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.

MAJOR PROJECTS

AB 1013 Determination. The following determination was issued and published in the *California Regulatory Notice Register* in recent months:

–April 6, 1993, OAL Determination No. 1, Docket No. 90-015. In its first determination since April 1992, OAL reviewed the California Municipal Utilities Association's (CMUA) contention that several policies of the California Energy Commission (CEC) constitute regulations required to be adopted pursuant to the APA. Specifically, CMUA contended that CEC's practice of determining its jurisdiction for certification of power facilities through case-by-case adjudication is a regulation subject to the requirements of the APA. Alternatively, CMUA contended that eight CEC policies, allegedly reflected in settlement agreements, staff statements, or adjudicatory decisions, constitute regulations subject to the APA. CMUA submitted its request for determination to OAL in May 1990, when litigation was pending between CEC and the City of Los Angeles' Department of Water and Power regarding CEC's jurisdiction over the Department's Harbor Generating Project; since that time, the Second District Court of Appeal held that—according to applicable statutory language—the Project is not subject to CEC's jurisdiction. *[12:2&3 CRLR 232]* According to OAL, CMUA's request for determination raised a closely related but distinct issue—whether several of CEC's interpretations of law are rules that are legally invalid because they have not been adopted pursuant to the APA.

Initially, OAL noted that APA rulemaking requirements generally apply to CEC's quasi-legislative enactments. According to OAL, CEC contended that the challenged rules are not quasi-legislative in nature, but are instead "jurisdictional determinations on a case-by-case basis, using adjudicatory procedures to determine the facts of each case and interpreting its enabling statute in light of those facts" that need not be adopted through rulemaking. Regarding its practice of determining its jurisdiction for certification of power facilities through case-by-case adjudication, CEC argued that "[t]he fact that the Commission has applied statutes and regulations on a case-by-case basis in some cases does not amount to a rule that the Commission will always proceed in that manner." In finding that CEC's case-by-case adjudication of the jurisdictional issue by applying statutes and duly adopted regulations is not a quasi-legislative action, OAL noted that the CEC's admitted absence of rules governing the process "is not a general policy governing future decisions; expressed recognition of the absence of rules is a mere statement of fact."

However, OAL found that six of the eight remaining challenged policies do constitute quasi-legislative actions; are rules of general application; and implement, interpret, or make specific the law enforced or administered by CEC or govern its procedure. Accordingly, those policies constitute regulations and are unenforceable unless adopted pursuant to the APA.

OAL Denies Petition for Rulemaking. On March 24, OAL denied a petition for rulemaking submitted by the California Highway Patrol (CHP) which requested that OAL adopt a regulation instituting a five-year retention period for rulemaking files created as part of rulemaking activities undertaken by executive branch agencies in compliance with the APA. OAL denied the petition on the basis that it does not have sufficient knowledge of the legal and factual context in which this request arises to propose a regulation establishing a five-year retention period, and noted that a longer retention period may be warranted. Accordingly, OAL requested that interested persons submit input regarding the length of an appropriate retention period and why; whether OAL is authorized to adopt a regulation on this subject; whether the regulation suggested by CHP is consistent with various provisions of law; and whether legislation is needed and, if so, what it should provide. OAL requested written comments by July 9, and is expected to decide a course of action by late July or early August.

LEGISLATION

SCA 6 (Leonard), as amended February 16, would authorize the legislature to repeal state agency regulations, in whole or in part, by the adoption of a concurrent resolution. SCA 6, which would not be applicable to specified state agencies, would require the concurrent resolution to specify the regulation to be repealed or specific references to be made, as indicated, and would subject those resolutions to the same procedural rules as those required of bills. The measure would also

require every regulation to include a citation to the statute or constitutional provision being interpreted, carried out, or otherwise made more specific by the regulation. *[S. Rls]*

AB 633 (Conroy), as amended April 12, would require the California Environmental Protection Agency to establish a moratorium on the adoption of any new or proposed regulations until January 1, 1995; require that agency to examine the effect on the economy of all regulations adopted since January 1, 1992, if any; and require the agency to identify all regulations that are more stringent than required under federal law, and permit the agency to revise a regulation to make it less stringent than under federal law without the approval of OAL. *[A. CPGE&ED]*

AB 969 (Jones), as amended May 3, would require a state agency proposing to adopt or amend any administrative regulation to assess the ability of California to compete with businesses in other states in its adverse economic impact statement. *[A. W&M]*

AB 1807 (Bronshvag), as amended May 3, would authorize boards within the Department of Consumer Affairs to provide required written notices, including rulemaking notices, orders, or documents served under the APA, by regular mail. *[A. W&M]*

