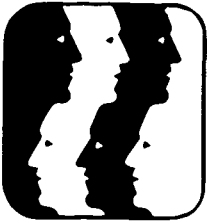


# INTERNAL GOVERNMENT REVIEW OF AGENCIES



**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.

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:

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

-March 29, 1989, OAL Determination No. 4, Docket No. 88-006. OAL determined that the San Francisco Regional

Water Quality Control Board's ("regional board") policies defining the term "wetlands" and prescribing criteria for permit decisions on discharges to wetlands are regulations within the meaning of the APA, thus requiring their adoption in accordance with APA rulemaking procedures. Moreover, OAL rejected the regional board's argument that the legislature intended to exempt such wetlands regulations from APA rulemaking requirements.

-April 5, 1989, OAL Determination No. 5, Docket No. 88-007. In this determination, OAL examined a memorandum dated October 1, 1987 issued by the Department of Corrections concerning the time frame in which an employee must call in sick to a supervisor. OAL determined that the memorandum is a regulation but, because it relates solely to the internal management of the Department, it is exempt from APA rulemaking requirements.

-April 19, 1989, OAL Determination No. 6, Docket No. 88-008. In this determination, OAL ruled on a request by the California State Employees Association challenging the Department of Corrections' unwritten statewide rule requiring Department employees to submit to urinalysis drug and alcohol testing upon reasonable suspicion of intoxication.

In determining that the unwritten rule is a regulation which must be adopted pursuant to the APA, and that the rule is not exempt from the requirements of the APA under the "internal management" exception, OAL engaged in an informative analysis of the three-tiered regulatory scheme used by the Department to carry out its duties under the California Penal Code. OAL also discussed in depth its interpretation of the internal management exception, which involves a two-part inquiry: (1) whether the challenged rule affects only the employees of the issuing agency; and (2) whether the challenged rule addresses a matter of serious consequence involving an important public interest. The excep-

tion applies only if the answer to the first question is "yes" and the answer to the second question is "no".

Here, the unwritten rule applied only to Department employees, such that the first part of the test for the exemption was satisfied. However, because "[t]he circumstances of and method used to test for drug and alcohol abuse by public employees, particularly those involved in protecting public safety, is an obvious matter of serious consequence involving an important public concern," OAL concluded that the second prong of the test was not satisfied, and that the exemption does not apply. As evidence of the seriousness of the issue of prison security and public safety, OAL cited the Department's own regulations defining the primary objectives of its institutions; the fact Governor Deukmejian issued Executive Order D-58-86, requiring the Department of Personnel Administration (DPA) to adopt drug testing regulations for employees in "sensitive positions"; and DPA's subsequent adoption of sections 599.960-966, Title 2, California Code of Regulations (CCR), authorizing reasonable suspicion drug testing of state employees in "sensitive positions," including Department employees.

-April 20, 1989, OAL Determination No. 7, Docket No. 88-009. Here, OAL was asked to determine whether the thirty-page "Medical Level of Care Guidelines" issued by the Department of Social Services (DSS) regarding residential care facilities for the elderly (RCFE) are regulations which must be adopted pursuant to the APA.

Under the Residential Care Facilities for the Elderly Act, Health and Safety Code sections 1569-1569.87, DSS is responsible for licensing and evaluating RCFEs. The "Medical Level of Care Guidelines" set forth eleven medical conditions or problems that would be allowed in an RCFE, and 24 medical conditions or problems which would prohibit a person from being kept in an RCFE. The presence of any of the latter 24 medical conditions may preclude the licensure of an RCFE or result in the citation of a licensed RCFE.

OAL found that because the Guidelines purport to interpret or make specific existing regulations in Title 22 of the CCR, they are regulations which must be adopted pursuant to the APA. OAL found that the Guidelines were invalid and unenforceable until DSS adopted emergency regulations codifying them on April 18, 1989.

-May 17, 1989, OAL Determination No. 8, Docket No. 88-010. In this deter-



mination, OAL found that the Water Resources Control Board's Resolution 88-63—its "Sources of Drinking Water Policy" adopted on May 19, 1988—is a regulation which must be adopted pursuant to the APA. (See *infra* agency report on WRCB for details on this determination; see also CRLR Vol. 8, No. 3 (Summer 1988) p. 116 for background information on WRCB's policy.)

