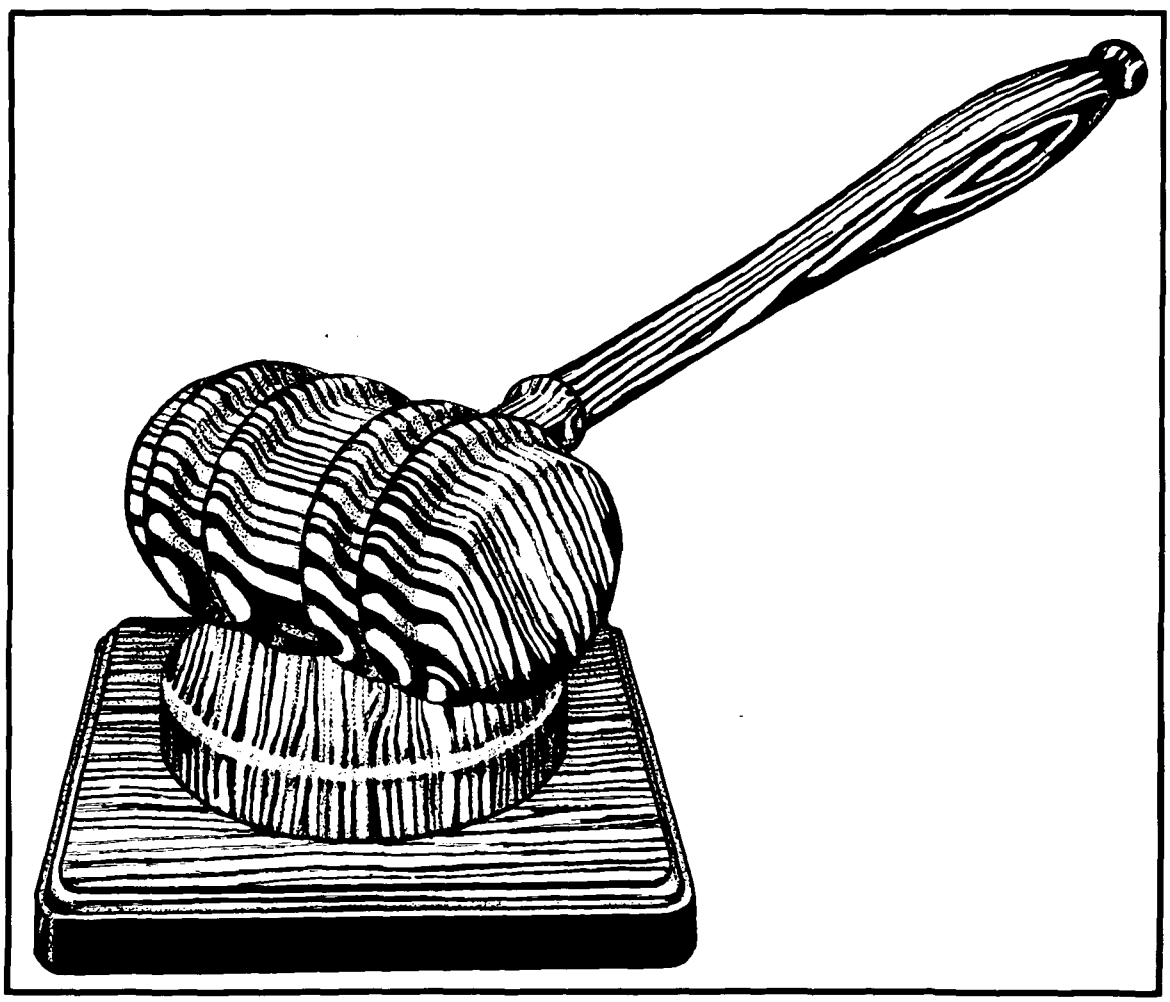
# THE CALIFORNIA Regulatory Law REPORTER

VOL. 2, NO. 1 WINTER 1982



Published by the Center for Public Interest Law
University of San Diego School of Law

Published by
**The CENTER FOR PUBLIC INTEREST LAW**
University of San Diego
School of Law



Cite as CRLR Vol. 2, No. 1 (Winter, 1982).

The Center for Public Interest Law
University of San Diego School of Law
Alcala Park
San Diego, California 92110
(714) 293-4806

The Center for Public Interest Law
Field Director
1233 56th Street
Sacramento, California 95819
(916) 454-5364

# THE CALIFORNIA Regulatory Law REPORTER

# TABLE OF CONTENTS

# FEATURE ARTICLE

## RULES FOR THE REGULATORS' REGULATOR

By Richard B. Spohn

*Editors Note: A graduate of the Harvard Law School, Mr. Spohn is the Director of California's Department of Consumer Affairs. Supervising over 40 major boards and commissions, Mr. Spohn's administration has been marked by vigorous consumer advocacy and sponsorship of substantial deregulation proposals.*

The Office of Administrative Law is indeed an interesting experiment and, from some perspectives, one doing rather well. Its director is heralded in terms paraphrasing the campaign bravado of another hero as "the man government fears most." It is spared the sting of upset solons. Scarcely an eyebrow wiggled when recently it issued a high-gloss, self-promotional brochure, sponsored by, among others, Chevron Oil Company. Kudos are logged in only by the gross, and dissenters are dispatched as "grumblers."

Since the advent of OAL, an esoteric koan amongst bureaucratic voyeurs has been, "who shall regulate the regulator of the regulators?" One might assume that the watchdog of regulatory excess would establish clear and stout self-disciplining rules for itself. Even if there were no great thirst for self-control, this at least would head off a whole generation of sniffings and catcalls from reined-in regulators.

But lo, in a stroke of boldness that caught the eye of even the most wilfull of regulators, OAL at first declined to obey the legislative order to issue its own regulations and, with that on the table, secured a statutory release from this excessive burden altogether. What is startling is not so much this flash of legislative prowess, but rather the abandonment of the caution expressed immortally by the medieval scholar Henry de Bracton, *non sub homine, sed sub Deo et lege* — "not under man, but under God and the law."

The detritus of history is layered with the wrecks of societies that have elevated a person or an institution above the strictures of their legal systems in order to save themselves from themselves, or at least from their systems of law. The lesson seems to be that when you follow a fellow on a white horse for very long, it can get real messy. Most thoughtful observers would like the noble experiment in governance that is OAL to work well. It is a promising antidote for the current popular spasm of doubt about government. Goodness knows we don't need white horse mess.

The best guarantee that OAL will meet our high hopes would be if it directly subjects itself to the self-discipline of public regulations. On grounds of the law, practicality, fairness and common sense, this appears to be a must.

The law is forthright. The Government Code provides that "'Shall' is mandatory and 'may' is permissive" (Government Code § 14). At its inception OAL was mandated to adopt regulations for itself (Government Code § 11344(b)). It never did. The following colloquy set out the explanation:

> Q. (Plaintiff's attorney) Okay. Incidentally, have there been promulgated any regulations interpreting any portion of the Act which establishes the Office of Administrative Law?
>
> A. (OAL Director) No.
>
> Q. Is that as a matter of a conscious policy decision within the agency or is it just the difficulty of work you have been unable to get to it?
>
> A. Generally our position on that has been that we should not adopt regulations unless there is an absolute necessity for adopting regulations. And to the extent that there are some other provisions of the Act that perhaps need clarification, we have sponsored a cleanup legislation to expand on that.
>
> (From Deposition of Gene Livingston in case of Furgatch v. OAL, Gene Livingston; May 12, 1981, p. 25, lines 15-26)

The "cleanup legislation" cleaned out the mandatory "shall" and replaced it with the permissive "may." But that does not let OAL off the hook. The "may" must be read in light of broader requirements of the statutory and case law governing administrative procedures. "May" is not absolutely permissive. Indeed, that law and the OAL legislation both use the same definition of a regulation:

> "... every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency...." (Government Code § 11342(b) ).

At least two recent cases have held that policies which fall within the statutory definition of a "regulation" are *invalid* unless appropriately adopted as administrative regulations. A "standard of general application" is perhaps the most demanding category.

In *Armistead* v. *State Personnel Board,* 22 C3d 198 (1978), the court found that the SPB had a rule masquerading as an "agency interpretation," and sharply rent the veil, dismissing the fiction and the rule for not having been duly promulgated. The court declared that the offending rule merited "no weight as an agency interpretation." In another State Personnel Board case, *Ligon* v. *California State Personnel Board,* 176 Cal. Rptr. 717 (1981), the court rejected a "policy ... intended to be generally applied in every case," finding that "[t]he Board's 'policy' is clearly a regulation." Since it had not been promulgated by the Board "in substantial compliance with the requirements of the APA," it was invalid.

The courts tell us, as does the APA, that if an agency is going to use a policy or "standard of general application" to carry out its legal responsibilities, then it must adopt same as a regulation. The recent presence of a softie "may" in OAL's legislative instruction on adopting regulations is utterly eclipsed by this higher, grander, and far more serious canon of legal fair play.

The extent of bureaucratic mischief which inevitably flourishes under a less vigorous definition of "regulation" was noted in *Armistead* by referral to the First Report of the Senate Interim Committee on Administrative Regulations to the 1955 Legislature. That report observed that:

> The manner of avoidance [of adoption of administrative regulations] takes many forms, depending on the size of the agency and the type of law being administered, but they can all be briefly described as "house rules of the agency."
>
> They consist of rules of the agency, denominated variedly as "policies," "interpretations," "instructions," "guides," "stan-

dards" or the like, and are contained in internal organs of the agency such as manuals, memoranda, bulletins or are directed to the public in the form of circulars or bulletins.

And so, in spite of contrary and long-standing statutory and case law, we witness the high irony of the stern judge of excessive public regulations adopting for itself the easy m.o. that had been followed by regulatory agencies a quarter of a century ago, before they started putting the "house rules of the agencies" into public regulation form. It does lend some credence to cyclical theories of history, or to the Gallic *plus ca change, plus c'est la meme.*

Setting aside these legal scruples, what difference does the absence of regulations at OAL really make? A whole lot. Regulations are not merely annoying burdens. They are meant to be helpful. As the OAL definition of a regulation details, they are used "to implement, interpret, or make specific the law enforced by it, or to govern its procedures." In short, regulations are adopted to make a governmental process *work,* to render it intelligible and accessible. Regulations tell you what the agency wants you to do to satisfy it in its sphere of control over you so that you can obey the law it is administering and go on about your business with the warmth of knowing that you are not an outlaw. A good regulation, particularly a procedural one, should make it as easy as possible for you to be a good citizen. It should make as clear as possible the sweet mysteries of government. A good regulation helps you, it helps the governmental process and it makes you feel good about government.

If you don't know what "they" want, you're going to feel frustrated, and there is little margin these days in the government frustrating people. "Cat-and-mouse" and "Guess-what-I'm-thinking" may be fine children's games and law school rituals, but they don't move the process of government forward very far. Even to be sporting about this, it is difficult to play the game when critical rules are only explained during the progress of the game. Alice may have been in Wonderland, but California is one of the great nations of the world.

OAL is authorized to review regulations for compliance with the five statutory criteria of necessity, authority, consistency, clarity and reference. The content of these rubrics is not always immediately or readily self-evident. The most ornery has been the "necessity" standard. Although no regulation exists to articulate what OAL understands by "necessity," OAL officials have privately revealed that there is a presumption that a regulation is unnecessary. The knowledge of the existence of this presumption is surely of aid to those graced with revelation, but is a secret snare to the hapless heathen. For the initiated, painstaking exegesis and entrail-divining-perforce after the face (a curious inefficiency) — have disclosed that the OAL "policy" of a presumption of non-necessity has erected the following possible tests:

a. A mere showing of necessity;
b. A preponderance of evidence;
c. Overcoming a rebuttal presumption;
d. A showing beyond a reasonable doubt.

In practice, there is a certain perverse exhilaration attached to the suspense of anticipating which standard will apply as a given regulation passes under the gimlet eye of the man government fears most. But such illicit pleasures would be instantly exchanged by any reasonable regulator for the guidance of a regulation.

(An historical note: AB 1111 at one time contained a "substantial evidence" test for demonstrating "necessity." However, that test was deleted from the bill, as it was deemed impractical and overly burdensome to the agency. Under general rules of statutory construction, OAL cannot implement and enforce a standard that was considered and rejected by the Legislature. Yet in certain cases that test has no doubt represented the "policy.")

In the opinion of many seasoning pioneers of OAL's uncharted frontiers, its lack of regulations has enabled it both to implement "policies" exceeding the scope of its own statutory authority, and to adopt policies which might well be legitimate if properly adopted in regulation form. Both policies are unknown to the agency until rejection of a proposed regulation.

In other instances, it can be strongly argued that OAL has violated the Legislature's prescription "that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations" (Government Code § 11340). As a for-an-example, one might consider the rejection of regulations on the subject matter to be included on the examination for licensure as an acupuncturist.

The lack of OAL regulations has led to a state of complete confusion over the "policy" of OAL toward the consumer complaint disclosure policies in the Department of Consumer Affairs. One of DCA's management rationality/consumer protection improvements of the recent past has been to encourage its boards and bureaus to adopt — in regulation form so that they would be accessible to one and all — procedures for disclosing complaints lodged against their respective licensees. A model policy and procedures statement was even prepared for them, after public hearings were held on the draft. Several boards and bureaus successfully adopted such regulations. Then OAL changed its mind, turned down two virtually identical texts on "necessity" grounds, and said that the prior approvals had been a mistake. It challenged not only the necessity of putting the policies and procedures in regulations but also the necessity for the existence of the policy.

When an agency can conduct its business without regulations, it can change its mind more easily. That's what regulations are all about: to provide some constancy, consistency, predictability, order, rationality and the rule of law. It just seems to work better that way.

In addition to the legal and practical considerations, there is an overriding question of fairness. On any given proposed regulation before OAL, there are at least three sets of actors interested in how things are done: the regulation's sponsoring agency, its supporters and its opponents. To all of these applies Professor Davis' admonition that:

> "... [i]n most circumstances, the more the private party can know about the agency's law and policy, the fairer the system; the less the private party can know, the lower the quality of justice." (Administrative Law Treatise, 1970 Supplement, p. 209.)

Fairness is a virtue not always found in the personality of a bureaucracy. That's why regulations are necessary, to ensure some fair play, to make the game as open and understood as possible. Sometimes a bureaucracy will be headed by a most fair and benevolent strong-person whose wisdom, character, gifts and good will so inform and permeate the bureaucracy that one might consider a return to monarchy, Magna Carta notwithstanding. But this does not always happen, and to protect ourselves against the regime of the inevitable mean spirit or charlatan, we write regulations. Alas, the human spirit is just not predictable enough.

Despite current political rhetoric, it is well established that many businesses and professions want a certain amount of regulation, to protect themselves from various economic, structural and competitive threats, and for a variety of other reasons. In planning their strategies for securing the regulations they want, even these private self-interested proponents, need to know what it will take to get the proposal past the final hurdle. The

vagueness that now clouds the OAL process is precisely the sort of uncertainty and potential for arbitrariness that private critics of government often cite. Private citizens as well as regulators want to know the rules of the game, what is expected of them. It seems best to tell one and all, clearly and publicly, in regulations.

In sum, it would be unfortunate if OAL were to emulate the old-time regulators and keep its policies, standards, and procedures inaccessible. In pursuing this course, OAL will also inevitably if inadvertently revive regulation by "house rules" of agencies hidden from public scrutiny.

OAL has the highest promise. It should, however, establish itself as the paragon of regulatory openness rather than as a reliquary for the bureaucratic enigmas of the past.

OAL should adopt regulations. It's only American: you debate and publish the rules of the game and then everyone has a fine time playing.

# COMMENTARY SECTION

## IS THIS REALLY NECESSARY?

*Beginning with this issue, the REPORTER begins a regular feature, entitled "IS THIS REALLY NECESSARY?" We hope to discuss on a regular basis particular examples of troubling regulatory policy.*

**1. The Contractors State License Board Specialties.**

The reader will note that the Litigation Section includes the case of *Roy Brothers Drilling v. Jones.* Here we have a licensed contractor, operating under the regulatory authority of the State Contractors License Board. The contractor passes a gamut of qualification and experience requirements, examinations, posts a bond and obeys a myriad of rules. Presumably, the reason is consumer protection rather than protection of those licensed from new competitors. It is consumer protection involving a "prior restraint," i.e. where government says: "you cannot practice your trade until we say you can." The "regulation" of most persons is without prior restraint, e.g. do what you want, but if you hurt someone or gyp someone you are going to be punished. The only seeming purpose to the prior restraint kind of regulation is to *prevent* some harm by making sure those doing certain work are less likely to make a mistake or swindle others. And presumably this "prevention" is most appropriate where the harm from an abuse is "irreparable" — later damages or later punishment simply are not enough given the enormous harm, or are unlikely to be obtained.

With all of this in mind we have the Roy Brothers. They contracted for and completed major work at the behest of consumer Jones. Did they not do the job? Did they endanger anyone? Did they do a bad job? Nothing in the record so indicates. But the consumer totally refuses payment. Not paying a $26,000 bill can mean the death of a small business, the end of the dreams of an entrepreneur. And anyone who has been an entrepreneur knows the struggle to compete against the established firms, the risk of one's lifesavings that is often involved, the employment of others who have cast their lot with the risk taker.

The Roy Brothers received nothing for their extensive work. Their survival may be jeopardized. Why? Not because they could not prevail in the marketplace. Not because they did not do a good job efficiently, but because the consumer will not pay and the court will not let them collect one dime. And why is that? Because although they were properly licensed as a "contractor," they were not licensed in the proper "subspecialty," one of many the Contractors State License Board has created. They can drill and install complex septic tanks and concrete vaults, do major earth moving and concrete work, but cannot drill and pour simple foundation caissons (columns).

A glance at the subspecialties reveals the underlying confusion with regulation which besets so much of the California regulatory process. There are over a dozen separate specialties, for such things as metal work, then another for decorative iron work. In 1981 a maker of decorative window grates operating for years to the delight of all of his customers was shut down. Competitors complained. The hard working tradesman could not pass an exam due to language deficiencies.

There are separate specialties for plumbing, heating, sanitation and solar installation. Electricians and masons, as well as plumbers, are divided into subgroups.

Certainly if a contractor does a bad job it is a pain in the neck for the consumer. And perhaps the present marketplace may not be able to protect the consumer adequately. But is a lousy ironwork decorative job so critical that we must set up a regulatory system to prevent any possible abuse? And if one has certain basic plumbing skills, does one really have to get a separate license for heating and cooling, solar installation, sanitation and general plumbing? If we are afraid damage will be created by the work of a contractor and a consumer will be recompensed, why not bond those who practice (as the Roy Brothers are already bonded), and recovery from the bond if there is insolvency and real harm? Why the specialties and why so many of them?

The final irony to the specialty system of the Contractors State License Board, is the way the Board treats the contractors. For example, if a "heating" contractor has a heating job but must do major dry wall work (another specialty) "supplemental" to the work in his assigned specialty, he may freely do so under Board rules. This is a critical admission of the Board. The Roys could very easily have done Mr. Jones' foundation work (similar in nature to the sanitation specialty they are assigned) if they had some trivial sanitation task on the property that was their specialty and there was a relationship with that work. If extensive work in *another* specialty is perfectly okay while doing work in a *authorized* specialty, how important are the specialty classifications? What enormous harm do they prevent which must be precluded by a prior restraint, when the agency itself removes the restraint for sake of licensee convenience? What public benefit are we reaping at the expense of the Roy Brothers firm?

**2. The Hiring Freeze.**

It was very important five years ago to be against government growth. Governor Brown, possessing some sensitivity to the imperative of proper political posture, implemented the "hiring freeze" to cut government down. You simply do not allow new hiring by the State, and attrition reduces government without anyone losing their job. Sounds desirable enough. But in practice it is a device to avoid making the tough political decisions — the look in the eye to a civil servant and the words face to face — you are not doing the job, pack up and get out.

What the hiring freeze has meant in practice involves far more than the simple model of government reduction through attrition. Some agencies do not have room for attrition, and yet everyone would agree some of them are necessary. Further, the rate of attrition is highly variable — deaths and retirements do not correspond to workload in a useful manner. Aware of the need for exceptions, the State began some exceptions. The Department of Health Services was largely excepted. Presumably this was because health is of special import. In fact, not everything (or very much some would argue) that the Department of Health Services does is critical to anyone's health, and there are other agencies whose functions may be more closely related to health but which lack the appropriate title including the word "health." Appearances have taken on disproportionate meaning in Sacramento.

The consequence of the "exception" is important. For although no new people can be hired, people can "laterally transfer." Translated, this means that you can steal an employee from another agency but you cannot hire anyone from the outside. This is great for the current employees, since they are subject to a

vigorous bidding war; promotion promises, shorter hours and other benefits. Even at the secretarial level, stealing persons from another agency has become a critical part of any agency's operations. Most new employees coming into State employment are coming in through the "excepted" agencies. Hence, the Department of Health Services hires many secretaries to fill their needs from the outside. But they do not keep too many of them. Other agencies bid them away with promises which would make the USC football recruiting staff envious. The end result: the Department of Health Services has trouble keeping those they hire. And other agencies subject to the freeze have an extremely limited field from which to choose, only lateral transfers. According to the many agency officials we talk with, it is often a choice among the least incompetent. And even when one finds a marginally competent person, he or she will not be around long, with all of the bidding and shuffling. Sacramento has been a mad merry-go-round for four years.

The simplistic "freeze" formula, which may attract a concise headline, does not make for responsible government.

**3. The Board of Behavioral Science Examiners.**

Marriage, Family and Child counselors are "regulated" by the Board of Behavioral Science Examiners. Apart from the appropriateness of licensing such an amorphous trade (what is competence?), how can they regulate and approve the courses taken by their "counselors?" If one reads section 1834.6 et seq of the BBSE Rules, one notes yet another anomoly. Courses are approved for one year. But there is no process for renewing approval after the one year. There is no clear process to examine course content at all. There is no criteria from which to judge course content. But if the provider of a course CHANGES the content of the course, he or she must obtain Board approval. Why?

Next Issue: Regulation of Engineers, Landscape Architects, and Drycleaners.

# PUBLIC INTEREST ORGANIZATION ACTION

## Introduction

Each regulatory agency of California government hears from those trades or industries it respectively affects. Usually organized through various trade associations, professional lobbyists regularly formulate positions, draft legislation and proposed rules and provide information as part of an ongoing agency relationship. These groups usually focus on the particular agency overseeing a major aspect of their business. The current activities of these groups are discussed as a part of the Summary discussion of each agency, *infra.*

There are, in addition, a number of organizations who do not present a profit-stake interest in regulatory policies. These organizations advocate more diffuse interests — the taxpayer, small businessman, consumer, environment, future. The growth of regulatory government has led some of these latter groups to become advocates before the regulatory agencies of California, often before more than one agency and usually on a sporadic basis.

Public interest organizations vary in ideology from the Pacific Legal Foundation to the Campaign for Economic Democracy. What follows are brief descriptions of the current projects of these separate and diverse groups. The staff of the Center for Public Interest Law has surveyed approximately 200 such groups in California, directly contacting most of them. The following brief descriptions are only intended to summarize their activities and plans with respect to the various regulatory agencies in California.

## AMERICAN LUNG ASSOCIATION OF CALIFORNIA

*(213) 484-9300*

The American Lung Association is concerned with the prevention and control of lung disease and associated effects of air pollution. Any legislative bill regarding respiratory care is of major concern to the Association. Several committees of the Association monitor the Air Resources Board and the Association supplies expert witnesses at Board meetings.

CURRENT PROJECTS:

The Association is trying to maintain and strengthen the Federal Clean Air Act which is soon to be reauthorized. Other health and environmental groups are working with the Association to counteract business and industrial groups allegedly trying to weaking the present Act.

The Association has an extensive letter writing campaign to lobby for various state bills. The Association is opposed to SB 274 (Foran) which would lower California's emission standards on buses by using the lower federal standards.

The Association is concerned with two issues in the Los Angeles area. The first issue is the protection of pound animals from use in medical research. The current ordinance prohibits use of the pound animals but the Los Angeles City Council is trying to change the ordinance so that medical researchers can use animals from the pounds. The Association is working to uphold the ordinance and protect the animals.

The second issue is unsafe air conditions for children to play in. The Association has held two meetings to inform teachers and principals to the harm of allowing children to play outside when the air pollution levels are dangerously high.

## CALIFORNIANS AGAINST WASTE

*(916) 443-5422*

Californians Against Waste (CAW) organized to support and lobby for a "can and bottle bill" which would require a deposit of at least 5¢ on all soft drink and beer containers. Eight states have passed a bill. CAW has focused its efforts on the Legislature in the past.

CURRENT PROJECTS:

Although the California legislature will vote on SB 4 in January 1982, CAW is shifting to an initiative campaign for the November 1982 ballot. Petitions will be available until March 1982.

In the regulatory field, CAW works with the Solid Waste Management Board. CAW addresses issues before the Board on the can and bottle bill and on related issues. The Solid Waste Management Board has endorsed SB 4.

## CALIFORNIA CONSUMER AFFAIRS ASSOCIATION

*(209) 453-5904*

The CCAA is an affiliation of those local governments which have consumer affairs programs. The consumer affairs representatives from each participating city or county meet as an association to exchange information and decide what issues to address. CCAA encourages its member to apply as public members to the various boards. Members have served on the Bureau of Home Furnishings, Bureau of Electronics and Appliance Repair and the Bureau of Collection and Investigative Services.

Of primary concern to the CCAA is the continued existence of local agencies in light of federal and state cutbacks. Since bailout funding is not foreseeable, some local agencies have been lost while others have merged in order to continue services to the public.

Fulfilling the spirit of the Public Member Act is another major goal of the CCAA. Many public positions are still vacant on state boards and commissions. This goal is part of a continuing effort to find new avenues of access to government agencies. CCAA would like to gain public access beyond just boards and bureaus, actually placing public members in state departments.

CCAA is exploring ways of improving and expanding consumer education in order to improve knowledge of the marketplace for more informed consumption. Eventually, CCAA would like to see consumer education expanded to include junior high schools and senior high schools as well as colleges. It is hoped that consumer education will become more interdisciplinary.

Currently CCAA has been asked to comment on regulations of approximately 38 boards and bureaus as part of the AB 1111 process.

With other consumer agencies, the CCAA monitors the Contractors State License Board. CCAA has obtained money for programs to monitor advertising of contractors on the local, rather than just the state level.

CURRENT PROJECTS:

CCAA held their annual conference on October 15 and 16 in Fresno. Herschel Elkrus of the California State Attorney General's Office presented a review of major consumer protection statutes and discussed the investigative role of local agencies. Tom Papageorge of the Los Angeles County District Attorney's Offfice and Tom Gree of the Department of Consumer Affairs presented a review of statutes authorizing the recouping of investigative costs in actions brought by law enforcement offices. Richard Spalin of the Department of Consumer Affairs spoke on the housing crisis and the lack of affordable housing.

Of particular importance to CCAA advocacy for 1982 will be legislative projects. CCAA proposes the following priorities:

*Tenant/Landlord:* support for "just cause" evictions, clarification of security deposit law and fair housing for children;

*Automobiles:* continued support for the "lemon bill" and BAR's voluntary shop certification program;

*Funding for Consumer Agencies:* continued support to fund consumer agencies;

*Home Improvement Contracts:* continued support for increasing consumer

*Public Members Act:* opposition to bills to decrease the public member majority on state Boards and Bureaus;

*Disclosure:* support for those measures increasing consumer disclosure requirements;

*Travel:* continued support for measures to increase consumer protection;

*Pre-Need Funeral Arrangements:* monitor existing legislation;

*Small Claims Court Reform:* monitor legislation;

*Mechanics Liens:* continued support for proposals to protect consumers from liens on their property;

*Public Participation:* support for public participation proposals;

*Mortgages and Consumer Credit:* monitor legislation.

## CALIFORNIA PUBLIC INTEREST RESEARCH GROUP OF SAN DIEGO
*(714) 236-1508*

CalPIRG is a nonprofit and nonpartisan organization founded and staffed by students from San Diego's three largest universities. It is the largest student funded organization of its kind in the state. CalPIRG helps San Diego residents with consumer issues through the Consumer Assistance Line at 236-1535.

CalPIRG is still waiting for the Public Utilities Commission decision on San Diego Gas and Electric's 1981 request for a major rate hike. Dave Durkin expects a decision sometime in January of 1982. According to Durkin, the PUC's decisions concerning SDG&E's current request are the most important in several years. SDG&E wants to include construction work in progress (CWIP) in the rate base, which has generally not been permitted in California. Durkin alleges that SDG&E is trying to assess rate-payers to provide a profit (a rate of return) on $63.9 million in currently non-productive land holdings.

Also pending is the PUC's decision on whether to allow SDG&E to obtain a 19% rate of return, which, according to Durkin, is at least 4% too high. CalPIRG also opposes SDG&E's effort to gain a large rate increase by adjusting lifeline rates. Essentially, large industrial users of energy would be paying a lower rate, while small residential customers would pay a higher rate than currently extant as proposed by SDG&E.

The CalPIRG Nursing Home Study will be released in March 1982. A new element has been added to the survey. In addition to surveys of citation records, financial data, and the clergy, there will be a deficiency survey. Deficiencies are thought important to determine quality because nursing homes do not necessarily get cited for deficiencies. This survey is designed to assist consumers in making a choice of facilities to be patronized.

The San Diego Area Agency on the Aged, which is a branch of San Diego County government, has recommended CalPIRG to the Board of Supervisors for the task of surveying the displacement of senior citizens due to condominium conversion, urban renewal, or gentrification. This survey will cover the problems and needs of senior citizens who are displaced. CalPIRG is currently working on a tenants survival manual that deals with the condominium conversion ordinances countywide.

The "Housing Project" of CalPIRG has completed its activities and published a 260 page edited version of the manual it used during the two ten-week training programs conducted in 1981. The manual is divided into a rental area and a home ownership area. It can be used as either a manual for a training course or as a resource guide. Its primary focus is on low to moderate cost housing and covers alternative sources of funding for housing, as well as advocacy before local housing authorities. The cost for this manual is $12.50 and can be purchased by writing to CalPIRG, 3000 E Street, San Diego, CA 92102. A free housing survey is avilable as a CalPIRG Report Volume 9, Number 4, October 1981.

The legal rights handbook for car purchasers is also available as CalPIRG Report Volume 9, Number 5, November 1981. This effort is designed to inform buyers of their existing contract remedies, warranty rights, and finance rights and covers repairs as well as purchases. The next CalPIRG reports will survey food prices, drug stores, and banks and will be out sometime in the first half of 1982.

Starting in January, 1982, CalPIRG reports will expand into bi-monthly television reports on Southwestern Cable Channel 15 on Sunday evenings at 8 PM. The focus of this program will be on specific consumer issues and topics on the same format as the CalPIRG reports. Eventually it is hoped that the program will expand to cover major lawsuits, consumer recalls and a people's law department.

The Statewide CalPIRG Board has voted to establish a Statewide office to act on behalf of all of the regional organizations. This development is part of a concerted effort to have a more centralized CalPIRG. Ultimately, perhaps in two or three years, it is hoped that the Statewide office will be in Sacramento and will coordinate Statewide efforts for CalPIRG branches on new campuses as well as extensive state lobbying on the model of New York PIRG.

Currently, CalPIRG is negotiating for a fee mechanism at San Diego State where CalPIRG garnered more than 60% of the vote in a recent referendum.

## CAMPAIGN FOR ECONOMIC DEMOCRACY
*(213) 393-3701*

The Campaign for Economic Democracy (CED) is a grassroots political organization dedicated to "increasing public participation in the basic economic decisions which affect people's daily lives in the work place, the market and the neighborhood." CED is committed to building power at the community level by putting a priority on the development of local CED chapters and the election of a "new generation of leadership of accountable progressive candidates to local and state office."

CURRENT PROJECTS:

A CED proposed Santa Monica City Toxic Chemical Disclosure Ordinance was passed by the city council. This makes Santa Monica only the second city in the country to pass such an ordinance. It would require businesses which store, use, handle and dispose of toxics to reveal those facts to the city.

The Steering Committee for CED recently endorsed the petition drive for a constitutional amendment to create a "split-roll" method of property taxation. This initiative, which requires 800,000 signatures, was organized by California Tax Reform Association.

## CENTER FOR PUBLIC INTEREST LAW
*(714) 293-4806*

The Center for Public Interest Law was formed after approval by the faculty of the University of San Diego School of Law in 1980. It is funded by the University and by private grants from foundations.

The Center is run by three full-time staff members, including an attorney in Sacramento, and approximately 40 graduate and law students. The faculty selected Robert C. Fellmeth, a member of the faculty, as Director of the Center.

It is the goal of the Center to make the regulatory functions of State government more efficient and more visible by serving as a public monitor of state regulatory agencies. The center has covered approximately 60 agencies, including most boards, commissions and departments with entry control, rate regulation or related regulatory powers over business and trades.

Students in the Center attend courses

in regulated industries, administrative law, environmental law and consumer law and attend meetings and monitor activities of their respective agencies. Each student also contributes updates of his/her agencies to the *California Regulatory Law Reporter* quarterly.

It is the intention of the Center to fully participate in the opportunities for public input offered by AB 1111 review and the Office of Administrative Law. Students have critiqued agency regulations in writing and in person. It is expected that a substantially greater student involvement in the AB 1111 process will take place in the coming year.

Thus far, the Center has testified or commented in detail on the comprehensive rules review before seven regulatory agencies including: Board of Solid Waste Management, Board of Dental Examiners, Acupuncture Advisory Committee, Psychology Examining Committee, Board of Registration for Professional Engineers, Cemetery Board and Board of Fabric Care. The Center expects to become increasingly active during 1982.

## CITIZENS ASSERTING SUPREMACY OVER TAXATION
*(213) 786-5977*

CAST is a nonpartisan, nonprofit organization of California taxpayers working to "reclaim the power of taxation" by the initiative process. CAST believes citizens should not give the government of California complete discretion to set tax levels "because waste and abuse inevitably ensue."

CAST's initiative to amend Article XIII, Section 29 of the California State Constitution has until December 11, 1981 to collect 550,000 signatures.

Essentially, this amendment would take the power to tax away from the legislature. No new tax, fee or levy could be imposed, or any existing tax increased without the consent of two-thirds of the affected taxpayers. Fines, court judgments, court costs or fees collected to cover "reasonable government service" would be exempt. Under this amendment, the state government would have no problem increasing fees for services if comparable service could be obtained from the private sector. If the state is the sole provider of these services, any increase above the cost of the service would have to go to the voters for approval. Essentially, all revenue producing schemes by the state would have to be approved.