SB 726 (Hill), as introduced March 3, would require a state agency, when proposing to adopt a regulation that affects small businesses, to adopt a "plain English" policy statement overview regarding each proposed regulation containing specified information; draft the regulations in plain English, as defined; and make available to the public a noncontrolling plain English summary of a regulation, if the regulation is technical in nature. *[A. CPGE&ED]*

SB 513 (Morgan), as amended May 6, would require all state agencies to assess, when proposing the adoption or amendment of any administrative regulation, the potential impact the proposed change may have on California jobs and business expansion, elimination, or creation, and require that the result of this assessment accompany the notice of proposed action. *[S. Appr]*

AB 1144 (Goldsmith), as amended May 3, would require state agencies to implement any standard, rule, or regulation that has been adopted by a federal agency to the extent permitted by state law and to the extent possible within the adoption process, unless the state agency finds that the burden created by the new local standard rule or regulation is justified by the benefit to human health, public safety, public welfare, or the environment. *[A. LocG]*

AB 64 (Mountjoy), as amended March 3, would prohibit any regulation adopted, amended, or repealed by a state agency, as defined, pursuant to the APA from taking effect unless and until the legislature approves the regulation by statute within 90 days of its adoption, amendment, or repeal by the state agency. *[A. CPGE&ED]*

LITIGATION

In ***State Water Resources Control Board and Regional Quality Control Board, San Francisco Region v. Office of Administrative Law***, No. A054559 (Jan. 20, 1993), the First District Court of Appeal affirmed the trial court's 1990 holding that WRCB's challenged wetlands policies 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. *[12:1 CRLR 29]* The First District rejected the boards' contention that the directives were meant to be something other than regulations, noting that "if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it."

BUREAU OF STATE AUDITS

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Created by SB 37 (Maddy) (Chapter 12, Statutes of 1993), the Bureau of State Audits (BSA) is an auditing and investigative agency under the direction of the Commission on California State Government Organization and Economy (Little Hoover Commission). SB 37 delegated to BSA most of the duties previously performed by the Office of Auditor General, such as examining and reporting annually upon the financial statements prepared by the executive branch of the state, performing other related assignments (such as performance audits) that are mandated by statute, and administering the Reporting of Improper Governmental Activities Act, Government Code section 10540 *et seq.* BSA is also required to conduct audits of state and local government requested by the Joint Legislative Audit Committee (JLAC) to the extent that funding is available. BSA is headed by the State Auditor, appointed by the Governor to a four-year term from a list of three qualified individuals submitted by JLAC.

The Little Hoover Commission reviews reports completed by the Bureau and makes recommendations to the legislature, the Governor, and the public concerning the operations of the state, its departments, subdivisions, agencies, and other public entities; oversees the activities of BSA to ensure its compliance with specified statutes; and reviews the annual audit of the State Audit Fund created by SB 37.

MAJOR PROJECTS

BSA Created to Take Over OAG's Duties. Until recently, the Office of the Auditor General (OAG) served as the nonpartisan auditing and investigative arm of the California legislature. OAG's duties included performing traditional CPA fiscal audits of various executive branch agencies or departments; investigating allegations of fraud, waste, and abuse in state government received under the Reporting of Improper Governmental Activities Act; and reviewing programs funded by the state to determine if they are efficient and cost-effective. However, the legislature shut down OAG in December 1992 after the defeat of Proposition 159, which would have established OAG in the California Constitution with the mandate to conduct independent, nonpartisan, professional audits as required by law or requested by the legislature, and exempted OAG from the expenditure limits imposed on the legislature by Proposition 140. *[13:1 CRLR 11–12]* Without legislative action, the legislature's failure to fund OAG would have required California to contract out audits to private entities in order to continue receiving $16 million in federal funding; OAG estimated that such action would cost the state about twice as much as having a state agency perform the audits. Accordingly, the legislature enacted and Governor Wilson signed SB 37 (Maddy) (Chapter 12, Statutes of 1993), creating BSA and transferring most of OAG's duties to the new Bureau; SB 37 maintains OAG in existence, but its duties are limited to the performance of special audits and investigations of public entities, including performance audits, that are requested by the legislature.

Whereas OAG operates under the Joint Legislative Audit Committee (JLAC) and is dependent on the legislature for funding its annual operating budget, BSA operates under the jurisdiction of the Commission on California State Government Organization and Economy (Little Hoover Commission) and is funded through the State Audit Fund, which will be continuously