the project that was approved and licensed by FERC."

#### FUTURE MEETINGS:

Workshop meetings are generally held the first Wednesday and Thursday of each month. For the exact times and meetings locations, contact Maureen Marche at (916) 445-5240.

the Commission. Members of the Board are appointed by the Governor for four-year terms. Each member must be at least 21 years old and a California resident for at least five years prior to appointment. In addition, the three industry members must have a minimum of five years' experience in auctioneering and be of recognized standing in the trade.

The Act provides assistance to the Board of Governors in the form of a council of advisers appointed by the Board for one-year terms. In September 1987, the Board disbanded the council of advisers and replaced it with a new Advisory Council (see CRLR Vol. 7, No. 4 (Fall 1987) p. 99 for background information).

#### MAJOR PROJECTS:

**Enforcement Program.** The Board's enforcement program investigates complaints regarding specific licensees. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 144 and Vol. 9, No. 4 (Fall 1989) pp. 125-26 for background information.) The Board is currently investigating complaints against three auction companies and six auctioneers for failure to pay consignors. Additionally, eight licensees have been suspended by the Board for failing to pay administrative fines assessed by the Board.

**Disciplinary Actions.** In addition to the enforcement program, the Board has a disciplinary review committee for both northern and southern California. The new northern California committee members include John Gallo, Paula Higashi, and John Rademaker; while the current southern California members are Judith Johnson, Jan Bendis, and Brian Meyers. As a result of disciplinary proceedings, five licensees have lost their licenses since the Board's January meeting. The basis for each revocation was failure to pay consignors. All five licenses were revoked under the authority of section 5775(m) of the Business and Professions Code. The Board will continue to encourage consignors to file complaints and bond claims with the Board when they have not been paid within thirty working days.

**Monitoring of Advertisements.** The Board continues to investigate complaints dealing with false advertising. As the complaints are received by the Board, investigations are conducted to determine whether disciplinary action should be taken against the specific licensee. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 144 and Vol. 9, No. 4 (Fall 1989) p. 126 for background information.) Lately, the main focus has been on the term "estate sale." The Board has



## INDEPENDENTS

#### AUCTIONEER COMMISSION

Executive Officer: Karen Wyatt  
(916) 324-5894

The Auctioneer and Auction Licensing Act, Business and Professions Code section 5700 *et seq.*, was enacted in 1982 and establishes the California Auctioneer Commission to regulate auctioneers and auction businesses in California.

The Act is designed to protect the public from various forms of deceptive and fraudulent sales practices by establishing minimal requirements for the

licensure of auctioneers and auction businesses and prohibiting certain types of conduct.

Section 5715 of the Act provides for the appointment of a seven-member Board of Governors, which is authorized to adopt and enforce regulations to carry out the provisions of the Act. The Board's regulations are codified in Chapter 3.5, Title 16 of the California Code of Regulations (CCR). The Board, which is composed of four public members and three auctioneers, is responsible for enforcing the provisions of the Act and administering the activities of



# REGULATORY AGENCY ACTION

defined the term "estate" to mean only the property of a dead person. A violation of this definition may subject a licensee to a \$500 fine. Licensees who use the term "estate" questionably are required to document the truthfulness of their advertisements. If they are unable to comply, the Board may take further disciplinary action, in addition to the \$500 fine.

## RECENT MEETINGS:

At its May 15 meeting in Sacramento, the Board established a two-member committee to review specified cases to determine whether a restricted license should be issued.

Also at its May 15 meeting, the Board re-elected Howard "Gus" Hall as President and Vance VanTassell as Vice-President, and elected Duayne Epple as Secretary.

## FUTURE MEETINGS:

September 14 (location to be announced).

## BOARD OF CHIROPRACTIC EXAMINERS

*Executive Director: Vivian R. Davis*  
(916) 445-3244

In 1922, California voters approved an initiative which created the Board of Chiropractic Examiners (BCE). Today, the Board's enabling legislation is codified at Business and Professions Code section 1000 *et seq.*; BCE's regulations are located in Chapter 4, Title 16 of the California Code of Regulations (CCR). The Board licenses chiropractors and enforces professional standards. It also approves chiropractic schools, colleges, and continuing education courses.

The Board consists of seven members, including five chiropractors and two public members.