Finally, there is a six year sunset clause on any voter approved tax measure. That is, any new tax would end automatically after six years. This initiative could affect fees or levies state agencies impose, e.g., licensing fees, since the legislature and the agencies would be prohibited from collecting any fees under the terms of the initiative unless two-thirds of the affected licensees agrees to them.

Its drive to collect these signatures began on July 14, 1981 and as of the end of November, CAST estimates that it has approximately 400,000 signatures. Five counties have already exceeded their quotas in collected signatures. The petition effort has been hampered by low contributions and little media coverage. Only $14,000 has been donated, $1,000 by the National Taxpayer's Union. The average contribution, however, is under $5. CAST has relied largely on volunteer help in its petition drive.

Recent help by Howard Jarvis has succeeded in focusing some media attention on CAST's efforts.

## CITIZEN'S ACTION LEAGUE
*(415) 647-8450*

The Citizen's Action League (CAL) is a nonprofit organization that motivates its members to work for and accomplish concrete improvements in their neighborhoods and cities. It is made up of local neighborhood chapters which elect officers and send representatives to either the Southern or Northern regional board and a statewide board. The emphasis is on local issues around which the neighborhood chapters build.

MAJOR PROJECTS:

In Northern California a local CAL chapter is demanding accountability from Standard Oil of California in Richmond for the disposal and release of toxic wastes and recent chemical explosions. Currently CAL is working on right-to-know legislation in order to force accountability.

One of CAL's major projects is to oppose utility rate increases. CAL works with the Public Utilities Commission and directly with utility companies, including San Diego Gas and Electric (SDG&E) and Pacific Gas and Electric (PG&E).

CAL is also working to improve police protection in certain neighborhoods in San Francisco and Compton. By meeting with Chiefs of Police and touring the neighborhoods with police officials, CAL has succeeded in gaining commitments for increased protection.

Along with the Citizens Labor Energy Coalition, CAL is lobbying against the decontrol of natural gas.

To locate the nearest California chapter, write or call the main headquarters at Citizen's Action League, 2988 Mission Street, San Franicsco, CA 94110.

## COMMON CAUSE
*(213) 387-2017*

Common Cause (CC) enters its second decade in pursuit of this stated goal: obtaining a "more open, accountable and responsive government." CC is involved in legislative advocacy and supports many bills which affect the regulatory agencies.

CURRENT PROJECTS:

Common Cause is lobbying against two bills. SB 165 (Ellis) which the State Board of Architectural Examiners (BAE) also opposes, seeks to change the membership balance of the BAE. SB 165 would change the current makeup of the Board, 5 public members, 3 architects and 1 building designer, to 13 members including 5 public members, 7 architects and 1 building designer. CC favors public members on the state boards and commissions.

Another bill which CC opposes is AB 429 which would prohibit a beer wholesaler from offering a quantity discount to any retailer. AB 429 was a reaction to the Department of Alcoholic Beverage Control's deregulation of the beer industry. Regulation 105 of the Department of Alcoholic Beverage Control (ABC) prohibiting discounts was deemed anticompetitive by ABC. Hence AB 429 was to stop ABC's proposed deregulation. The legislature has not passed AB 429 but neither has the Governor allowed the new regulation repealing section 105 to be enacted. Therefore, the status quo prevails. The Governor has promised to set up a Commission to look at the effects and benefits of deregulation. As of this time, no commission has been appointed.

CC is currently doing an intensive survey of all the members of State Boards and Commissions to determine the impact of public members. CC has been polling all members of boards and commissions. CC is expecting the survey to be completed in January, 1982.

## CONSUMER FEDERATION OF CALIFORNIA
*(213) 388-7676*

The Consumer Federation of California (CFC) is composed of 60 nonprofit state and local organizations and private individuals. The CFC strives to educate consumers in such areas as food, credit, nutrition, insurance, housing, health care, energy, utilities and transportation. The organization serves as a consumer advocate before state and local regulatory agencies and legislative bodies.

CURRENT PROJECTS:

CFC has actively supported "The Lemon Bill" (AB 1787), which would have provided additional protection to

consumers purchasing a defective automobile. The bill has been made into a two year bill.

CFC also supports AB 256 (McCarthy) which would prohibit discrimination against renters with children. This bill has also been made into a two year bill.

SB 180 (Marks) would increase small claims actions to $1,500 and open night courts for the convenience of those who work in the day. Despite amendments, CFC continues to support this measure.

The conclusions of the Los Angeles test on item pricing have been submitted to the city council.

AB 65, recently passed and signed by Governor Brown, would pre-empt local ordinances that allow stores to forego item pricing.

As for the coming legislative session, CFC will continue to support the "lemon bill." It also plans to concentrate on mortgage legislation and supports efforts to eliminate consumer credit ceilings. CFC also supports ACA 22, the split-roll tax initiative which CFC thinks is a more equitable approach to property taxes than the current Proposition 13 system which favors business property over residential and agricultural property.

## CONSUMERS UNION
*(415) 431-6747*

The Consumers Union is the largest consumer organization in the nation. CU publishes "Consumer Reports" and finances consumer advocacy on a wide range of issues in both federal and local forums. Historically, CU has filed several major lawsuits or amicus briefs in California lawsuits. CU has opposed milk supply and price fixing and supported termination of "fair trade" liquor laws (vertical price fixing) via court actions. CU's current major focus in California is legislative advocacy.

With other groups listed above, CU opposed AB 1079 prohibiting disclosure of complaints against licensees until the period of appeal on the ruling has expired. CU feels the public should be aware of the licensees' alleged violations long before the adjudication of the complaint has ended. CU argues that AB 1079 is inconsistent with the court system which informs the public of pending litigation.

CU is also opposed to AB 650 which would partially deregulate savings and loans in California, and AB 429 which would limit competition in wholesale beer sales.

CU recently testified before the Department of Food and Agriculture when the Department was hearing public comments pursuant to AB 1111 review of rules.

CU's California office, consisting of two full-time attorneys, has recently been reduced to one attorney due to budget constraints.

## ENVIRONMENTAL DEFENSE FUND
*(415) 548-8906*

Environmental Defense Fund (EDF) is a national membership organization whose purpose is to protect environmental quality and public health. A small group of scientists and naturalists on Long Island founded the organization in 1967. The founders were concerned that DDT was poisoning wild birds. The original EDF staff helped to bring about the federal ban of DDT in 1972. EDF concentrated its efforts in four areas: energy, toxic chemicals, water resources and wildlife. EDF strives to bring about the rational use of mineral, land, water and air resources by advocating carefully planned development that is both economically and environmentally sound.

CURRENT PROJECTS:

EDF works and testifies before the PUC and the Energy Commission. Recently, EDF conducted a sophisticated computer analysis which caused two of California's utilities, PG&E and Southern California Edison to drop plans for a $5 billion coal project in the Alan-Warner Valley. EDF demonstrated that utilities could realize just as many watts with alternative sources and end-use efficiency as with the plants the utilities had planned to construct. Significantly, the alternative sources would cost half a billion dollars less than the proposed new coal plant.

Several years ago, EDF helped in the PUC's adoption of the policy that utility rates be based on investment in alternative energy sources and conservation. EDF continues to testify before the PUC. Regarding water use, EDF favors pricing strategies, investment in end-use efficiency, drought contingency planning, and other water conservation measures over expensive, large scale structural solutions "which are often environmentally destructive."

## NATIONAL AUDUBON SOCIETY
*(916) 481-5332*

The National Audubon Society is a major organization whose main goals are to conserve wildlife and help establish and protect wildlife refuges, wilderness areas and wild and scenic rivers. The Society supports measures for the abatement and prevention of all forms of environmental pollution. A major project is preservation of the remaining California condors.

CURRENT PROJECTS:

The Society is working with the Energy Commission on a "New Energy Plan" which calls for conservation and the use of solary energy, minimizing the need for nuclear energy. The Society is implementing the plan by working with PG&E in the Bay Area. PG&E is conducting an energy audit for the membership of the Society's local chapters.

The Society has worked with the Fish and Game Commission on regulations regarding falconry and the captive breeding of the California condor. The regulations which the Fish and Game Commission approved were later rejected by the OAL. OAL insisted that the approved regulations were not "streamlined enough" and thus too hard on falconers and breeders. The Society's goal is to protect and not jeopardize wild populations. Hence, the Society believes simplicity in the regulations is not as important as the protection of wildlife.

The Society is the lead plaintiff in a lawsuit against the Los Angeles Department of Water and Power, alleging the depletion of Mono Lake, the breeding ground of 90% of the California gulls. This year, 95% of the gulls failed to breed because of the continued decrease in the lake's level. The U. S. Congress is considering a bill to make Mono Lake a National Monument. The Society is soliciting support from the Water Resources Control Board and the State of California for the bill and the preservation of the gull habitat.

## NATURAL RESOURCES DEFENSE COUNCIL
*(415) 421-6561*

The NRDC is a major national organization with an "established role in the formation of environmental policies and a commitment to conserve and improve the quality of our human and natural environment." The NRDC San Francisco office works on Western environmental issues, including energy, coastal zone management, forestry and public lands.

In mid-1980, NRDC published an alternative energy scenario for California which advocated the substitution of conservation and renewable energy resources for conventional coal and nuclear power plants. NRDC is now working with state agencies on proceedings directed toward achieving these goals. NRDC is currently involved in cases before the Public Utilities Commission (PUC) and the Energy Commission.

A key recommendation of NRDC's scenario was saving energy through upgrading energy efficient building standards. NRDC was active in the Energy Commission's recent proceeding to revise

its residential building standards, which resulted in adoption of new standards by the Commission in June 1981. An NRDC member participated on the advisory committee to the Building Standards Commission, which approved the Energy Commission's standards in September.

In addition to its work on the residential standards, the NRDC has urged the Energy Commission to adopt more stringent standards for commercial buildings. The Energy Commission has established advisory committees, including an NRDC staff member, to develop updated nonresidential efficiency standards. NRDC is also participating in the Commission's formal hearings on the new standards to ensure that they are technically sound and provide for the maximum cost-effective level of energy efficiency.

Utility conservation programs also play an important role in the NRDC scenario. To assure the achievement of these goals, NRDC participated in hearings on Pacific Gas and Electric's zero-interest conservation loan program.

The NRDC scenario advocated development of new alternative energy supplies such as wind power and cogeneraction. Toward this end, NRDC has participated in several proceedings before the PUC to encourage the establishment of favorable rates for utility purchases of power from alternative energy producers.

A second issue in which NRDC has been very active in California is that of coastal preservation through involvement in the development of local coastal programs required by the Coastal Act. As the original deadline for completion of all local coastal plans approaches, NRDC has been working with the Coastal Commission and state legislature on extension programs for some plans not yet completed.

The Model California Coastal Act is presently under attack in the state legislature by prodevelopment forces seeking to weaken the act significantly. NRDC is cooperating with other environmental groups to ensure that the impact of this important piece of natural resource legislation is not diminished.

## PACIFIC LEGAL FOUNDATION
*(916) 444-0154*

The Pacific Legal Foundation (PLF) was founded to represent the public interest by supporting free enterprise, private property rights and individual freedom. PLF devotes most of its resources to litigation. Suits are brought anywhere in the United States. Some California cases having regulatory impact and involving PLF follow.

*Pacific Legal Foundation v. California Coastal Commission:* PLF has filed suit against the California Coastal Commission in an effort to compel it to comply with a state law which the Commission "has seen fit to ignore." That law, enacted in 1979, was designed to reduce administrative regulations and improve their quality by requiring a review by the OAL of all rules prior to publication. The law applied to all state agencies, but the Coastal Commission has refused to submit its regulations to OAL for review.

Specifically, PLF is challenging the Commission's *Interpretive Guideline for Wetlands and Other Wet Environmentally Sensitive Habitat Areas* that the Commission issued in March, 1981. Since local governments and applicants for coastal development must conform to provisions set forth in the guideline, PLF contends the wetlands guideline must be reviewed by OAL. A hearing in this matter was in San Francisco County Superior Court on November 10, 1981. PLF argued that the California Coastal Commission has not complied with a state law requiring submission of the Commission's recently adopted wetlands guideline to the OAL for review. Local governments and applicants for coastal development must conform to provisions set forth in the guideline.

*Pacific Local Fundation v. State Water Resources Control Board:* The California Ocean Plan requires, among other things, the removal of 75% of the suspended solids from wastewater and absolute prohibition of sewage sludge discharge into the ocean. The result is a mandate for land disposal of the great quantities of sludge generated despite "scientific data indication that ocean disposal may be beneficial to an ocean ecology." Further, the economic cost of complying with the Ocean Plan may be more than small municipalities can bear.

PLF has served its complaint of the State Water Resources Control Board asking to enjoin implementation of the Ocean Plan because of the state's failure to comply with the California Environmental Quality Act which requires preparation of an environmental impact report concerning the plan.

*Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission; Pacific Gas & Electric Company v. State Energy Commission:* California laws which place a moratorium on the construction of nuclear power plants were the subject of two nuclear cases which the United States Court of Appeals for the Ninth Circuit consolidated on appeal. Representing a coalition of citizen groups, PLF was successful in *Pacific Legal Foundation v. State Energy Commission* in having the District Court rule that the key section of the California nuclear laws which indefinitely barred nuclear power plant licensing in California was unconstitutional.

On October 7, 1981, the Court of Appeals for the Ninth Circuit held that the California moratorium on new nuclear power plants was constitutional and thus reversed the lower court. PLF has filed a petition for rehearing with the Ninth Circuit Court asking it to reconsider its October 7 decision. PLF argued in its petition that the Ninth Circuit had misconstrued the purpose of the moratorium, which was essentially a safety-regulated statute. Under federal law, the regulation of nuclear safety hazards is "explicitly reserved to the federal government." PLF also argued that the court had overlooked both its own prior decisions, as well as those of the Supreme Court, in holding that PLF had failed to establish standing to sue. PLF was representing an engineer whose employment was terminated as a result of the California moratorium. (For further discussion, see Litigation section, infra.)

*Tahoe-Sierra Preservation Council v. State Water Resources Control Board:* PLF filed suit on behalf of the Tahoe-Sierra Preservation Council and affected property owners against the California Water Resources Control Board challenging the legality of the state board's recently adopted water quality plan for the Lake Tahoe Basin. The lawsuit seeks a judicial determination that the state board failed to follow the law in enacting its Tahoe Water Quality Plan. The suit specifically attacks those provisions of the California Water Quality Plan that imposes a permanent moratorium on the use of private property (which constitutes approximately 50% of the undeveloped lots on the California side of the Tahoe Basin). The suit alleges that the State Board, in adopting these permanent restrictions, acted in a manner in excess of their legal authority and challenges the State Board action as being otherwise arbitrary and unreasonable. It also argues that just compensation is constitutionally required under such circumstances. PLF has filed a motion for summary adjudication in Placer County Superior Court.

## PLANNING AND CONSERVATION LEAGUE
*(916) 444-8726*

The Planning and Conservation League (PCL) is a public interest lobby group aimed at conserving and protecting California's natural resources. PCL interacts with numerous state agencies, including the Air Resources Board, Board of Forestry, Coastal Commission and the Water Resources Control Board.

The $75 million Energy and Resources

Fund legislation which PCL supported in the past was approved by the State Legislature. However, a problem concerning state revenue projections may require a new look at the financing of this fund.

SB 618, authorizing the creation of a $100 million toxic waste superfund, was signed into law on September 24, 1981, with strong PCL support. This law will provide $10 million per year for ten years to be collected from a tax on producers of toxic wastes. It also offers some compensation to victims, makes the state eligible to receive federal clean-up funds, and issues help in emergency spill situations.

PCL has opposed two Assembly bills which allegedly would have hampered environmental organizations efforts to litigate. A $500,000 bond requirement for plaintiffs bringing environmental lawsuits was written into AB 1914. AB 1915 would have a required a $250,000 bond to be posted to cover attorney's fees in lawsuits concerning the environment. These two bills have been modified so that application of the above provisions has become so narrow as to not be of further concern. Another provision that would have "pierced the corporate veil" of environmental organizations so that their officers would be liable as individuals in litigation has been dropped. Because of these changes, PCL has become neutral on this legislation.

The new cities bill, which would have allowed the state to bypass local regulations for five new cities in California, was passed in the last session. However, it was vetoed by the Governor. PCL actively opposed this measure.

PCL also announced the establishment of an environmental lobbying network (ELN) which would eventually include a Sacramento-based lobbying service for those joining the network.

Starting in January of 1982, organizations and individuals who join ELN will receive weekly updates about legislative actions that affect their area of interest. Each computer readout will contain a summary of newly introduced bills and any amendments. Included will be a listing of committee assignments and their latest hearing dates. All bills will be listed by headings and subheadings. A full-text mailing of a particular bill may be generated from this list through the Legislative Bill Room.

An alert system is included so that any member can inform other ELN members of legislation that requires urgent attention.

## PUBLIC ADVOCATES
*(415) 431-7430*

Public Advocates was founded in 1971 in order to represent low income and minority people on issues concerning education, consumer rights, employment rights and inner city revitalization. Although it sometimes handles class action litigation, it operates increasingly through the executive branch. For example, Public Advocates organized an inner city food petition in order to improve grocery services in disadvantaged neighborhoods. They wrote an administrative petition that was delivered to Governor Brown and believe it has resulted in state funding for inner city grocery stores.

Public Advocates recently filed four administrative petitions with the federal government on domestic infant formulas. The results of a one year study of domestic infant formulas have been submitted to the Food and Drug Administration and the California Department of Consumer Affairs, and is currently under consideration.

Public Advocates also represents minority consumers seeking loans from financial institutions. They worked to stop the Crocker-Midland Bank merger in order to prevent Midland, a foreign bank with no interest in local communities, from funneling money "out of the country." The Federal Reserve Board, however, refused to hear the petition.

The health industry also holds the active interest of Public Advocates. Of particular concern are conditions and services in nursing homes; government procedures for disbursement of Medi-Cal funding; and the rates paid to hospitals.

Recent litigation involving discrimination against children in a mobile home park has attracted the attention of Public Advocates. Public Advocates also maintains an active interest in a land use case in Hawaii. A local public interest group on Kaui, the Committee to Save Nukolii, is challenging local developers use of the doctrine of equitable estoppel for their benefit in a fight for available land for development.

## PUBLIC INTEREST CLEARINGHOUSE
*(415) 557-4014*

The Public Clearinghouse is a resource and coordination center for public interest law focusing on the San Francisco Bay area. It is a cooperative venture of Bay area law schools, including Hastings, Santa Clara and San Francisco. The Clearinghouse publishes a directory of public interest organizations to update their activities.

The Clearinghouse places students in California's regulatory agencies to work on the AB 1111 review process. Also, the Clearinghouse publishes a regulatory and legislative alert to inform the public of recent developments in public interest issues.

CURRENT PROJECTS:

In their October Impact Newsletter, Clearinghouse presented their 1982 Legislative Agenda. These bills were chosen for their potential impact on the public interest and their potential for success.

*ACA 22* (Hannigan) is an effort toward a "progressive tax structure" to deal with the problems of Proposition 13. The Proposed Constitutional amendment would eliminate the reassessment provisions of Proposition 13, which apply when residential and agricultural properties are sold. Currently, when property is sold the benefits of Proposition 13 are lost so that owners of identical housing may pay drastically different property taxes. The amendment would reassess all agricultural and residential properties at 1975 values, limit increases in value to 2% per year, and maintain tax rates at 1% per year. Without the proposed change, a 1978 purchaser of a house at $40,000 pays property taxes of $400 per a year; a 1981 purchaser of an identical house bought at $180,000 pays $1,200 for the same local government services.

Business properties would also be appraised at 1975 value. However, the increase in value per year would not be limited and the tax rate would begin at 1.35% and increase .05% per year until a ceiling of 1.75% is reached. This change would recapture 2/3 of the tax relief given to business under Proposition 13.

The revenue generated would fund local government services: fire protection, schools, parks, and a general fund for vital services such as health and welfare. A vote is pending in January 1982, but anticipated heavy opposition may force a ballot initiative drive to amend Article 13(a) of the State Constitution.

*AB 1597 (Bates):* This bill imposes a 6% severance tax on crude oil production in California. The revenue generated will be deposited in a School and Services Fund, to provide funding for cities, counties, and schools. It is estimated that the tax would raise $500 million in the first year.

This tax is imposed when the crude is removed and is based on the price at the wellhead. The tax revenues would increase as the price of oil increases.

Although California is the fourth largest oil producing state, it is the only major oil producing state without a severance tax on oil.

The Clearinghouse contends that the oil companies cannot pass the tax increase onto consumers due to deregulation, i.e., oil companies cannot increase the price of California crude oil above the world market price.

The bill is expected to run into stiff opposition on the Assembly floor, where a two-thirds vote is required.

*AB 2193 (Harris)* enacts a Campaign Finance Reform Act which would give candidates an option to accept strict limits on campaign donations by individuals and groups in return for matching public campaign funds financed by a $1 tax check off on the state income tax form. The current state income tax reduction for individuals of up to $100 per year would be eliminated. Only 7.3% of Californians claim it as a savings of only $11 per year for individuals. This bill would stimulate individual campaign contributions where the current deduction does not. It would also weaken incentives for contributions by large groups and corporations.

AB 2193 goes to the Assembly Ways and Means Committee in January, 1982.

*AB 1787 (Tanner):* This "Lemon Bill" was amended in the Senate Judiciary Committee in August 1981 under pressure by auto manufacturers and dealers.

These amendments would increase the minimum standard for a "reasonable" attempt to conform to an auto warranty. The lemon presumption would arise after five attempts to repair rather than the original bill's four attempts to repair within the first twelve months or 12,000 miles. In addition, a written notice must be given to the warrantor before the presumption arises.

*SB 345 (Sieroty) and AB 623 (Bates)* would prevent landlords from evicting tenants without "just cause" such as failure to pay rent or damaging the property. Both are under heavy opposition from the California Association of Realtors and the California Apartment Association.

SB 345 must clear the Senate floor by the end of January or die. AB 623 must clear both the Assembly Judiciary Committee and the Assembly floor by the end of January.

*AB 256 (McCarthy-Roberti)* would prohibit discrimination against children in the rental market. The authors have twice passed on opportunities to place this bill on the agenda in the Senate due to uncertainty on the vote count. In January of 1982 it will have a third chance to be placed on floor for vote.

In an attempt to prepare for the demise of the Legal Services Corporation, Clearinghouse will conduct seminars in January 1982 on how small firms can represent consumers as a significant fee-generating part of their practice.

These seminars will cover attorneys fees and alternative ways of financing a public interest practice. This effort is a direct response to the Reagan Administration's comments on how the legal profession will have to take up the slack in public interest litigation. This seminar is also expected to cover the current law on public interest attorney's fees.

In February 1982, Clearinghouse will co-sponsor with the American Bar Association a "Public Interest Law Faculty Conference" that will focus on curriculum at law schools. It will be a meeting of approximately thirty Northern California Law School faculty. The agenda will include a discussion of what Public Interest Law training should consist of for Public Interest lawyers in the 1980's. This discussion includes proposals for curriculum changes in existing public interest programs, clinical supervision and a model curriculum.

The Clearinghouse hopes to provide a model for public interest law programs nationwide, and they intend to publish a revised directory of public interest groups in the Los Angeles, San Diego and San Francisco Bay Areas.

The update of the Santa Clara directory is done in December. This directory covers South San Francisco Bay, San Mateo, South Alameda and San Jose.

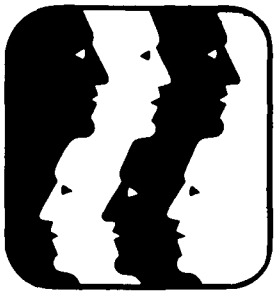
## SIERRA CLUB
*(916) 444-6906*

The Sierra Club volunteers are active before many boards, including the Energy Commission, Air Resources Board, Board of Forestry and the Coastal Commission. The Club publishes "Energy Clearinghouse," a newsletter dealing with energy issues and legislation.

CURRENT PROJECTS:

The Club recently worked with the Energy Commission to revise energy efficient building standards which the Energy Commission passed June 30, 1981. The Building Standards Commission passed the building standards which will go into effect in July 1982. A recent development is the Sierra Club's petitioning of the California PUC along with the utility-rate relief advocacy organization "Toward Utility Rate Normalization." This petition was to withdraw the PUC's approval of the massive Point Conception liquified natural gas terminal. These two groups believe the energy situation has changed significantly since the project was approved in 1978. They want to stall the project before it clears its last regulatory hurdle (a PUC ruling that the site is physically suited for the facility). The PUC staff has responded to the petition and although held it should be denied, the PUC recognized that the substance of the arguments were correct. PUC has admitted there have been significant changes in the energy situation and will address these issues before they grant final approval of the project. A seismic committee that is reviewing the earthquake safety of the project will give its conclusions of the study before the PUC reviews the project.

# 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.**

## THE OFFICE OF ADMINISTRATIVE LAW (OAL)

*Director: Gene Livingston*
*1414 K Street, Suite 600*
*Sacramento, CA 95814*
*(916) 323-6221*

The Office of Administrative Law (OAL) was established on July 1, 1980 during major and unprecedented amendments to the Administrative Procedure Act (*see* AB 1111, McCarthy, Ch. 567, Stats 1979). The Office is charged with the orderly and systematic review of all existing and proposed regulations against five statutory standards — necessity, authority, consistency, clarity and reference. OAL has the authority to disapprove any regulation that, in its determination, does not meet all of the five standards. OAL also has the authority to review all emergency regulations and disapprove those that are not necessary for the immediate preservation of the public peace, health and safety or general welfare. The goal of OAL's review is to "reduce the number of regulations and to improve the quality of those regulations which are adopted..." (Gov. Code section 11340).

(For a more detailed analysis of OAL's mandate *see* CRLR Vol. 1, No. 1 (Spring, 1981) at p. 2-8.

LEGISLATION:

For a complete summary of all the major legislation of 1981 affecting OAL and the Administrative Procedures Act, please see the "General Legislation" section at the back of this *Reporter.*

APPEALS:

On September 10, 1981, OAL rejected regulations promulgated by the Air Resources Board (Title 13, Sections 2107, 2109 and 2110) relating to a system for establishing penalties for violations of vehicle emission standards and a second system establishing a procedure to be followed when a vehicle recall is warranted.

Section 2107 provides that if quality audit tests performed upon any given vehicle or engine type indicate that average emissions for a production quarter exceed applicable ARB standards, all vehicles or engines of the tested type will be presumed to be in violation of ARB standards. Thus, manufacturers of vehicles or engine types that fail the average emissions test are liable for penalties of up to $5,000 for every vehicle produced in the production quarter, regardless of the fact that individual vehicles meet ARB emission standards.

Section 2109 permits the ARB executive officer to specify what percentage of vehicles subject to recall must actually be returned to the manufacturer and repaired and empowers the executive officer to require manufacturers to offer "incentives" to vehicle owners to return their vehicles.

The section also provides that if the number of cars actually returned and repaired is less than the specified number required to be repaired, the manufacturer is liable for a separate $500 penalty for each vehicle that constitutes the difference between cars returned and cars required to be returned.

OAL rejected section 2107 on the grounds that "(t)he rule-making file fails to show any necessity for presuming that all vehicles manufactured in a particular production quarter are in violation of applicable emission standards when the quality audit tests might show that in fact only a portion of them actually exceed the emission limits." OAL states that section 2107 exposes manufacturers to "arbitrary" and "harsh penalties" and that the rule-making file "offers no explanation" as to why such a rigid presumption is necessary to make the ARB's enforcement procedures effective.

OAL rejected section 2110 on the grounds that the rule-making file "does not present any facts which justify penalizing automobile manufactures who comply with all aspects of an ARB recall order for the failure of individual vehicle owners to respond." Although admitting that the rule-making file "does contain some evidence that past recalls have resulted in fairly low return rates," OAL concluded that there is nothing "in the record to support a conclusion that punishing manufacturers when the rate of vehicle return is less than what the ARB feels it should be would have any effect on owner compliance."

In addition to the above-mentioned reasons for disapproval, OAL rejected the proposed regulations on the basis that the ARB had failed to comply with Government Code Section 11346.4 which states in pertinent part:

> "The effective period of a notice issued pursuant to this section shall not exceed one year from the date thereof. If the action proposed in such notice is not commenced within such period of one year a notice of the proposed action shall again be issued..."

In this instance, the ARB issued notice of the proposed regulations in February, 1980, received public comment from March-May, 1980, approved the regulations in July, 1981, and filed the regulations with OAL on August 11, 1981.

OAL rejected the regulations because they were not filed with OAL within one year of the date of notice. The Governor, referring to OAL's interpretation of Section 11346.4 as "exemplary of overly strict construction," concluded that when the ARB commenced holding public hearings within one year of the date of notice, it had complied with the provisions of Section 11346.4.

In letters of October 13 and 14, 1981, the Governor overruled OAL's disapproval of Section 2109 and 2110. The Governor simply states that the ARB has the authority and, "based upon its expertise gained from extensive experience," was justified in deciding that "incentives to vehicle owners and fines imposed upon manufacturers which do not repair a given percentage of the defective engines are necessary to ensure that defective engines are repaired." Previous recalls had failed to produce a sufficient number of repaired vehicles to adequately protect the air quality.

The Governor declined to reinstate the presumption proposed in Section 2107, but did so "without prejudice of any kind to its resubmission," and in anticipation of resubmission of Section 2107 by the ARB to OAL.

DEPARTMENT OF HEALTH SERVICES. GOVERNOR ESTABLISHES

SUBSTANTIAL EVIDENCE TEST AS STANDARD OF REVIEW FOR OAL TO APPLY WHEN REVIEWING A REGULATION FOR NECESSITY.

On September 11, 1981, OAL disapproved a proposed regulation by the Department of Health Services (Title 17, Section 10381) which would require, with few exceptions, that all over-the-counter (OTC) drugs sold in California and intended for absorption in the human body contain a label stating, "Caution: If pregnant or nursing a baby, consult your physician or pharmacist before using this product."

OAL rejected the regulation for lack of authority and necessity.

Although admitting that there are "numerous statutory provisions" relating to mislabeled drugs, OAL concluded the Department only has the authority "to tag or remove such (mislabeled) drugs from the market" and lacks the "specific" authority "to impose this labeling requirement."

The Governor, in a letter of October 14, 1981, concluded the Department has the requisite authority. Health and Safety Code Section 26638 provides, in pertinent part:

"Any drug ... is misbranded unless its labeling bears all of the following information:

a) adequate directions for use;

b) such adequate warnings against use in pathological conditions or by children where its use may be dangerous to health;

c) adequate warnings against unsafe dosages or methods or duration of administration or application.

Warnings shall be in such manner and form as are necessary for the protection of users."

Health and Safety Code Section 26400 requires the Department to consider, "(t)he extent to which the labeling ... fails to reveal facts concerning the drug ... or consequences of customary use of the ... drug..."

Lastly, Health and Safety Code Section 26202 provides, "the Department may adopt any regulations which it determines are necessary for the enforcement of this division."

*Lack of Necessity:* Referring to the regulation as "broad," "all-encompassing," "imposing," and "pervasive," OAL rejected the regulation on the lack of necessity. Basically, OAL rejected the regulation because the Department could not conclusively prove that all OTC drugs present dangers to unborn and nursing young: "...the Department cannot contend that fetal exposure occurs each time a pregnant or nursing mother ingests *any* over-the-counter product."

OAL disposed of the Department's argument that consumers are misled into believing OTC drugs are safe because they do not carry a caution label in the same absolutist manner: "The Department has not shown that the consumer belief that OTC drugs are ... safe is incorrect as to *all* OTC drugs."

When overturning OAL's disapproval of the regulation, the Governor first established the standard of review to be employed by OAL when determining if a regulation is necessary:

> "...OAL is acting as a reviewing body. The level of proof required of the agency should be similar to that required by a reviewing appellate court, i.e., substantial evidence. If OAL makes a determination that the requisite necessity is lacking ..., as it did in the instant case, it must conclude that the record of the rule-making proceeding does not contain substantial evidence supporting the agency's determination that the proposed regulation is necessary. To apply any other standard would be to permit OAL to make independent health-related decisions, acting in effect as another self-appointed Department of Health Services. This would be in clear violation of Government Code Section 11340.1 which provides ... that 'it is the intent of the Legislature that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rule-making agency...' "

The Governor continues:

"If proof that OTC drugs cause actual harm to fetuses or newborn babies is required before the Department ... can adopt a regulation requiring the drugs to have a label advising potential pregnant or nursing users to consult with a physician or pharmacist before using the product, the proposed regulation would lack evidentiary support. However, Health and Safety Code Sections 26202 and 26638 require that the Department determine only that the regulation is necessary to provide pregnant or nursing mothers with adequate directions for use of OTC drugs or to adequately warn them against use if the OTC drugs may be dangerous to their health. In its review, OAL must only decide whether the Department ... determination is supported by substantial evidence, not whether, given the evidence, an initial determination by OAL would have been different than that made by the Department..."

The Governor concludes the rule-making file is "replete" with evidence and testimony that (a) the effect of OTC drugs on fetuses is unknown; (b) based on animal tests there is a strong likelihood that the effect of at least some OTC drugs on fetuses and newborn babies is harmful; and (c) that, if informed, many mothers would forego the use of OTC drugs to safeguard their young. Therefore, the Department acted reasonably and within its mandate by requiring OTC drugs to carry the warning.

APPEALS/LITIGATION:

In October, 1981, OAL was involved in a heated battle between itself and the Department of Social Services and the Governor.

On September 21, 1981, DSS filed proposed emergency regulations with OAL which would have rendered many poor children and adults ineligible from continuing to receive aid under the Aid to Families with Dependent Children (AFDC) program. DSS asserted that the basic need for the emergency regulations was to conform California law to recent changes in federal law and thus avoid the loss of federal funds.

On October 1, 1981, OAL rejected this argument and repealed the emergency regulations on two grounds: a) federal law requires formal notification from the Secretary of the United States Department of Health and Human Services, after opportunity for notice and comment, that a state's program is out of conformity with federal law before federal funds to a state are restricted; and California had received no such notification; and b) even if OAL approved the proposed emergency regulations state statute would not be in conformity with federal law and California would face the same loss of federal money. Furthermore, the State Legislature had recessed before passing AB 799, the bill which would have conformed the state statutory AFDC program to the federal program.

