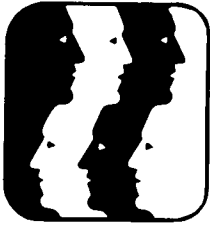


# INTERNAL GOVERNMENT REVIEW OF AGENCIES



**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:

-February 23, 1988, OAL Determination No. 2, Docket No. 87-008. In reviewing numerous sections of the Department of Corrections' "Departmental

Administrative Manual" governing polygraph examinations, inmates' private physicians, and dental services, OAL found that some of the sections were regulations and therefore subject to APA rulemaking requirements. OAL also found some of the challenged provisions to be either "nonregulatory" or merely restatements of existing statutory language, regulations, or caselaw. Such provisions need not be promulgated in accordance with APA rulemaking mandates.

-March 7, 1988, OAL Determination No. 3, Docket No. 87-009. The subject of OAL's scrutiny was a Board of Control policy requiring some psychotherapy expenses to be reviewed by the Board prior to reimbursement of crime victims under the state's Victims of Crime Act. Using a two-part method of inquiry to ascertain whether the challenged policy is a "regulation" within the meaning of the APA, OAL determined that the policy is a "rule, regulation, order or standard of general application" (Government Code section 11342) in that it applied to "all members of a class, kind, or order"—that is, all crime victims who claim psychotherapy expenses at specified rates; and that the rule implements, interprets, or makes specific the law enforced by the Board.

The Board of Control had argued that its policy is a procedure which "merely require[s] the claims to be reviewed by the Board prior to being approved or disapproved" (emphasis original), thus falling within the "internal management" exception to APA rulemaking requirements. Under that exception, contained in Government Code section 11342(b), rules which relate only to the internal management of a state agency are exempt from APA requirements.

OAL partially agreed, finding that "[a] rule which merely requires the Board's staff to route psychotherapy expenses claimed at hourly rates to the Board for review prior to reimbursement, related only to the internal management

of the Board, and thus is not subject to the requirements of the APA."

However, OAL qualified its conclusion by finding that "[i]f the Board imposes additional procedural requirements on claimants or routinely denies claims for psychotherapy expenses exceeding certain hourly rates," such a policy is a "regulation" within the meaning of the APA, and subject to APA rulemaking requirements.

-March 16, 1988, OAL Determination No. 4, Docket No. 87-010. This determination focused upon the Board of Prison Terms' policy excluding independent psychiatric and psychological reports from parole consideration hearings for prisoners serving indeterminate sentences. OAL found that the policy, adopted by the Board in June 1986, is a regulation which must be adopted in accordance with APA requirements. The Board of Prison Terms has notified OAL that it has begun the formal process of adopting the exclusion policy as a regulation (proposed section 2239, Title 15, California Code of Regulations).

-April 6, 1988, OAL Determination No. 5, Docket No. 87-011. In response to a request filed by Assemblymember Gil Ferguson, OAL issued this determination concerning the Fish and Game Commission's "Wetlands Resources Policy."

At the time of its initial adoption on January 9, 1987, the Commission's policy ed a paragraph which stated, in part, that the Commission "opposes, consistent with its legal authority, any development or conversion which would result in a reduction of wetland acreage or wetland habitat values. To that end, the Commission *opposes wetland development unless, at a minimum, project mitigation assures there will be 'no net loss' of either wetland habitat values or acreage*" (emphasis added).

As adopted on January 9, 1987, the Commission policy required the Department of Fish and Game to uniformly oppose wetlands projects which diminished wetland habitat values or acreage. In its determination decision, OAL noted that such opposition "was or could have been expressed by requiring streambed alteration mitigation measures prohibiting loss of wetland acreage or requiring the acquisition of compensating acreage." Thus, OAL found that the policy, as originally adopted, applied to a broad class of "persons" and government entities which might be involved in wetland development, thereby constituting a standard of general application which must be adopted as a regulation in accordance

with APA rulemaking requirements.

On December 3, 1987, the Commission revised its wetlands policy by adopting guidelines which limited the application of the policy to those situations where the Commission's role is to provide advisory comments to other permitting agencies. Because of this policy revision, OAL determined that the Commission's wetlands policy is now "non-regulatory" in nature and is therefore not subject to APA requirements.

-April 27, 1988, OAL Determination No. 6, Docket No. 87-012. The Department of Corrections' "Administrative Manual" was the subject of this determination, which concerned inmate/parolee appeal procedures, as set forth in Chapter 7300 of the Department's manual.

Although OAL found some of the challenged Chapter 7300 provisions to be nonregulatory or simply restatements of existing statutes, regulations, or case-law, it determined the bulk of Chapter 7300 to be a "regulation" and therefore subject to APA procedural requirements.

