the provisions of the APA. *[S. GO]*

AB 88 (Kelley) would exempt from the APA the WRCB's adoption or revision of state policy for water quality control and water quality control plans and guidelines; the issuance of waste discharge requirements, permits, and waivers; and the issuance or waiver of water quality certifications. The bill would require WRCB and its regional boards to provide notice to specified persons and organizations, prepare written responses to comments from the public, and maintain an administrative record in connection with the adoption or revision of state policy for water quality control and water quality control plans and guidelines. *[S. AWR]*

AB 1736 (Campbell) would have specified that no exemption to any provision of the State Contract Act, whether by statute, regulation, or in the State Administrative Manual, shall apply to any action taken by OAL to have the CCR or updates to the CCR compiled, printed, or published by anyone other than a state agency. This bill died in committee.

AB 2060 (Polanco), as amended May 15, would have required state agencies and air pollution control districts to adopt rules and regulations creating a variance process, whereby an individual or private entity may apply for relief from regulations adopted by that governmental agency, and would have required every such agency to adopt a procedure for an appeal of any decision that leads to orders, sanctions, or fines being given to private individuals or entities, including the denial of a variance. This bill died in committee.

LITIGATION:

In ***Engelmann v. State Board of Education***, 2 Cal. App. 4th 47 (1991), the Third District Court of Appeal affirmed the Sacramento County Superior Court's holding that the governing procedures and criteria used by the State Board of Education in selecting textbooks for use in public schools must be adopted pursuant to the APA. *[12:1 CRLR 29]* The Board's petition for review is presently pending before the California Supreme Court.

On April 27, the Third District Court of Appeal affirmed the trial court's holding in ***Fair Political Practices Commission (FPPC) v. Office of Administrative Law, et al.***, No. C010924. In an unpublished decision, the Third District upheld the lower court's finding that FPPC regulatory actions are subject to review under the APA only as it existed at the time of the electorate's 1974 approval of the Political Reform Act which, *inter alia*, created the FPPC. OAL, its authority to review agency regulations, and the six criteria upon which its review is based were not created until 1980. *[12:1 CRLR 29]*

In other litigation, the state Water Resources Control Board's appeal of the final judgment in ***State Water Resources Control Board and the Regional Quality Control Board, San Francisco Region v. Office of Administrative Law***, No. A054559, is still pending in the First District Court of Appeal. In a judgment favorable to OAL, the trial court held that the wetland rules at issue 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]*

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.

MAJOR PROJECTS:

Conflict of Interest Code Revisions Approved. OAG's revisions to its conflict of interest code, which were reviewed and approved by the Fair Political Practices Commission, were approved by the Office of Administrative Law on March 19. *[12:1 CRLR 30]* The revised code designates OAG employees who must disclose certain investments, income, and interests in real property and business positions, and disqualify themselves from making or participating in governmental decisions affecting those interests.

RECENT AUDITS:

Report No. P-069 (January 1992) examines the Public Utilities Commission's (PUC) intervenor compensation program, which was established in Public Utilities Code section 1801 *et seq.* to promote public involvement in proceedings involving utility companies by compensating certain intervenors for their participation and contribution. The audit was conducted in response to a request from Senator Robert Presley, who has received numerous complaints from public interest group intervenors that the PUC's interpretation of the statutes creating the intervenor compensation mechanism actually stifles public participation in Commission proceedings rather than encouraging it. *[12:1 CRLR 23, 30, 186–87; 11:4 CRLR 206; 10:1 CRLR 1]*

Under the statutory scheme, public interest intervenors are required to participate in sometimes years-long proceedings with no assurance that they are even eligible for intervenor compensation. This approach works hardships on intervenor groups, which must wait until the conclusion of the proceeding to learn whether, in the eyes of the Commission, they have made a "substantial contribution" to a PUC decision on one or more issues. Then they must file a detailed, itemized compensation request, and wait months or even years for a PUC ruling on the request. One of the chief complaints of intervenors is the lengthy delay between participation, the decision on the merits of the proceeding, and the decision on the compensation request. OAG's report noted that the PUC is required by law to make a decision on the merits of an intervenor's compensation request within specified time limits. However, in 32 of the last 38 compensation decisions completed during the last three fiscal years, the PUC exceeded the

decision deadline by an average of four months. OAG also found that in 24 of the 38 decisions reviewed, intervenors did not file for compensation within 30 days of the case decision, as is required by law. However, in all but six of the 24, the PUC allowed exceptions to the intervenors' filing deadlines.