In addition to the above reasons OAL flatly concluded that, "(w)here, as here, ... persons would be deprived of financial aid which is critical to their health and well being, without the opportunity to comment, utilization of the emergency regulation procedures can be permitted only when the crisis situation contemplated by Government Code Section 11349.6 actually exists. This is not such a case."

On October 3, 1981, at the request of DSS, the Governor overruled OAL when, without elaboration, he simply stated an emergency existed. The Western Center on Law and Poverty immediately sought and received a temporary restraining

order barring the state from implementing the regulations.

On October 18, 1981, the same Los Angeles Superior Court judge enjoined the state from implementing the regulations pending trial. The judge ruled that the Governor's review authority of OAL decisions does not extend to OAL repeal of agencies' emergency regulations. (See Government Code Section 11346.1(b), Section 11349.5 and Section 11349.6(b).)

Meanwhile, on October 9, 1981, DSS filed a second set of AFDC emergency regulations. Again, on October 19, 1981, OAL repealed the regulations because DSS failed to establish that the regulations were necessary "for the immediate preservation of the public peace, health and safety or general welfare." (Government Code Section 11346.1(b).)

In this second instance, DSS relied upon an October 8, 1981 telegram from the Secretary of the United States Department of Health and Human Services which informed DSS that certain provisions of the California Welfare and Institutions Code were inconsistent with federal requirements. With this telegram DSS attempted to invoke Welfare and Institutions Code Section 11003 which states:

> If the United States Department of Health, Education, and Welfare issues a *formal* ruling that any section of this code relating to public assistance cannot be given effect without causing this state's plan to be out of conformity with federal requirements, the section shall become inoperative to the extent that it is not in conformity with federal requirements.

With inconsistent state statute sections rendered inoperative, DSS could, by emergency regulation, conform state AFDC regulation to federal requirements, and the newly adopted regulations, in turn, would not be inconsistent with state statute.

However, OAL ruled that the October 8, 1981 telegram did not constitute a formal ruling (additionally, California had not been given notice and an opportunity to be heard) and, that DSS reliance on Section 11003 was misplaced. Consequently, state statute remains in conflict with federal requirements and the proposed AFDC emergency regulations are still inconsistent with state law.

However, in spite of these legal gyrations, and the fact that OAL could have ruled the emergency regulations repealed on the basis of inconsistency with state law, it did not. Again, as before, OAL repealed the AFDC emergency regulations because it concluded no emergency existed:

> "Our order of repeal is based on the fact that your statement of emergency does not set out facts sufficient to suspend the rights of persons affected by this regulatory action to basic notice and a public hearing."

APPEAL OF EMERGENCY REGULATION:

On October 8, 1981, the Commission for Teacher Preparation and Licensing (Commission) filed an emergency regulation that raised the licensing fee for teaching or related credentials from $30 to $40. The Commission acted pursuant to SB 631 (Dills; Chapter 890, Statutes of 1981) which amended Education Code Section 42235 by increasing the fee which the Commission could charge from $30 to $40. The act was an urgency statute and stated:

> "This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:
>
> To prevent depletion of the Teacher's Credential Fund and severe limitations upon the ability of the Commission ... to issue credentials to applicants for service in the public school system at the earliest possible time, it is necessary that this act take effect immediately."

In reliance upon SB 631 and in need of the additional $192,000 the fee increase would generate, the Commission filed its emergency regulation."

On October 16, 1981, OAL repealed the regulation because "this fee increase ... is not needed for the immediate preservation of the general welfare." The Commission had failed to cite "any facts to demonstrate ... a need for a fee increase." Furthermore, OAL concluded that "the fact that the Legislature passed SB 631 as an urgency statute does not, of itself," permit the Commission to adopt emergency implementing regulations. Emergency regulations must meet the separate test in the APA (Government Code Section 11346.1) and, in this case, the regulations do not meet the test.

On October 26, 1981, the Commission appealed OAL's repeal to the Governor and on November 3, 1981 OAL sent a letter to the Governor explaining its decision.

OAL first postulated that the Governor does not have the authority to review or reverse OAL decisions regarding the repeal of emergency regulations. Whereas, the Governor has the authority to reinstate regulations that OAL has "disapproved," the Governor has no authority to reverse OAL decisions "repealing" regulations. (See Government Code Sections 11346.1, 11349.5 and 11349.6(b); see also above.)

Secondly, OAL claimed "[t]he use of urgency language by the Legislature is not dispositive of the question of whether a state agency may issue an emergency regulation to implement such a [statute]." Urgency statutes do not "silently repeal the Government Code provisions regarding emergency regulations and thereby permit state agencies to avoid public notice and hearing." If the Legislature wished to waive the applicable provisions of the APA it would say so explicitly, as it had done with other bills. Because the Legislature did not specifically waive the emergency regulation provisions of the APA as they pertained to the Commission's fee increase, OAL concluded that the relevant APA provisions remained in force and that, in this instance, the Commission had not satisfied them.

On November 16, 1981, the Governor overruled OAL's decision and ordered OAL to file the emergency regulations with the Secretary of State. The Governor's letter states:

"Your [OAL] determination that no emergency sufficient to justify adoption of the regulation without notice or public hearing conflicts with a contrary determination on the same issue made by the Legislature."

The Governor also relied on traditional rules of statutory construction and found that the provisions of SB 631 were more specific and recent than the conflicting provisions of the APA and, thus, controlling. Consequently, because SB 631 declares an emergency, an emergency exists, and OAL's decision to the contrary is overruled.

Lastly, in response to the ruling in AFDC emergency regulations case *(Cluchette v. Brown,* Los Angeles Superior Court No. C 384208, see above) the Governor simply states that he believes the judge was in error, that the ruling has been appealed, and that the ruling "in no way prohibits the Governor from overruling OAL in the instant action."

Note: AB 1014 (McCarthy; Chapter 865, Statutes of 1981) settles some of this confusion by amending Government Code Section 11346.1(b) to provide that "[t]he enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action."

# INTERNAL GOVERNMENT REVIEW OF AGENCIES

## THE OFFICE OF THE AUDITOR GENERAL

*660 J Street, Suite 300*
*Sacramento, CA 95814*
*Auditor General: Thomas W. Hayes*
*(916) 445-0215*

The Office of the Auditor General (OAG) is the nonpartisan auditing and investigating arm of the California Legislature. The OAG is under the direction of the Joint Legislative Audit Committee (JLAC). The JLAC is comprised of 14 members; 7 from each house, 8 Democrats and 6 Republicans. Assemblyman Ingalls is the current Chairman. The JLAC has the authority "to determine the policies of the Auditor General, ascertain facts, review reports ... take action thereon and make ... recommendations to the Legislature ... concerning the state audit ... revenues and expenditures..." (Gov. Code section 19501). The JLAC receives requests to perform an audit from Committee Chairpersons, JLAC members and Officers of the Legislature. If approved by the JLAC, the request is forwarded to the OAG.

Gov. Code section 10527 authorizes the OAG "to examine any and all books, accounts, reports, vouchers, correspondence files, and other records, bank accounts, and money or other property, or any agency of the State ... and any public entity including any city, county, and special district which receives state funds..." In addition to the traditional fiscal audit, the OAG is also authorized to make "such special audit investigations, including performance audits, of any state agency ... and any public entity ... as requested by the Legislature."

The 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 Government Activities Act (Gov. Code section 10540 et seq.); and the Performance Audit Division which reviews programs funded by the state to determine if they are efficient and cost-effective.

RECENTLY RELEASED AUDITS:

The performance audit that has generated the most controversy in recent months is report No. P-053, October 26, 1981 entitled "California's hazardous waste management program does not fully protect the public from the harmful effects of hazardous waste."

The report is extremely critical of the Department of Health Services (DHS) and its failure to perform any of its major functions as required by federal and state law. DHS's major hazardous waste management functions are:

a) issuing operating permits to all facilities that treat, store, handle or dispose of hazardous waste. DHS has the authority to specify operating criteria and minimum practice standards and the concomitant authority to deny, suspend or revoke permits.

b) enforcing the hazardous waste management laws and regulations. This function includes inspecting facilities to ensure compliance with permits, investigating complaints, and pursuing administrative remedies (suspension or revocation of permits, corrective action orders) and legal sanctions (injunctions, civil and criminal penalties).

c) regulating the transportation and shipment of hazardous waste. This involves registering hazardous waste haulers, inspecting and certifying vehicles and containers, ensuring adequate training of drivers, and coordinating inter-agency emergency response to highway spills.

d) monitoring the production, shipment and disposal of hazardous wastes. DHS is authorized to monitor the life movements of hazardous waste by establishing a "cradle-to-grave" manifest system. The primary purpose of the manifest system is to defect the "midnight dumping" or illegal disposal of hazardous wastes. The manifest system also assists DHS in collecting fees (see below).

e) collecting fees. Until recently, DHS was required to collect fees on the disposal of hazardous wastes. The fees were intended to provide enough money to fund the administration of the Hazardous Waste Control Act. However, DHS encountered such difficulty with fee collection, that collection responsibility was recently transferred to the State Board of Equalization.

The Auditor General's report listed the following shortcomings (if not outright failures) with DHS performance in each of its major function areas:

a) DHS has issued operating permits to only 18 or California's approximately 1,200 facilities (less than 2%). Moreover, the 18 permits that have been issued were not issued on a priority basis. Some of California's facilities that handle the most hazardous wastes are operating without permits.

DHS had issued interim permits to approximately 635 facilities by April, 1981 and expects to issue interim permits to the remaining facilities by 1982. However, most, if not all of these interim permits, have been, or will be, issued without an on-site inspection.

b) DHS lacks a routine inspection program to assess facilities' compliance and to identify potential problems and violations of law. DHS has inspected problems and violations of law. DHS has inspected less than 15% of the state's hazardous waste facilities and some of those inspections were prompted by complaints.

The lack of routine inspections contributes to operators' ignorance. The OAG report states that many operators were unaware of DHS jurisdiction or regulations, because they had never met DHS personnel on field inspections.

The report also concludes that DHS does not consistently resolve violations of law because it fails to adequately monitor the status of corrective actions, and, in some instances, fails to investigate complaints of improper activity.

Lastly, (in the area of enforcement) the report concludes that DHS does not vigorously pursue enforcement actions. When it does initiate an enforcement action it often settles for insubstantial penalties. The DHS response is that court battles are time-consuming, expensive and rarely as successful as informal negotiation with violators.

The OAG suggests DHS needs additional enforcement punch and recommends written citations, additional administrative fines or penalties, binding arbitration or expedited procedures for suspending permits.

c) DHS has failed to adequately regulate or monitor the shipment of hazardous wastes. DHS has not promulgated any regulations relating to hazardous waste haulers, shippers, vehicles or containers. However, on December 15, 1981, DHS will hold a public hearing to adopt emergency regulations that establish "minimum standards" relating to haulers, vehicles and containers.

DHS's monitoring system has been ineffective at tracking hazardous wastes because the manifest system does not compare producer and disposer manifest copies to verify that the same loads shipped are disposed. However, DHS is aware of the problems and has initiated the installation fo a fully automated management system that is designed to provide complete "cradle-to-grave" monitoring.

Attached to the back of the audit is the response of Ms. Beverlee A. Myers, Director of the Department of Health Services, to the OAG audit. In her response, Myers states, "I concur completely with all of the specific recommendations which are presented in the report ... [and] will move swiftly to carry out the recommendations."

The single largest step taken by DHS to date has been the complete reorganization of its hazardous substances control activities. As previously reported (see

CRLR Vol. 1, No. 2, p. 15), and until recently, the Governor was attempting to create a Department of Toxic Substances Control. Recently, the Governor abandoned this attempt and, instead, restructured the Division of Toxic Substances Control within DHS. On November 19, 1981 at an interim, oversight hearing of Assemblywoman Sally Turner's Committee on Consumer Protection and Toxic Materials, DHS unveiled its new divisional structure.

The reorganized Division of Toxic Substances Control has two branches: a) the Laboratory and Epidemiology Branch, in which all of the scientific research is conducted; and b) the Hazardous Waste Management Branch, which is the regulatory half of the Division. The Hazardous Waste Management Branch houses four sections:

1) Alternative Technology and Policy Development Section (which Acting Deputy Director Bob Stephens indicated will receive the highest priority);

2) Procedures and Regulation Development Section;

3) Permit, Surveillance and Enforcement Section; and,

4) Site Cleanup and Emergency Response Section. (This Section has the responsibility of locating and cleaning up abandoned dump sites.)

The following performance audits are scheduled to be completed and released in December, 1981 or January, 1982: Board of Medical Quality Assurance (No. 035; relating to BMQA's alleged inconsistent enforcement policy); Department of Rehabilitation (No. 038); Worker's Compensation Appeals Board (No. 045); California Horse Racing Board (No. 076); and County Lobbying Activities (No. 078).

AB 739 (Ingalls, Chapter 1168, Statutes of 1981) makes the following changes in the law:

1) declares certain records of the Auditor General to be legislative records, and, consequently, requests to inspect the records must be approved by the Joint Legislative Audit Committee;

2) expand the Auditor General's access to previously confidential records of all state agencies and any public entity which receives state funds;

3) requires that any public entity which receives state funds and enters into a contract involving the expenditure of state funds in excess of $10,000 permit the Auditor General to inspect all related records for a period of three years after the final payment under the contract; and

4) removes the January 1, 1982 Sunset date and extends indefinitely the "Reporting of Improper Governmental Activities Act" (Government Code Section 10540; see CRLR Vol. 1, No. 2, p. 13 for more details).

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

*11th and L Building, Suite 550*
*Sacramento, CA 95814*
*Executive Director:*
*Les H. Halcomb*
*(916) 445-2125*

The Little Hoover Commission was created by the Legislature in 1961 and became operational in the spring of 1962. (*See* Gov. Code section 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." (Gov. Code section 8502.) This unique formulation enables the Commission to be California's only real, 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 Gov. 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, and all expenditures of public funds, more directly responsive to the wishes of the people as expressed by their elected representatives.

MAJOR PROJECTS:

In recent months, the Commission has devoted much of its time to its investigation of the State Department of Education. To date, the Commission has concentrated on the activities and operation of individual school districts. (Los Angeles Unified School District, see CRLR Vol. 1, No. 2, p. 14 and No. 3, p. 15; San Juan School District see below.) These investigations of individual school districts has led the Commission to conclude that, although some of the districts' problems are internally created, many are the result of an inflexibly bureaucratic and essentially adversarial relationship between the districts and the Department. This conclusion has been buttressed by an Auditor General's report (Overview of the Organization, Roles, and Responsibilities of the State Department of Education, P-065; see CRLR Vol. 1, No. 3, p. 15) which states that the many entities responsible for California's public school system (the State Board of Education, the State Department of Education, the County Board of Education and the school district governing boards) are "a group of parallel, yet autonomous governing bodies..."

The Commission will not be reviewing the Governor's reorganization plan that proposed the creation of the Department of Toxic Substances Control (see CRLR Vol. 1, No. 2, p. 15). The Governor has scrapped his plans for the Department and, instead, has settled for the creation of a Division of Toxic Substances Control within the Department of Health Services. (See the report on The Office of the Auditor General in this *Reporter's* "Internal Government Review of Agencies" section for a complete discussion.)

The Commission's investigation of the California Horse Racing Board continues but there have been no significant developments in recent months.

The USC historical study of the Commission has been delivered to the Commission but as of December 1, 1981 was not yet released to the public.

RECENT MEETINGS:

On November 11, 1981, the Commission held a public hearing in Sacramento on the San Juan Unified School District. In his opening remarks, Chairman Shappell stated that the Commission was interested "in all aspects of [the District's] business management" but particularly the areas of property utilization practices, deferred maintenance, excess classroom capacity and excess school acreage.

Commissioner Post stated that, unlike previous Commission investigations of other school districts, the investigation of the San Juan Unified School District was "very favorable and cooperative." Post commended the District's representatives for their recent efforts in closing and consolidating underutilized school buildings.

In the past few years the District has closed 5 schools, reduced its budget by $3 million and cut its transportation costs by $400,000. The District has converted one of the five closed sites to school related purposes and has recently hired a consultant to study the best means of disposing of the remaining 4 sites. The sale of closed school sites is a difficult undertaking because of school related restrictive zoning ordinances, and it appears that the District will ultimately lease the 4 sites.

Commissioner Post again commended the District for its ability to avoid lawsuits while closing schools. No lawsuits have been filed over the District's closure of 5

schools, whereas in Los Angeles Post stated that the lawsuits are "rampant" over every school closure.

Mrs. Naida West, President, San Juan Board of Education, attributed the absence of lawsuits to community involvement in the decision-making process. The District held elaborate and time-consuming neighborhood hearings in an effort to involve the community and avoid alienating parents. The ultimate product was a community understanding and consensus on the need to close schools.

Chairman Shapell asked why the District still has an average 12% excess capacity in its K-12 schools. District representatives responded by saying that while the District's overall school population is declining, the population in grades K-2 is increasing. Consequently, the present 12% excess will shortly be reduced if not eliminated.

The District has a related problem of excess school acreage. Until recently, the District was a rural area, land was cheap, and consequently, the District purchased large parcels of land. Now, however, the District is more urgan, land values have escalated and the District is holding approximately 91 acres of unused yet valuable land. The District indicated it is conducting a study of its excess acreage and in some instances has initiated the rezoning process prior to selling.

The most discussed issue at the hearing was the District's implementation of the State's 21 mandated categorical educational programs (see CRLR Vol. 1, No. 2, p. 5 for a more detailed discussion). These state required programs constitute 20-25% of the District's budget and necessitate the hiring of numerous teaching and non-teaching personnel. District criticisms of the state mandated programs were primarily two-fold: (a) the state programs are too inflexible and do not give the local districts the discretion to respond to local differences and community needs; and (b) the mandate often exceeds the accompanying state funding.

The Commission expressed great interest in exploring the issue of categorical educational programs and Executive Director Halcomb indicated that interest may become the thrust of the Commission's investigation of the Department of Education. The meeting adjourned on that note.

The Commission completed two days of hearings on the status of the California public educational system on December 2 and 3. Testimony was heard from federal, state and local officials as to the effect of budget cuts necessitated by Proposition 13 and the general economic picture on school district budgets, what cuts have been made, will be made, and should be made in the near future as a result of this fiscal austerity.

Commission Chairman Nathan Shappell opened the proceedings with a brief summary of the problems facing school districts, evidence of waste in school budgets, and the concern of the Commission that more can and should be done to eliminate such waste. He noted that:

(1) There are over 1,000 school districts in California (the number is set generally at 1,043), and literally hundreds of these have almost no enrollment;

(2) Student enrollment declines yearly, and yet an increase in local budgets and manpower is observed by the Commission;

(3) Staff membership shifts increasingly from teaching to non-teaching positions, with a perceived threat of decreased educational opportunities for students, but increased demand on the state for money to pay such persons;

(4) A net increase has been noted among local school employees (mostly in these non-teaching positions of 50,000, though there are 400,000 fewer students and 15,000 fewer teachers than there were ten years ago.)

Chairman Shappell voiced the Commission's concern that the State Department of Education (hereinafter DOE) is not performing its responsibility to curb this trend adequately.

A representative from the DOE drew a grim picture of the future of the California public education system. Budgets for more programs at every level have been cut radically, and less money will be available in fiscal 1983 than there is at present. The representative asserted that local school districts will have to cooperate with one another, sharing one another's financial burdens just to maintain ordinary operations. (N.B.: at §777 levels, whatever that means.) Although the federal Consolidated Education Improvement Act will have only a limited impact on the educational programs of California, because many of these are administered solely at the state level, and do not depend on federal grants, the budgetary surplus on which local governments have relied for the last couple of years is now depleted, and severe tightening of local belts will be required in the months ahead. (Of state programs which do receive federal funding, 28 received block grants, including Economic Impact Aid (EIA), but Title I was left out of the distribution.)

A common perception of the problem at the state level was summed up in an anecdote told by one witness, Maxine Frost, President of the California School Boards Association, and a member of the Riverside Unified School District. She related that a member of a local school board was said to have suggested to the DOE that the computers at the local district be hooked into those in Sacramento so that the data required by DOE would not have to be compiled, written out and transported to Sacramento. This would result in a savings of time and taxpayer's money, it was felt. However, the state official was aghast at such a notion. It would cost 11 bureaucrats their jobs! However, Ms. Frost also warned the Commission against falling into the trap of considering all administrators as so much dead wood, pointing to the functions they perform, such as making court appearances, monitoring spending, reviewing testimony which may be considered essential to the smooth operation of an educational system the size of the state of California.

Each representtive of local school board district complained in testimony before the Commission about the amount of paper work generated by regulations promulgated by the DOE. Dr. Pauline Hopper, Assistant Superintendent of Compensatory Education of the Los Angeles Unified School District (LAUSD) illustrated the situation dramatically by indicating 15 9½" x 11" x 11" boxes she had brought to the hearing. These boxes, she said, contained only one third of the paper required to make application for funding of one program. Dr. Wayne Ferguson, Superintendent of the Fremont Unified School District, noted than in 1956 it had required one side of one sheet of paper to complete an annual budget for a school district; today, that has mushroomed into a document that can run two or three hundred pages.

Ms. Frost pointed out that one consequence of this forced concentration on paperwork is that educational objectives tend to get lost in the shuffle. Focusing on frequently trivial details of administraation causes less attention to transmission of knowledge. As Chairman Shappell pointed out, while the government argues about how, when, where, why and how much of program funding, it is the students who suffer.

The Commission was advised to study the systems of other states, such as Hawaii, where the public schools are centrally administered, and Nevada, where a mandate was handed to local districts from the legislature to consolidate a number of districts into one district by a determined date. Dr. Leland Newcomer, President of the College of the Canyon, related that at that time, 14 districts in a portion of the state were consolidated into one district. Whether such a program would be feasible in California is a question that has yet to be answered.

Dr. Newcomer also suggested that the

monitoring done by the DOE be more restricted, that local districts be given the responsibility to achieve a mandated objective, and that those districts submit simplified reports on what was to be accomplished in a given program, how they accomplished it (if they did), and evidence of accomplishment. He suggested that though the objective may be mandated, the process should be left to the discretion of the districts, who are more aware of their own situations than the department in Sacramento can be.

Testimony given by these members and representatives of the educational system was enlightening for persons unfamiliar with the administration of schools. Each witness was asked near the conclusion of his or her testimony where he/she thought the budget of the district could be cut if the district were to discover that its state funding would be cut by 10%. None appeared to feel that any more could be trimmed from present allocations without a severe reduction in the quality of education. It is with this apparent impasse that the Commission must now deal.

## DIVISION OF CONSUMER SERVICES DEPARTMENT OF CONSUMER AFFAIRS

*1020 N Street, Room 504*
*Sacramento, CA 95814*
*Chief: Ron Gordon*
*(916) 322-5252*

The Division of Consumer Services has the major responsibility for carrying out the provisions of the Consumer Affairs Act of 1970. It is through the Division's programs that the Department fulfills its mandate to educate and represent California consumers. The Division has four units: the Legislation Unit, which represents the consumer before the Legislature; the Litigation Unit, which is authorized to initiate and intervene in lawsuits that affect consumers; the Consumer Education Unit, which publishes educational information and also performs some consumer complaint mediation, and; the Research and Special Projects Unit, which does precisely as its title implies. (Please see CRLR Vol. 1, No. 2 (Summer, 1981) at p. 16 for a complete introduction to the Division.)

There have been no significant recent developments affecting either the Division's litigation or special projects.

The Division expected a ruling by the Board of Equalization on the co-op case in November, 1981 (See CRLR Vol. 1, No. 3, p. 16) but as of December 1, 1981 no ruling had been issued.

Meanwhile, the Board's proposed ruling has drawn the ire of many people and groups, including the Governor. In a letter dated November 6, 1981 the Governor urged the Board to overturn its staff's proposed ruling:

> "The Board has proposed to levy sales tax against the value of volunteer labor and membership fees..."
>
> "The novel theory of taxation offered by the board undermines basic principles of volunteer labor and self-help that have guided co-operatives for more than 100 years. Government should encourage, not hinder, efforts by people to help themselves."
>
> "Volunteer labor allows many co-operatives to sell necessities at reduced prices. A tax on this volunteer labor and membership fees could affect more than 1,000 co-operatives and buying clubs in California, raising prices and discouraging memberships."
>
> "I know of no precedent for such a tax anywhere in the United States, nor am I aware of any explicit statutory or case authority for the Board's position. I urge the Board to reverse this ruling."

Lastly, in a moment of sardonic humor, the San Jose Mercury News, in a November 15, 1981 editorial entitled, "The spirit of volunteerism?," awarded the staff of the California State Board of Equalization this year's "Harpo Marx Memorial Trophy for Off-the-Wall Thinking in Government" for "its daring, innovative, dramatically provocative and totally asinine recommendation" in the now famous co-op case.

## ASSEMBLY OFFICE OF RESEARCH

*110 J Street, Fifth Floor*
*Sacramento, CA 95814*
*Director: Art Bolton*
*(916) 445-1638*

Created in 1966, the Assembly Office of Research (AOR) performs four major functions: 1) budget analysis; 2) research and policy formulation of major policy projects; 3) routine research for Assembly members as requested; and 4) 3rd reading bill analyses. The AOR is directed by the three year old Special Assembly Committee on Policy Research Management. The Committee, chaired by Assemblyman Berman, is a bipartisan collection of house leaders. The Committee members are: Berman (Chairman), Nolan (Vice-Chairman), W. Brown, Hallet, Hannigan, Imbrecht, Lancaster, McCarthy, Pagan, Ross, Torres, and Vasconcellos. Mr. Art Bolton has replaced Mr. Steven M. Thompson as director of AOR. The Committee approves all of AOR's major policy projects and generally supervises AOR's ongoing activities. However, there is no rigid protocol between the Committee and AOR, and AOR appears to exercise a substantial degree of independence. AOR's major policy projects are often self-initiated and only secondarily approved by the Committee.

The Government Operations Review project (GOR) continues to dominate AOR's efforts. GOR is an indepth review of the efficiency of state government with particular emphasis being placed on the problems of: hiring, employee performance, purchasing, contracting for services (consultants), super agencies and administrative rulemaking. A final public report and specific legislative proposals are due in January or February, 1982. To date GOR has had the strong support of the Policy Research Management Committee Chairman Assemblyman Berman and Vice-Chairman Nolan. Mr. Doug Chandler has replaced Art Bolton as GOR project manager.

AOR's other major reports are nearing completion (see CRLR Vol. 1, No. 2, p. 18 for a partial list). As of December 1, 1981, there were no final or interim reports available to the public. However, AOR has informed the *Reporter* that reports will be made available to the public upon completion.

The *Reporter* has learned that AOR is considering the publication of a newsletter. No details on the length, content or frequency of the newsletter are yet available but any movement in this direction should be encouraged. Although AOR does not operate clandestinely, it is very difficult to ascertain what projects and reports AOR is working on and the status of any projects or reports. A monthly newsletter that included brief descriptions of projects, their status, scheduled completion dates and any related public hearings (including hearings by the Committee on Policy Research Management) would greatly facilitate efforts by private citizens and groups to keep abreast of AOR's activities.

On December 3, 1981, the AOR released a thirty page summary of the status of the seven major policy projects it has undertaken this legislative session. Final reports are scheduled for completion in early 1982 and specific legislative proposals are expected no later than early spring, 1982. The summary indicates the AOR project manager for each project and which legislator(s) requested the research projects. Short description of each project follows:

1) Project: Youth, Unemployment and Schools — State law requires that graduates of public schools "should have sufficient marketable skills for legitimate remunerative employment." However, California's secondary school system is not providing many of its students, particularly Blacks and Hispanics, the

required schools.

The project is focusing on innovative approaches to this problem that are funded and organized outside of the regular school system.

2) Project: State and County Responsibilities: Human Services Programs — This project deals with the many federal, state and court mandated programs that counties are required to provide. Proposition 13 induced budget constraints and the new federal block grant approach to human services programs have further exacerbated already strained state-county relationships.

3) Project: Local Government Revenues — Constraints and Opportunities — Since the passage of Proposition 13 in June 1978, county revenues have failed to keep pace with inflation and population increases. County "discretionary" revenues — revenues that can be spent at the sole discretion of county boards of supervisors — have declined to the point that counties are unable to fund many important local services.

Counties have become increasingly dependent on the state for more and more of their revenues. State "strings-attached" money reduces the counties' decision-making authority with the result that counties are rapidly becoming mere "agents" of the state.

The project will identify means to increase county discretionary revenue.

4) Project: Government Operations Review (GOR) — GOR focuses on the state's cumbersome and often counter-productive hiring, purchasing and contracting systems. Proposed solutions include opening more state positions to non-civil servants and delegating greater authority to department heads to conduct their own purchasing and contracting.

GOR also deals with the problem of evaluating employee performance. The study includes that the state's current system for measuring employee performance is woefully inadequate and that merit raises are routinely granted not on the basis of merit but longevity.

Additionally, GOR studies the state's administrative rulemaking control agencies — the Office of Administrative Law, the State Building Standards Commission, and the Department of Finance.

GOR concludes that the control agencies need to formalize their procedures and better define their review standards. Unnecessary delays occur because of unspecific statutory direction, disputed jurisdictions, the absence of inter-control agency communication and cooperation, and vague review standards.

Lastly, GOR reviews the efficacy of the state's Super Agencies. Created during Governor "Pat" Brown's administration, Super Agencies were designed to assist the Governor in policy formation and planning, streamlining the administration and management of the operating departments, and serving as a communication link between the Governor and the operating departments. However, the Super Agencies have gradually assumed operating functions which often duplicate or conflict with the duties and functions of the operating departments or other control agencies (Department of Finance, General Services, and State Personnel Board.)

GOR proposes that the Super Agencies either be abolished or drastically reduced in size.

5) Project: Status Offenders — Legal Issues and Treatment Alternatives — As defined by Welfare and Institutions Code Section 601 "status offenders" are persons under the age of 18 who continually disobey the orders of parents or guardians or are beyond the control of such persons, violate curfew laws or are habitually truant. Until 1976 status offenders could be detained in secured detention facilities. Since 1976 the law has prohibited the placement of status offenders in locked detention facilities. Consequently, troubled youths are "falling through the cracks" of the juvenile justice system and not receiving needed services. Moreover, the exposure of non-criminal youths to the juvenile justice system (and its many criminal youths) tends to criminalize otherwise non-criminal offenders.

The project suggests the removal of status offenders from the juvenile justice system and their placement in a newly-created family court. The study also recommends the creation of Family Service Centers which would serve as central receiving agencies in each county for all troubled youths.

6) Project: Sacramento — San Joaquin Delta — The Delta consists of approximately 60 islands, separated by some 700 mile of interconnecting waterways and protected by 1,100 miles of manmade levees. The Delta is intensively farmed and produces $400 million of foodstuffs annually. The U.S. Army Corps of Engineers has estimated that it will cost approximately $1 billion to perform badly needed repairs on the levees.

The purpose of the project is threefold: 1) identify methods of financing the repair project; 2) resolve jurisdictional disputes between the poorly-coordinated 6 local water districts, 50 levee districts and 5 county governments in the Delta; 3) prioritize specific repairs within the overall repair project. The project recommends the creation of a Delta Task Force or Study Commission to spearhead the reconstruction effort.

7) Project: Water Transfer Study — The distribution of water in California is governed by a confusing complex of state and federal statutes, regulations and prodedures, which, particularly in times of scarcity or emergency, inhibits its efficient allocation and use.

The report suggests that because of rising construction costs, interest rates, and pumping costs, the public will become more reluctant to approve publicly financed water projects. There is a growing need and demand for a voluntary water market system that will allocate water among competing claimants and create economic incentives for efficient water use.

The report will concentrate on methods and legislation to remove legal impediments to the free sale, lease and transfer of water.

## SENATE OFFICE OF RESEARCH

SOR has recently released the following reports:

1. Block Grant Provisions of Omnibus Budget Reconciliation Act of 1981 (October 23, 1981).

The Omnibus Budget Reconciliation Act of 1981 (essentially the federal budget for FY 1982) collapsed approximately 60 former categorical programs into nine block grants. The nine block grants are: Community Services; Preventive Health Services; Alcohol, Drug Abuse and Mental Health; Primary Care; Social Services; Community Development; Elementary and Secondary Education; and Home Energy Assistance. Additionally, the Budget Act reduced block grants appropriations by approximately 25% (this 25% does not include President Reagan's subsequent request for an additional 12% reduction).

The Budget Act permits states to accept immediate administrative control of any or all of the nine block grants or defer responsibility for the grants until no later than October 1, 1982. In the latter instance, the federal government continues to administer the programs in a quasi-categorical fashion. (At this time California has accepted responsibility for two grants — Social Services and the Low-Income Home Energy Assistance Program.)

Basically, the SOR report addresses the problems California government will face when administering the nine block grants in an era of shrinking government budgets. The report summarizes the problem in the following manner:

> "1. A number of the Reconciliation Act block grants will require allocation decisions to be made at the state level rather than at the federal level, meaning that the con-

stituent pressures which are attracted by such decisions will now be added to the pressures already focused on state decision makers;

2. These allocation decisions will have to be made in virtually every case, with federal fund reductions, of up to 50% over previous levels."

The report identifies two kinds of "equity" problems:

"Where a new set of issues and policy decisions must be made at the state level, what principles need to be adopted to assure a *fair selection of grantees?* Where these allocation decisions must also be accompanied by funding reductions, what principles need to be adopted to assure a fair distribution of the impact of such reductions?"

The report then discusses each of the nine block grant areas and identified (as closely as possible) specific budget cuts and funding levels, program responsibilities and possible legislative responses.

California has already made at least one formal response to the Reconciliation Act. AB 2165 (Vasconcellos; Chapter 1186 Statutes of 1981) states the Legislature's intents and findings regarding the federal block grants and establishes procedural and substantive requirements for the administration of federal block grant funds in FY 1981 and thereafter Specifically, AB 2165:

1. Directs the state to assume administrative responsibility for the Low-Income Energy Assistance and Social Services block grants for FY 1981.

2. Specifies that responsibility for the remaining block grants shall not be assumed from the federal government until July 1, 1982.

3. Mandates California to maintain its level of funding for categorical programs consolidated into federal block grants.

4. Requires all state departments affected by categorical or federal block grants to prepare a report for the Legislature on funding levels and affected clients.

5. Creates a block grant advisory task force which, among other duties, must hold public hearings on program performance and services.

