



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

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. F-828 (April 1989) is entitled "The California Exposition and State Fair is Fiscally Independent But Can Still Improve its Financial Controls." Cal Expo is responsible for managing the annual state fair and for providing a site for other events during the remainder of the year. As an independent entity in state government, Cal Expo is governed by an eleven-member board of directors responsible for its year-round operations and management. Among the facilities at Cal Expo are exposition buildings, a racetrack, an aquatic amusement park, and a concert amphitheater.

OAG is required to prepare an annual report on the fiscal status of Cal Expo until 1991. In this annual report, OAG conducted a financial audit for the fiscal year ending June 30, 1988. Since 1980, state law has required that Cal Expo work toward becoming fiscally independent of the state's General Fund.

Cal Expo's total revenues during 1987-88 exceeded its total expenses by approximately \$2.63 million, ending the year with a surplus in the California Exposition and State Fair Enterprise Fund ("Enterprise Fund"). This was the third consecutive year that Cal Expo's revenues have exceeded total expenses.

Also during 1987-88, Cal Expo completed deferred maintenance and repair projects worth approximately \$467,000. However, the funding provided for such repairs will no longer be readily available from the current funding source. Thus, Cal Expo will have to use current revenues, the Enterprise Fund, or seek additional sources of funding to pay for the remaining maintenance and repair projects, which are estimated to be worth \$4.3 million.

OAG recommended that Cal Expo continue to improve its financial condition by completing needed deferred maintenance projects and fully implementing its preventive maintenance plan; completing a detailed marketing plan to promote the use of its facilities between state fairs; and improving its fiscal accounting

and reporting system.

Report No. P-847.2 (April 1989) is an audit of the California Department of Corrections' construction of the San Diego prison. This audit was performed by the Arthur Young Company under contract to OAG. Although planned since the 1960s, design of the San Diego prison structure was not begun until 1982. With construction recently completed, the OAG contracted with Arthur Young to conduct a financial audit to determine whether the capital outlay costs were adequately documented.

The California Department of Corrections (CDC) estimates that the final capital outlay costs for the San Diego prison are \$158 million. As of March 1989, \$157 million had been encumbered. In its financial audit, Arthur Young found that these costs are properly stated, complete, and adequately supported.

The final computed cost per bed is \$61,368. Although this amount exceeds the initial authorization of \$50,000, the prison has the second lowest cost per bed of seven new California prisons; its costs are 5.1% lower than the average of these seven medium security prisons.

Arthur Young reviewed responsibilities for management of the various capital outlay cost items and found that neither CDC, the program manager, the architect, nor the construction manager could have prevented major cost overruns or delays while still being in compliance with legislative cost targets and CDC correctional design standards.

The total cost of the San Diego prison was increased due to changes to lump sum contracts above the contingency allowed for change orders. The increased costs were due to design changes and owner requests that were not included in the initial bid documents. Because the increase in work occurred after the contracts were awarded, Arthur Young estimates that the increased cost due to the lack of competitive bidding is approximately \$250,000.

While construction of the prison appears to be complete, CDC is still experiencing problems in operation of the prison. Four gymnasiums and a textile mill are still not in use.

At present, there is an outstanding claim of \$1.8 million from a contractor for the cogeneration plant built at the prison. However, CDC disputes the amount. If CDC is required to pay this claim, the claim settlement should be added to the cost of the prison. Of the fifteen construction contracts awarded for the prison, this was the only construction claim. This amount is signifi-

cantly lower than the average \$26 million in claims filed at two prisons built prior to the San Diego facility.

Report No. P-861.2 (April 1989) is the second quarterly monitoring report of the Alameda-Contra Costa Transit District ("the district"). In March 1988, OAG filed a report entitled "The Alameda-Contra Costa Transit District's Financial and Administrative Controls Need Improvement" (Report No. P-767). In its initial report, OAG found that the district had insufficient financial control over its operations and had overpaid its board of directors and officers for travel and personal expenses. As a result of the first report, the legislature enacted Chapter 1147, Statutes of 1988, requiring OAG to monitor the district's progress in correcting the identified deficiencies. Report P-861.2 notes the actions taken by the district to correct these deficiencies.

The district operates over 800 buses providing approximately 61 million passenger trips annually in Alameda, Contra Costa, San Francisco, and San Mateo counties. With 2,000 employees, the district's 1988-89 budget includes expenses totalling \$121.1 million and projected revenues of \$118.7 million, leaving a deficit of \$2.5 million.

In Report P-861.2, OAG reports that although the district's budget process has improved, and it has acted on previous OAG suggestions for improving the budget, the district still has a deficit of \$2.5 million. Nevertheless, the budget process is better documented and contains what should prove to be more reliable estimates of revenues, subsidies, and expenses.

Moreover, the district has complied with OAG's recommendation that the directors who were overpaid for expenses be billed for each overpayment. At present, all but one director has repaid the district. Also, the district has modified its expense report to include an attestation by the claimant that he/she incurred the claimed expenses while conducting district business.