OAG also noted that the PUC is not required to determine intervenors' eligibility to seek compensation at any specific time after the intervenors have filed eligibility requests. As a result, OAG found that intervenors may participate in lengthy proceedings without any assurance from the PUC that they will be eligible to request compensation.

OAG also noted that statutory restrictions and the PUC's interpretation of relevant law may limit compensation amounts paid to intervenors and inhibit intervenor participation in PUC proceedings. For example, the law requires the PUC to adopt at least part of an intervenor's presentation in order for the intervenor to be compensated for making a substantial contribution to a PUC proceeding. Once this is established, however, the PUC generally awards compensation only for costs related to that portion of the intervenor's presentation adopted; such conditions make it difficult for intervenors to receive reimbursement for all of their costs of participating in PUC proceedings. Also, the PUC has stated its intent to formally review the necessity of compensating intervenors for the time required by intervenors to prepare their detailed compensation requests. OAG stated that lack of compensation for this cost would further inhibit public interest intervenors from participating in PUC proceedings. OAG also noted that intervenors cannot request compensation until after the PUC issues a case decision; intervenors may be deterred by the financial burden imposed by lengthy proceedings.

OAG recommended that the PUC take the following actions to improve its intervenor compensation program:

–continue to reimburse intervenors for the costs incurred in preparing their compensation requests;

–require PUC administrative law judges (ALJs) to complete proposed compensation decisions in time to allow necessary internal review and public comment before the deadline required by law;

–ensure that both intervenors and ALJs are aware of the deadlines for filing eligibility and compensation requests; and

–issue an eligibility decision before the compensation decision.

OAG also recommended that the legislature take the following actions to ensure that the legislative intent of the intervenor compensation program is being carried out:

–determine whether the current definition of "substantial contribution" and the PUC's application of this definition are consistent with the intent of the program;

–determine whether the PUC's current practice of prorating intervenors' expenses by the intervenors' degree of success on each issue in which they participate is consistent with the intent of the program;

–determine whether advance funding should be provided to intervenors and, if so, develop an alternative funding mechanism to provide initial start-up loans, interim loans, or both, to credible intervenors;

–determine whether there is a necessity for requiring a PUC ruling to establish an intervenor's eligibility to request compensation; and

–require the PUC to rule on eligibility requests within a specified time.

Report No. F-066 (January 1992) is an analysis of the state's compliance with requirements for entering into consultant contracts. The Department of General Services (DGS) is responsible for providing administrative oversight of state departments (including every state office, department, division, bureau, board, or commission, excluding the legislature, the courts, and any agency in the judicial branch of state government) entering into consultant contracts. Several issues discussed in this report were also addressed in an October 1991 OAG report entitled *The Department of General Services' Administrative Oversight of State Agencies That Award Contracts (P-014). [12:1 CRLR 30]*

Initially, OAG found that many departments are confused by the definition of the term "consultant services contract" in determining whether certain contracts are consultant contracts or other services contacts. Public Contract Code section 10356 defines consultant contracts as providing "services which are of an advisory nature, provide a recommended course of action or personal expertise, have an end product which is basically a transmittal of information either written or verbal and which is related to the governmental functions of state agency administration and management and state agency program management or innovation, and which are obtained by awarding a procurement-type contract, a grant, or any other payment of funds for services of the above type." Existing law requires control procedures for consultant contracts beyond those required for other services contracts. As a result of departments' confusion over what constitutes a consultant contract, OAG found that the state frequently fails to comply with certain legal requirements. For example, at six out of nineteen departments, 46% of the consultant contracts reviewed by OAG were not approved before contract work was begun, as required by law. In one Department of Health Services consultant contract, a contractor began work approximately nine months before the contract was approved.