6. A Background Paper prepared for the Special Session entitled "State's Welfare Program and the Federal Budget," November 9, 1981. (The SOR was assisted by the AOR in preparation of the paper.)

The federal Omnibus Budget Reconciliation Act of 1981 made a number of substantial changes in the Aid to Families with Dependent Children (AFDC) program. With minor exception, Congressional changes to the AFDC program restricted eligibility and reduced entitlements. As a result of these federal changes, many provisions of California law (both statute and regulation) were suddenly inconsistent with federal law and, consequently, California no longer qualified for matching federal funds.

The SOR paper estimates that absent the necessary statutory and regulatory changes, California could lose $60.5 million in state funds and $11.4 million in county funds in the last eight months of FY 1981.

(Please see the discussion of the AFDC program and the related attempts at regulatory change in the report on the Office of Administrative Law in this *Reporter's* "Internal Government Review of Agencies" Section for a more complete background.)

Basically, the SOR paper is a bill analysis of the following four Special Session bills:

SB 1X and AB 1X address the problems of AFDC regulatory change and OAL's rulings in that regard. In an effort to minimize the loss of federal funds, SB 1X and AB 1X authorize the implementation of the necessary AFDC regulatory changes and state that such changes constitute an emergency, thereby removing OAL's objections to the emergency regulatory changes.

SB 2X and AB 2X address those AFDC provisions that require statutory change in order to conform the state statutory AFDC program to federal requirements.

The SOR paper contains a list of the specific AFDC statutory and regulatory changes enacted by the Special Session legislation.

# REGULATORY AGENCY ACTION

## State & Consumer Services Agency (Department of Consumer Affairs)

### BOARD OF ACCOUNTANCY

*Executive Officer:*
*Della Bousquet*
*(916) 920-7121*

The Board of Accountancy regulates, licenses and disciplines public accountants and certified public accountants (PA's and CPA's). One major function of the Board's staff is to administer and process the nationally standardized CPA exam. Approximately 16,000 applications are processed each year. Three to four thousand of these applicants successfully complete the entire exam and are licensed.

MAJOR PROJECTS:

The Board's AB 1111 task force has completed its review of existing regulations. The findings have been submitted and OAL is currently conducting their review of the task force's work. The Board will hold a Rule Review Hearing May 7, 1982 in Los Angeles.

The three member task force comprised of representatives of the plaintiffs, the Board and the Department of Consumer Affairs assigned to review the Filipino case has completed its investigation (see CRLR, Vo. 1, No. 3 (Fall, 1981), p. 18). It presented its findings at the Board's December, 1981 meeting in the form of standards by which each of the controversial files could be individually evaluated. The need for these standards arises from an apparent discrepancy in the grading standards applied to Filipinos versus non-Filipinos. The recommended standards were not adopted, however. Plaintiff's counsel, the Qualifications Committee and the Board were not able to reach a common ground to modify or substitute for the current domestic experience requirements for foreign applicants. The Board did consider several individual cases and seemed satisfied that existing standards, properly applied, produced results that were both fair to the applicants and adequate to assure competency.

The Board continues to try to fully comply with the terms of the settlement. A special Board meeting has been scheduled for January 8, 1982 solely for the purpose of considering individual files of plaintiffs. To date, 195 Filipinos denied licenses have been reviewed. Twenty-nine of these have been approved, approximately 20 have been deferred due to some deficiency in their file, but these applicants can practice in the interim. One hundred forty-six were denied licenses to practice. The Board continues to search out Filipinos who would have applied to practice accountancy but were discouraged by the Board's discriminatory practices. This is a difficult task due to the increasing lack of Filipino faith in the Board's system and the impossibility of knowing who would have applied except for the Board's discouragement.

RECENT MEETINGS:

Although preoccupied by the Filipino discrimination issue, the Board made several minor decisions at its December, 1981 meeting. The Board is scheduling an awards program for January of 1982 to recognize outstanding achievement and progress related to affirmative action in accountancy. Lack of a meaningful number of nominations has been an early problem.

The Board, having received funding in June of 1981 for a free accounting program for low income Californians, is currently recruiting and considering alternative ways of implementing such a program.

FUTURE MEETINGS:

Special session January 8, 1982 in Los Angeles; January 29-30, 1982 in San Francisco.

### BOARD OF ARCHITECTURAL EXAMINERS

*Executive Secretary:*
*Michael Cassidy*
*(916) 445-3393*

The Board of Architectural Examiners (BAE) licenses and regulates architects and building designers. Architects are individuals who can legally perform any aspect of building planning and design. Building designers are members of a closed class of licensed professional designers whose projects are restricted by specific height and span limitations. BAE is a nine member special fund board composed of five public members, three architects and one building designer.

MAJOR PROJECTS:

BAE continues to work on two major projects: creating a new California licensing exam, and increasing the effectiveness of its enforcement division.

An immediate concern to BAE is the preparation of the administration of the December 1981 NCARB exam. The last edition of this *Reporter* (CRLR Vol. 1, No. 3 (Fall 1981) at p. 18) related the agreement between BAE and NCARB, i.e.: all parties agreed to preserve a national examination system. Thus, California will not give its own exam. Since BAE had virtually completed its own independent test, the BAE will provide its proposed examination specifications and materials and any future information to NCARB for integration into the creation of the new NCARB test. In return for BAE's continued use of the NCARB test, NCARB has agreed to work on a new exam which considers BAE's suggestions. This new exam is tentatively to be implemented by December 1982.

Enforcement improvement is awaiting a written report from the Department of Consumer Affairs on the subject. BAE has decided to wait for the report, so no progress has been made to improve in any major way the Board's enforcement division. (For futher information, *see* CRLR Vol. 1, No. 3 (Fall 1981) at p. 19).

BAE continues its AB 1111 review process. It currently plans to hear public comment on the last Articles, § 3-8 The Board plans to have a hearing separate from the regular meeting. The hearing will be sometime in January 1982.

RECENT MEETINGS:

The Board met in Los Angeles on October 23, 1981. The main purpose of the meeting was to prepare for the administration of the December exam.

The Methodologies Committee of the Examination Committee reported on a disappointing trip to Tucson. Hal Levin and Jerry Weisbach, two of BAE's members, met in Tucson with NCARB to revise exam methodologies. Levin related that NCARB already had its methodologies for the December 1981 exam so NCARB was not receptive to new suggestions. The BAE desires the exam to reflect actual architectural tasks and thinks the present NCARB exam is inadequeate.

Levin felt discouraged about the agreement with NCARB and does not rule out the need to give California's own exam in December 1982. To get support from other states associated with NCARB, Levin suggested BAE give the other states a recommendation about making a new exam with a copy of the NCARB agreement (see above). BAE's own newsletter distributed in November included an article on the agreement. It was sent to every NCARB member, among others.

BAE instructed its staff to supply NCARB and ECC with all information necessary regarding test change methodologies. And BAE unanimously agreed to send a joint letter from BAE and the California Council of the American Institute of Architects (CCAIA) to NCARB encouraging NCARB to seriously consider California's proposed test change methodologies.

Since California had almost completed its exam before the agreement, BAE continued to complete the exam even after the NCARB agreement. The exam makers are ready for committees to review the content of the test.

Michael Cassidy, the executive secretary, reported that an appropriations deficiency bill (SB 613) passed and was signed by the Governor. The bill gave (1) $200,000 for the December 1981 exam for which the Washington agreement with NCARB left BAE deficient; (2) $19,000 for remodeling BAE's board offices and (3) $30,000 to complete a study on the question of re-opening the Building Designer Category.

Cassidy disclosed at the meeting that BAE has decided to move into offices that are already remodeled so that the BAE can save the money designated for remodeling. The Finance Committee also discussed the cost of giving the exam. By law, there is a $50 per section limit on the cost of the exam. BAE is looking into the feasibiity of raising the cost of the fee because NCARB continues to raise the cost of the tests it supplies.

The Board discussed the actual administration of the December exam. In the past, BAE has objected to questions on the NCARB exam but the exam committee approved the December NCARB test without comment because it felt that objecting to questions was futile. However, the BAE is interested in getting input from exam takers about ambiguous or unfair NCARB questions. Since the examinees cannot leave the examination room with any notes, etc., BAE instructed staff to make a form to allow candidates to record exam questions that were objectionable. The examinees may take a carbon copy of the form out with them. BAE needs to know about objectionable questions in case examinees appeal the exam results.

Finally, the Board discussed the possibility of reopening the "Building Designer"Category. Assemblyperson Filante, Chairperson of the Assembly Business and Professions Committee, requested the study and SB 613 included money to accomplish it. The study was to define the nature and scope of registered and non-registered design practitioner lawful activity. The Business and Professions Committee expects the BAE to present the study to them by January 1, 1982. The BAE discussed whether the Board has dragged its feet. BAE decided to authorize the study as is and to see what the results are. If time or money becomes scarce, BAE can take steps then.

LEGISLATION:

SB 613 (Johnson): As noted above, this bill was passed and signed by the Governor in the 1981 session. The bill provides a 30-day grace period for building designers to renew their licenses. Included in this bill was just under $250,000 for various Board expenses, including the administration of the NCARB December exam.

SB 165 (Ellis): This bill would eliminate the public member majority of the BAE. The current makeup of the BAE, 5 public members, 3 architects, 1 building designer, would be changed under SB 165 to 5 public members, 7 architects, and 1 building designer for a total of 13 members. SB 165 was passed in the Senate and is awaiting action in the Assembly Ways and Means Committee. The BAE opposes this bill, which will probably be considered in January of 1982.

AB 1647 (L. Stirling): This bill would eliminate the category of "Building Designer" and grandfather all currently registered building designers as "architects." The BAE has taken no position on this matter. The study that Filante requested to study the need for opening the Building Designer Category will affect this bill.

FUTURE MEETINGS:

25 January 1982 in San Francisco.
8 March 1982 in Orange County.

## ATHLETIC COMMISSION

*Executive Officer: Don Fraser*
*(916) 445-7897*

The Athletic Commission regulates amateur and professional boxing, contact karate and professional wrestling. The Commission consists of five members serving four year terms each. All members are "public" as opposed to industry representatives. The Commission is Constitutionally authorized and has sweeping powers to license and discipline the sports in its jurisdiction. The Commission licenses promoters, booking agents, matchmakers, referees, judges, managers, announcers, ticket-takers, ushers, timekeepers, seconds, boxers and wrestlers. Most emphasis is placed on boxing, where regulation extends beyond licensing and includes equipment and weight requirements, physical examination requirements and the separate approval of each contest to preclude mismatches. Commission inspectors attend all professional boxing contests.

MAJOR PROJECTS:

The major projects of the five member Commission include a pension disability plan for boxers and a comprehensive rule change package designed to deregulate professional wrestling and boxing.

The pension-disability plan is the world's first comprehensive system to protect boxers. The Commission was required by the Legislature to formulate such a plan in 1974. The previous Commission did not act in the area, believing such a plan to be unworkable. The current Commission has conducted actuarial studies and drafted a plan allowing benefits from promoter, manager and boxer contribution based on the number of scheduled rounds for each boxer. Several years of continuous boxing are required for the pension part of the system to "vest."

Although the OAL refused to publish the pension-disability rules, subsequent negotiations betwen the OAL and the Commission resolved any remaining objections and the rules were filed and published to take effect on January 1, 1982.

The deregulation proposal is part of a comprehensive review of rules begun by the Commission one year before the rule review required of all agencies by AB 1111. The Commission hired a California Institute of Technology economist, Dr. Roger Noll, to conduct a comprehensive economic study of the trade as regulated and of the impact of regulation. Based on this study and subsequent hearings, the Commission has scheduled final consideration of a rule change packet for professional wrestling and boxing. The changes involve ending the licensing of announcers, ticket-takers, ushers, and other ancillary employees and the policing of these functions by simply holding their employer, the licensed promoter, responsible for their performance. Promoters would be relieved of the requirement to use licensed ticket-printers, and would not be licensed by "arena" or territory, but would be free to promote anywhere in the state.

Since wrestling exhibitions are "fixed" and injuries are rare, some have argued that its regulation should be ended. The strongest argument in favor of continued regulation has been somewhat cynical: wrestling generates revenues for the Commission to take to the Legislature to justify the appropriations needed to regulate the more dangerous sport of boxing. The current rule proposal deregulates wrestling to some extent but does not end its regulation.

The current rule change package is divided into three parts. The "primary" rule change packet includes those updating and deregulation proposals which can

be made without new enabling legislation. This package was considered and passed at the May 22 meeting of the Commission in Los Angeles. Among the changes made are: removal of promoter license requirements to identify prospective dates of events, and to specify the arena to be used (and thus be limited to that arena); removing commission certification of physicians who give physical examinations to licensees (Commission certification requirements for ringside physicians remain); removing specific limits on purse amounts payable to various contestants; removing prohibitions on starting main events after 10 PM; removing the need to keep comprehensive records of those receiving complimentary tickets; removing limits on the number of seats available to the press; and ending the licensing of ticket-printers and doormen.

The secondary rule change package includes those provisions requiring statutory change *(see below)*. The secondary package would end licensing of announcers, ushers, et al. and hold the licensed promoter who employes these persons responsible for their behavior. Likewise, wrestling is substantially deregulated. Advance notice of wrestling participants, rest period specifications, dress requirements for referees, limitations on the frequency of wrestling, and other requirements are ended.

There is also a tertiary package. Immediately prior to the AB 1111 implementation, the Commission had already written to all licensees and had sent copies of the rules to all concerned, asking for comments and suggestions. These comments are included in the tertiary package. Most of the suggested changes are not to eliminate rules, but rather in the direction of change (a boxer should or should not be saved by the bell in the final round, etc.). In addition to this existing package, the Commission proposed to OAL public hearings on June 17 and 18 in Sacramento and Los Angeles, respectively, to solicit additional public suggestions and comment. These hearings were conducted by staff with no additional public response.

In order to implement the secondary package above, and to make other changes, the Commission drafted AB 2322 (Kapiloff). This bill has passed the Legislature, and has been signed by the Governor. The bill authorizes deregulation, raises license fees somewhat, and lowers some of the gate taxes from 5% to 2%, particularly in areas where heavy competition from lower gate tax states is leading promoters to schedule the major boxing contests in nearby states. According to the Commissioners, since the implementation of the pension disability plan will cost between two and three percent of the gate, the reduction is needed to prevent large-scale avoidance of California for the bigger fights. The bill also clarifies numerous conflicting laws and rules concerning minimum glove weights and simplifies bonding requirements for promoters (requiring one bond instead of three separate bonds). In general, the Commission law and rule change packages greatly simplify regulation. The Commission believes that fraud, health and safety standards are not compromised by the changes.

The Commission is confronted with the following additional dilemmas:

1. The Commission will be reviewing amateur boxing. Currently, amateur boxing is exempt from regulation if it is nonprofit. It is nonprofit if the revenues go only for boxing related expenses. Hence, the *San Francisco Examiner* annual tournament which contributes excess funds to charity is regulated, while other amateur events are not. Since the basis for regulation is to protect health and safety and to prevent fraud, the disposition of funds would appear unconnected to these goals.

The Commission has drafted a major revision to the current law governing amateur regulation. It provides that the Commission has jurisdiction over all boxing where an admission is charged or where anybody is paid anything (covering everything but neighborhood fist fights). However, the Commission may defer aspects of its regulation to amateur supervisory bodies which meet or exceed the health and safety standards of the Commission, subject to Commission annual verification and monitoring of those standards. This would allow responsible groups like the AAU to run their own shop without having to use Commission licensed referees, but maintain general Commission oversight, preventing health and safety laxness.

2. The Commission has decided to once again review its relationships with international and national boxing organizations, chiefly the WBA and WBC. These two international boxing associations rival each other and have separate lists of "champions" and "contenders." Most state Commissions tend to belong to one or the other of these two organizations, although both are private in nature. California has traditionally been allied with the WBC, directed by Jose Sulaiman of Mexico. After an examination of its policies in 1980, the Commission voted to maintain its independence from any international organization, but to assist any who request help on a nondiscriminatory basis. This decision followed, among other things, the squelching by the WBC delegates in 1978 and subsequent years, of plans to raise funds for a boxing pension-disability plan for boxers. Although WBC and WBA conventions are replete with emotional demonstrations of concern for boxer safety and welfare, several of the California commissioners have been unimpressed with the underlying sincerity of international delegates who seem to represent local promoters more than the exalted principles espoused.

3. The Commission is increasingly concerned with unlicensed kickboxing.

RECENT MEETINGS:

The Athletic Commission met on November 20, 1981. The first part of the meeting was held at the State Building in downtown Los Angeles from 3 to 7 PM. The Commissioners interviewed seven final candidates for Executive Officer and voted to appoint Don Fraser to the post. Mr. Fraser has a long history in boxing, most recently as a promoter out of the Forum in Los Angeles. Martin Denklin, a referee and also a finalist, was selected as a Deputy Executive Officer if federal funding can be obtained for the position. If not, the Commission shall request an additional position and monies from the State budget. Financing and specification of precise duties for Mr. Denklin is problematical at this time.

The second part of the meeting occurred in the famous Main Street Gym in Los Angeles from 7 PM until 10 PM. The meeting in the gymnasium was an attempt by the Commission to make access to it easier for its poorer licensees (e.g. boxers as opposed to promoters). The meeting was not able to get to the rule change proposals. The passage of AB 2322 opens the way for adoption of both the secondary and tertiary packages described above.

The Commission heard complaints from a number of referees that current assignments to matches by Commission staff have slighted the more veteran referees and judges. The Commission voted to survey all assignments over the past year to evaluate the complaints.

Routine business included approval of new promoter licenses, a request to the Commission to compel a promoter to pay a bill for publicity work, and a request to the Commission to reverse the decision of a referee. Both latter requests were denied.

FUTURE MEETINGS:

In January 1982, to be announced. The January meeting should consider the rule change packages, the question of WBC (World Boxing Council) and WBA (World Boxing Association) affiliation and the election of a new Chairman for 1982.

## BUREAU OF AUTOMOTIVE REPAIR

*Chief: Robert Wiens*
*(916) 366-5050*

The Bureau of Automotive Repair regulates repair facilities throughout California. Automobile Repair facilities are required to be licensed, pay a registration fee (paid to the State Treasury to the credit of the Automotive Repair Fund) and display a large sign in the facility identifying them as approved repair dealerships, also advising the consumer where to direct complaints if he/she is not satisfied with the quality of service. The Bureau is then supposed to enforce the provisions of the Automotive Repair Act, sanctioning member dealerships which do not live up to its standards.

The Bureau is assisted by an Advisory Board of nine members, five from the general public and four from the industry.

MAJOR PROJECTS:

The Assembly Transportation Committee conducted interim hearings in Los Angeles in December on the Controversial "Smog Bill" SB 33 (Presley.) The bill, which will be administered through the Bureau if passed, proposes annual inspection of smog devices. Proponents of the bill claim the result of annual inspections will be cleaner air and compliance with federal Environmental Protection Agency standards. Those favoring the bill contend the federal government could cut off federal funds for highway construction and sewage treatment if such a program is not implemented. Opponents of the bill say the cost and inconvenience of annual inspections far outweigh the minimal clean air benefits they contend will result. Bureau of Automotive Repair Chief Robert Wiens said the Assembly may consider revising the Senate bill to make the inspection program biennial, rather than annual. It is expected the Assembly will vote on SB 33 in January.

SB 1232 (Presley), the volunteer shop-certification bill, has been passed out of the Judicial Committee and must pass out of the Senate Finance Committee by the end of January if it is to remain alive. The pilot program would be administered in Sacramento on a volunteer basis. Shops participating would subject themselves to inspections showing they (1) had the necessary and mandatory equipment, (2) maintained the skills of their mechanics, (3) guaranteed their work and (4) abided by the Bureau's recommendations in the event of a dispute between the shop and customer. In return for participating in the program, those repair shops would be able to advertise and display signs announcing their participation. The program would be financed by fees paid by participating shops, government agencies and private foundations. It is currently anticipated that some 200 shops in the Sacramento area would participate in the three-year pilot program.

The Bureau's AB 1111 review was submitted to OAL December 31, 1981. Hearings throughout the state resulted in little controversy and minimum changes.

RECENT MEETINGS:

The Bureau authorized an increase in automotive repair dealers registration fees, allowed under recently passed SB 380, from $50 to $100. The increase goes into effect January 1, 1982.

Chairman of the Board Roy Kiesling made proposals for the upcoming year which include: (1) Seeking alternative funding for the Bureau. Currently the entire budget is funded from fees paid by the industry. Kiesling suggested shop fees should be revised to more equitably "tax" businesses based on their volume of business. (2) Developing a collision repair brochure, which would detail for the consumer his rights against insurance companies, repairers, the Bureau of Automotive Repair and the Department of Insurance. (3) Developing methods of informing car owners and repair shops in clear language about technical information published by automobile manufacturers. (4) Contacting all domestic manufacturers to establish a corporation representative to discuss problems within the industry.

In other action, the Board appointed Rosemary Shahan-Dunlap, President of Motor Voters, of San Diego, to the vacant slot on the Bureau.

FUTURE MEETINGS:

The next scheduled meeting of the Bureau will be January 14, 1982 in San Diego at the County Administration Building. The main topic of discussion will be alternative means of funding the automotive repair dealers regulatory program.

## BOARD OF BARBER EXAMINERS

*Executive Secretary:*
*James D. Knauss*
*(916) 445-4933*

The Board of Barber Examiners sets professional standards for teaching, examining and licensing barbers; inspects barber shops; and generally assures that the public receives competent services in a sanitary environment. Two vacancies remain on the five-member Board.

MAJOR PROJECTS:

On November 30, the Board filed its Statement of Review Completion with OAL, completing its AB 1111 regulatory review. The Board is continuing its revision of the professional licensing exam. AB 2010, which takes effect on January 1, provides for a seven member Exam Review Committee which will make recommendations for an appropriate new exam.

## BOARD OF BEHAVIORAL SCIENCE EXAMINERS

*Executive Secretary:*
*Samuel Levin*
*(916) 445-4933*

The Board of Behavioral Science Examiners is responsible for licensing marriage, family and child counselors (MFCC), licensed clinical social workers (LCSW) and educational psychologists. The Board defines the scope of services which may be provided by each category or licensee, establishes education and experience requirements, designs and administers examinations, sets licensing fees, conducts disciplinary hearings and suspends and revokes licenses. The Board membership consists of eleven appointees, six of whom are public members. Two new public members, introduced at the September 1981 meeting are Richard Gaylord and Harold Sturza.

MAJOR PROJECTS:

The issue of consumer education has been a major concern of the BBSE for the last two years. The Board has argued that the task of informing consumers of their rights depends ultimately on the difficult question of what makes a good therapist. As a part of this ongoing inquiry, the Board adopted new regulations in November 1979 adding "sexual misconduct" as grounds for license suspension or revocation.

The Board has been wrestling with the task of revising the consumer education brochure. Two years of work has yet to produce a revision satisfactory to all Board members.

In September 1980 the Board proposed a regulation which would have required each licensee to prepare a full "disclosure statement" for use by potential clients. The proposed statement would contain required information as to fees, graduate degrees, supervised therapy experience, areas of therapeutic specialty and any license suspensions or revocations within the past seven years. As discussed in The California Regulatory Law Reporter Vol. 1, No. 1 (Spring, 1981), the intense controversy generated by this regulation resulted in the Board's decision not to adopt it.

RECENT MEETINGS:

Board members are responsible for

designing six examinations per year — both written and oral examinations — for the three groups of licensees. The Board is acutely aware of current suits challenging the licensing examination of the Psychology Examination Committee. The BBSE is attempting to take preventative measures to insure that their examinations meet the standard of job-relatedness. A budget proposal has been submitted to DCA for a test validation specialist to be employed by the BBSE but to operate under the aegis of DCA's Central Testing Unit. It is envisioned that the test specialist will work closely with Board members in the process of soliciting and selecting test questions.

The Board has also submitted a budget request for a word processor which will provide absolute test security and statistical information on the examinations.

The BBSE is operating with a budget surplus of approximately $400,000. To reduce the surplus, the Board originally proposed both decreasing fees and switching to a cyclical fee renewal. Due to increases in the proposed 1982-83 budget, the Board decided in July not to reduce fees but to begin licensing on a cyclical basis.

At the November meeting, the chairperson of the Consumer Education Committee reported that the Committee will be meeting in January to work on the consumer education brochure. The Committee will hold a public information hearing in conjunction with its full Board meeting on Saturday, January 9, in Monterey. The Committee hopes to produce a final version of the brochure at its meeting of January 10.

The chairperson of the Administrative Committee reported in November that the Committee had a report on the Board's Executive Secretary which she wished to present in closed session. Counsel for the Board advised the members that a closed session was permissible under law for discussing civil service personnel but not for discussing appointed personnel, such as the Executive Secretary. Board members, obviously uncomfortable at the thought of pursuing the issue in open session, seized on a loophole which would allow them to discuss "office procedure" in closed session. The questions as to which course to follow was left unresolved; the Administration Committee was directed to consider the issue and make a recommendation at the January Board meeting.

Currently, the time limits for reexamination imposed on applicants who fail the licensing examinations are inconsistent among the three professions licensed by the BBSE. The Administrative Committee has recommended that the Board seek legislation which would make the time limits consistent.

The BBSE's confusion with regard to the mandate of AB 1111 was apparent at the November meeting. The Board discovered at that time that nobody was clear as to what the Board's timeline was for completing the AB 1111 review. The Board directed the Executive Secretary and counsel to report within one week with the necessary information. The Board also discussed whether the responsibility for making AB 1111 recommendations lay with Board members or the Executive Secretary. It was decided that it was the duty of the Executive Secretary to review the regulations and submit recommendations for repeal, amendment and rewrite to the Board. The Executive Secretary's plea that he did not have adequate staffing to handle the work generated by AB 1111 went unheeded. Board member Dr. Wells Longshore was appointed as chairperson of the Ad Hoc Committee to rewrite the regulations. He will serve as liaison between the Board and the Executive Secretary.

AB 1111:

The BBSE has held four AB 1111 information hearings. One hearing was held for each of the three BBSE licenses. The fourth was a joint meeting with the Psychology Examining Committee. The meetings were structured as issue-gathering hearings only. The Board prepared issue papers on the regulations and heard comments from the public.

The joint meeting of the BBSE and PEC was held on October 3, 1981 in Los Angeles. The notice to BBSE licensees stated that the meeting would be a joint one to discuss "mutual concerns and interests relating to licensed psychologists and licensed marriage, family and child counselors and the regulations of both the Board and the Committee." The licensees who appeared for the meeting expected to discuss some of the controversial questions of jurisdiction and competency between psychologists and MFCCs. They reacted with surprise when the Executive Secretary of the BBSE explained that the meeting instead would focus on the narrower issues presented by AM 1111. Their surprise turned to anger when it was announced that the two groups of licensees would adjourn to separate rooms to discuss their respective regulations — after but a fifteen minute "joint" meeting. The Executive Secretary reacted to the hostility of the group by responding that although the notice was misleading it had at least succeeded in getting a sizeable number of licensees to attend the meeting! A member of the audience successfully suggested that the boards meet separately for awhile and then reconvene for a joint meeting.

During the separate portion of the meeting, there was considerable concern expressed about the experience requirement for MFCCs. Several suggestions were made to tight up the regulations, e.g. requiring that licensees have five years experience as MFCCs before they can perform as supervisors. Other areas of concern were the regulations covering hypnosis, unprofessional conduct, advertising and the human sexuality requirement. One Board member suggested that it would be fruitful for the PEC and BBSE to jointly consider an unprofessional conduct regulation.

At the subsequent joint meeting with the PEC, the focus of most of the discussion was in the area of competence. Licensees from both boards expressed concern at the number of fellow licensees perceived as being incompetent. Possible solutions discussed were specialty licensing and mandatory relicensing. An underlying issue which was uppermost on many minds but which was *not* dicussed is the perception of many licensed psychologists that most MFCCs are incompetent. It appeared that BBSE members and licensees would welcome an opportunity to work with the PEC on mutual problems. However, as long as PEC licensees disparage the MFCC license, such cooperation is a remote possibility at best.

FUTURE MEETINGS:

The next meeting of the BBSE will be on January 9 in Monterey.

## CEMETERY BOARD

*Executive Secretary: John Gill*
*(916) 920-6078*

The Cemetery Board licenses cemeteries, crematories, cemetery brokers, and salespersons. Religious cemeteries, public cemeteries, and private cemeteries established before 1939 which are less than ten acres in size are all exempt from Board regulation. Because of these broad exemptions, the Board has only 185 licensees, primarily brokers and salespeople. A license as a broker or salesperson is issued if the candidate passes an examination testing knowledge of the English language and elementary arithmetic, and demonstrates a fair understanding of the cemetery business.

MAJOR PROJECTS:

The Board has completed review of its regulations as required by AB 1111. The Board held its final informational hearing relative to its Article 1, general, and Article 2, fee, regulations on December 4, 1981.

On September 8, 1981 Governor Brown signed SB 912 (Craven) requiring each cemetery authority to pay, in addition to an annual regulatory charge, a

charge of not more than fifty cents for each burial, entombment, inurnment or cremation.

SB 339 (Foran) prohibiting the commingling of the cremated remains of one person with those of another without the express written permission of the person entitled to control disposition of the remains, failed Committee passage on August 10, 1981.

RECENT MEETINGS:

At its last meeting on December 4, 1981 the Board conducted its routine business of approving cemetery broker and crematory licenses and issuing cemetery certificates of authority.

The Board discussed the maintenance problems experienced for the past several years with the Hollywood Cemetery Association in Los Angeles. In the past 17 months alone the Board has received 15 complaints about the overgrown and neglected conditions. The Board is considering adoption of regulations specifying the maintenance standards it expects each cemetery authority to follow.

The Board is also considering adopting by regulation disclosure provisions on all prearrangements. When a consumer enters into a contract for cemetery commodities in advance of need, the cemetery authority can treat any payment received thereunder as a final sale with a guaranteed price or as a deposit against the cost of the goods and services at the time of death. The Board believes the cemetery authority should be allowed either option, but that the price guarantee, or lack thereof, should be clearly disclosed to the consumer at the time the contract is entered into.

The Board discussed proposing legislation making violation of the Cemetery Act a felony, and revising the endowment and special care provisions to conform to existing practices within the industry.

Service Corporation International, the largest cemetery and funeral service firm in the United States, has incorporated its endowment care funds at Turner and Stevens Company in Monrovia and at Eternal Valley Memorial Park in San Fernando. Although all endowment care funds must be held in trust, the law does not clearly prohibit incorporation of the fund itself. However, the Board believes legislative intent prohibits such incorporation.

Because an involuntary bankruptcy has been filed against Crestlawn Memorial Park Association, the Board appears to be unable to take any independent action to recover its $500,000 trust fund shortage pending the outcome of the federal court proceeding.

The Board began its December 4, 1981 meeting conducting its routine business of approving cemetery broker and crematory licenses and issuing cemetery certificates of authority. During consideration of his application for a license to operate a crematory to serve members of the Neptune Society, Richard Jongordon stated that he would be happy to show his sophisticated equipment to any Board member. Leslie Wells, one of the Board's public members, indicated that she found his invitation rather distasteful. When the Board inquired about the success of his coffin store, Ms. Wells wondered whether he intended to put bells on his coffins for Christmas. Ms. Wells had similar disparaging remarks about the interment newsletter. Bettie Kapiloff, another public member, also indicated she saw a need to inject some humor into the meeting.

The Board discussed the problem its licensees face as the result of its infrequent meetings. Often someone has invested a substantial sum of money into equipment which cannot be used for several months until the Board approves the license application. More frequently, however, the application is submitted shortly before the meeting, but is incomplete when the Board actually meets. Because the Board does not want to delay action on the license for three to four months until the next meeting, it approves the application subject to numerous contingencies, such as passing the examination and submitting all necessary documents. At this meeting the Board wondered whether it could consider two crematory applications which had not been submitted in time to be placed on the agenda. The Board's counsel noted that an agenda item can only be added if an unforeseen emergency condition exists. Without inquiring as to the actual existing conditions, Ms. Wells suggested an emergency would exist if bodies were being held awaiting cremation pending approval of the application. A member of the audience suggested that a crematory in the area already licensed by the Board could be used in the interim. Ms. Wells' motion failed for lack of a second. Both applications will be heard next meeting.

The Board discussed the maintenance problems experienced for the past several years with the Hollywood Cemetery Association in Los Angeles. In the past seventeen months alone the Board has received fifteen complaints about the overgrown and neglected conditions. However, since there is no violation of law involved, and the Board cannot expect an eighty-year-old cemetery to look like a golf course, it decided to take no action.

The Board has also been experiencing problems with Hollywood's trust funds. Money is generally not deposited into trust until thirty days after its receipt, and there have been periods of up to ninety days where trust money was not deposited. The Board accepted the owner's offer to predeposit $5,000 each quarter, the average it receives during that time, into trust. As to past violations, the Board instructed its staff to send a letter informing Hollywood that it intends to bring disciplinary action if the situation reoccurs.

In 1978, Service Corporation International, the largest cemetery and funeral service firm in the United States, incorporated its endowment care funds at Turner and Stevens Company in Monrovia, and at Eternal Valley Memorial Park in San Fernando. Although the incorporation has been disclosed on all reports submitted to the Board, the Board did not notice it until recently. SCI maintains that since the law clearly states that special care funds must be held in trust, but is not explicit about endowment care funds, a trust is not required. The Board believes that the legislature clearly intended both funds be held in trust. When SCI noted that the tax savings of approximately $50,000 per year could be credited to the fund, Ms. Wells asked him to provide the Board with information as to how that money was actually spent. The Board determined that the only way to resolve the problem is to obtain an opinion from the Attorney General.

The Board considered adopting regulations requiring disclosure provisions on all pre-arrangements. When a consumer enters into a contract for cemetery commodities in advance of need, the cemetery authority can treat any payment received thereunder as a final sale with a guaranteed price or as a deposit against the cost of the goods and services at the time of death. The Board believes the cemetery authority should be allowed either option, but that the price guarantee, or lack thereof, should be clearly disclosed to the consumer at the time the contract is entered into. The Board instructed its staff to draft regulations for consideration at its next meeting.

The Board discussed the advisability of introducing legislation making violation of the Cemetery Act a felony rather than a misdemeanor, and revising the endowment and special care provisions to conform to existing practices within the industry. To avoid the provisions of the Open Meetings Act, the Board decided to appoint a two-person Committee, Mr. Groh and Ms. Kapiloff, to draft appropriate language. A third Board member, Ms. Klass, will be a consultant to the two member Committee.