In its initial report, OAG reported that five of the six salaried attorneys employed by the district were using district staff and resources to conduct their private law practices. To correct this deficiency, the district adopted a policy prohibiting all district directors, officers, and employees from using district resources for nondistrict business. The policy also explicitly prohibits the district's attorneys from engaging in private law practice while employed by the district. At present, the policy is being



adhered to by all district employees.

In Report P-861.2, OAG recommends that the district continue to minimize the extent of the budgeted deficit for fiscal year 1988-89 by continuing to develop documented estimates of revenues, subsidies, and expenses for future budgets, and ensuring that those estimates are reliable.

COMMISSION ON CALIFORNIA STATE GOVERNMENT ORGANIZATION AND ECONOMY (LITTLE HOOVER COMMISSION)

Executive Director:

Jeannine L. English

Chairperson: Nathan Shapell
(916) 445-2125

The Little Hoover Commission was created by the legislature in 1961 and became operational in the spring of 1962. (Government Code sections 8501 *et seq.*) Although considered to be within the executive branch of state government for budgetary purposes, the law states that "the Commission shall not be subject to the control or direction of any officer or employee of the executive branch except in connection with the appropriation of funds approved by the Legislature." (Government Code section 8502.)

Statute provides that no more than seven of the thirteen members of the Commission may be from the same political party. The Governor appoints five citizen members, and the legislature appoints four citizen members. The balance of the membership is comprised of two Senators and two Assemblymembers.

This unique formulation enables the Commission to be California's only truly independent watchdog agency. However, in spite of its statutory independence, the Commission remains a purely advisory entity only empowered to make recommendations.

The purpose and duties of the Commission are set forth in Government Code section 8521. The Code states: "It is the purpose of the Legislature in creating the Commission, to secure assistance for the Governor and itself in promoting economy, efficiency and improved service in the transaction of the public business in the various departments, agencies, and instrumentalities of the executive branch of the state government, and in making the operation of all state departments, agencies, and instru-

mentalities and all expenditures of public funds, more directly responsive to the wishes of the people as expressed by their elected representatives...."

The Commission seeks to achieve these ends by conducting studies and making recommendations as to the adoption of methods and procedures to reduce government expenditures, the elimination of functional and service duplication, the abolition of unnecessary services, programs and functions, the definition or redefinition of public officials' duties and responsibilities, and the reorganization and or restructuring of state entities and programs.

MAJOR PROJECTS:

Reports in Progress. The Little Hoover Commission has undertaken the following studies and expects to release reports as indicated below:

-The Commission's report on the role and functions of the state's boards, commissions, and authorities, including an analysis of their efficiency, necessity, and effectiveness, was scheduled for release in June. (See CRLR Vol. 9, No. 2 (Spring 1989) p. 39 for background information.)

-No release date has been scheduled for the Commission's ongoing report on California's K-12 public school system. That report will focus on education funding (including monies generated from Proposition 98) and fiscal accountability of schools. Similarly, no release date has been announced for the Commission's separate report on special funds (as distinguished from state general funds) for education.

-On March 16, the Commission conducted a follow-up public hearing to review the state's management of real property and the progress made since the March 1986 release of its report entitled *California State Government's Management of Real Property*. No date has been scheduled for issuance of the follow-up report.

-Another follow-up public hearing was held on April 28 to review the state's telecommunication system and the newly proposed CALNET system, which will result in the state acting as its own long distance telephone company at a cost of up to \$150 million. A Commission spokesperson recently stated that information is still being gathered and that no release date has yet been set for the report.

-A study of the state's management of solid waste is also in progress, with no scheduled report date.

-The Commission recently began a new study to review the structure and

operations of the Department of Fish and Game, including regulatory aspects, and held its first related public hearing on May 15. No date has been set for this report's release.

DEPARTMENT OF CONSUMER AFFAIRS

Director: Michael Kelley
(916) 445-4465

In addition to its functions relating to its forty boards, bureaus and commissions, the Department of Consumer Affairs (DCA) is charged with the responsibility of carrying out the provisions of the Consumer Affairs Act of 1970. In this regard, the Department educates consumers, assists them in complaint mediation, advocates their interests in the legislature, and represents them before the state's administrative agencies and courts.

MAJOR PROJECTS:

Statewide Inventory of Local Dispute Resolution Programs. The Institute for Judicial Administration (IJA), a national judicial research institute, is conducting statewide surveys of programs that provide alternative dispute resolution services directly or indirectly to the court systems in several states, including California.

As the oversight agency for the California Dispute Resolution Programs, DCA will assist the IJA in completing the survey. The California system consists of a network of informal and affordable county-based mediation centers throughout the state, based on the idea that an impartial mediator can often help adversaries reach a mutually satisfactory settlement. It is hoped that the program will defuse many disagreements which might otherwise end up in an already crowded state court system. (See CRLR Vol. 8, No. 2 (Spring 1988) p. 33.) Presently, seventeen counties participate in the program with a total of 21 funded programs.

DCA Reorganization. The Public Affairs, Complaints Assistance, and Correspondence Divisions of the DCA have been consolidated into one new division entitled the Division of Consumer Services. The new division will be headed up by John C. Lungren, Jr., whose official title is Deputy Director and Chief of Consumer Services.

Dispute Resolution Program. The Dispute Resolution Advisory Council has not yet submitted its final package of