## MAJOR PROJECTS:

*Regulatory Changes.* On January 29, the Office of Administrative Law (OAL) disapproved BCE's amendments to section 356, Chapter 4, Title 16 of the CCR. This change would require Board-approved continuing education (CE) courses to be sponsored by chiropractic colleges having or pursuing status with the Council on Chiropractic Education; and would require that four out of every twelve hours of CE be in adjustive technique. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 144 and Vol. 9, No. 2 (Spring 1989) p. 112 for background information.) OAL found that section 356 failed to satisfy the clarity and

necessity standards in Government Code section 11349.1, and that the Board failed to adequately summarize and respond to all public comments. BCE plans to correct these deficiencies and resubmit the regulation to OAL.

In early March, BCE released a modified version of new section 355(c), which would now require applicants for license renewal who operate or supervise the use of a thermography unit in their practice to enroll in and complete a 48-hour certification program or post-graduate course in spinal related thermography education, twelve hours of which may be applied to the annual renewal. This requirement would commence with the renewal period for 1991. BCE accepted comments on this revised language until March 21, and submitted the rulemaking record to OAL on April 30.

On May 3, OAL rejected the Board's adoption of new section 355(c), which would require certain chiropractors to complete a minimum of 48 hours of a thermography course. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 145; Vol. 9, No. 4 (Fall 1989) p. 127; and Vol. 9, No. 3 (Summer 1989) p. 117 for background information.) Again, OAL found that the rulemaking package failed to satisfy the clarity and necessity standards and that the Board failed to respond to all public comments; OAL also found that the Board had made substantial changes to its noticed language without giving the public an adequate opportunity to comment, and that BCE failed to comply with several technical requirements of the Administrative Procedure Act. BCE plans to correct the deficiencies and resubmit section 355(c) to OAL.

On June 5, OAL approved BCE's adoption of section 317(u), regarding "no out of pocket" advertising. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 145 and Vol. 9, No. 4 (Fall 1989) pp. 126-27 for background information.)

On December 29, BCE submitted to OAL its proposed amendment to section 355(a), which would (among other things) raise the annual renewal licensing fee from \$95 to \$145. (See CRLR Vol. 10, No. 1 (Winter 1990) pp. 144-45 and Vol. 9, No. 4 (Fall 1989) pp. 126-27 for background information.) However, the Board subsequently decided to withdraw that amendment pending the outcome of Proposition 113 on the June 5 ballot, which changes the annual license renewal date for chiropractors to the individual chiropractor's birthday, and raises the penalties for unlicensed chiropractic practice. That initiative was successful on the June ballot.

The Board also recently decided to

withdraw from OAL consideration new section 311, regarding the registration of fictitious names. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 145 and Vol. 9, No. 4 (Fall 1989) pp. 126-27 for background information.) The Board may insert fictitious name language into section 324. BCE has also decided to withdraw section 331.11, which would establish a 3.0 grade point average in an accredited two- or four-year college in order to matriculate at a Board-approved school.

On March 8, BCE held a public hearing on two proposed amendments to section 331.1. First, the Board proposed to add a preamble to the section, which states that chiropractic doctors have a legal obligation to diagnose and recognize even those diseases and conditions which may be beyond their scope of practice to treat, in order to make the appropriate referrals for the overall protection of the public. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 145 for background information.)

The Board also seeks to add new subsection (d) to the section, which specifies that BCE will not approve any school, provisionally or otherwise, unless the agency accrediting that college, in addition to being recognized by the U.S. Commissioner of Education, fully accredits educational hours and coursework in all of the areas of chiropractic education as required in section 5 of the Chiropractic Initiative Act and its regulations. Because the Board members are not trained educators and must rely on accrediting agencies to evaluate course content and establish standards for measuring the quality of education, the accrediting agency must have the expertise to advise the Board in all areas of education required by California law. Following the hearing, the Board decided to take final action on the amendments at its July 26 meeting.

At its July 26 meeting, BCE was scheduled to hold a public hearing on its proposed addition of regulatory sections 306.1 and 306.2. New section 306.1 would authorize the Board to create Mid-Level Review Panels to review, education, and provide assistance to individual chiropractors, as assigned by the Board, to strengthen various aspects of their practice. The Mid-Level Review Panel shall include outside chiropractic experts chosen by BCE; chiropractors under review shall participate on a voluntary basis, and the records and proceedings shall be confidential and shall not be subject to discovery or subpoena.

New section 306.2 would provide legal representation by the Attorney General's office in the event that a per-