Recent legislation defined a cemetery to include a crematory. Therefore, anyone operating a crematory must obtain a

license as a cemetery salesperson. However, the qualifications for a cemetery sales license are inapplicable to the operation of a crematory. In addition, many funeral directors, licensed by the Board of Funeral Directors and Embalmers, are installing crematories in their funeral homes, with a resulting problem of overlapping jurisdiction. Ms. Wells suggested the introduction of legislation to license crematory operatory. However her suggestion ws rejected when the Executive Secretary indicated that many legislators feel direct disposition services should not be licensed at all, an alternative the Board opposes.

Although the sale is not yet final, the successful bidder at the sale of Crestlawn Memorial Park appeared to apprise the Board of Crestlawn's status. The Board indicated it hoped he was aware of all the problems with Crestlawn, including the $2 million trust fund shortage, and that he would be able to solve them.

Throughout the three and one-half hour meeting the Chair continually remarked as to the need to "keep the agenda moving." Comments could be heard from among those in attendance to the effect that the Board appeared to be more concerned with leaving as early as it could than with hearing those who had taken the time to come to the meeting.

FUTURE MEETINGS:

With the appointment of Ronald Ferguson, an industry member, the Board's quorum problem is not as critical, and the Board should be able to hold its meetings on a regular quarterly basis. The next meeting is set for March 12, 1982, in Los Angeles or San Francisco.

## BUREAU OF COLLECTIONS AND INVESTIGATIVE SERVICES

*Chief: James Cathcart*
*(916) 920-6424*

The Bureau of Collections and Investigative Services oversees the regulation of five industries: collection agencies, repossessions, private investigators, private patrol operators and alarm services. The Bureau regulates by licensing and formulating regulations. However, decisions are made by one person, rather than by a majority of Board members. The individual vested with this executive power is the Chief of the Bureau, James Cathcart. The Chief is appointed by the Governor, subject to confirmation by the Senate.

Decision-making is delegated to the Chief by the Director of the Department of Consumer Affairs. This delegation gives the Chief unusual authority to issue licenses and propose regulations. The Chief receives the license application and other paperwork directly from the applicant. He then evaluates these materials and decides whether the license should be granted. The Bureau does have one advisory Board under its jurisdiction. The Collection Agency Advisory Committee makes recommendations to the Chief regarding the regulation of collection agencies. The Committee is not a decision-making body and does not directly regulate. Because of the heavy regulation in the collection industry, it does function as a consultant to the Chief.

The Bureau only has public meetings when proposing regulations, as required by the Administrative Procedure Act. Since it is not a multi-member Board, the Open Meetings Act does not apply. There are no hearings regarding licenses; all decisions are made administratively by the Chief. The Collection Agency Advisory Committee does have regular public hearings.

MAJOR PROJECTS:

In each of the Bureau's five major industries there are ongoing projects peculiar to that industry. Each industry has its own regulations and legislation which affect it. The major project common to all five industries, however, is compliance with AB 1111.

The Bureau is currently implementing legislation regarding repossession. AB 1453 takes effect January 1, 1982, and will greatly expand the authority of the Board to regulate this industry. The new law provides for the assessment of administrative fines for violations of regulations, and clamps down on unlicensed repossession. Finally the law sets forth clear guidelines for when and where a car may be repossessed, and procedures for return of personal property. Specific administrative remedies are provided for violations of these guidelines. The Bureau is now formulating regulations that will assist in implementing the new law.

The Bureau is also proposing new regulations for firearms training programs for private security guards. The regulations call for more specific and detailed requirements, including the expansion of mandatory training hours to sixteen. These rules have been rejected by OAL (*see* Commentary discussion *infra*). The Bureau has yet to respond to the recent disapproval of OAL.

With regard to collection agencies, the Bureau is presently redrafting regulations which would bring attorneys who do substantial collection work under the Bureau's regulatory authority. Under the Collection Agency Act, attorneys are exempt from regulation by the Bureau although they engage in collection activity. Attorneys do not have to obtain a license to do collection work and do not have to register their individual collectors.

The new regulations have been submitted to the OAL, and define what constitutes doing business as a collection agency. An attorney who employs a lay person to do collection work will be regulated by the Bureau under these regulations.

RECENT MEETINGS:

At the December 18 meeting of the Collection Agency Advisory Committee, AB 1111 regulation review was discussed, as well as debtor's rights. No final decisions have been made on rule revisions under AB 1111.

FUTURE MEETINGS:

The Bureau will meet in February in Fresno to take public testimony on its regulations pursuant to AB 1111.

## CONTRACTORS STATE LICENSE BOARD

*Registrar: John Maloney*
*(916) 445-4797*

The Contractors State License Board licenses contractors to practice in California, sets forth regulations to handle consumer complaints about contractors already licensed and mandates performance requirements.

The 13 member Board, which consists of 8 contractors and 3 public members, all appointed by the Governor, meets approximately every two months. There are no vacancies at present. The Board regularly discusses amendments to the existing rules and regulations and proposes improvements in the contractors' licensing procedures, including examination question about which it has received complaints.

The Board now has three Committees: an Operations Committee overseeing budget and management; and Enforcement Committee on field work and investigations; and a Consumer, Industry and Labor Relations Committee functioning as an Executive Committee. The Committees further information and do not require a quorum.

MAJOR PROJECTS:

The CSLB has been actively investigating unlicensed activity. A sweep of the Mammoth area was conducted by 2 teams. These teams are composed of 2 persons: an investigator from the Department of Labor Standards and a deputy from the CSLB district office in the area. The teams visit job sites and issue citations for unlicensed activities and other illegal activity (e.g. not carrying worker's compensation or paying workers cost without tax deductions, etc.) Civil penalties levied totaled approximately

$37,000. This money will be channeled to the Department of Labor Standards for further enforcement activity.

Sweeps were also conducted in San Jose and Monterey. The CSLB opened a total of 64 cases for investigation: 17 against non-licensees and 47 against licensed contractors. In San Jose, after repeated sweeps, the city issued 157 business licenses to contractors in September, as compared to 23 in August. The primary reason appears to be word of mouth about the sweep activity, which detects failure to obtain a local business license as well as failure to have a CSLB license.

The staff of the CSLB is now contacting the CSLB staff of other Western states to learn what they are doing and to set up mutually beneficial relationships. The Registrar will meet with other state registrars to solicit suggestions for improved programs.

A public hearing was held at the October 28-30, 1981 meeting to raise fees for different licensing activities up to their statutory maximums. Until now they have been well below authorized maximum levels. The Board is desperately trying to cut costs and raise money from alternative sources to meet current expenses. Although no bill is pending, the Legislature will be shortly asked to develop some general guidelines to tie future fees to the costs of running individual programs applying to those paying the fees. The fee raises adopted by CSLB in October were not related to specific costs, but were required because of general budgetary problems faced by the CSLB.

RECENT MEETINGS:

Board rule #775, which gives the Registrar the authority to waive written examinations when certain requirements are met (e.g. at least 4 years of experience with a licensed contractor) will soon become irrelevant due to the passage of AB 1590 (see below). AB 1590 gives the Registrar broader discretion to waive exams, e.g. without the experience requirement. The law becomes effective January 1, 1982. In the 90 day period prior to the October CSLB meeting, 56 requests for waivers were filed: 28 have been approved, 18 are pending and 10 were rejected.

The CSLB hired a consulting firm to review 5 of the current contracting exams and report to the Board on whether the tests were good, i.e. does it test what it should, does it measure what it should, and is it a reliable indicator of competence. The consultants reported that the 5 exams studies are in need of significant redoing. Out of the 700 questions examined, 64% of them were faulty for entry level contractors, with 35% of the questions thrown out completely. The reading level required for the exams was well above the standard 10th grade level.

Several very general suggestions were offered at the October CSLB meeting to improve the exam: 1) have a panel of experts in the field advise staff in writing the exam; 2) do an in-depth job analysis and test only what is needed for that job; 3) protect against adverse impact on certain groups of examinees.

At its October 1981 meeting, the CSLB was also presented with the problem of its authority to review the Registrar's decisions. After a long discussion, the Board decided that they have the authority to review everything that the Registrar does but that they should reconsider his decisions only in extraordinary situations. There are time limits imposed to CSLB review to asssume certainty in final decisions. The time limit in most cases will be 30 days.

The final business at the October meeting was a hearing on whether the solar license classification should remain as a supplementary classification (SC44) or whether it should become a primary classification. This was a very hotly debated topic, with about 14 people testifying. After hearing all of the comments at the meeting, the CSLB referred it back to Committee and tabled it until the December or subsequent meeting of the Board, at which time a final decision will be made.

LEGISLATION:

Of the 4 bills introduced in the 1981 regular session, only AB 1590 passed. (For a description of all 4 bills, see CRLR, Vol. 1, No. 3 (Fall, 1981) p. 24.)

AB 1590 (Ingalls): Provides that an examination for a contractor's license may be waived if the qualifying individual has an active license in the same classification as that being applied for; or if the qualifying individual has, for 5 of the 7 years immediately preceding the application for licensure, been employed by an active licensee in the same classification as is being applied for. The new law provides that an exam for a contractor's license for a licensed corporation seeking to replace its "qualifying individual" may be waived if the new qualifying individual is an employee of that corporation, and, for 5 of the 7 years immediately preceding the application, has been employed in a supervisory capacity in the same classification as is being applied for and the corporation has held a license in good standing in the same classification. The new law takes effect January 1, 1982.

AB 178 has ben introduced in late session and may be considered in 1982. It would provide that the penalty for engaging in the business of a contractor without a license shall be a fine of not less than $100 or more than $5,000.

FUTURE MEETINGS:

The next meeting of the CSLB will be in January at a time and place to be announced.

## BOARD OF COSMETOLOGY

*Executive Secretary:*
*Harold Jones*
*(916) 445-7061*

The Board of Cosmetology, as with the Barber Board, regulates the "beauty" industry by teaching, examining and licensing. It has seven members, four public and three from the industry.

MAJOR PROJECTS:

The Board has nearly completed its AB 1111 review; a final public hearing will take place January 24. In an attempt to reduce its $1.1 million budget surplus (*see* CRLR Vol. 1, No. 3 (Fall, 1981)) the Board has submitted a rule change proposal allowing it to reduce license fees. The Board will vote on the fee reduction schedule at its January meeting.

The Board has now adopted Statements of Review Completion for all but two of its articles. At its January 1982 meeting, the Board will review the regulations concerning exams and sanitary rules.

The Board decided at its November 15-17, 1981 meeting to seek fine penalty authority for santitation violations. According to Executive Secretary Harold Brown, violations discovered in salon inspections would be corrected more quickly if fines could be levied immediately. The Board is currently drafting legislation and seeking a sponsor.

Concern over unlicensed activity continues. The Board has issued a press release urging both the public and its licensees to report instances of unlicensed activity.

RECENT MEETINGS:

The Board met in Moneterey on November 16 and 17. In addition to hearing committee reports, the Board discussed satellite classrooms. There is a national trend toward existing cosmetology schools setting up branch campuses away from the main facility.

The Board also set up a special ad hoc committee to report on the prevalence of "hair braiding" by unlicensed persons. The current popularity of braided hairstyles has prompted the Board to investigate whether all practitioners should be licensed; it is seeking an Attorney General Opinion on the question.

The Board's "clean-up bill," AB 1674 and SB 612 has been signed by the Gover-

nor. The latter bill gives the Board additional authority to monitor cosmetology schools and provides additional protection to cosmetology students.

Finally, the entire Board adopted a Mission, Goals and Objectives Statement for the coming year to promote Board efficacy.

FUTURE MEETINGS:
January 24 and 25, in San Francisco.

## BOARD OF DENTAL EXAMINERS

*Executive Secretary: Rodney M. Stine*
*(916) 445-6407*

The Board of Dental Examiners issues state licenses to practice dentistry to those applicants who successfully pass the examination administered by the Board. The Board is charged with enforcing the provisions of the Dental Practice Act (Business and Professions Code, Section 1600 et seq.) through various disciplinary measures. The Board consists of four public members and eight practicing dentists.

Dental auxiliaries are also regulated by the Board. The Board is assisted in this regulatory effort by its Committee on Dental Auxiliaries. Although the Committee enjoys a sizeable degree of independence from the Board, it has no regulatory authority of its own and acts in a purely advisory capacity vis-a-vis the Board. The Committee has nine members.

MAJOR PROJECTS:

Guidelines enabling dental assistants to perform more complex dental procedures once they obtain the Board required training are currently being drafted into regulations. The expanded functions for dental assistants have long been opposed by the California Dental Association. However, the Association has now accepted the concept, but remains concerned about the type and amount of training which the Board should require. The dentists contend that the dental assistants should be held to the same "result and standard of care" as a dentist for any functions they perform. The Committee on Dental Auxiliaries and Association are continuing to discuss guideline standards. Rodney Stine, Executive Secretary of the Board of Dental Examiners, said the guidelines should be drafted into regulation form within 90 days.

The Board approved at its December 11 meeting a Diversion Program, which would give a dentist who is a substance abuser the option of entering a rehabilitation program or facing disciplinary action and possible suspension or revocation of his/her license. Further, the Board voted to allow its staff investigators to arrest licensed dentists unable to perform their duties due to being under the influence of drugs or alcohol. Arrest would be a last-resort measure and would basically entail taking the abuser to a treatment facility. The program and enforcement provisions have been submitted to the Assembly for drafting.

New Penalty Guidelines and Regulations will be discussed by the Disciplinary Action Committee January 15, in Los Angeles. The Committee is expected to consider approving pretrial conferences as a means of resolving disputes between clients and dentists prior to a full hearing. Another consumer oriented provision the Committee will consider is proscribing education requirements when a dentist is found to be incompetent. The penalty would ensure that a dentist could not practice until competency is proven. In the area of malpractice, the Committee may recommend new reporting standards when malpractice suits are settled by insurance companies. Under present law, any malpractice suit that is settled in excess of $3,000 must be reported to the Board. The Committee is expected to debate both the pros and cons of raising the requirement to $10,000 or lowering it to $500. Those favoring the $500 settlement reporting standard content clearer patterns of continued violations by a single dentist will be noticed. However, proponents of the $10,000 reporting requirement claim consumers would benefit by having more leverage in obtaining higher malpractice settlements. Other considerations to be reviewed will be staff capabilities of handling additional workloads. Yet a third alternative to be considered is having insurance companies report any combination of malpractice settlements that add up to $10,000 in a two year period.

At the insistence of Board member Dr. Shirley Bailey, staff is currently investigating how the state school system can prescreen school age children for dental problems. It is hoped this can be done through existing programs, private insurance programs and volunteer dental exams. This is expected to be one of the major programs the Board will develop in 1982.

The Board is continuing its AB 1111 review. It is scheduled to be completed in February or March and will be submitted to OAL in April or May.

FUTURE MEETINGS:

The next scheduled meetings are January 22-23, 1982 at the Royal Inn in San Francisco; February 26-27 at the Sheraton Hotel, Airport, in Los Angeles; and March 26-27, Royal Inn, Airport, San Francisco.

## BUREAU OF ELECTRONIC AND APPLIANCE REPAIR

*Chief: Jack Hayes*
*(916) 445-4751*

The Bureau of Electronic and Appliance Repair registers service dealers who repair major home appliance and electronic equipment. Grounds for denial or revocation of registration include false or misleading advertising, false promises likely to induce a customer to authorize repair, fraudulent or dishonest dealings, any willful departure from or disregard of accepted trade standards for good and workmanlike repair and negligent or incompetent repair. The Electronic and Appliance Repair Dealers Act also requires service dealers to provide an accurate written estimate for parts and labor when requested, provide a claim receipt when accepting equipment for repair, return replaced parts and furnish an itemized invoice describing all labor performed and parts installed.

To ensure compliance with the Electronic and Appliance Repair Dealer Registration Law and regulations adopted pursuant thereto, the Bureau continually inspects service dealer locations. It also receives, investigates and resolves consumer complaints.

MAJOR PROJECTS:

During September 1981, the Bureau received 200 written consumer complaints, 85 involving repair performance and 23 involving failure to return equipment. The Bureau resolved 137. For 53 complaints the Bureau found no violation, but resolved the complaint by mediation, adjustment or referral. Eight informal adjustments were made and 41 complaints were closed for insufficient evidence. Four hundred forty-three complaints were pending before the Bureau, however 117 are not being processed at this time as the result of current administrative and/or criminal action against the service dealer. One hundred fourteen verbal complaints were received and resolved by telephone. The Bureau obtained $2,552 in consumer monetary relief. The Bureau issued 53 notices of non-compliance and sent 24 warning letters, primarily for non-registration. One administrative accusation and 1 criminal action were filed. One registration was revoked and another suspended. Twelve administrative and 13 criminal actions were pending. Forty-two investigations were opened, 54 closed and 97 pending. The Bureau ran 3 sets through suspect dealers. Total communications, including all incoming and outgoing correspon-

dence and telephone calls were 6,201, of which 84 were registration applications. Eighty-seven registrations were issued during the month and as of September 30, 1981 the Bureau had 8,578 total registrations.

During October 1981, the Bureau received 164 written consumer complaints, 98 involving repair performance and 30 involving failure to return equipment. The Bureau resolved 173. For 89 complaints, the Bureau found no violation, but resolved the complaint by mediation, adjustment or referral. Six informal adjustments were made and 40 complaints were closed for insufficient evidence. Over 400 complaints were pending before the Bureau. However, 120 are not being processed at this time as the result of current administrative and/or criminal action against the service dealer. One hundred twenty-six verbal complaints were received and resolved by telephone. The Bureau obtained $6,280.38 in consumer monetary relief. The Bureau issued 58 notices of non-compliance and sent 26 warning letters, primarily for non-registration. Two administrative accusations and 2 criminal actions were filed. One registration was revoked. Twelve administrative and 14 criminal actions were pending. Thirty-seven investigations were opened, 62 closed and 93 pending. The Bureau ran 2 sets through suspect dealers.

Total communications, including all incoming and outgoing correspondence and telephone calls were 6,283, of which 122 were registration applications. Eighty-seven registrations were issued during the month and as of October 30, 1981, the Bureau had 8,552 total registrations.

The Bureau is continuing its attempt to resolve the problems service dealers experience in obtaining replacement parts from certain manufacturers. Letters were sent to 7 manufacturers detailing dealer complaints and inquiring as to what action they had taken in response. The Bureau has yet to receive a reply.

RECENT MEETINGS:

The Bureau's Advisory Board is comprised of 2 representatives of the appliance industry and 5 public representatives appointed for four-year terms. Ronald Rosen, an attorney from Beverly Hills, has replaced John Hopkins as one of the Board's public members. The Bureau is currently attempting to fill the 2 public vacancies on the Board.

At its last quarterly meeting on December 18, 1981, Jose Balbin, Sanyo's National Service Manager, informed the Board of the improvements made in its parts availability and distribution systems. Because the Bureau was successful in resolving this problem with Sanyo, it plans to invite other manufacturers with parts availability problems to appear before the Board. Although the Bureau's jurisdiction does not extend to manufacturers, by bringing problems to the attention of the public and the industry, the Board hopes the manufacturer will attempt to resolve the parts problem informally with the Bureau rather than risk adverse publicity.

Although Atari has been in contact with the Bureau, it has not yet registered its Sunnyvale video game repair facility. Because the Bureau does not have clear jurisdiction over manufacturers or video games, it is reluctant to take legal action at this time, even though it is still receiving complaints involving Atari. The Bureau plans to introduce legislation in the next session clarifying their jurisdiction in this area and anticipates registration by Atari once the legislation is introduced.

The Board considered at length the need for legislation defining the extent of the Bureau's jurisdiction. Much of the current technology, and consequently the items service dealers repair, was not envisioned when the Electronic and Appliance Repair Dealers Act was originally written. The Board favors clarification of Bus. & Prof. Code § 9801 by revising the definition of "service dealer" and specifically including automobile radios and stereos, direct satellite antennas, home computers, video games and information distribution units within the Bureau's jurisdiction.

FUTURE MEETINGS:

The next Board meeting will be held in March. However, the exact date has not yet been set.

## BUREAU OF EMPLOYMENT AGENCIES

*Chief: Portia S. Siplin*
*(916) 920-6311*

Created by the Employment Agency Act, the Bureau of Employment Agencies is a seven-member board consisting of three representatives from the employment agency industry and four public members. All members are appointed by the Governor for a term of four years, and a quorum of four is required.

The Employment Agency Act empowers the Board to inquire into the needs of the employment agency industry. It is charged by statute with focusing its concern on promoting the public welfare. Based on this inquiry, the Board sets its policies. At its most fundamental level, the Board operates as an advisory board to the Chief of the Employment Agency Bureau.

The Chief of the Employment Agency Bureau prepares examinations for all candidates and ensures they are examined in accordance with designated rules and regulations established by the Chief. No employment agency may operate without a license; no license is issued unless an examination has been satisfactorily completed. A license entitles the licensee to engage in the business of finding all types of employment for others and charge a fee for the service.

Prior to licensing, an employment agency deposits a bond of $3,000 with the Bureau payable to the State of California for any damages caused by the licensee. The Bureau adopts rules and reglations that define "good business practices" within the trade, and is charged with establishing guidelines for violations of these rules, as well as assessing penalties for violations.

Presently, the advisory board has only six of its seven positions filled. The vacant seat is for a public member. Ms. Siplin hopes this seat will be filled in the near future. Since the Board is purely advisory, the Bureau's ability to take action is not impaired. In any event, the Chief makes many of the decisions unilateraly, usually asking for advice only on important matters.

MAJOR PROJECTS:

AB 1633 remains a major concern of the Board. AB 1633 had passed in both the Assembly and the Senate. The bill would have stripped the Bureau of its enforcement powers and provided that the Senate (instead of the Governor) would fill vacancies on the Board. It was announced at a recent meeting that AB 1633 has been vetoed by the Governor. It is not anticipated that the bill will be reintroduced this year.

The Bureau distributed drafts of several proposed amendments to the Employment Agencies Act which would strengthen the Bureau's enforcement and disciplinary authority, and stiffen the penalties for violations of both the statute and the Bureau's regulations. These proposed amendments include:

(1) A provision which would more clearly define the activities which cannot be performed without a Bureau license;

(2) The denial of a license to any person previously convicted of engaging in unlicensed activity;

(3) The addition of specific civil remedies for unlicensed activity over and above the existing but difficult remedy of criminal prosecution, including injunctions to restrain further unlicensed activity, a $6,000 penalty for violation of such an injunction, and a $2,500 immediate penalty for operation of an employment agency without a license;

(4) A specific statute which would authorize the Bureau to discipline an agency for a violation of its rules and regulations;

(5) The imposition of a $1,000 fine on an agency operating after 30 days following cancellation of its statutory surety bond.

Other proposed legislation includes:

(1) An amendment which would establish a panel to review complaints involving an allegation that an applicant terminated employment for just cause within 90 days from the date of employment and is thus entitled to a fee refund;

(2) The transfer of the responsibility for licensing modeling agencies from the Bureau of Employment Agencies to the Department of Industrial Relations; and,

(3) A proposal that the Bureau be allocated $250,000 from its Fund for the purpose of conducting an independent study of the personnel services industry in California and the Bureau of Employment Agencies.

The Bureau's 1981 request for an additional $170,000 for undercover investigative operations for 1982 was disallowed by the Legislature. Further, the Legislature added the following control language to the budget: "no funds may be expended for the purpose of conducting undercover investigations." Bureau Chief Portia Siplin stated that undercover investigations were essential to adequately monitor unlicensed activity and to test allegations of fraud. When the employment agency industry members expressed strong opposition to undercover activity, Ms. Siplin responded that such investigation is only conducted when unlicensed activity is suspected or when the Bureau receives a complaint about a licensed agency. After further discussion, the Board passed a unanimous resolution expressing its opposition to the budget control language.

AB 1111:

The Bureau recently conducted an AB 1111 review of several articles of its rules and regulations, including regulations pertaining to advertising, nurses' registry licensing, and miscellaneous rules. Issue papers distributed by the Bureau reflect an admission by the Bureau that the entirety of Article 3 (Advertising) does not satisfy the "clarity" criterion established by AB 1111, and a complete proposed redraft of the article was printed. It was also proposed that one section in the nurses' registry regulation be repealed as partly duplicative by another statute and partly in excess of the Bureau's statutory authority. Several miscellanous regulations were recommended for clarification, repeal and/or incorporation with other related regulations, or further study by the Board.

FUTURE MEETINGS:

Friday, February 19, 1982 in Los Angeles.

## BOARD OF FABRIC CARE

*Executive Secretary: Beverly Bair*
*(916) 920-6751*

The Board of Fabric Care licenses, regulates and disciplines the dry cleaning industry. The Board is supposed to consist of seven members, four from the public and three from the industry. Presently, the Board is operating with only five members. The two public members who resigned five months ago have not yet been replaced.

MAJOR PROJECTS:

The Board of Fabric Care's effort to ban the use of two dangerous chemicals in "on-site" dry cleaning has been momentarily set back. AB 103, the Board sponsored bill regarding on-site cleaning, was not voted on due to the Republicans walk-out during the Assembly controversy over reapportionment. The bill will be voted on when the Legislature reconvenes in January. The bill is expected to pass.

The use of toxic chemicals in the carpet cleaning industry may soon be addressed by the Board. Board President Bob Depper informed members that a new chemical method of cleaning carpets was unveiled at a recent carpet cleaners trade association meeting. Apparently, the new method involves the use of a "mysterious solvent" which Depper reports is urea-formaldahyde, a carcinogenic chemical. Presently, the Board has no regulatory authority over the carpet cleaning industry. This is primarily due to the fact that carpet cleaning used to involve only a soap and water method. The Board of Fabric Care must soon decide if it will seek legislative authority to regulate the use of chemicals in carpet cleaning.

The Board is also conducting meetings with the Department of Consumer Affairs legal office in order to explore the options available to the Board in assisting with the rash of abandoned dry cleaning establishments. The Board has received over 200 complaints from consumers who have been unable to reclaim their clothes from dry cleaning stores which have been left abandoned. The Board presently cannot immediately enter these plants in order to prevent clothes from being stolen. Various Board members have been volunteering their time to help consumers reclaim clothes that remain in the abandoned plants. The Board is exploring the possibility of using an insurance policy or a fund to cover the consumes losses.

The Board is considering AB 1111 rule review through a "task force." The Center for Public Interest Law has critiqued many of the existing rules as unnecessary red tape, or as redundant to existing statutes.

RECENT MEETINGS:

Doris Easley reported that the Board's new exam and answer sheets have been put into effect. All the translators, who foreign speaking applicants are allowed to employ, must now state in writing that they have no ties to the dry cleaning industry. There had been some speculation that the translators who knew the dry cleaning process were unfairly helping some applicants. The Board also adopted a policy that no instructors from the various dry cleaning schools will be allowed to be examiners at the licensing tests. The Board felt this was necessary in order to avoid any appearance of impropriety between applicants and their former teachers.

The Board of Fabric Care has also recently changed location. The Legislature sought to expand some of its offices forcing the Board to its new address at 1430 Howe Avenue, Building G, Suite 3, Sacramento, CA 95825. The Board is also considering purchasing a car. The state contract prices range from 5,000 to 6,800 dollars. The Board has authorized the Executive Secretary to pursue this matter.

LEGISLATION:

AB 360, a bill which would have required a tax on alterations made on new garments was vetoed by the Governor. SB 257, which was recently passed, will require the Board to establish the maximum and minimum time period to process a licensee's application.

FUTURE MEETINGS:

On December 4, 1981 in San Francisco Airport Holiday Inn, the Board conducted the last of the AB 1111 task force reviews. A report on the task force's final recommendations will be reported in upcoming issues of the Reporter.

## BOARD OF FUNERAL DIRECTORS AND EMBALMERS

*Executive Secretary:*
*Kathleen Callanan*
*(916) 445-2413*

The Board of Funeral Directors and Embalmers licenses funeral directors, funeral establishments, embalmers and approves change of business name or location. It registers apprentice embalmers, annually approves funeral establishments for apprenticeship training,

annually accredits embalming schools and administers the licensing examinations. The Board inspects the physical and sanitary conditions of a funeral establishment, enforces price disclosure laws and audits preneed funeral trust accounts maintained by its licensees. An audit by the Board of a licensed funeral firm's preneed trust funds is statutorily mandated prior to transfer or cancellation of the license. Currently, there are approximately $54 million in preneed trust accounts in California. To date, the Board has recovered nearly $2.5 million in out-of-trust preneed funds. In addition, the Board investigates and resolves consumer complaints.

MAJOR PROJECTS:

The Board continued review of its regulations as mandated by AB 1111, holding an informational hearing on October 30, 1981 to consider its regulations governing apprentice embalmers and embalmer's licenses, as well as its general, procedural, and miscellaneous regulations.

Based upon lack of necessity the Board is recommending repeal of 4 of the 5 regulations governing apprentices. However, the Board favors revising § 1229 to clearly specify that all embalming by an apprentice, up to and including the first 100 human dead bodies shall be completely performed under the direct supervision of and in the presence of the designated supervising embalmer. While many believe the apprenticeship program needs improving, some licensees feel that the expense involved in requiring such supervision will cause several funeral directors to abandon their apprenticeship program. Nevertheless the Board believes the statute mandates such supervision and hopes to ensure that apprentices receive proper training.

The Board is recommending repeal of most of its regulations of the licensing examination. The Board finds no necessity for regulations specifying such routine examination procedures as no smoking, talking or leaving during the exam.

For the same reason the Board suggests repeal of 3 of its 4 general provisions, retaining only the regulation requiring licensees to file current addresses with the Board.

The Board determined that subsequent to passage of the Administrative Procedure Act and the Open Meeting Act several of its procedural regulations were unnecessary. The remaining procedural regulations will be considered further at the next hearing.

The Board is recommending reducing the renewal fee paid by a licensed embalmer brom $50 to $25. At present, fees collected from licensed funeral directors account for approximately 43% of the Board's revenue, yet 83% of the Board's annual expenditures are for funeral director related activities. Embalmer fees comprise approximately 46% of the Board's annual revenue, while only 17% of the Board's budget supports embalmer related activities. (The remaining 11% of the Board's annual revenue is derived from surplus money investments.) The Board believes it is not equitable for 1 licensee group to subsidize the activities provided to other licensees. However, current budget projections indicate that the Board will experience a deficit within 2 years unless it is able to generate additional revenue. Reducing the embalmers' fees would necessitate a substantial fee increase elsewhere. Since the Board's major expense involves auditing of preneed accounts held by funeral directors, fees will likely be raised for those maintaining reportable preneed trust funds.

The Board plans to complete its review at its next meeting.

Governor Brown signed AB 201 (Papan) on September 23, 1980. The Board continued to oppose this preneed bill, even though its most controversial provisions were "gutted" prior to passage. The Board is continuing to work for the enactment of legislation eliminating the trust fund abuses widespread under the Short Act which in effect allows Funeral Directors to act as bankers. In part, as the result of the controversy surrounding AB 201, the Assembly Committee on Business and Professions held hearings in Los Angeles on November 18, 1981 and in Sacramento on November 20, 1981 to determine appropriate legislation regulating preneed funeral arrangements. (See discussion in the Advocacy Section, *supra.*) Kathleen Callanan, the Board's Executive Secretary, testified to urge that all money collected for funeral goods and services in advance of need be placed in totten trust accounts with the licensed funeral director as beneficiary.

The Board has been actively attempting to recover the $500,000 trust fund shortage at Crestlawn. However, with the filing of the involuntary bankruptcy against the firm, the Board is precluded from taking further action.

James B. Allen is the Board's new inspector for Northern California.

RECENT MEETINGS:

Under a policy adopted last year, the Board began denying a license to any profit making mortuary having the word "society" as part of its licensed name. The Board believes use of such a name implies the firm is a charitable or not-for-profit organization and therefore is confusing and misleading. Firms previously so licensed have not been required to change their name, but firms operating under a temporary license as a "society" are not being granted a final license under that name. At its last meeting on October 30, 1981, the Board denied a license to San Francisco Neptune Society and indicated it would also deny a license to Hayward Neptune Society. The Board expects the 2 firms to bring suit to determine the constitutionality of its policy.

The Board considered similar problems experienced with memorial and membership societies operating for profit. As the result of several consumer complaints and inquiries, the Board investigated the various types of societies and found wide variations in their operation. Some are not licensed at all, some independently licensed, while others are operated by a licensed funeral establishment. One society is organized simply to sell preneed arrangements serviced by a licensed funeral director who is not affiliated with the society. Some societies place the membership fees collected into trust accounts until services are provided, but others do not. Because of this disparity the Board believes some regulation is probably appropriate, even if only a disclosure of the status of the society and whether the membership fee is applied toward the cost of services at the time of death or is used for office expenses. The Board instructed its staff to draft regulations, including regulations retroactively prohibiting use of the word "society" by any licensee unless the firm is actually non-profit, for consideration at a future meeting.

The Board prohibited the charging of a revocation fee when preneed funds are held in a totten trust. Although the statute authorizes a 10% revocation fee, the Board concluded that such a fee may only be charged on reportable trusts maintained by the funeral director. The funeral director may not withhold any portion of the totten trust upon revocation by the depositor.

FUTURE MEETINGS:

The next Board meeting has not yet been scheduled, but will be held between January 11 and 18, 1982, in San Francisco.

## BOARD OF REGISTRATION FOR GEOLOGISTS AND GEOPHYSICISTS

*Executive Secretary:*
*John W. Wolfe*
*(916) 445-1920*

This eight member Board licenses geologists and certifies geophysicists and

engineering geologists. Most of these designations are done by examination and a few are done by Board recognition of comparable training and experience in other states.

The Board is composed of five public members and two professional members. There are no vacancies. The staff consists of two full-time employees, the Executive Secretary, Mr. John Wolfe and his secretary and two part-time employees. The President of the Board is Dr. James Slosson.

The Board is funded by the fees it generates. The projected budget for fiscal 1981-82 is $134,557. The Board meets monthly, usually on the third Thursday of the month. Meetings are held at various cities around the state.

The Board is headquartered at 1120 "N" Street, Room 1124, Sacramento, CA 95814.

MAJOR PROJECTS:

As mandated by AB 1111, a review of the Board's existing rules and regulations against the criteria of necessity, authority, clarity, consistency and reference is underway. This review of the Board's regulations began on March 26, 1981 and is expected to be completed by February 28, 1982. The Board held public meetings on September 17 and October 15, inviting public participation in the review process through oral or written comments. Staff reports that the Board expects to have their Statement of Review Completion to the OAL by the scheduled deadline of February 28, 1982.