In addition, for 45% of the contracts reviewed at six of the nineteen departments, the departments failed to review post-evaluations or to require résumés of appropriate contractor personnel before contract approval. OAG also found a lack of compliance with the requirement that departments complete contractors' evaluations within 60 days of completion of the contract. Seven of the nineteen departments reviewed failed to complete twelve contractors' evaluations promptly. Finally, OAG noted problems in the departments' compliance with requirements for sole-source contracting. OAG found that the evidence used by some departments to justify certain sole-source contracts was inadequate, and some departments' annual consultant contract reports did not follow applicable reporting requirements and identify whether contracts were sole-source contracts.

OAG recommended that DGS take the following actions to improve its effectiveness:

–determine if contracting departments are appropriately distinguishing between consultant and other services contracts and, if not, provide clarification of the distinction;

–require its Office of Legal Services (OLS) to promptly implement all necessary procedures to maintain accurate statistics on the number of late contracts received from individual departments so DGS can take appropriate action;

–require departments to prepare written evidence of their review of negative evaluations, if any, of proposed contractors, and submit this evidence with other contract documents to OLS for approval;

–require state departments to certify annually that they have prepared the required evaluations of completed contracts and submitted any negative evaluations to OLS;

–restrict or terminate the authority to enter into consultant contracts of any department that is not appropriately completing, retaining, and submitting evaluations;

–reiterate what information is required in departments' annual reports on consult-

ant contracts, and include in its own reports a clear indication when DGS has not assessed the completeness of the reports submitted by contracting departments; and

–require close adherence to the requirements for sole-source status as found in section 1236 of the State Administrative Manual.

Report No. A-201 (January 1992) highlights selected audits conducted by OAG from July 1990 through December 1991. During that period, OAG issued 61 audit reports which it has grouped into six areas: education, health and welfare, transportation and environment, justice, government operations, and financial administration. OAG's report highlights several audits from each of the six areas, and—in response to the question, "who audits the auditors?"—includes two opinions by outside auditors on OAG's own financial operations and audit quality.

Report No. P-064 (February 1992) concerns the office productivity, staffing standards, personnel classifications, and revenue requirements at the Board of Vocational Nurse and Psychiatric Technician Examiners. This Board is responsible for licensing vocational nurses and psychiatric technicians, enforcing its professional performance standards, and examining and approving the programs that educate and train its licensees.

OAG noted that over the four fiscal years ending June 30, 1991, the Board's expenditures in support of its vocational nurse program increased 61%; according to OAG, much of the increase was either justified or beyond the Board's control. For example, OAG found that increased expenditures for salaries were justified given the Board's workload. Also, cost of living increases that were implemented by the Board were determined by other agencies and were thus beyond the Board's control.

OAG found that the Board unnecessarily keeps automated records of expired licenses; OAG estimated that the Board could save $5,000 per year by routinely purging these records. As a result, during OAG's audit, the Board instituted a policy of periodically purging records it does not need from the automated records maintained for the Board by the Department of Consumer Affairs (DCA).

OAG also found that the Board had revised the duties of one of its staff members without notifying DCA's personnel office; as a result, that staff member is not performing duties that justify her classification. OAG recommended that the Board work with DCA's personnel office to correct that employee's classification. In addition, OAG recommended that the Board inform DCA's personnel office of any changes in the duties of its staff, including past changes of which the personnel office may not be aware.

Report No. P-44 (February 1992) is the third in a series of semiannual reports concerning how the Department of Health Services (DHS) processes reimbursement requests for certain prescribed drugs under the Medi-Cal program; this report reviews DHS' process for counting and compiling data on drug treatment authorization requests (TARs) received and processed from June 1990 through November 1991. *[11:4 CRLR 48; 11:2 CRLR 45]*

For this report, OAG reviewed data regarding drug TARs received by telephone, fax, mail, and DHS' automated voice-response system, VDTS. As of November 1991, however, DHS no longer accepts telephone calls from providers for the purpose of processing drug TARs. OAG also reviewed data on the number of drug TARs approved, modified, denied, and returned from June 1990 through November 1991.

OAG found that DHS received approximately 5,500 more drug TARs during the six-month period from June 1991 through November 1991 than it did during the same period in 1990. According to OAG, the increase may be attributable to a 20% increase in Medi-Cal beneficiaries eligible to obtain drugs through the program. However, OAG found that DHS' drug units are taking longer than the time allowed by law to process mail-in drug TARs. These delays occurred primarily because of staff reductions at the San Francisco drug unit, which was scheduled to close in April, and the lack of any staff increases at DHS' other drug units.