*Legislative Requests for OAL Review of Regulations.* Government Code section 11340.15 provides that OAL shall, at the request of any standing, joint, or select committee of the legislature, initiate a "priority review" of any regulation, group of regulations, or series of regulations. Notice of such a request is published in the *Notice Register* and is sent to interested parties. OAL subsequently takes into consideration the comments of interested parties in determining whether the regulation complies with the six standards of review established under Government Code section 11349.1.

A priority review requested by legislators must be completed within ninety days of OAL's receipt of the request. If OAL determines that the challenged regulation does not satisfy any of the six APA standards, it must issue an order to show cause (OSC) as to why the regulation should not be repealed. If the agency which promulgated the challenged provision does not make the proper showing within the specified time period, OAL must pursue repeal of the regulation as provided by Government Code section 11340.15(c).

Recent OAL activities involving legislative requests for priority review include the following:

-Section 403.04, Title 13, California Code of Regulations. As reported in CRLR Vol. 8, No. 2 (Spring 1988) at page 29, OAL issued an OSC as to why this Department of Motor Vehicles (DMV) regulation, which requires new car sellers to possess vehicles before

advertising them for sale, should not be repealed. On May 9, the DMV submitted its response to the OSC. OAL has sixty days from the date of receipt to decide whether to proceed with repeal of the challenged provision.

-Section 2582, Title 23, California Code of Regulations. On March 4, OAL issued a statement of reasons supporting its conditional determination that section 2582 should be repealed. This action followed OAL's review of agency and interested party responses to OAL's OSC concerning the challenged provision.

Section 2582 sets out closure requirements for surface impoundments, including specific mandates regarding removal of residual wastes; inspection and dismantling of remaining impoundment features; and disposal of contaminated wastes.

The basis of OAL's decision to repeal was its determination that section 2582 did not meet the APA clarity standard with regard to the apparent purview of the section. Specifically, OAL found that section 2582, as it appeared in the California Code of Regulations, listed a reference citation which seemed to indicate that the regulation applied to a class of waste disposal sites to which it was not, in fact, intended to apply.

OAL's order to repeal section 2582 was conditioned on whether the Water Resources Control Board submitted an appropriate reference citation for the provision as a nonregulatory change within thirty days of the date of the Order of Repeal. In fact, the Board did submit such a reference citation within the prescribed time period, thus avoiding repeal of section 2582.

To further clarify the purview of the provision, OAL took the rather extraordinary step of adding a note to the California Code of Regulations, following the text of section 2582. The note states that "[t]he change of reference citation was for the purpose of making clear that this section does not apply to Class I units. This change was intended to be, and is, a clarification of existing law and not a change thereto."

*Governor Reverses OAL.* In response to the California Horse Racing Board's appeal of OAL's disapproval of its simulcast wagering regulations (see CRLR Vol. 8, No. 2 (Spring 1988) pp. 29-30), the Governor has reversed OAL's decision and ordered that the regulations be filed with the Secretary of State.

The Governor's decision, dated March 17, was largely based on a finding that the simulcast wagering regulations were not invalidated by a legislative

modification of the regulatory authority upon which they were based, as was argued by OAL.

The regulations were filed with the Secretary of State in late March and became effective April 22. (See CRLR Vol. 8, No. 2 (Spring 1988) pp. 116-17; Vol. 7, No. 3 (Summer 1987) pp. 127-28; and Vol. 7, No. 2 (Spring 1987) p. 101 for background information.)

*Training Classes for State Agency Rulemaking Personnel.* Beginning this fall, OAL staff will conduct a series of training classes in rulemaking. The Department of Personnel Administration is handling the outreach for the classes, which will consist of two-day sessions designed to assist agency administrative and technical staff involved in the rule-making process, as governed by the APA.

The cost to agencies for the training is \$145 per person. The first training session is scheduled to occur at the State Training Center on September 13-14, with subsequent sessions tentatively scheduled for December 5-6, April 3-4 and June 1-2. Agency personnel interested in participating should call (916) 445-5121.

## LEGISLATION:

*AB 2732 (Felando)*, as amended March 16, would provide that whenever a statute or section of a statute which is used as reference or authority for promulgation of a regulation is itself repealed, becomes ineffective or inoperative by its own terms (e.g., a sunset provision), or is ruled invalid by a court of appropriate jurisdiction, the correlative regulation shall be deemed by operation of law to be repealed, ineffective, and otherwise inoperative coincident with the repeal or ineffectiveness of the statute upon which it relies.

The measure would also provide for temporary repeal of regulations for which the correlative statutory authority or reference provisions have been temporarily repealed or rendered ineffective.