The Board has proposed two pieces of legislation, AB 940 and AB 2175, both primarily sponsored by Assemblywoman Lafollette. AB 940 would allow the Board to prescribe application fees for, and increase the renewal fees for, specialty geologists and geophysicists. Public hearings have been held to allow public comment on the bill. AB 2175 would add a definition of "negligence" to the enabling statute. Members of the Board feel that such an amendment will help the Board protect the public against substandard geological work.

The Board is also attempting to formulate policy concerning the certification of "reciprocity" candidates; i.e., geologists and geophysicists from other states or countries, with equivalent certificates of registration. Statutes provide that the Board may issue a certification to an entering applicant with equivalent certificate of registration, without written examination, when the applicant satisfies Board rules (Bus. & Pro. Code Section 7847). The Board is attempting to formulate a procedure to guide the certification of such applicants. The procedure the Board is considering consists of a mandatory "oral appraisal interview" of the applicant by the Board to determine his knowledge of California law concerning the practice of geology or geophysics. The Board is attempting to formulate criteria that would guide such an oral interview.

The Board is also trying to formulate policy to guide the certification of geologist and geophysicists under the "grandfather" section of the enabling statutes. Business and Professions Code Section 7847.5 and 7847.6 provide that the Board may issue a certification of registration, without written examination, to geologists and geophysicists with at least 14 years of professional geological work experience. The purpose of these sections was to provide a procedure for the certification of "eminent" professionals in the field without resorting to a written examination. There is a difference of opinion among Board members as to procedures which should be followed; some members believing that all such applicants be required to take some kind of examination as a condition to certification. The Board has been grappling with this problem for some time and no resolution seems imminent.

RECENT MEETINGS:

At the September 17, 1981 meeting in San Francisco, the Board approved an increase in the renewal fees for registration as a geologist or geophysicist from $40 to $80. The Board is allowed by statute to set renewal fees of "not more than $80." Budget constraints were cited as the reason for the increase of fees to the statutory upper limit. The new renewal fees will take effect at the 1982-1984 biennial renewal period. Other major subjects at the September meeting were the "reciprocity" problem, AB 940 and AB 2175, and the timing of the fall written examination.

In addition to the public hearings concerning the AB 1111 regulation review, the Board at its October 15 meeting, considered the amendment of regulations dealing with credit for graduate work to fulfill Board registration requirements. The Board regulations require, among other things, at least 7 years of professional geologic work to be eligible for geological examination. A portion of this requirement can be fulfilled through graduate work. The proposed amendment concerned the computation of these experience credits for graduate work. A graduate student geologist brought to the Board's attention inequities in the proposed scheme as it would be applied to persons concurrently working and going to graduate school. The Board decided to postpone action on the proposed amendment, pursuant to further Board discussion.

At its November 19, 1981 meeting, the Board adopted a new regulation which specifies that "A registered or certified geologist or geophysicist shall practice only in the field or fields in which he or she is by education and/or experience fully competent and proficient." The Board conducted further public hearings on their AB 1111 regulation review at this November meeting.

LEGISLATION:

At close of the last Legislative session, both AB 940 and AB 2175 were still in Committee, but staff expects further action during the 1982 session.

FUTURE MEETINGS:

The Board meets regularly the third Thursday of the month. The next two meetings have been scheduled: January 20 in Sacramento; February 16 in Los Angeles.

## BUREAU OF HOME FURNISHINGS

*Chief: Gordon Damant*
*(916) 920-6951*

The Bureau of Home Furnishing licenses manufacturers, retailers, renovators and sterilizers of furniture and bedding. In addition, the Bureau establishes rules regarding labeling requirements approved by the California State Department of Public Health pertaining to furniture and bedding.

To enforce its regulations and control its licensees, the Bureau or its inspectors have access to premises, equipment, materials and articles of furniture.

The Chief of any inspector may open, inspect and analyze the contents of any furniture or bedding and may condemn, withhold from sale, seize or destroy any upholstered furniture or bedding or any filling material found to be in violation of rules and regulations of the Bureau. And the Bureau may also revoke or suspend a license for violation of its rules.

There is an eleven member (5 industry members and 6 public) California Advisory Board of Home Furnishings. It advises and makes recommendations to the Chief of the Bureau regarding changes in rules and regulations of the Bureau, needs of the industry and policy changes to promote public health and safety. The Chief of the Bureau serves ex officio as the secretary of the Board, but is not a board member.

MAJOR PROJECTS:

The Bureau's main concern is review of its regulations mandated by AB 1111. The Bureau has been developing "position papers" on its regulations which will be submitted to the Office of

Adminstrative Law (OAL) for approval. The "position papers" are a result of the Bureau's review of its regulations for necessity, clarity, authority, consistency with other laws and proper reference.

The Bureau has been holding public informational hearings on the existing regulations; however, little public or industrial input has been received.

The Advisory Board of the Bureau met in September 1981. The following was discussed:

Analysis Costs: The Board discussed the budget problems being caused by the increase in upholstery analysis costs. The main factor contributing to this has been the increase in chemical costs. The Board reported that because of this, the cost of each furnishing analysis has increased 100% over the last year.

Waterbed Regulations: At the industry's suggestion the Board is going to draft new waterbed regulations to bring the current ones "up to date with today's industry." The original regulations were drafted in 1973. Since that time the industry has grown and changed so much that the regulations do not cover all "waterbed" products.

Care Labeling: Three to four years ago the Board had considered requiring the industry to attach "Care Labeling to Upholstered Furniture" labels to upholstered furniture. The purpose of the labels was to provide information to consumers regarding proper care and cleaning of the particular fabric used in their piece of furniture.

At that time the Federal Trade Commission was also in the process of instituting a similar plan. Because of this, the Board opted to suspend its own plans pending the outcome of the FTC action.

Nothing has ever materialized on the Federal level, however, and so the Board is preparing to follow through with its original plan.

Much opposition is expected, especially from the fabric industry. Because there are over 20,000 different types and styles of upholstery fabric, the industry views its task under this plan to be an enormous and costly undertaking.

Feather Pillow Fraud: The Bureau was recently made aware of a manufacturing company who had been fraudulently selling what they claimed to be new white-goose-down pillows. The Bureau found specifically that (1) the amount of actual goose down was 20% less than the minimum allowed by law and (2) that the pillows, claimed to be of all new materials, were found to contain substantial amounts of old materials.

The Bureau was in the process of procuring an injunction against the company when it was purchased by a larger company. The Bureau found procuring an injuction against the new "innocent" company to be difficult as they had not "personally" acted in violation of any regulations.

The Chief of the Bureau has ordered that all of the pillows in violation of standards not be sold in California and ordered them to be shipped out of state.

Consumer Education Pamphlets: The Board discussed a new consumer information pamphlet entitled "Tips on Purchasing Mattresses and Foundations" and the draft of a new pamphlet regarding feather and down products.

Legislation Update: For substance, see CRLR, Vol. 1, No. 3, (Fall 1981), at 29. SB 205 (Green) has been put on "hold" in the Legislature. The bill will not be actively pursued by its author at this time and has been made a two-year bill. In the meantime, the Los Angeles District Attorneys' office is examining ways to address the issues dealt with in SB 205, by means other than with Legislation.

AB 1079 (Floyd) was passed at close of session, but in amended form. As amended, the bill has no impact on the Bureau of Home Furnishings and only affects the Contractor's State Licensing Board.

Broyhill Amendment: Representative Broyhill (R-NC) had drafted an amendment to the Federal Consumer Product Safety Act which would have allowed preemption of State Safety Standards by industry standards. Under this bill, if the furniture industry within a state were to voluntarily adopt their own safety standards and those standards were found to be adequate by the Consumer Product Safety Commission, then the industry would not be bound by a states own standards.

The Bureau was strongly opposed to this bill. The bill passed through congress but was blocked in conference.

FUTURE MEETINGS:

To be announced.

## BOARD OF LANDSCAPE ARCHITECTS

*Executive Secretary: Joe Heath*
*(916) 445-4954*

The Board of Landscape Architects licenses those in the practice of designing landscapes and supervising implementation of design plans. To qualify for a license an applicant must successfully pass the written exam of the National Council of Landscape Architectural Registration Boards (CLARB) and the Board's oral exam. In addition, an applicant must have the equivalent of six years of landscape architectural work. A degree from a Board approved school of landscape architecture counts as four years of experience.

The Board is required to investigate all verified complaints against any landscape architect and to prosecute all violations of the Practice Act. The Board consists of four public members and two professional landscape architects, one each from Northern and Southern California.

MAJOR PROJECTS:

Current projects of the Board include: review and revision of testing procedures; completion of the Board's sunset report; distribution of the consumer brochure; and implementation of AB 1111.

The Board has consistently experienced difficulties in its relationship with the Council of Landscape Architectural Registration Boards (CLARB), from whom the written exam (the Uniform National Examination — UNE) is purchased. Much of the difficulty stems from California's lack of representation on CLARB. Although California buys 48% of the total exams sold by CLARB, it has only one vote in the organization. As a result, California has been unable to affect a reduction, a quantity discount or even a freeze on CLARB's exam fees. California presently subsidizes about 60% of the cost of the exam to its examinees. Last year about ½ of the California Board's exam budget paid CLARB for exams. Furthermore, the Board believes that the UNE has an eastern bias which results in California examinees being penalized for using design components which, though incorrect for the East, are quite correct for California because of different climate conditions, etc. The Board has considered developing its own exam, but recognizes that development of an exam would be costly, would take enormous time and energy commitment and might affect reciprocity from other states.

Board member Paul Saito recently elicited comments from other states' boards about the possibility of a CLARB board restructuring to help eliminate the alleged biases. Three of the four states which have responded so far sympathize and indicate support, but say that many of the problems California is experiencing might be peculiar to California because it purchases so many exams. Board member Mike McCoy said that change must come from within the CLARB board itself.

In the meantime, Board Executive Secretary Joe Heath is putting together two proposals: first, to have exams graded by some combination of college professors and professional landscape architects in California, rather than by CLARB in New York; and second, to have an independent party review the exam to see whether it actually reflects public health, safety and welfare considerations. (The history portion of the

exam, in particular, has been criticized by students, professionals and Board members for having no relation to public health, safety and welfare.) Heath is also constructing two timetables: one for writing the 1983 exam; and one for preparing documents and representation for the 1982 CLARB meeting, which will be held in February in San Diego.

The Board is also revising its oral exam procedures. The oral exam tests applicants' knowledge of law (e.g. mechanics' lien laws) and plants unique to California. Heath has devised a plan whereby the Board would nominate about twenty oral exam "Commissioners" (licensed landscape architects), train them and then hire them to conduct oral examinations of candidates. Heath said the orientation of the exam would be changed from the mere failing of students for poor performance on the exam to counseling them on which courses to take to improve their scores. Heath expects the plan to be fully operating next year. The present oral exam procedure involves two Board members examining one to three candidates at a time.

The Board's sunset report, written by Joe Heath and an undergraduate student hired out of Brigham Young University, was completed in August. The Board's continued existence depends on submission of a report detailing the need for the Board and an evaluation of its performance by June 30, 1982. The Board has recently finished reviewing its report.

The report outlines the purposes, organization and administration of the Board, discusses the continued need for the Board, and evaluates Board performance. Its recommendations include:

1. Appointment of an additional professional member (the Board is currently composed of four public members and two professional members).

2. Amendment of section 5641 of the Business and Professions Code, the Landscape Architecture Practice Act, to eliminate several broad exemptions. Right now, there is no formal legal distinction between landscape "architects" and landscape "designers," except that the latter do not need a license. Section 5641 permits anyone to design a landscape without a license if public health or safety are not affected.

3. Granting of restitutionary powers to the Board in judgments handed down against individual landscape architects. The Board wishes to be able to make the plaintiff whole in case of default or delinquency by the offending landscape architect.

The Oregon Board of Landscape Architects was sunsetted for six months last year before a new bill reinstated it as a licensing board. California's Board is currently sunsetted. California licenses fully 50% of the nation's landscape architects.

The Board has been looking into more effective methods of publicizing and distributing its consumer brochure, which explains the qualifications of a good landscape architect and encourages consumers to report their complaints to the Board. The Board distributed the brochure to licensees to be made available in their offices and to local schools, news media, consumer unions and the Sierra Club. The Board also contracted with the California Consumer Affairs Association (CCAA, a branch of county government) to distribute the brochure in fourteen counties through its normal channels, local consumer groups. The Board never received a distribution report from seven of those counties because of June of this year the state had slashed their budgets. Heath nevertheless believes the brochures were distributed in those counties. But Bord member Ernie Spears and Board President Nancy Hardesty agreed that CCAA was not doing a good job distributing the brochures. Board member Carla Frisk is currently researching the possibility of using Public Service radio and television announcements to promote the brochure and to make consumers aware of the existence of the Board. Heath ordered 50,000 more brochures with the budget surplus (about $4,000 of unused funds earmarked for part-time help and travel).

The Board's AB 1111 review of regulations is now complete. The Board shall submit a record of review to the Office of Administrative Law in the form of tapes by January of 1982. The comment period was held open until the end of 1981.

At the Santa Barbara meeting July 11, several code sections were reviewed and modifications suggested. An audience of five, including two professors of landscape architecture, a landscape architecture student/Board Education Committee member and a staff monitor from the Center for Public Interest Law, actively participated. Suggested revisions dealt with the clarity and necessity of the regulations.

RECENT MEETINGS:

The October 30, 1981 meeting was held at the San Francisco Airport Hilton Hotel. Board member Ernie Spears was absent.

The majority of the meeting time was devoted to an indepth review of the Board's sunset report third draft. Each Board member was permitted to make page-by-page (and at times, line-by-line) corrections and suggestions. There was little discussion of the changes; most were minor and quickly agreed upon by the Board. The report had been significantly revised from the second draft with long-awaited input from professional landscape architects. At the conclusion of the review, Board members Mike McCoy introduced a resolution that the Board endorse the report in substance. The resolution was adopted by the Board. All that remains to be done with the report before submission is for Joe Heath to make the agreed upon corrections.

All other activities of the meeting were conducted by subcommittees because, at various times, there were not enough members present to constitute a quorum. Before Carla Frisk arrived, Paul Saito presented a report on responses to a letter he had sent to other states' boards concerning CLARB. (See Major Projects, above). Later in the meeting, after Nancy Hardesty left, Carla Frisk played tapes of public service announcements created by a company whom she believed should be hired by the Board to create an announcement promoting the Board's consumer brochure. The topic was put on hold to be discussed at the next meeting.

FUTURE MEETINGS:

The next meeting of the Board will be held in February, precise date and place to be announced.

## BOARD OF MEDICAL QUALITY ASSURANCE

*Executive Director:*
*Robert Rowland*
*(916) 920-6393*

The BMQA is a nineteen member Board within the Department of Consumer Affairs. The Board is divided into 3 autonomous divisions: Allied Health, Licensing and Medical Quality.

The combined purpose of the BMQA and its three divisions is to protect the consumer from incompetent, grossly negligent, unlicensed or unethical practitioners, to enforce provisions of the Medical Practice Act and to educate healing art licensees and the public on health quality issues.

The functions of the individual divisions are as follows:

The Division of Allied Health licenses and regulates the areas of audiology, physician's assistants, podiatry, speech pathology, physical therapy, psychology, acupuncture and hearing aids. Most regulation occurs through the Committees of this Division (*see* separate reports, *infra*).

The Division of Medical Quality is responsible for disciplining physicians who are found to be in violation of the Medical Practice Act. In addition, it is attempting to establish review mechanisms to identify physician problems such as drug and alcohol abuse and rehabilitate the physician before the problem

becomes more serious and affects patients.

The Division of Licensing's responsibilities include testing for licensing, license renewal, establishing the continuing medical education requirements and verification of the physician's license to practice.

The BMQA, together with its three divisions, meets approximately five times a year at various locations throughout the state.

MAJOR PROJECTS:

As with many other agencies, the Board's primary concern is complying with AB 1111. The position papers are currently being drafted and are slated as an agenda item for the January meeting. The Board expects to hold public hearings in April and June.

The Board is also in the process of considering an amendment to section 2052 (old section 2141), the definition of the "practice of medicine."

RECENT MEETINGS:

The most recent Board meeting was November 12-13 in Los Angeles. The Board has decided to table the proposal to amend section 2052 until future meetings. Several members expressed concern over the measure, noting that althrough there has been much discussion, little may be done. Another member emphasized that the goal of any change was not to decrease the level of protection to the public but to carry forward a higher level of public protection. There remains a divergence of views on the subject.

The Board also elected the following persons for the 1982 term: BMQA President: Eugene Fellmen, M.D.; Vice President: Marc Babitz, M.D.; Division of Allied Health Chair: Jeoffrey B. Gordon, M.D.; Division of Medical Quality Chair: Lawrence M. Hill, M.D.; Division of Licensing Chair: Lindy Kumagai, M.D.

BMQA Executive Director Robert Rowland initiated discussion on four bills which the Board is interested in sponsoring in 1982. The first proposed bill would allow the Board to increase FLEX exam fees to cover both the change to the Board imposed by the Federation of State Medical Boards and reasonable administrative expenses. The bill would also appropriate an additional $112,000 to the Board's current year budget to avoid a serious disruption of the June 1982 FLEX. The second proposed bill allows the following MQRC Program legislative changes: (1) increasing the number of panel members from five to seven while still maintaining a quorum of five; (2) clarifying the role of the committees to focus on the general review of the quality of medical practice; (3) clarifying the definition of quorum to be the appointed membership and not the total possible membership; (4) expanding the pool of potential panel members to achieve the peer review originally intended in the creation of MQRC's in AB IXX; and (5) deleting seciton 2020 which implies that the Board's investigators and medical consultants work for MQRC's. The third proposed bill acts to repeal archaic statutes including the student loans grant program which has currently been replaced by the Physician Incentive Loan Program. The fourth proposed bill would insure confidentiality of orders for mental illness examinations by removing these orders to compel psychiatric examination from the public record.

The Division of Allied Health is currently considering drafting legislation to allow registered nurses, physician assistants and pharmacists to prescribe drugs. This proposed draft addresses an ongoing controversy among physicians, registered nurses and the Attorney General's office over the legality of a non-physician prescribing drugs.

The Division of Medical Quality is enjoying continued success in its Diversion Program for Impaired Physicians. The program provides a structured peer support system for impaired physisicans.

The Division also expressed disappointment in progress in several districts in its Professional Performance Pilot Project, noting the possibility of discontinuance in certain areas if progress does not improve.

The Division of Licensing continues to push for a supplemental California Licensing Exam (CLEX) as well as influence changes in the national exam to include CLEX subject areas. The division set forth the task of developing and implementing CLEX as a major goal for 1982.

The Division awarded ten loans through its Physician Incentive Loan Program. Of the ten recipients, seven speak Spanish, six are minorities and two are women.

FUTURE MEETINGS:

January 21-22, 1982 in San Diego.
April 1-2, 1982 in Sacramento.
June 10-11, 1982 in Monterey.
September 16-17, 1982 in Santa Clara.
November 18-19, 1982 in Palm Springs.

## ACUPUNCTURE ADVISORY COMMITTEE

*Executive Officer:*
*Susan Andreani*
*(916) 924-2642*

The Board of Medical Quality Assurance's Acupuncture Advisory Committee is an eleven member committee charged with setting educational and licensing standards for acupuncturists. The Committee consists of four public members and seven acupuncturists Five of the acupuncturists must have at least ten years' experience in acupuncture, but need not possess a physician's and surgeon's certificate. The remaining two must have at least two years' acupuncture experience and possess a physician's and surgeon's certificate.

The Committee makes recommendations to the Division of Allied Health Services (Division) of the Board of Medical Quality Assurance, based on information gathered at public hearings and the expertise of its professional members. It serves in an advisory capacity, and is not empowered to adopt regulations. (This function is reserved for the Division.) The Committee will become an autonomous rule-making body on July 1, 1982, and will them be known as the Acupuncture Examining Committee.

MAJOR PROJECTS:

The Committee is currently evaluating schools which have applied for approval of their acupuncture programs. Three California schools will be evaluated in February. One school is located in San Diego and two are situated in Los Angeles.

In evaluating acupuncture programs, the Board interviews the faculty members teaching the course. These interviews are designed to analyze the qualifications and experience of acupuncture instructors. The interviews and curriculum evaluation form the basis of the final determination regarding the quality of the school's acupuncture program.

The Committee is constantly upgrading the licensing exam. The October exam, which included a written portion, had a 26% pass rate. Public hearings will continue to be held regarding exam contents.

The Committee is also attempting to establish an appeals process for those who failed the exam. This process allows an individual to write a letter explaining the grounds for his/her appeal. A subcommittee reviews these letters, and determines whether the appeal is justified. Remedies for when an appeal is granted will be determined in February.

LITIGATION:

The Division is presently evaluating the possibility of further legal action regarding the Committee's proposed regulations expanding the scope of the acupuncture licensing examination.

The necessity of these regulations was based on the professional judgment of the members of the Committee and not on empirical study. The OAL had rejected the regulations, citing a lack of

necessity demonstrated in the rule-making record. The Committee contended that its members had the professional expertise to set exam standards by weighing public testimony and relying on the Committee member's professional backgrounds.

The OAL veto was upheld, however, when the Governor failed to render a decision on the Division's appeal within the ten-day statutory appeal period, the APA provides that all appeals of OAL decisions are heard by the Governor. If he does not act within ten days of receiving the appeal, the OAL decision is automatically sustained.

Acting on the advice of counsel, the Division will probably elect to rehear the regulations rather than immediately appealing to the California District Court of Appeals. While the APA does allow such an appeal after the exhaustion of administrative remedies, the Division has been advised that rehearing will help make a stronger case. The Division wants to confine the issue on appeal to whether the Committee's professional judgment can justify the broadening of exam standards without corroborating empirical study. Complying with the notice and hearing aspects of the APA will ensure that the appeal is not decided on procedural grounds.

If the OAL again rejects the exam regulations, the Division will appeal to the Governor and, if necessary, to the District Court of Appeals.

RECENT MEETINGS:

The Committee met on October 17 in San Francisco to hear public testimony on the use of the title "Doctor" by acupuncturists. The Committee has recommended that new acupuncturists be allowed to use the title Doctor if certain requirements are met. An acupuncturist would be allowed to use the title if he or she has taken the current upgraded exam and as three years of clinical education. Presently, an acupuncturist can only use the title if he or she is an M.D. or has a doctorate from an accredited educational institution.

FUTURE MEETINGS:

The Division of Allied Health will meet in San Diego on January 22, 1982, and will consider inter alia, acupuncture exam content regulations.

## HEARING AID DISPENSERS EXAMINING COMMITTEE

*Executive Officer:*
*Carol Richards*
*(916) 920-6388*

The Board of Medical Quality Assurance's Hearing Aid Dispensers Examining Committee consists of seven members, four public. One public member is a licensed physician and surgeon specializing in treatment of disorders of the ear and is certified by the American Board of Otolayrngology. Another is a licensed audiologist. The three non-public members are licensed hearing aid dispensers. The Committee prepares, approves, grades and conducts exams of applicants for a hearing aid dispenser's license. The Committee also reviews the qualifications of applicants for the exam.

Actual licensing is performed by the Board of Medical Quality Assurance. The Committee is further empowered to hear all disciplinary matters assigned to it by the Board.

RECENT MEETINGS:

At the September meeting in Los Angeles the following items were discussed:

Competency Guidelines: The Committee is continuing to work on "Competency Guidelines" which will be designed to outline minimum requirements of a hearing aid dispenser in practice. The Speech Pathology and Audiology Examining Committee is expected to contribute recommendations on this subject. The Division of Allied Health of the Board of Medical Quality Assurance is in favor of the drafting of such guidelines.

Continuing Education (CE): Course content and approval of CE programs was discussed in September. Some CE courses in the past have been submitted to the Committee and approved when little more than the course name and a brief outline were made available. The courses later presented to licensees were not the same as those approved. The Committee resolved that in the future more detailed information about the exact course content would be requested, to assure the Committee of the content and quality, before approval would be given.

Supervision of Temporary Licensees: The Committee continued to deal with the problem of supervision by licensed dispensers of temporary licenses. The Committee discussed drafting guidelines which would outline the requirements and limits of a temporary license and also outline the requirements of a licensee with respect to supervision of a temporary licensee.

A major problem exists in that temporary licensees are being allowed to practice without the close supervision of a licensed hearing aid dispenser that is required.

The Committee hopes their guidelines will force more close supervision of the temporary licensees.

LEGISLATION:

AB 194: It was reported that the "urgency clause" had been removd from the bill in an attempt to get it through the current session of the Legislature. It did not work, however, so Assemblyman Rosenthal will re-insert the urgency clause and attempt passage in 1982.

AB 194 would amend section 3350, et seq. of the Business and Professions Code. The stimulus for this Assembly Bill was the perceived problem caused by "itinerant dispensers" of hearing aids. "Itinerant dispensers" of hearing aids are licensed or unlicensed sellers of hearing aids who move about between various establishements of licensed vendors and sell hearing aids to the public. Allegedly, problems arise when consumers seek service for defective products and are unable to locate the seller who has moved on to a new location. It is already unlawful to fit or sell hearing aids without a license. The bill further defines, in broader terms, who will be "deemed to be engaged in the fitting or selling of hearing aids." (Any individual who makes recommendations, either directly or in consultation with a licensed hearing aid dispenser, to any person with impaired hearing for the purpose of fitting or selling hearing aids and is in direct physical contact with that person.) AB 194 also requires licensed hearing aid dispensers who engage in the fitting or selling of hearing aids at the business location of another licensee to notify the Board of the location and dates that services are to be provided at that location. And the Bill also provides that a licensee who is the owner, manager or franchisee at a location where hearing aids are fitted or sold shall be responsible to the purchaser for the adequacy of the fitting or selling of any hearing aid sold by any licensee at that location.

AB 1111:

The Committee held its second public comment hearing on all its regulations on September 25 in Los Angeles. The Committee will continue to work on its regulations before submission to the OAL. No final product has yet emerged.

FUTURE MEETINGS:
To be announced.

## PHYSICAL THERAPY EXAMINING COMMITTEE

*Executive Officer: Don Wheeler*
*(916) 920-6373*

The Physical Therapy Examining Committee is a six-member board charged with the responsibility for examining, licensing and disciplining approximately 8,600 physical therapists. The Board has three public members and three physical therapist members. Presently, one public member position is vacant.

Committee licensees fall into one of four groups: Physical therapists; physical therapist assistants, physical therapist supervisors (physical therapists with at least two years' experience who, upon Committee certification, can supervise up to two physical therapist assistants); and physical therapists certified to practice electromyography. The latter certificants engage in kinesiological electromyography or the more rigorous clinical electromyography.

Lastly, the Committee approves physical therapy schools. An exam applicant must have graduated from a Committee-approved school before being permitted to take the licensing exam.

When approving schools, the Committee relies almost exclusively on the guidelines supplied by the American Physical Therapy Association and the Council on Post-Secondary Education. Because the Committee recognizes these national standards, there is at least one school in each of the 50 states and Puerto Rico whose graduates are permitted to apply for licensure in California.

MAJOR PROJECTS:

The AB 1111 review of existing regulations continues to be the Committee's dominant project. To date, the Committee has had only limited participation in the review process, with the majority of comments being received from its licensees.

Executive Officer Wheeler has stated that Committee position papers will be ready for the Committee's January meeting. At that meeting, the Committee will have a consent calendar and discuss those regulations that elicit comment.

In a related OAL action, the Committee adopted a revised fee schedule at its November meeting and submitted the proposed schedule to OAL in early December. If OAL approves the fee regulations, the Committee's budget problems will be alleviated. Projections indicate that further increases will not be needed until 1986.

A related budget problem continues to plague the Committee. As previously reported the Committee has prosecuted very few enforcement actions in recent years. However, this year has seen a marked increase in enforcement activity. As of December 1, 1981 the Committee was involved in six cases; two recently filed accusations, one nearly complete stipulation (which can involve probation, suspension, revocation, restitution or community service), two other stipulations still being negotiated and one soon-to-be scheduled hearing.

This increase in enforcement activity is putting a large strain on the Committee's budget. The Committee is in the process of requesting additional funds for enforcement purposes, but its past poor enforcement record is hampering the Committee in this regard. However, Wheeler expressed confidence that the additional funds would eventually be forthcoming. Meanwhile, the Committee is forced to pursue its enforcement remedies very slowly and avoid going to expensive hearings for as long as possible. Wheeler stated that budget constraints have not yet forced the Committee to compromise or settle for unsatisfactory stipulations in order to avoid administrative hearings and save money.

The Committee's consumer education brochure is still scheduled for distribution in early 1982.

Rumors continue to circulate about revising the Committee's regulations pertaining to physical therapist supervisors. However, no specific Committee action has been taken at this point. One possible revision might be the elimination of Committee approval for physical therapists to become supervisors.

B 1980 (Moorehead; Chapter 629, Statutes of 1981) was signed by the Governor.

FUTURE MEETINGS:

The Committee will meet in San Francisco on January 15, 1982.

## PHYSICIAN'S ASSISTANTS EXAMINING COMMITTEE

*Executive Officer: Ray Dale*
*(916) 924-2626*

The BMQA's Physician's Assistants Examining Committee regulates the various types of "physicians' assistants," their supervisors and training programs. The Legislature has provided for paramedical health care personnel to stem the growing "shortage and geographic maldistribution of health care service in California," and "encourage the more effective utilization of the skills of physicians by enabling them to delegate health care tasks ..."

In order to fulfill this mandate, the Committee certifies individuals as physician's assistants (P.A.'s), allowing them to perform certain medical procedures under the physician's supervision. For a primary care physician's assistant, permissible procedures include the drawing of blood, giving the injections, ordering routine diagnostic tests, performing pelvic examinations and assisting in surgery. A P.A. may be certified for other tasks where "adequate training and proficiency can be demonstrated in a manner satisfactory to the Board."

The Board is made up of nine members, all appointed by the Governor.

MAJOR PROJECTS:

The Committee has had four goals for 1981:

1. Initiating public relations activities to inform the general public and other members of the health professions what a P.A. is and what tasks P.A.'s may perform.
2. Changing the law so that a majority quorum may carry a motion.
3. Changing the law to allow more P.A.'s membership on the Committee.
4. Clarifying and simplifying the Committee's regulations (AB 1111) with the Office of Administrative Law.

RECENT MEETINGS:

The Committee has been told that many of the accredited P.A. programs in California may not comply with the Committee's requirement that "educational programs shall establish equivalency and proficiency testing and other mechanisms whereby full academic credit is given for fast education and experience ..." (Section 1399.524(e)). If the Committee is not giving equivalency credit as required by its rules, the effect is to slow the expansion of P.A.s in California. Such retardation increases medical cost escalation pressures. In addition, unnecessary required educational costs will alledgedly be passed on to the consumer. No definitive action has been taken by the Committee on the issue.

The Committee decided on November 11, 1981 to reinstate an "annual report requirement," which will call on the accredited programs to report their performance in granting "equivalency" credits for past experience. A subcommittee has been formed to evaluate the responses and report back information learned about equivalency mechanisms available in California's accredited physician's assistants educaitonal programs.

The majority of the November 11, 1981 meeting was spent putting together a budget proposal to keep the Committee running in the black for the next several years. There are at least four problems the Committee sees with its present budget. First, the Division of Allied Health Services has begun charging the Committee for shared services, which had been provided free of charges in the past. Postage is one of those services which the Committee must now pay out of its own budget. A second problem is that the executive officer is only budgeted at eight-tenths time, but has found it impossible to work less than full time to keep up with required Committee work. Third, the Committee seeks a full-time secretary, believing that the six-tenths budget at present is inadequate and contributes to the long delays in processing applications. Lastly, the Committee has spent 76% of

its investigation budget in the first three months of this year. In order to continue the investigation of complaints, an important protective function, the Committee wishes to obtain more funds.

The Committee has taken several steps to cut its own operating expenses, including planning fewer committee and subcommittee meetings to reduce travel costs, and charging for certain mailings that they have not charged for in the past. However, the Committee still believes that more revenue is needed, and will request additional funds from the Legislature.

The Physician's Assistants Examining Committee gets its revenue pool entirely from the fees of P.A.s, P.A. supervisors, and P.A. educational programs. In order to increase their revenue pool, so that the Legislature could authorize increased Committee spending, the Committee decided to raise the amounts of the various fees they charge. The major changes involve the doubling of fees for supervisor applicants from $50 to $100, the doubling of fees for supervisor biennial renewal from $75 to $150, the doubling of fees for P.A. certification from $50 to $100, and the doubling of fees for P.A. biennial renewal from $75 to $150. All of the above fees will thus be raised to the maximum allowed by statute. The fee increases are based in part on an assumption that total license fee monies collected will not otherwise increase over the next five years. This would mean that the number entering the practice and the number leaving would have to remain equal over the next five years. In fact the number in the profession has increased each year and there is nothing to indicate a contrary trend in the near future.

Committee Projections:

| | 79-80 | 80-81 | 81-82 |
|---|---|---|---|
| Lic. Fees | 133,430 | 53,537 | 162,660 |
| | 82-83 | 83-84 | |
| Lic. Fees | 55,120 | 162,660 | |
| | 84-85 | 85-86 | |
| Lic. Fees | 55,120 | 162,660 | |

Projecting a straight line means that in order to meet increased costs, the only option is to increase fees. The critics of this tactic content that once the money is raised beyond the income estimates, it generally will be spent. (e.q. see CRLR Vol. 1, No. 2 (summer 1981) at p. 34, where monies were spent rather than letting them revert, another common practice.)

The Committee is at this time also resubmitting to the OAL a proposed amendment to one of their regulations. The present regulations require a minimum of one year of clinical training from a P.A. training program. The proposed amendment would allow a student to challenge the clinical component, provided that the student complete the three-month preceptorship (training and study under a committee approved physician) required elsewhere in the regulations. OAL rejected this proposed amendment on the ground that no necessity was shown for the three-month preceptorship. The Committee believes that a three-month preceptorship is the only way to evaluate whether an applicant really possesses the skills which would be otherwise acquired by a year of clinical training.

Two issues are raised by OAL rejection of the P.A. rule: 1. the charge gives P.A.s an additional option to satisfy requirements, thus deregulating or cutting red tape. 2. OAL knows nothing about P.A. regulation and allegedly attempts to reverse a policy decision of a governmental agency solely empowered to make that judgment. The OAL notion that the record must "support" a policy judgment is a unique proposition. See detailed discussion in CRLR Vol. 1, No. 3 (Fall 1981) "Commentary" and "Internal Government Review" sections, see also "Internal Government Review" section above.