OAG also reviewed the methods used by the drug units for measuring the time it takes them to respond to a drug TAR from the time it is received to the time the completed TAR is returned to the provider. In its July 1991 report, OAG noted that TARs received by telephone and fax were processed within 24 hours, as required by law. In this report, OAG's review of 53 drug TARs submitted through VDTS at DHS' Stockton drug unit revealed that 52 of them were processed within 24 hours.

Also, OAG contacted four pharmacies that had submitted TARs through the mail to ask if beneficiaries ever suffered a lapse in medication as a result of delays in the process; none of the pharmacies were aware of any lapses.

Report No. P-118 (March 1992). State law requires all California counties to design and implement "voter outreach" programs to identify and register unregistered voters, and delegates to the Office of the Secretary of State (Office) the responsibility for overseeing the counties' programs; this report reviews the Office's oversight of the voter outreach programs. The report notes that twelve of the 58 counties surveyed do not have formal outreach programs; of the sixteen outreach plans reviewed, twelve did not meet all of the minimum requirements. According to OAG, the Office's failure to annually evaluate counties' programs in accordance with state regulations has contributed to the counties' noncompliance. OAG also found that the Office has used inappropriate methodologies and made numerous miscalculations to reimburse counties for their net costs in implementing voter registration and outreach, resulting in overpayments to many counties and underpayments to a few others.

OAG recommended that the Office ensure that counties design and implement voter outreach plans and programs that meet state minimum requirements; annually evaluate county outreach programs; and revise its methodology for determining reimbursement figures.

Report No. F-101 (March 1992) is the State of California's financial report for the fiscal year ending June 30, 1991. OAG reported that the state spent approximately $2.6 billion more than it generated in revenues for that fiscal year; the state's general fund ended the year with a deficit of $3.5 billion. The report includes several general purpose financial statements regarding fiscal year 1990–91, such as a combined balance sheet, a combined statement of revenues, expenditures, and changes in fund balances, and a combined statement of cash flows.

Report No. F-133 (March 1992) concerns the state Board of Equalization's (BOE) model for setting reimbursement rates for special tax jurisdictions (STJs), which are created by voters to support transit agencies or other government services. Pursuant to Revenue and Taxation Code section 7270, counties with STJs must contract with BOE to administer local transactions and use tax programs. BOE currently administers the collection and distribution of tax revenues for 27 STJs. Following its review of BOE's method of setting a reimbursement rate for this administration, OAG made the following findings:

–BOE's rate for reimbursement includes an overstatement of charges to STJs for a portion of the costs related to registering taxpayers, processing returns,

auditing taxpayers, and collecting delinquent taxes in counties that do not have STJs;

–BOE's reimbursement rate for STJs in counties with two STJs is overstated, and its rate for STJs in counties with one STJ is understated because BOE misallocated $2.2 million in costs between the two groups of STJs as a result of allocating costs on the basis of revenue benefit rather than workload basis;

–BOE's model does not adjust the rates for the over- or under-collection of reimbursement in prior periods; and

–the workload standards used by the Board are not quantifiable, resulting in limited assurance that some costs allocated to the STJs are reasonable.

To ensure that the STJs pay an equitable reimbursement rate, OAG recommended that BOE exclude costs for registering taxpayers, processing returns, auditing accounts, and collecting taxes receivable that are related to counties that do not have STJs from costs that are shared between the state, cities and/or counties, and STJs; use a workload standard basis for allocating costs between STJs located in counties with one STJ and STJs located in counties with two STJs; and incorporate an adjustment mechanism into the model that considers the over- or under-collection of reimbursement during the previous period.

Report No. P-120 (April 1992) is a comparison of financial and utilization data for investor-owned and nonprofit long-term care facilities. A facility is considered to be investor-owned when the net earnings accrue to the sole proprietor, partners, or shareholders owning the facility; nonprofit entities include church-related and charitable corporations. In 1990, California had a total of 1,177 facilities that provided 35.2 million patient days of long-term care. Among other things, OAG noted the following about those facilities:

–A total of 125 facilities do not serve Medi-Cal patients; 87 of these are investor-owned and 38 are nonprofit.