OAL officially remains neutral on AB 2732, which is pending in the Senate Committee on Governmental Organization as of this writing, following its passage in the Assembly on April 7.

*SB 1729 (Maddy)*, which was chaptered on March 30 as urgency legislation (Chapter 63, Statutes of 1988), exempts the Department of the California Highway Patrol from specified APA procedural requirements with regard to promulgation of regulations establishing routes for transportation of explosives; and establishes special procedural requirements for notice, comment, and

filing regarding such rulemaking.

## LITIGATION:

In *California Chapter of the American Physical Therapy Association (APTA), et al. v. California State Board of Chiropractic Examiners, et al.* (consolidated case nos. 35-44-85 and 35-24-14), a Sacramento County Superior Court judge has overruled defendants' demurrers and denied defendants' motions to strike as to various causes of action and allegations pleaded therein. As a result, defendant OAL is appealing the lower court rulings to the Third District Court of Appeal.

Plaintiffs allege, *inter alia*, that OAL "did arbitrarily, capriciously and unlawfully approve" section 302, Title 16 of the California Code of Regulations, which was adopted by the Board of Chiropractic Examiners (BCE) to define the scope of chiropractic practice. Among other things, plaintiffs APTA and the California Medical Association, and intervenors, which include the Board of Medical Quality Assurance and its Physical Therapy Examining Committee, allege the following with regard to OAL's approval of the challenged provision:

-That OAL "failed to apply the standards for review which are set forth in Government Code section 11349.1" and "failed to require the proper giving of notice and opportunity for hearing as required [by specified sections of the Government Code] when...substantive provisions of the regulation were being significantly changed upon resubmission of the regulation by [defendant BCE]."

-That "[n]either Government Code section 11349.3...[n]or any other provision of law empowers OAL to approve a regulation in part and disapprove the same regulation in part [as was done upon resubmission of section 302] and such regulatory review procedure is the product of an illegally adopted regulatory procedure."

-That OAL acted in excess of its lawful authority when it "[a]pproved the resubmitted version of section 302 although it possessed substantially all of the defects previously identified by OAL in its written opinion [initially disapproving the regulation] of March 16, 1987."

The Court of Appeal was expected to rule on defendants' various petitions on or after May 25. (For additional information, see CRLR Vol. 8, No. 2 (Spring 1988) p. 30; Vol. 8, No. 1 (Winter 1988) p. 36; and Vol. 7, No. 4 (Fall 1987) pp. 30 and 100.)

## 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. P-730 (February 1988)* concerns a review of allegations of racial discrimination, favoritism, and other irregularities by the California Horse Racing Board (CHRB) in the licensing and selection of stewards who officiate at horse races. The audit revealed several questionable, and in one area unlawful, practices.

OAG staff found that the CHRB does not always record questions asked, answers given, and scores received during the oral portion of the steward's licens-

ing examination. Therefore, staff members were unable to dismiss or substantiate allegations regarding this portion of the licensing process.

The Board was also found to have bypassed statutory licensing requirements by issuing permanent identification cards instead of licenses to successful applicants, although state law requires the Board to contract only with licensed stewards. This CHRB practice has resulted in the forfeiture of at least \$5,800 in license fees since 1980. It also means that the Board has bypassed the statutorily-mandated fingerprinting procedure, which has resulted in the appointment of at least one steward with an undiscovered misdemeanor criminal record.

The Board's executive secretary explained the nonlicensing to auditors as merely a preferred method of contracting with stewards, since the CHRB issues the identification cards only to candidates who successfully complete the examination process. Also, the CHRB believes that because stewards are contract employees of the CHRB, they could negotiate away the license fee even if the Board did issue licenses.

OAG staff were unable to substantiate any of the racial discrimination or favoritism allegations because the Board does not maintain age, race, or gender information on applicants for the steward examinations (nor is it required to by law). Further frustrating the audit was the lack of response from complainants. The only responding complainant was unable to provide sufficient evidence to prove or disprove the allegations.

Staff auditors discovered that the CHRB has not fully implemented recommendations contained in a 1982 audit entitled *The California Horse Racing Board Needs To Improve Its Regulatory Control of Horse Racing* (Report No. P-076, March 1982) (see CRLR Vol. 2, No. 3 (Summer 1982) p. 28), including recommendations to improve the monitoring of the distribution of proceeds from charity race days, along with procedural improvements for the licensing and auditing of parimutuel activities.

The present audit recommends that the Board:

-License stewards and contract only with the licensed stewards as required by state law;

-Charge fees for steward licenses as set by its own regulations and require renewal of licenses every three years; and

-Follow the same fingerprinting procedures in licensing stewards as are followed when issuing other CHRB licenses.