FUTURE MEETINGS:
To be announced.

## PODIATRY EXAMINING COMMITTEE

*Executive Officer: Aldo Avellino (916) 920-6347*

The Podiatry Examining Committee of the Board of Medical Quality Assurance (BMQA) has six members. All are appointed by the Governor. The Committee consists of two public members and two private members who are licensed podiatrists. There are presently two vacancies. The Committee sets educational and licensing standards for podiatrists and is empowered to inspect hospital facilities which specialize in podiatric medicine. This authority also allows the Committee to inspect hospital records relating to podiatry.

MAJOR PROJECTS/RECENT MEETINGS:

The Committee is currently involved in evaluating the continuing education courses offered to podiatrists. In order to be relicensed, a podiatrist must complete 50 hours of approved continuing education courses over a two-year period. Because of this requirement, the Committee has determined that courses should correspond with the educational needs of podiatrists and reflect areas of clinical development.

An institution desiring to offer a continuing education course must first survey local podiatrists to determine what areas of study are most desired and needed. The institution then submits a course assessment to the Committee, justifying it in terms of the needs of local podiatrists. The Committee evaluates these assessments and either approves or disapproves the course. An unapproved course will not be credited toward fulfillment of the continuing education requirement; therefore, approval is necessary to the course's survival. The supervision of these continuing education programs is the Committee's major ongoing project.

The Committee will present position papers regarding continuing education at the Division of Allied Health meeting on January 22, 1982. Some podiatrists, who teach continuing education courses, have attacked the need survey, self assessment criteria as a handicap to formulating courses. They contend the criteria limits their ability to offer courses, and allows the Committee to proscribe what instructors can teach. The Committee, however, believes that the criteria and evaluations eliminate frivolous courses which are merely designed to justify the 50 hour requirement, but have little practical value to podiatrists or consumers.

The Committee is currently trying to implement its statutory authority to inspect hospital facilities specializing in podiatric medicine, and is examining hospital records relating to podiatric care. These actions will give the Committee a larger role in podiatric quality control, determining if hospitals are complying with regulations.

Hospital associations have opposed inspections by the Committee, contending that the Committee does not have the regulatory power. They assert that since there are no specific regulations which dictate how the Committee is to conduct these inspections, there is no authority for the Committee probes. The Committee counters by saying that Section 2498 of the Business and Professions Code allows inspection of hospital facilities which relate to podiatric medicine, and therefore statutorily sanctions the practice. The Committee is presently awaiting an Attorney General's Opinion before continuing with future inspections.

LEGISLATION:

The Legislature recently passed AB 1205, which sets licensing standards for out-of-state podiatrists who have passed the national board examination. Presently, out-of-state podiatrists are not required to take the California exam if they have passed the national exam. AB 1205 will require out-of-state podiatrists to take an oral exam, administered by the Committee, in order to practice in California. The bill also requires out-of-state

podiatrists to serve a one-year surgical residency as a condition of licensure. The bill will take effect January 1, 1983.

FUTURE MEETINGS:

The Committee will present its position papers to the Division on January 21, 1982 in San Diego.

## PSYCHOLOGY EXAMINING COMMITTEE

*Executive Officer: Howard Levy (916) 920-6383*

The Psychology Examining Committee (PEC) is the state licensing agency for psychologists. The PEC sets education and experience requirements for licensing, administers licensing examinations, promulgates rules of professional conduct, regulates the use of psychological assistants, conducts disciplinary hearings and suspends and revokes licenses. The PEC is composed of eight members, three of whom are public members. One public member position has been vacant for approximately one year.

MAJOR PROJECTS:

The Committee has formed an ad hoc subcommittee composed of Dr. Maria Nemeth, Dr. Matthew Buttiglieri and legal counsel to develop regulations for comparability studies. Presently, applications of candidates with degrees from non-accredited, non-approved schools are judged by the same standards as applications from candidates with equivalent degrees. The Committee decided there is a significant difference in these two categories of degrees and, therefore, different standards should apply. The equivalent degree standard examines the candidate's individual coursework. The new regulations for comparability studies will place more emphasis on scrutinizing the school itself. The questions which the Committee must address is how to determine whether a particular program is comparable to a Ph.D. in Psychology.

Major concerns of the PEC have been consumer education; sexual misconduct on the part of therapists; the regulating of psychological assistants; ethical violations by licensees which are also legal violations; the licensing of applicants who are already licensed in another state; and the licensing examination itself.

The California State Psychological Association (CSPA) has approached the PEC with a proposal for an impaired psychologist program. The goal of the program would be rehabilitation of psychologists with alcohol and drug problems and of psychologists guilty of sexual misconduct with patients. CSPA presented to the Committee an issue paper which concluded that of the 6,000 practicing psychologists in California 360 can be expected to be having sexual relations with their patients at one time. The PEC has made no decision on this issue but expects to invite further discussion with CSPA in January.

THE EXAMINATION CONTROVERSY:

An applicant for licensure by the PEC must first pass an objective written examination and then sit for a subjective oral examination. The Committee has been working to improve both exams, focusing on content and relevancy of the written exam. The grading of the written exam, however, has become the center of a bitter controversy.

The current dispute began with an April, 1977 decision by the PEC to adopt an objective national exam, the Examination for Professional Practice in Psychology (EPPP), in place of the subjective essay exam it had been using. The EPPP is prepared by the American Association of State Psychology Boards and is administered by the Professional Examination Service. The Committee also decided to adopt the national mean as a passing score, rather than the 75% raw score it had previously used. Arlene Carsten, a PEC Public member, brought suit against the PEC alleging that the PEC was compelled by statute to use a 75% raw score cutoff as a passing grade. The California Supreme Court affirmed the trial court's decision that Ms. Carsten, as a Committee member, was not the proper person to bring the suit since she was not a candidate for licensure and so was not in a position to be hurt by the Committee's grading policy. (See discussion in litigation section, infra.)

Until October, 1980 the mean for the standardized national test did, in fact, equate to a raw score of about 75%. In January, 1980 the PEC passed a motion to change the cutoff to the national mean for all candidates with doctoral degrees. This refinement, which raised the raw score slightly, was thought to be necessary because in California the Ph.D. degree is an exam prerequisite, while in some other states candidates with masters' degrees are allowed to take the exam. The current dispute arose when the refined national mean score for the October, 1980 exam rose to approximately 79%. The result was that seventy-seven candidates who scored between 75% and 79% failed the exam.

Several of these failed candidates filed suit against the PEC seeking of writ of mandate from the court compelling the PEC to apply a lower 75% score cutoff. They relied on the specific wording of the enabling statute which states, "(a) grade of 75% shall be a passing grade ..." The court denied the writ, agreeing with the declaration of a psychometric expert that the statutory language has no plain meaning and has no possible meaning or interpretation unless the raw score is first defined and then related to one of a number of possible standards of comparison.

The question became moot when the PEC at its January, 1981 meeting decided to retroactively lower the passing score for the October exam to the national mean for all candidates with Ph.D. degrees minus one-half standard deviation. The practical effect was to bring the cutoff point down to 75% score, thereby enabling the seventy-seven affected candidates to sit for special orals in March. At its February 1981 meeting, the PEC reaffirmed that the passing frade for the April exam will remain the national mean for all candidates with Ph.D. degrees.

Paul Hoffman, a member of the Examinations Sub-Committee of the American Association of State Psychology Boards, was present at the February meeting to answer questions about the EPPP. His explanation for the jump in the national mean for the October exam was simply that the October exam was easier than previous exams. In Dr. Hoffman's opinion, the next three or four years could see a drastic restructuring of the exam.

The examination has also been the subject of a study authored by Eric Werner of the Department of Consumer Affairs and presented at the January, 1981 PEC meeting. Mr. Werner collected data on the April 1980 EPPP pursuant to California law, which prohibits adverse impact on any group of candidates unless the examination has been validated for job-relatedness. The review of the April EPPP revealed a significant adverse impact on ethnic minorities and older examinees, raising the legal issues of the exam's relevance to the profession. Mr. Werner concluded that there was doubtful "practice relevance" of EPPP score in relation to the fundamental purpose of licensure: ensuring public health and welfare. He therefore recommended that the Board reconsider the use of the national mean cutoff.

There are at present five complaints on file with the Department of Fair Employment and Housing alleging that the EPPP discriminates on the basis of either age, race or national origin. The PEC response to the charge of age discrimination reads in part:

"The psychology Examining Committee recognizes that the EPPP is an instrument in need of substantial improvement. We are utilizing California's economic leverage to prod the

American Association of State Psychology Board (AASPB) into modifying their exam. This effort has already met with some success in our view. The only other option available to the Committee would be to develop a California exam. Such an endeavor would be costly, time consuming and result in an uncertain end product."

Interestingly, the PEC 1982-83 budget contains budget change proposals to develop a new written examination.

RECENT MEETINGS:

At the July meeting the question arose as to how to process *present* applications for comparability status while comparability criteria are being developed. One Committee member thought that making determinations on a case by case basis is illegal. This position was challenged by another member who thought that holding up applications while deciding comparability criteria is also illegal. In rebuttal, it was stressed that comparability standards apply to schools, not individuals, and therefore delaying applications does not discriminate against individual applicants. The bout was interrupted by the chairman who directed that the credentials subcommittee and the Executive Secretary work together to resolve this issue.

Gregory Gorges, staff counsel for the Department of Consumer Affairs, reported at the July meeting that he is analyzing forms 13 and 14 of the examination to determine if there is adverse impact. Committee member Dr. Antonio Madrid stated that he had given recommendations to the Professional Examination Service for form 15 of the examination which will be administered in October, 1981. He stressed that it is important for the PEC to followup to see how many of the recommendations are actually utilized.

The PEC will be requesting applicants taking the October licensing examination to answer a short questionnaire designed to measure adverse impact. The results will provide empirical evidence to be used by both the PEC and either the Central Testing Unit or the Department of Fair Employment and Housing.

Waiver of the examination became a hotly debated issue at the July meeting. The PEC had a request for waiver from an applicant who, all committeee members agreed, had more than ample credentials for the request to be granted. Unfortunately for the applicant, he made the mistake of first taking the infamous examination, flunking it and then requesting waiver. Some committee members took the position that waiver could not be granted to an applicant who fails the examination because waiver depends on the applicant demonstrating "competence in areas covered by the examination" (Bus. and Prof. Code, section 2946). Other members pointed out that the examination would perfectly measure competence only if it had perfect validity. If an applicant demonstrates competence in *other* ways, it was asserted, then the examination can be waived. Those opposing waiver reasserted that under the statute the examination is the only criteria which can be applied in this case. The waiver was not granted, but the discussion was indicative not only of the PEC's uncertainty as to the conditions allowing waiver, but also of its discomfort in relying on the examination as the sole determinant of "competence."

The executive officer reported at the May meeting that as of July 1, 1981 the PEC's budget, for the first time in years, would be in the black. The Psychology Fund was created via a transfer of funds from the BMQA Contingency Fund. The executive officer also reported that current PEC staffing patterns are adequate and backlogs have been cleared. The Committee expressed its appreciation and requested the executive officer to formally commend staff. Budget change proposals for the '82-83 budget include increased enforcement against unlicensed practice, funds for consultants to work on the oral examination and a possible ethnic psychology requirement and, as previously mentioned, funds for developing a new written examination.

At the November 21 meeting the Committee approved its participation in a joint question-and-answer session with the California State Psychological Association scheduled for February. Correspondence to PEC from Dr. Hays, president of the American Association of State Psychology Boards (AASPB), suggests that he would like to assist PEC in its defense of the appropriateness of the national exam. Dr. Madrid, of the Examinations subcommittee, will represent PEC at AASPB's December Executive Committee meeting.

PEC further resolved to continue its dialogue with the Department of Developmental Services (DDS) as regards clearer activities definition, more uniform regulation, and possibly licensing of "Behavior Modification Specialists." While these practitioners are more centrally under DDS regulation, the Committee felt that its mandate to protect consumers from unlicensed psychological practice justified monitoring of an input into DDS progress in this area.

The Committee deferred action on regulations for domestic educational comparability until the Credentials Subcommittee has finished its proposed guidelines for foreign program comparability.

AB 1111:

The PEC held an information hearing on September 12 in San Francisco. The committee prepared its own extensive issue paper and invited public comment. The purpose of the meeting was to generate issues only — substantive decisions on the regulations will be made at a later date. As of the November meeting, the PEC staff was still preparing position papers on the regulations. Decisions on the rule revisions were re-agended for the February meeting.

FUTURE MEETINGS:

The next scheduled meeting of the PEC is January 8-9 in San Francisco.

## SPEECH PATHOLOGY AND AUDIOLOGY EXAMINING COMMITTEE

*Executive Officer:*
*Carol Richards*
*(916) 920-6388*

The Board of Medical Quality Assurance's Speech Pathology and Audiology Examining Committee consists of 9 members; 3 Speech Pathologists, 3 Audiologists and 3 public members (one of whom is a physician or surgeon). The Committee is responsible for the examination of applicants for licensure. The Committee hears all matters assigned to it by the Board, including but not limited to any contested case or any petition for reinstatement, restoration or modification of probation. Decisions of the Committee are forwarded to the Board for final adoption.

MAJOR PROJECTS:

The Committee, in conjunction with the Board of Medical Quality Assurances, is continuing its AB 1111 review of current rules. An "issue publication" has been distributed to interested public groups to provide background information regarding the regulations.

A major ongoing problem facing the Committee is reestablishing the status of the Severe Language Disorder/Aphasis (SLD/A) public school training program.

Qualified applicants must complete 9 months (full time, 30 hours/week) of supervised Required Professional Experience (RPE) after Committee examination in order to obtain final licensure. The SLD/A program is one of several acceptable types of RPE for this purpose. SLD/A training programs were previously given full credit if the applicant was to teach in the school setting on a full-time basis. The Committee has decided that the public school training program will receive only half credit.

Those fulfilling their RPE through a public school training program prior to April 24, 1981 (approximately 75 applicants) will have their individual program settings evaluated by the Committee to determine if the RPE requirement is adequately met. The Committee will consider the age, number and specific language disorders of the pupils taught in making its decision. It is expected that most will be allowed to receive full credit.

LEGISLATION:

AB 1528, introduced in May 1981 by Assemblyman Rosenthal, expands the definition of what shall be deemed to be "hearing aid dispensing" requiring licensure. Existing law exempts from licensure registered licensed audiologists and licensed physicians and surgeons who make recommendations to patients to purchase specific hearing aids by mail-order. (Bona fide sale of HA's by catalog or direct mail is also exempt.)

The bill would: "provide that physicians and surgeons or an audiologist shall be deemed to be directly or indirectly engaged in the sale of hearing aids if he or she makes a recommendation for the purchase of a HA not individually fitted to the purchaser by a licensed hearing aid dispenser," and "delete the provision exempting from regulation sales of hearing aids by catalog or direct mail."

The effect of this bill would be to require that all hearing aids be purchased only through one who is licensed by a hearing aid dispenser. This would eliminate the ability of a patient ("purchaser") to bypass the hearing aid dispenser and purchase by mail under the guidance of an audiologist, physician or surgeon alone.

The Committee is opposed to the present bill. The Committee's major concern is the definition of the "practice of fitting or selling of hearing aids," as applied to functions performed by the audiologists.

The Committee decided that further discussion would be taken at a later time as the bill will first go to the Health Committee in January.

RECENT MEETINGS:

Competency Guidelines of the Hearing Aid Dispensers Examining Committee (HADEC): At the September, 1981 meeting, the feeling of the Committee was that the HADEC guidelines were incomplete and would create confusion. The Committee presented its modifications, expressing its reasons at the November, 1981 meeting. The Committee felt that, aside from being confusing, the HADEC guidelines were inadequate to assure the competence of a dispenser. The Committee suggested that instead of publishing Competency Guidelines, publishing "Procedures for Hearing Aid Fitting or Selling by Hearing Aid Dispensers" would be more appropriate. The Committee submitted their "Procedures" for HADEC approval and use.

Applications for Licensure: The Committee examined the petition of several applicants for waiver of the Required Professional Experience requirement for licensure. After discussion of each individuals' records, the following action was taken: Denial of waiver for Marla Shragg and Patricia Avery and grant of waiver for Roger Burgraff.

A Mr. Forcucci petitioned the Committee for acceptance of his training at an unaccredited intitution (Marysville-North West Mississippi State University). The Committee requested a school catalogue to evaluate the program (pursuant to Req. Section 1399.157(a)(2)) and no further action was taken at this time.

License Renewal Fee Increase: The Committee held a special meeting on October 2 to discuss an increase of the biennial renewal fee from $5 to $35, a step "necessary to maintain the solvency of the Speech Pathology and Audiology Examining Committee."

The Committee agreed that the increase was necessary and passed the motion to do so.

## BOARD OF EXAMINERS OF NURSING HOME ADMINISTRATORS

*Executive Office: Hal Tindall (916) 455-8435*

The Board of Examiners of Nursing Home Administrators is empowered to develop, impose and enforce standards for individuals desiring to receive and maintain a license as a Nursing Home Administrator. The Board may revoke or suspend a license after an administrative hearing on findings of: gross negligence, incompetence relevant to performance in the trade, fraud or deception in applying for a license, treating any mental or physical condition without a license and violation of any rules adopted by the Board.

MAJOR PROJECTS:

Legislation: At its October 22-23 meeting in San Diego, the Board discussed AB 1083 (Imbrecht), a bill dealing with "Testing of Physicians and Surgeons." The bill would authorize the Division of Licensing of the Board of Medical Quality Assurance to administer a written examination to applicants for a physician's and surgeon's certificate based on reciprocity or as a diplomat of the National Board of Medical Examiners. The examination would cover only areas of nutrition, child abuse and detection, geriatric medicine, human sexuality, alcoholism and drug abuse and medical jurisprudence.

The Board feels that if passed, AB 1083 would improve patient care in nursing homes. The Board was informed, however, that the California Medical Association is opposed to the bill and has threatened to kill it in the Senate Finance Committee or on the floor of the Senate. The bill was approved by the Assembly and the Senate Business and Professions Committee. The Board feels that additional support from the Board members and also other Health Associations will be needed to ensure passage of AB 1083.

The two bills opposed by the Board, AB 1551 and AB 107 (see CRLR Vol. 1, No. 3 (Fall, 1981) p. 39), are still pending.

AB 1111:

The Board is continuing its AB 1111 consideration. At the October 22-23 meeting, regulations were discussed in Article 5 (Sections 3140, 3141, 3142, 3144); Article 6 (Sections 3150, 3152, 3156); Article 8 (Section 3175). None of the above sections was approved for submission to OAL. The Board felt changes were needed in each of the sections and that the responsible Committees would proceed accordingly.

Of the previously submitted regulations, the OAL has approved eleven and rejected eight. Those accepted as submitted were 3100.5 (repealed), 3101 (amended), 3103 (amended), 3107 (repealed), Article 8 (amended title), 3118 (renumbered to 3177), 3119.5 (repealed), 3176 (repealed).

The eight rejected were Sections (reason): 3104 (necessity, failure to respond to public comments), 3109 (necessity), 3160 (necessity), 3161 (clarity), 3162 (necessity), 3164 (necessity). 3165 (necessity), 3178 (necessity). The Board addressed the comments and reasons for rejection by the OAL and resubmitted the rejected sections for reconsideration.

RECENT MEETINGS:

At the October 22-23, 1981 meeting in San Diego, Mr. B. Ronald Freed made a presentation to the Board outlining his qualifications to take the Nursing Home Administrators license exam. In closed session the Board agreed that Mr. Freed substantially met the requirements established in Section 3116(b) of Title 16 (Calif. Admin. Code) and that he should be allowed to take the nursing home administrators exam, subject to verification of his work experience in Texas and Florida.

Disciplinary Matters: At the August, 1981 Board meeting the following action was taken on licensees Donnel Piraro and Victor Rodgers: Stay of suspension of

license and imposition of one year probation on each.

At the October 22-23 meeting the following actions were taken:

Daniel Bumgarner: stay of revocation of license; 60 day suspension and 5 year probation.

Mona Fisk: stay of revocation of license; 60 day suspension and 3 year probation.

Emanuel Treitel: stay of revocation of license; 2 year probation.

Charles Marshall: approved a stipulation calling for revocation of license.

Mildred Marshall: approved a stipulation calling for stayed revocation of license; 18 month probation.

The precise violations committed by these persons were not described by the Board.

FUTURE MEETINGS:

February 1982, Northern California.

## BOARD OF OPTOMETRY

*Executive Officer: John Quinn*
*(916) 445-2095*

The Board of Optometry consists of nine members appointed by the Governor. Six are licensed optometrists and three are non-licensees from "the community."

The newest appointee is Lawrence S. Thal, O.D. He attended his first Board meeting on November 22, 1981. The full-time Executive Officer, John T. Quinn, was appointed in early 1980. The Board holds meetings eight times a year at various locations throughout the state.

The purpose of the Board is to protect the consumer from harm caused by unsatisfactory eye care. This purpose is accomplished by the setting of minimum standards for entry into the profession and the monitoring of established practitioners. One exam is given each year to those wishing to become optometrists. The exam is given at one location only, either Berkeley School of Optometry or the Southern California College of Optometry in Fullerton, the two sites alternating. The Board monitors the established profession by investigating complaints directed to the Board. First, however, the Executive Officer screens the complaints and determines which should be investigated by the Division of Investigation of the Department of Consumer Affairs and which can be answered by his office. Generally, the complaints answered by the Executive Officer are those "which do not involve a violation of statutes or Board regulations." The Executive Officer estimates that 95% of all complaints received fall into this category.

The Board is also responsible for reviewing fictitious name permits that are submitted for approval. Generally, the Board is concerned with names that might confuse the public because of their similarity to names already used, or the possibility of deceptively inferring a specialty.

RECENT MEETINGS:

On October 17, 1981 the Regulation Review Advisory Committee met to prepare a final draft of the review of regulations in Articles 1 through 5. These regulations had been previously reviewed at prior committee meetings (see CRLR Vol. 1, Nos. 1, 2, 3 (Spring, Summer, Fall, 1981)). This final draft was presented to the Board at its November 22, 1981 meeting. The Board voted to approve the draft excluding recommendations relating to sections 1510, 1513, 1514 and 1520. These regulations were returned to the Committee for further examination.

On November 22, 1981 the Board met in San Diego. The first order of business was the election of officers. Dr. Beasley was elected as President, Dr. Harmer as Vice President and Dr. Lieblein as Secretary. Committee assignments were deferred until Dr. Beasley takes office.

On November 22, the Board again faced the possibilities for implementing periodic relicensure. The Board, via Dr. Stacy, drafted a proposal and solicited responses concerning this proposal. Generally, the responses were positive, however, many were against the 50 hour per year continuing education requirement. It was felt that extensive continuing education would be expensive and burdensome on practicing optometrists. Many pointed out that no state in the nation requires more than 25 hours per year and the medium appears to be 12 hours per year. Additionally, the viability of an exam alternative was discussed. Various Board members, while not willing to make formal statements, expressed concern with the whole concept of relicensure exams. The proposal was returned to Dr. Stacy for further alteration.

LEGISLATION:

The California Optometric Association requested that the Board investigate the feasibility of implementing statutes which would allow the Board to administer fines for violation of the Optometry Practice Act. This proposal was referred to the legislative committee. Relating to this topic the Board discussed what to do about unlicensed practitioners. Suggestions included requesting licensed practitioners to report unlicensed activities and making it unprofessional conduct not to report names of those practicing without licenses. The Board voted to table this dicussion until the next meeting.

The final topic of advertising which was to be presented by Dr. Lieblein was postponed until the next Board meeting.

FUTURE MEETINGS:

The next Board meeting will be the weekend of January 23-24, 1982.

## BOARD OF PHARMACY

*Executive Secretary:*
*Claudia Klingensmith*
*(916) 445-5014*

The Board of Pharmacy grants licenses and permits to pharmacists, pharmacies, drug manufacturers, wholesalers and sellers of hypodermic needles. It further regulates all sales of dangerous drugs, controlled substances and poisons. For enforcement of its regulations, the Board employs full-time inspectors who investigate accusations and complaints received by the Board. This may be done openly or covertly as the situation demands.

The Board is authorized by law to conduct fact-finding and disciplinary hearings, and to suspend or revoke licenses or permits that they have previously issued, for a variety of causes, including professional misconduct and any criminal acts substantially related to the practice of pharmacy.

The Board consists of ten members, three of whom are public members.

MAJOR PROJECTS:

The Impairment Program, which involves special treatment for pharmacists who have alcohol or drug abuse problems, continues to be considered while various other professional licensing agencies are being contacted for coordination. The State Bar of California, the Board of Medical Quality Assurance, the Board of Optometry, the Board of Registered Nursing, the Podiatry Examining Committee and the Board of Dental Examiners are among those who have been contacted regarding the joint impairment program. The Board of Pharmacy feels that the program could be more constructive if the other agencies participate in a single, comprehensive program.

At the September and November meetings concern was expressed by the Board regarding "look-alike" drugs. These are substances, classified as neither controlled nor dangerous, which are packaged to look like pharmaceuticals and advertised in magazines for sale through the mails under common street drug terminology. The Board feels that they endanger the public through the risk of persons who, accustomed to consuming look-alike drugs (with their low potency),

gain possession of the real drugs, and, not knowing the difference, consume the same number of tablets or capsules. The result could be death. The Board was not sure of its jurisdiction on the matter, and decided that the Attorney General should be encouraged to intervene in the sales of look-alike drugs. It appears that other agencies are acting on the "look-alike" problem. The City of Los Angeles has passed an ordinance banning sales of look-alikes and is prosecuting a test case. In the last week of November 1981, a statewide injunction was issued to cease and desist their advertising as misleading. Finally, in the first week of December, the California FDA seized the vast majority of look-alike drug inventories at points of manufacture and warehousing. The Board may have no further need to consider the matter.

In the past, license and permit renewal fees have all been due on October 1 of even-numbered years. Due to cash flow, collection and work load concentration problems, the Board has implemented a cyclical renewal fee system similar to driver's license renewals. The two-year license period will be retained as soon as the transition period is completed. In the future, pharmacy, wholesaler and manufacturing permits will be renewed on their original application dates, and pharmacists' licenses will be renewed on the pharmacists' respective birthdays.

RECENT LEGISLATION:

SB 1029, which allows Health Maintenance Organization (HMO) to own pharmacies, was passed. Historically, no organization could own pharmacies if physicians owned or controlled more than 10% of it. SB 1029 has carved an exception out of this rule, but is limited in application to only two HMOs, Maxi-Care and Permanente.

SB 257 (Rains) requires regulatory agencies to publish the minimum, medium and maximum number of days, based on actual experience, that the agency takes from the time applications are received until the time when a license is either granted or denied. The law incidentally requires changes in agency forms. The Board estimates that, because of the extensive statistical analysis involved, they will have to spend an extra $60,000 in 1982 and $57,000 per year thereafter because of this bill. SB 257 was signed into law on September 30, 1981.

AB 1868 (Berman), passed by the legislature and signed by the Governor on September 24, 1981, amends Business and Professions Code section 4046 extensively. It allows pharmacists to furnish compounded medicine to prescribers for in-office use, to transmit valid prescriptions to another pharmacist, and to administer drugs and antibiotics pursuant to prescriber's order. Pharmacists employed in licensed health care facilities can furthermore order or perform tests on patients and adjust patients' drug therapy pursuant to a prescriber's authorization, if they "have received appropriate training as determined by the Board." The Board has decided not to specify what "appropriate training" is; when this new law becomes effective (Jan. 1, 1982), pharmacists and health care administrators will not have a policy statement to guide them.

RECENT ACTIONS:

The Board has delegated authority to its executive secretary to reissue licenses which have been revoked because of late or nonpayment of renewal fees. In making her decision, the executive secretary is to consider how long the license has been revoked and what the applicant has been doing since. In any cases where the applicant was or is on probation, the applicant will have to come before the full board before the license is reissued.

The Board has decided that it will allow the use of calculators on the math portion of its exams. (This is contrary to the policy of the National Association of Boards of Pharmacy.) Programmable calculators will not be allowed, however, and the mechanics of enforcement of this restriction will be worked out later.

In a surprising move, the Board has voted to repeal all of its regulations relating to radioactive pharmaceuticals. It feels that these regulations are redundant to other state and federal controls on radioactivity.

FUTURE MEETINGS:

The Board has sceduled meetings at the following dates and locations: January 27 and 28 in Los Angeles, March 17 and 18 in Sacramento, May 19 and 20 in Los Angeles, July 28 and 29 in San Francisco, September 29 and 30 in San Francisco and November 17 and 18 in Los Angeles.

## BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS

*Executive Secretary:*
*James W. Baetge*
*(916) 445-5544*

The Board of Registration for Professional Engineers regulates the practice of engineering and land surveying. Civil, electrical, mechanical and structural engineering and land surveying are known as "practice" disciplines. Practice registration requires that in order to call oneself the name of a discipline and in order to perform the work of such discipline, one must register with the Board unless otherwise exempted. There are other numerous "title" engineering disciplines. In order to call oneself the name of a "title" discipline, one must register with the Board. However, in contrast with "practice" disciplines one may perform the work of such disciplines without registration. An engineer, except a civil engineer, is exempt from registration if he or she works for the government, a public utility or an industrial corporation: as a result, ninety-two percent of California's engineers are exempt.

Since 1978, the Board has included thirteen members, seven from the public. Five members must be registered as professional engineers, and one must be licensed as a land surveyor. The professional members must have twelve years experience in their respective fields.

The Board has established seven standing committees which deal with land surveying and the various branches of engineering. Previously, there had been nineteen committees, one for land surveying and one for each branch of engineering. The new system groups two, three or four related branches of engineering in one committee. This was done to make the committees more manageable. Each committee is composed of three Board members. The committees approve or deny applications for examinations and register applicants who pass. The actions taken by the committees must be approved by the Board; approval is routinely given.

To be registered as a professional engineer, the applicant must not have committed certain acts or crimes, have six or more years experience as a professional engineer (graduation from an accredited engineering school counts as four years) and pass an examination applying engineering fundamentals to factual situations. The applicant must also specify the branch of engineering for which he desires registration. To qualify as an "engineer in training," the applicant must be of good moral character, have four years experience and successfully pass an examination applying engineering fundamentals to factual situations. The qualifications, experience requirements and exmainations are essentially similar for licensure as a land survery and land surveyor in training.

The Board regularly considers the Proposed Opinions of Administrative Law Judges who hear the appeals of applicants who are denied registration, and engineers and land surveyors who have had their registration suspended or revoked for violations.

MAJOR PROJECTS:

The Board has concluded its public hearings for comment on Board Member

I. Michael Schulman's report on Title Registration. Mr. Schulman's five proposals would substantially alter the regulation of engineering in California. They are: (1) Eliminate all "title" disciplines established by Board regulations; (2) Eliminate all "titled" disciplines established by statute; (3) Register all exempt engineers who are in responsible charge (i.e., who maintain independent control and direction of engineering work) in "practice" disciplines. ("Registration" here means that the exempt engineer would be required to submit his or her name to the Board in order to work as an engineer. No exams would be required, and the registration could be revoked for incompetence, etc.); (4) Establish criteria to determine if a discipline should be covered by "practice" registration; and (5) Review all "title" disciplines to determine whether they should become "practice" disciplines. The Board will now pursue the development of criteria to determine whether any particular branch of engineering should be regulated.

The Board will be concluding its public hearings pursuant to AB 1111. The final hearing, at which the Board will hear comment on any rule, will be held January 20, 1982 in Sacramento.

RECENT MEETINGS:

July 15, 1981: The Board approved the attendance of its members at a meeting of the San Francisco Bay Area Engineering Council. Also approved were two decisions of administrative law judges in two cases denying registration as engineers.

The actions of the standing committees were approved. Seventy engineers were registered and three were denied registration. The results of the engineer-in-training examination were confirmed; 1746 examinees passed and 877 failed. The results of the land surveyor-in-training examination were also confirmed; 98 examinees passed and 155 failed. Also, 113 applications for registration as engineers were accepted, and four were found ineligible. Two applications for licensure as land surveyors were accepted.

The Legislative/Rules Committee reported on pending legislation. After discussion, the Board voted to oppose AB 299, which would modify some of the exemptions in the Professional Engineers Act. The Board also discussed a staff memorandum which suggested that the Board seek legislation to adopt a Code of Ethics/Rules of Professional Conduct. The Board approved the recommendation and directed the staff to draft such legislation in cooperation with the Department of Consumer Affair's Legal Office.

The Executive Secretary reported on the status of Rule 419.1, complaint disclosure. Under this rule, the Board would provide to anyone, upon request, information about complaints against registrants and licensees. Mr. Baetge indicated that the staff is working on problems deriving from Office of Administrative Law review and a revised version with more supportive evidence will soon be submitted to OAL for approval.

The Board held a hearing for public comment on the Schulman report. Nearly all of those who testified were connected with the engineering profession. Some represented professional associations and others represented themselves. Some favored the retention of the present system, while others recommended that some or all of the "Title Disciplines" become "Practice Disciplines." As to which Title Disciplines should become Practice Disciplines, the criterion most favored by witnesses was whether the public's "health and safety" are affected by work done in the present Title Disciplines.

September 11, 1981: The Board approved the attendance of its members at meetings of the Manufacturing Engineering Society and the California Council of Professional Engineers. The Board adopted the proposed decision of an administrative law judge in a case denying registration as an engineer, and rejected a proposed decision in another case, and instead called up the transcript to decide the matter on the record.

The actions of the standing committees were approved. Twenty-eight engineers were registered and four were denied registration. A total of 456 applications for registration as engineers were accepted and 17 were found ineligible. One land surveyor was licensed. Forty-two applications for licensure as a land surveyor were accepted and three were found ineligible.

The Board also discussed the progress made on the implementation of SB 2. This law requires civil engineers registered after January 1, 1982 to pass the second division of the land surveying exam before they can practice land surveying. Previous law allowed any registered civil engineer to also practice land surveying. The legislation was enacted because of the concern that civil engineers were automatically allowed to practice land surveying without regard to their experience or competency.

The Registration Committee discussed a staff memorandum concerning the elimination of the mandatory land surveying problem from future civil engineering examinations because of SB 22. The Board approved the committee recommendation to eliminate the land surveying problem from the next civil engineering examination.