–Facilities cited several reasons for not serving Medi-Cal patients, including low reimbursement rates, excessive Medi-Cal requirements, and designing and marketing facilities to serve only the affluent.

–87 investor-owned facilities not serving Medi-Cal patients reported that they earned an aggregate net income of $1,173,000 ($.62 per patient day) while nonprofit facilities not serving Medi-Cal patients reported aggregate net losses of $7,887,000 ($12.26 per patient day).

–Investor-owned facilities serving Medi-Cal patients paid $.15 per patient day for income taxes and $.48 per patient day for property taxes. Nonprofit facilities serving Medi-Cal patients paid $.13 per patient day for property taxes and paid no income taxes.

Report No. P-125 (April 1992) concerns special education for pupils with learning disabilities. As of April 1, 1991, 179 school districts and county offices of education reported to the state Department of Education that they had 1,358 learning-disabled pupils enrolled in nonpublic schools. OAG estimated that the total cost of educating learning-disabled pupils in nonpublic schools was over $20 million during fiscal year 1990–91. Pupils with exceptional needs who are ordered to juvenile hall must also be provided with a free, appropriate education. Data compiled from 42 local plan areas for special education indicate that they spent approximately $2.5 million in special education funds during fiscal year 1990–91 to provide special education services for 1,730 pupils in juvenile court schools. Of that amount, over $2 million was used to provide special education programs for 1,231 pupils with learning disabilities.

Report No. P-123 (May 1992) concerns the use of the California Disaster Relief Fund to cover state costs resulting from the October 1989 Loma Prieta earthquake. OAG found that 19 agencies and two programs received money from this fund, the fund will be depleted in fiscal year 1992–93, and the total estimated state costs of the earthquake exceed the fund's resources by approximately $677 million. To ensure that money in the Disaster Relief Fund is properly budgeted, OAG recommended that the Department of Finance revise the Fund's budget for fiscal year 1992–93 so that the total combined amount of money transferred or scheduled to be transferred from the Fund does not exceed the Fund's available money.

Other Audits. Additionally, OAG produced the following reports during the past few months:

–Report No. P-119 (January 1992) surveys the compensation, retirement benefits, and employment contracts at school districts, community college districts, county offices of education, and special districts;

–Report No. F-030 (February 1992) reviews the state's allocations and expenditures at the state level of the additional transportation funds made available by the 1989 Transportation Blueprint Legislation; and

–Report No. P-143 (April 1992) reviews the food services at the California Correctional Institution at Tehachapi.

LEGISLATION:

AB 1944 (Campbell), as amended January 13, requires the legislature to reappropriate $6 million to the Department of Finance (DOF) for expenditure by DOF to support the costs of the Auditor General associated with audits that are mandated by state or federal statutes, or both. This bill was signed by the Governor on January 27 (Chapter 1, Statutes of 1992).

AB 3036 (Eaves), as amended April 21, would require the Auditor General to study the long-term financial impact on the State Highway Account of the conversion of motor vehicles to low- or zero-emission alternative fuels, and report its findings and recommendations to the Governor and the legislature in draft form by January 1, 1994, and in final form by March 1, 1994. *[A. Floor]*

SCA 34 (Maddy), as amended March 3, would ensure continuation of the Office of the Auditor General and require it to conduct independent, nonpartisan, professional audits as required by state or federal law or as requested by the legislature. SCA 34 was chaptered on March 11 (Chapter 8, Resolutions of 1992), and will appear on the November ballot.

SB 1132 (Maddy) would have required the Auditor General to complete audits in accordance with the "Government Auditing Standards" issued by the Comptroller of the United States. This bill died in the Senate Rules Committee.

LITIGATION:

On March 9, the U.S. Supreme Court rejected the final legal challenge to Proposition 140, the term limits initiative approved by voters in November 1990. *[12:1 CRLR 31]* Without comment, the justices refused to hear the state legislators' challenge to the initiative, which will result in a complete turnover of the legislature within the next six years. Last October, the California Supreme Court voted 6–1 to uphold the term limits set by Proposition 140, opining that California's voters had made it clear that they wanted to throw out of office "an entrenched dynastic legislative bureaucracy." In addition to term limitations, Proposition 140 also mandated a 38% cut in the legislature's budget, which has severely affected funding and staffing for OAG.