—May 18, 1989, OAL Determination No. 9, Docket No. 88-011. In this determination, OAL found that section 2708 of the Department of Corrections' Administrative Manual, which sets forth grooming standards for departmental peace officer and fire fighter personnel, is a regulation within the meaning of the APA, but is exempt from APA rulemaking requirements because it relates solely to the internal management of the Department.

*Proposed Rulemaking by OAL.* On May 12, OAL published its notice of intent to amend several provisions of its own regulations, which appear in Title 1 of the CCR. OAL was scheduled to hold a July 18 public hearing on the proposed regulatory changes.

The majority of the proposed changes are minor, including the inclusion of new section 1, which will provide definitions of terms found within Chapter 1, Title 1 of the CCR; the renumbering and amendment of section 5 (formerly section 120), which will now apply to all types of notices which agencies seek to publish in the *Notice Register*; an amendment to section 6, including a revised "Notice Publication/Regulations Submission" ("Form 400") required to be submitted to OAL by agencies along with the rulemaking file on completed regulatory actions; and an amendment to section 44 regarding the fifteen-day public availability of changes made to the text of proposed regulations after their publication in the *Notice Register*.

However, the regulatory changes also include the addition of new section 55, entitled "Public Comments Concerning Emergency Regulations." Existing OAL regulations are silent as to whether and when OAL may consider comments from the public submitted directly to OAL when it is reviewing emergency regulations adopted pursuant to Government Code section 11349.6(b). New section 55 would allow OAL to consider these comments under specified conditions, including a requirement that the comments be received within five calendar days after OAL receives the emergency regulations, and that the commenter submit the comments to the contact person of the rule-

making agency which adopted the emergency regulations. The agency may submit a response or rebuttal to the comments within eight calendar days after OAL's receipt of the regulations.

*1989 Edition of APA Available.* The 1989 edition of the Administrative Procedure Act is now available from OAL for \$3 per copy. The new edition includes changes which resulted from legislation passed in 1988 as well as information regarding the Permit Reform Act and the State Records Management Act, which pertains to disposal of records.

## LEGISLATION:

*AB 855 (Felando)*, as amended on June 5, would provide that if OAL becomes aware of a regulation for which the statutory authority has been replaced or becomes ineffective by its own terms, OAL would be required to notify the agency and the legislature of its intent to repeal the regulation. The agency would be permitted to initiate a review and submit this to the Governor's Legal Affairs Secretary. The Governor would make the final decision on the repeal of the regulation. This bill is pending in the Assembly Ways and Means Committee.

## LITIGATION:

In *California Coastal Commission v. Office of Administrative Law, et al.*, No. A039702 (1st Dist., May 17, 1989), the First District Court of Appeal affirmed a trial court judgment that certain interpretive guidelines of the Coastal Commission are not subject to the APA.

The Pacific Legal Foundation (PLF) had filed a request for determination with OAL, seeking a ruling that certain specific Commission interpretive guidelines relating to coastal development permit applications are regulations within the meaning of the APA, and thereby subject to OAL review. OAL found that the guidelines are governed by the APA and declared them "invalid and unenforceable" until adopted pursuant to the APA and approved by OAL. The Commission instituted an action in superior court challenging OAL's determination. The trial court granted summary judgment in the Commission's favor, based on the California Supreme Court's ruling in *Pacific Legal Foundation v. California Coastal Commission*, 33 Cal. 3d 158 (1982). In that case, the Supreme Court upheld several permanent interpretive guidelines adopted by the Commission pursuant to Public Resources Code (PRC) section 30620(a)(3). PRC section 30333 provides that Commission rulemaking is generally subject to the APA,

except as provided in Health and Safety Code section 18930 and PRC section 30620(a)(3). As the guidelines here challenged by PLF and OAL were adopted under section 30620(a)(3), the First District affirmed.

On May 26 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 Superior Court), the court heard BCE's motion for reconsideration of its earlier rulings granting motions for summary adjudication filed by the Board of Medical Quality Assurance and the California Medical Association. The court took the matters under submission and scheduled a status conference for July 7. Plaintiff and intervenors challenge BCE's adoption and OAL's approval of section 302 of BCE's regulations, which defines the scope of chiropractic practice. (See CRLR Vol. 9, No. 2 (Spring 1989) p. 37 and Vol. 8, No. 3 (Summer 1988) p. 36 for background information on this case.)

## 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."