The Executive Secretary indicated that it would be necessary to make a minor change in proposed rule 419.1 in order to comply with the requirements of the Office of Adminsitrative Law, and that this item would be put on the agenda for the next meeting. The Executive Secretary recommended, and the Board approved, the cancellation of six applications for failure to complete the examination within two years as required by Board rule.

FUTURE MEETINGS:

The next Board meeting will be on January 20, 1982 in Sacramento, and February 17, 1982 in Los Angeles. The January meeting will be the last public hearing for AB 1111.

## BOARD OF REGISTERED NURSING

*Executive Officer:*
*Barbara Brusstar*
*(916) 322-3350*

The Board of Registered Nursing licenses all Registered Nurses, regulates trade entry and specifies practices under its licensing power. The Legislature has provided the Board with legal authority to include more sophisticated patient care activities and the Board determines the requisites for those certain activities. The Board also issues certificates to practice nurse-midwifery to qualified applicants. The nine members include three public members; three direct patient care nurses; one licensed nurse who is an administrator of a nursing service, and one licensed physician.

The Board is empowered to take disciplinary action against a temporary licensee, a licensed nurse or an applicant for a license. A license may be suspended, revoked or subjected to a probationary period for nursing violations.

An ongoing function of the Board is to prepare and maintain a list of accredited schools of nursing in California. It determines required subjects of instruction and number of units of instruction and clinical training necessary to guarantee competence. The Board shall deny or revoke accreditation to any school of nursing which does not meet Board requirements.

MAJOR PROJECTS:

Legislation: AB 534 passed the 1981 Legislature authorizing the Board to increase certain fees and establish specific new fees. There were two people at the November 21, 1981 meeting in Los Angeles considering precise fee amounts under the new authority of AB 534, and there was very little oral testimony. All proposed regulations were adopted. The

specific purpose for the fee change is to increase the revenues collected by the Board to meet operating expenses. Currently, the Board's expenditures exceed its revenues. The new application fee is $25, down from $35. The license renewal fee was increased from $16 to $22, while the penalty fee for failure to timely renew a license is now $11. Copies of the exact language of the regulations and the statement of purpose may be obtained upon request from the Board at 1020 "N" Street, Sacramento, California 95814.

Licensing Exams: All boards are required to review licensing exams for adverse impact. If an exam is found to have adverse impact on one or more minorities, the Board must prove the exam is job-related. The BRN hired Applied Research Consultants, Inc. to check the nurse licensure exam, and the exam was found *not* to be job-related. The next step is for the Department of Fair Employment and Housing to file with the Commission of Fair Employment and Housing a request for a review of the exam and of the job-relatedness study. If the Commission judges the exam illegal, it will file a complaint against the BRN. Some members of the Board have expressed concern over the unfairness of the test, and they support a new, job-related exam. The current exam shows a failure rate of about 60% for blacks, while whites fail at about an 11% rate.

Reciprocity: By May 1, 1981, no Canadian nurses will be licensed by endorsement in California. The BRN wanted to review the Canadian nurse licensure exam to judge the qualifications of Canadian nurses for practice in California. Canada refused to allow the BRN to review the exam and its basis. In the future, Canadian nurses will have to pass the California nursing licensure exam to practice in this state.

FUTURE MEETINGS:

The Board will meet on January 21 and 22, 1982 at the State Building in San Diego. The next meetings are on February 18 and 19, 1982 at the State Building in Sacramento. Board meetings are subject to change, so it is advised to call and confirm before attending.

## BOARD OF CERTIFIED SHORTHAND REPORTERS

*Executive Secretary:*
*Judy Tafoya*
*(916) 445-5101*

The Board of CSR was established to protect the consumer in two ways. The Board attempts to protect those who use the services of shorthand reporters by requiring a minimum competency standard of reporters. To achieve this goal, the Board requires testing and licensing of prospective reporters. A licensed reporter may have his or her license suspended or revoked where gross incompetence or professional misconduct is found.

The Board also certifies shorthand "schools." The Board considers the educational quality of the schools by reviewing the pass rates of their students on the reporters' exams. The Board will grant or withhold certification from a school on that basis. The Board may also de-certify a currently accredited school.

MAJOR PROJECTS:

The Transcript Reimbursement Fund (TRF), which pays reporters for the cost of trial transcripts for indigent appellants, is increasingly used. From July 1 (when the Fund became operative) to September 10, $4,236 was disbursed; between the 10th and 30th of September $39,244 was paid out.

The Board is concerned about two potential abuses of the TRF system that have come to its attention. First, reporters set their own rates. There are no rate controls whatsoever imposed by statute or regulation. The legislation which created the TRF provides that reporters must be paid for their services, but no maximums are stated. Less scrupulous reporters who become aware of this could grossly overcharge the TRF, and there is nothing which could be done to stop the practice. Maximum rates can be set on a variety of viable bases, but any will require legislation. In the meantime, the Board believes it would be a good idea to ask reporters to verify that the rates they charge the TRF are their "normal" rates, but there are no clear remedies for abuses.

The second potential abuse is the possibility of double payment. Reporters and attorneys have contractual relationships, and attorneys are sometimes required to make advance payments or deposits for the reporter's services. The TRF billing procedure is arranged so that the reporter sends a bill to the attorney, who forwards it to the TRF, and they pay the reporter directly. Nowhere is there any allowance for consideration of advance payments or deposits. If the reporter fails to return the advance payment or deduct it from his total fees, he will to that extent be paid twice. It cannot clearly compel refunds to attorneys. In fact, as the system now functions, the Board has no way of knowing whether advances have been paid at all. A change in the legislation may well be required to correct this problem, since the Board may not adopt regulations contrary to the statute. Until a more permanent solution is devised, the Board intends to ask attorneys whether they have made such payments, and if so, in what amounts. This will have at least a deterrent effect, and may provide cause for rejecting TRF applications on grounds of inaccuracy.

Last spring, Assemblyman Filante criticized the Board's consistent opposition to electronic reporting methods. (These methods are of essentially two types: direct input to a computer from a stenotype machine, or computer-printed transcripts from the reporter's tapes.) In response to his criticism the Board decided to take an unbiased look into the practicality of electronic reporting, and has since been compiling information and receiving testimony on the state of the technology. At the November meeting, the Board announced it was dropping the investigation because it didn't feel that it is within its jurisdiction. The Board's opinion is that its jurisdiction does not extend beyond the protection of consumers and the ensuring of justice, and that electronic reporting methods are outside these perimeters.

Purusant to AB 1111, the Board has begun public hearing on regulatory review. The first of the two hearings was held on December 5 in Los Angeles. These hearings shall continue on an unspecified date in March in San Francisco. The Board still intends to complete the process by March, 1982.

RECENT ACTIONS:

The Exam Specifications Project (ESP) Committee has completed its investigations. The purpose of the study was primarily to ensure the relevance of the exam (and perhaps to improve it) and secondarily to provide the schools with guidelines for necessary basic skills, knowledge and competence for reporters, and ultimately to ensure high professional standards and quality. None of the Committee's findings have been announced yet, but the final report should become available in January. The Board would like to implement the ESP recommendations on the March 1982 exam, but expects that the November 1982 exam is a far more likely target date.

At the November meeting it was reported that as of September 30, $37,000 of the $158,146 budget had been spent. This is about 10% over budget, and is due mostly to enforcement expenses. New legislation and recent OAL regulations are expected to result in further cost increases of about $90,000 next year. Budget change proposals will be submitted in January.

The Board is considering changing the annual license renewal fee. The fee is currently set at $125, the statutory maximum. The proposed renewal fee is $110.

The Board has received complaints regarding owners of reporting firms who have withheld or edited transcripts. Although it stated an intention to schedule hearings on the matter, no action has been taken yet.

FUTURE MEETINGS:

The second and final public hearing on regulatory review (AB 1111) is scheduled for an unspecified date in March, 1982. No other meetings are currently scheduled.

## STRUCTURAL PEST CONTROL BOARD

*Executive Officer:*
*Mary Lynn Ferreira*
*(916) 920-6323*

The Structural Pest Control Board (SPCB) is empowered to license structural pest control operators and structural pest control field representatives. Field representatives secure pest control work for operators. SPCB licensees are classified for either: (1) fumigation, the control of household and wood-destroying pests by fumigants; (2) general pest, the control of general pests without fumigants; or (3) termite, the control of wood-destroying organisms with insecticides and structural repairs and corrections, but excluding the use of fumigants.

In addition to licensing, SPCB also requires otherwise unlicensed individuals employed by its licensees to take a written exam on pesticide equipment, formulation, application and label directions if they apply pesticides. The SPCB licenses approximately 2,000 individuals.

The SPCB has six members, four of whom are public members. One public member position and one industry position are vacant. The SPCB's enabling statute is in Bus. and Prof. Code section 8500 et seq. and its regulations in Title 16, Cal. Admin. Code section 1900 et seq.

MAJOR PROJECTS:

The AB 1111 mandated review of SPCB regulations has generated a good deal of comment from license holders and the SPCB internal staff but little interest from the consuming public. The Board conducted a public hearing on October 30, 1981 in Los Angeles to hear public comment concerning the review of regulation section 1970.3, which provides that a licensee must secure with a secondary lock all outside doors of structures to be fumigated, unless such locks could not be installed without defacing the property. The Board proposed to amend the regulation so as to provide that if secondary locks could not be installed on all the outside doors of a house to be fumigated, the licensee would be required to post a certified security guard. Along with a representative from the L.A, Agricultural Commissioner's Office, four licensees testified at the hearing that secondary locks were more effective than security guards and that there was no door on a house which could not hold a secondary lock. The Board unanimously changed the proposed amendment to require licensees to install secondary locks on all outside doors of houses to be fumigated, without exception.

Along with developing proposed regulation changes, the Board has been busy adopting new changes in policy. The Board has decided that it will no longer permit license applicants to satisfy their education credits under section 5565.5 with the same education credits used to fulfill experience requirements. Other policy changes included clarification of the requirements and responsibilities for course instructors under section 8565.5 and a new draft of the notice given to a licensee when a violation has been determined by the SPCB.

At present, the SPCB is petitioning the Department of Food and Agriculture to prohibit the use of known or suspected carcinogens or mutagens by unlicensed persons.

## TAX PREPARER PROGRAM

*Executive Secretary:*
*Don Procida*
*(916) 920-6101*

The Tax Preparer Program is responsible for the registration and investigation of tax preparers within the state of California. Exempt from the Program's registration requirements are certified public accountants, public accountants, attorneys, banks and trust companies and persons licensed to practice before the Internal Revenue Service. The activities of each of these groups are regulated by another body. Other persons wishing to become registered tax preparers must submit an application and provide a $1,000 surety bond to the Program. There is no test for competency to become a registered tax preparer but any "commercial" preparer must be registered with the program.

MAJOR PROJECTS:

The Program handles consumer complaints regarding tax preparers. The Adminsitrator determines the manner in which each complaint is handled. The Program handles approximately 400 complaints a year and has the authority to suspend or revoke a registration certificate.

RECENT EVENTS:

The last year the Program was funded for investigations was 1979-80. During that period, 12 registration certificates were revoked and 2 were suspended. Since that time, there have been no revocations or suspensions due to the lack of investigative funding.

In the recent past a surplus of approximately $900,000 was created from the receipt of registration fees. Through the budgetary process, the Legislature reduced the Program's overall budget (administrative and investigative) to $1. As a result, the Program is not empowered to collect any fees from applicants for registration. Therefore, there exists a statutory framework for the program but no funding to implement that law.

A bill (Assembly Bill 1110) to repeal the existing statutes and refund the surplus to registered preparers was initially rejected by the Assembly Ways and Means Committee. Its author, Assemblyman Filante, may reintroduce the bill this January. The exact provisions of the bill are currently subject to hot debate. On one end are professional associations who advocate a statutory scheme of mandatory entrance examinations, continuing education requirements and evaluation of consumer complaints by the Program. At a polar position are those who would repeal the existing statute and refund the current surplus to preparers who have paid to become registered. Proponents of the former position argue that such measures are necessary to protect the public from unqualified and unscrupulous persons engaging in the business of preparing income taxes. Those who would completely abolish the program feel that any regulation of tax preparers, at this time, is unnecessary.

Regardless of whether AB 1110 or other legislation providing full testing and continuing education becomes law, all current registrations on file with the Program expired on October 31, 1981. There has been no attempt to register tax preparers after that date and apparently there will be no attempt to do so until the Program's budget is restored. The continued existence of the Program is questionable at this time.

## BOARD OF EXAMINERS IN VETERINARY MEDICINE

*Executive Secretary:*
*Gary K. Hill*
*(916) 920-7662*

The Board of Examiners in Veterinary Medicine licenses all doctors of Veterinary Medicine, veterinary hospitals, animal health care facilities and animal health technicians (AHT's). The qualifications of all applicants for veterinary licenses are evaluated through a written and a practical examination. Through its

regulatory power, the Board determines the degree of discretion that a veterinarian, an animal health technician and an unregistered assistant have in the performance of animal health care tasks. The Board reserves the power to revoke or suspend the license or registration of any veterinarian or AHT for any act committed in violation of the regulations after a proper hearing.

The Board may also at any time inspect the premises on which veterinary medicine, surgery or dentistry is practiced. All such facilities must be registered with the Board and must conform to the minimum standards set forth by the same. This registration is subject to revocation or suspension if, after a proper hearing, a facility is deemed to fall short of the Board's standards.

The Board is comprised of six members, including two public members. The Animal Health Technician Examining Committee consists of three licensed veterinarians, one of whom must be involved in AHT education, three public members and one AHT.

MAJOR PROJECTS/RECENT MEETINGS:

Several new rules were approved at the Board's October 28, 1981 meeting in San Francisco. The examination fee for veterinary students will increase from $35 to $50. Owners bringing their animals in for treatment may feel more secure about leaving their pets at an animal hospital overnight. A New regulation will require veterinarians to give prior written notice to a client if there will be any time period within a 24-hour period when no qualified personnel will be on duty at the hospital. The new rule was enacted to allow clients the opportunity to make an informed decision about whether or not they wish to leave their animals at a facility if there is a period of time when the animal would be left unattended. The regulation will also alleviate any misrepresentation by the veterinarian as to whether or not the hospital provides round-the-clock services. The passage of the new regulation did not occur without challenges from practicing veterinarians. One opponent to the provision considered it an undue burden on veterinarians to provide written notice to their clients, citing the inevitable cost increases. It was observed by Board members that this increase could be passed on to the clients by upping the fees marginally. Another veterinarian who objected to the rule felt burglaries could become a problem if it became known that no persons would be on the hospital premises at certain times. Noting that animal hospitals could be likely targets for such crimes due to drugs on the premises, Board members nonetheless felt the matter could be best dealt with when and if such a rise in burglaries become apparent. It was noted that veterinarians themselves could do their part to eliminate the danger of break-ins by their choice of the form used to give notice, which is left to their discretion. It is also still up to the veterinarian whether to provide round-the-clock service or not. Members of the Board foresee some difficulty in enforcing the new provision. Funding and manpower for such a task is minimal at best. It was suggested that alerting veterinarians to the new feature on the list of "compliances" hospital inspectors will look for will provide them with an incentive to work out notice systems at the hospitals. Otherwise, the Board will relay on complaints from consumers for enforcement. Failure to comply with the rule could result in a fine, or at least theoretically, in revocation of a veterinarian's license.

A member of the Animal Health Technician Committee was present at the meeting to give a progress report on the group's activities. The Committee met on November 7, 1981 to discuss the substantive education and qualification requirements of animal health technicians. A major proposal put forth by the AHT represenative involved the AHT license exam. The Committee wants to do away with a policy that requires a radiation safety exam to be taken separately from the rest of the exam. The new proposal is to consolidate the exam by incorporating the radiation safety element into the major exam.

The present system is causing problems among practicing and aspiring AHT's alike. Many say that expertise in radiation safety is of fading significance within the profession today. In recent years, anesthesia has taken over as the more vital skill to master. AHT's say the difficulty of the radiation portion of the exam outweighs its value in the practice of animal health care. Also, there has been no marked decrease in radiation safety violations in spite of the emphasis the exam places on radiation safety. Some practicing AHT's have been decertified for not meeting current radiation standards. The AHT Committee would like the current regulation repealed in lieu of new legislation. The Committee has also requested the Board take a closer look at AHT job tasks. The former wants the Board to consider widening the AHT's discretion in his practice to include performing such tasks as dental extraction, suturing and in administering anesthesia. The House of Delegates of Veterinary Medicine has approved the first two, but wants more study done on the latter before a decision is reached.

FUTURE MEETINGS:

To be announced.

## BOARD OF VOCATIONAL NURSES AND PSYCHIATRIC TECHNICIAN EXAMINERS

*Executive Secretary:*
*Billie Haynes*
*(916) 445-0793*

The eleven member Board of Vocational Nurse and Psychiatric Technician Examiners includes three licensed vocational nurses, two licensed psychiatric technicians, one vocational or registered nurse with a teaching or administrative background and five public members. The Board licenses all vocational nurses and psychiatric technicians and regulates trade entry and specified practices under its licensing power.

MAJOR PROJECTS:

Legislation passed in November of 1981 (AB 154) allowing an increase in the initial licensing fee for vocational nurses. The biennial renewal fee maximum has also been increased, doubling the figure from twenty-five to fifty dollars.

Vocational nurses are required by law to take continuing education courses throughout their careers. The Board recently supported mandatory continuing education for psychiatric technician examiners as required by SB 266, which passed the Legislature in 1981. Governor Brown, however, vetoed this legislation, contending that the efficacy of mandatory continuing education has not been proven and that it is an additional, possibly unnecessary, burden for psychiatric technicians.

In September, 1981, SB 532 was passed, allowing an interim permit to be issued to vocational nurses for the three week period after examination passage and while approved licenses are being printed. Previously, vocational nurses had to wait to receive the license in the mail before they could begin working.

FUTURE MEETINGS:

The Board will meet on January 7 and 8, 1982 at the State Building in San Diego. The next Board meetings will be on March 4 and 5, 1982 at the State Building in Los Angeles. It is important to call and confirm meeting dates as they are subject to change.

## Business & Transportation Agency

### DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

*Director: Baxter Rice*
*(916) 445-3221*

The Department of Alcoholic Beverage Control (ABC) is a constitutionally authorized State department. The Alcoholic Beverage Control Act vests the Department with the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State. The Department issues liquor licenses and investigates violations of the Business and Professions Code and other criminal acts which occur on premises where alcohol is sold. Many of the disciplinary actions taken by the ABC are printed in the liquor industry trade publication, BEVERAGE BULLETIN.

The ABC divides the state into various districts, with field offices to regulate its many licensees. The ABC Director, Baxter Rice, is appointed by the Governor. Approximately 14 million dollars has been allocated to the Department for fiscal year 1981-82.

MAJOR PROJECTS:

AB 1111: As with other California agencies, ABC has been involved in the AB 1111 review of its regulations. Public hearings were concluded this fall and comments resulting from those hearings, along with inhouse analysis, have been submitted to the OAL. According to Director Rice, 20% of the regulations have been repealed, 20% have been amended and the other 60% left unchanged. Public hearings may again resume once OAL has had the opportunity to review and comment upon the proposed changes.

Vertical Price-fixing: A current concern faced by ABC regards the fate of AB 429, a bill which would impose by statute an allegedly anti-competitive requirement not to discount even where economies of scale effect cost savings, i.e. to prohibit volume discounts on beer sales. This bill would also allow exclusive territorial restraints by beer manufacturers over wholesalers. It is opposed by the ABC.

AB 429 was promoted by the industry in response to recent vertical price-fixing cases *(Corsetti* and *MidCal)*. The *Corsetti* case in 1978 involved a liquor retailer who refused to abide by the stipulated resale price set by a liquor manufacturer. Corsetti argued that the statute authorizing manufacturer-set resale prices was unconstitutional as an unlawful delegation of legislative powers and in restraint of trade. The California Supreme Court upheld Corsetti's right to price as he pleased and rejected the statute. In the subsequent *MidCal* case, the United States Supreme Court upheld the invalidation of vertical price-fixing as to wine sales. These cases caused ABC to repeal conflicting language in Rule 105 of its regulations (effective 1-1-82). AB 429 was promoted in response to these two cases and the ABC's repeal of 105. Recently, however, AB 429 became a "two-year bill." There has been some discussion among the industry, the governor's office and the ABC concerning public response to AB 429, and its probable effects. There is some evidence that the industry will allow the ABC opposed AB 429 to die if parts of Rule 105 will remain in effect. The ABC may agree to try and prohibit volume discounts of beer or retain some other aspect of Rule 105 in order to stave off the more complete anti-competitive effect of AB 429. The bill has passed the Senate and is currently in Assembly waiting for concurrence.

Primary Source Rule: Historically, when vertical price-fixing was legal, the law stipulated that a retailer or distributor must receive his supply from a manufacturer or his designated agent. This is commonly referred to as the "primary source rule." It prevents distributors from searching for the best deal from other wholesalers or manufacturer's representatives in other parts of the country, since the wholesaler can only buy from the manufacturer or his representative assigned to the area where he does business. With the end of vertical price-fixing, the "primary source rule" was extinguished by ABC as well. Small retailers started buying directly from other states and undercutting their large California competitors. These outside states (primarily Oklahoma) had "affirmation" laws which required that all manufacturers' sales within the state be at or below the lowest price at which that firm sells to anyone in any other state.

The liquor industry was concerned about the end of the primary source rule. They approached the ABC and negotiated a deal. If ABC would support reenactment of the primary source law (contained in AB 499), it would not oppose an "affirmation" statute like Oklahoma's for California (SB 570). Then a problem developed. While both AB 499 and 570 passed, a law suit was immediately filed *(Rice* v. *Williams)* which successfully enjoined enforcement of the pro-industry AB 499. The United States Supreme Court is expected to make a decision as to whether or not to hear the case by the end of December. See *Williams* v. *Rice* 108 CA 3d 348 (9-24-80).

Alcoholic Beverage Tax: As a result of an increased desire to curb alcohol related problems, there has been a strong legislative support for channeling additional monies into alcoholism rehabilitation-educational programs and into law enforcement. Those who work in alcohol abuse professions contend that the money for enforcement and rehabilitation must come directly from the sale of alcohol. Currently, revenue from alcohol tax goes for general government operations, not to rehabilitation programs. Recently, Assemblyperson Art Torres (Los Angeles) proposed a bill that would increase alcohol taxes and channel this extra money into detoxification programs in the Los Angeles area. While the bill failed on a 2-9 vote of the Assembly Revenue and Taxation Committee, the bill is coming up for reconsideration.

AB 1594 (Morehead) is a nickel a drink tax on alcohol served in bars and restaurants. While a portion of the revenue raised from this tax would surface in the general fund, a large portion of the money would be earmarked for alcohol abuse programs and procedures. There have been a number of interim hearings on the bill. AB 957 (Waters) would also increase the tax on alcohol, however, this money would be deposited in a general fund for general use.

Licensing Limitations: Currently before the Legislature is SB 632 (Dills), which has been sponsored by the Department. ABC is challenging the current "cap" to general liquor licenses. The law now limits the number of licenses to one per 2,500 population for on-sale (drinking on premises) and one per 2,000 population for off-sale (liquor stores). The limits are set county by county, and the law grandfathered in those licensed when it passed. As a result of the grandfathering, there have been no new on-sale licenses in Los Angeles (which by contrast had many liquor stores) since 1959. The effect of the limit has been some monopoly power control for liquor establishments and the growth of a very high barrier to entry for new firms. The only way for a new entrepreneur to start up is to buy someone's existing license. Their value is now enormous, in many places

$60,000 and over. This price is a market reflection of the excess profit derived from the protection against competition enjoyed by the license holders. In and of itself, it is a barrier to entry that deserving entrepreneurs from lower or lower middle class backgrounds may not easily overcome.

The purpose of SB 632 is to take the speculative value out of retail liquor licenses. The bill will bring the value of licenses to a lower and more permanent level. SB 632 will grant current licensees a three year moratorium on new licenses. The county-by-county basis for limitation would be eliminated. The current licensees would not be troubled by additional licenses, but they could take their licenses to other counties. Some counties would have a much higher density of liquor stores or bars than others. The market would create new entrants from other counties where demand was high while preserving much of the value of the license. Then after three years of evening out through inter-county movement, ABC would end the limits, allowing local zoning rules and the market place to determine the number of liquor establishments, as with shoe stores and most American retail commerce. Additionally, ABC would charge about $10,000 for a license, and apply this money to a trust fund. The interest would finance the ABC. If the license were sold or turned in the licensee would receive his money back. However, should the licensee engage in flagrant violation of the rules, he could be fined up to the amount of the deposit. Since the license is the basis for much of the ABC's pervasive power over liquor establishments, a license which may be sold or turned in, combined with a returnable fund in trust would give the ABC some disciplinary muscle when the value of the licenses is diminished by competitive forces.

Interim hearings on the bill were held in late October. It was a well-attended hearing with testimony from various elements of industry. Amendments to the bill are now being considered and if amended, regular hearings will be set for January for full policy consideration.

RECENT MEETINGS:

The Department of Alcoholic Beverage Control does not have regular meetings, and since it is not a multimember Board it is not subject to the Open Meetings Act.

Public hearings are held for proposed rule changes or when licensure disputes arise under the Administrative Procedures Act. If the ABC denies an application or the issuance of a license is protested, there is a right to a hearing before an administrative law judge of the Office of Administrative Hearings Department of General Services. Further, there is a quasi-judicial Alcoholic Beverage Control Appeals Board to review ABC adjudicative actions. There have been no recent public meetings of serious consequence.

FUTURE MEEINGS:

To be announced.

## STATE BANKING DEPARTMENT

*Superintendent:*
*Richard Dominguez*
*(415) 557-3232*

The State Banking Department administers all laws applicable to corporations engaging in the commercial banking or trust business, including the establishment of state banks and trust companies; the establishment, operation, relocation and discontinuance of various types of offices of these entities; and the establishment, operation, relocation and discontinuance of various types of offices of foreign banks. The Superintendent, the chief officer of the Department, is appointed by and holds office at the pleasure of the Governor.

The Superintendent approves applications for authority to organize and establish a corporation to engage in the commercial banking or trust business. In acting upon the application, the Superintendent must consider:

1. The character, reputation and financial standing of the organizers or incorporators and their motives in seeking to organize the proposed bank or trust company.

2. The need for banking or trust facilities in the proposed community.

3. The ability of the community to support the proposed bank or trust company, considering the competition offered by existing banks or trust companies; the previous banking history of the community; opportunities for profitable use of bank funds as indicated by the average demand for credit; the number of potential depositors; the volume of bank transactions; the stability, diversity and size of the businesses and industries of the community. For trust companies, the opportunities for profitable employment of fiduciary services are also considered.

4. The character, financial responsibility, banking or trust experience and business qualifications of the proposed officers.

5. The character, financial responsibility, business experience and standing of the proposed stockholders and directors.

The Superintendent may not approve any application unless he determines that: the public convenience and advantage will be promoted by the establishment of the proposed bank or trust company; conditions in the locality of the proposed bank or trust company afford reasonable promise of successful operation; the bank is being formed for legitimate purposes; the proposed capital structure is adequate; the proposed officers and directors have sufficient banking or trust experience, ability and standing to afford reasonable promise of successful operation; the proposed name does not so closely resemble as to cause confusion the name of any other bank or trust company transacting or which has previously transacted business in the state: the applicant has complied with all applicable laws.

If the Superintendent finds that the proposed bank or trust company has fulfilled all conditions precedent to commencing business, he then issues a certificate of authorization to transact business as a bank or trust company.

The Superintendent must also approve all changes in the location of a head office, the establishment or relocation of branch offices, and the establishment or relocation or other places of business. A foreign corporation must obtain a license from the Superintendent to engage in the banking or trust business in this state. No one may receive money for transmission to foreign countries or issue travelers checks unless licensed. The Superintendent also regulates the safe-deposit business.

The Superintendent examines the condition of all licensees. However, as the result of the growing number of banks and trust companies within the state, and the reduced number of examiners following passage of Proposition 13, the Superintendent now conducts examinations only when he considers it necessary, but at least once every two years. The Department is coordinating its examinations with the FDIC so that every other year each agency examines certain licensees. New and problem banks and trust companies are examined each year by both agencies.

The Superintendent administers the Small Business Loan Program, designed to provide long-term capital to rapidly growing small businesses whose growth exceeds their ability to generate internal earnings. Under the traditional standards used by banks, these small businesses cannot provide adequate security to qualify for regular bank loans.

The Superintendent licenses Business and Industrial Development Corporations which provide financial and management assistance to business firms in California.

Acting as Administrator of Local

Agency Security, the Superintendent oversees all deposits of money belonging to a local governmental agency in any state or national bank or savings and loan association. All such deposits must be secured by the depository.

MAJOR PROJECTS:

On October 15, 1981 the Superintendent filed with the Secretary of State an Order Adopting, Amending, and Repealing Regulations to implement SB 285 relating to the licensing and regulation of foreign banks. (See CRLR Vol. 1, No. 3 (Fall, 1981) p. 50). Since the legislation was enacted as an emergency measure, the regulations were adopted on the same basis and took effect upon filing.

Foreign banks have considerable operations in the state, and California is a major center of international banking. As of June 30, 1981, 48 foreign banks maintained 65 California state representative offices. This included 24 foreign (other state) banks with 39 California state representative offices and 24 foreign (other nation) banks with 26 California state representative offices. As of the same date, 85 foreign (other nation) banks maintained 94 California state agencies and branch offices. The total assets of these California state agencies and branch offices were $32.8 billion.

Foreign banks continually apply for approval to establish California state offices. In the fiscal year ending June 30, 1981, 9 foreign banks applied for approval to establish California state representative offices, and 15 foreign (other nation) banks applied for approval to establish California state agencies or branch offices. With the enactment of SB 285, the number of applications is expected to increase significantly.

The New Banking Law sets forth a comprehensive system for the licensing and regulation of foreign banks, including foreign banks domiciled in other states of the United States ("foreign (other state) banks") and foreign banks domiciled in foreign nations ("foreign (other nation) banks"). The New Banking Law divides California state offices (offices located in and licensed by the State of California) of foreign banks into the following classes:

1. Representative offices, which may engage only in representational functions;
2. Nondepository agencies, which, like the remaining classes of offices, may transact commercial banking business but which may not accept any deposits;
3. Depositary agencies, which may accept only deposits of a foreign nation, an agency or instrumentality of a foreign nation, or a person residing, domiciled, and maintaining its principal place of business in a foreign nation;
4. Limited branch offices, which may accept only deposits of the kind permissible for a depositary agency or an Edge Corporation;
5. Wholesale branch offices, which may accept only deposits of the kind permissible for depositary agencies, deposits of $100,000 or more, and deposits the acceptance of which the Superintendent determines by regulation or order does not constitute engaging in domestic retail deposit activities requiring deposit insurance protection;
6. Retail branch offices, which may accept any deposits.

The New Banking Law offers attractive new opportunities to foreign (other nation) banks in the form of California state limited branch offices and wholesale branch offices. Also, since FDIC insurance is now available for branch offices of foreign (other nation) banks, California state retail branch offices, which require FDIC insurance, are a feasible option for foreign (other nation) banks. As a result, the Superintendent expects that foreign banks which do not already have California state offices will be applying in greater numbers for approval to establish such offices. In addition, many foreign (other nation) banks which already have California state offices are expected to apply for approval to upgrade their offices and thereby establish new California state offices. Several have already indicated their intention to do so.

The New Banking Regulations are limited to those which are essential for the establishment of new California state offices of foreign (other nation) banks, including the upgrading of existing offices; the continued operation of existing California state agencies and branch offices and the operation of new California state agencies and branch offices of foreign (other nation) banks in a businesslike manner; the maintenance of safety and soundness in California state agencies and branch offices of foreign (other nation) banks for the protection of their customers, creditors, and the public; and efficient and effective enforcement of the New Banking Law. Regulations which are not essential to the accomplishment of these immediate objectives, but which are necessary to implement the legislation, have been omitted from the New Banking Regulations and will be proposed for adoption as regular, nonemergency regulations.

In addition to adopting the regulations, the Superintendent also adopted forms and instructions for use under SB 285, covering applications by foreign banks for approval to establish California state representative offices and applications by foreign (other nation) banks for approval to establish California state agencies and branch offices.

Having adopted the forms and instructions, the Superintendent has begun accepting and processing applications by foreign banks for approval to establish California state offices, including applications for approval to upgrade existing offices.

Public hearings on the emergency regulations were held on January 5, 1982 in Los Angeles and on January 6, 1982 in San Francisco. Written comments on the regulations will be accepted until January 20, 1982.

AB 650, which took effect on August 27, 1981, made two changes in the Banking Law relating to adjustable rate mortgage loans. First, the bill added section 1227.1 to the Financial Code, requiring the Superintendent of Banks to adopt regulations authorizing state chartered banks and subsidiaries of bank holding companies to make real estate loans with other than a fixed rate of interest if national banks doing business in California are authorized by federal law or regulation to make such loans. Second, the bill amended section 1227 of the Financial Code to add to the list of conforming real estate loans made in accordance with regulations adopted by the Superintendent under section 1227.1.

On September 3, 1981 the Superintendent adopted regulations under Fin. Code § 1227.1. After approval by OAL, the regulations were filed with the Secretary of State and became effective on September 16, 1981.

Fin. Code § 1227.1 applies to California state-chartered commercial banks and subsidiaries of bank holding companies. In addition, Fin. Code § 1756 makes § 1227.1 applicable to state-licensed depositary agencies and branch offices of foreign banks. Accordingly, the regulations apply to state-chartered commercial banks, subsidiaries of bank holding companies, state-licensed depositary agencies and branch offices of foreign banks.

The regulations are similar to Part 29 of the regulations of the Comptroller of the Currency. However, because Fin. Code § 1227.1 specifies that the regulations of the Superintendent are subject to the limits of the laws of California, the regulations do not override the *Wellenkamp* rule, nor do the regulations permit the charging of prepayment penalties in excess of the limits prescribed by California law.

Pursuant to AB 1111, the Superintendent of Banks has begun review of the Business and Industrial Development Corporation regulations which cover,

among other subjects, issuance of licenses, corporate matters, personnel, affiliates, transaction of business, records, and reports. As the first step in the review process, the Superintendent has invited all interested persons to submit their comments and suggestions by December 31, 1981. Thereafter, the Superintendent will form a task force of representatives of Bidco's and of the State Banking Department. After first studying the comments and suggestions received, the task force will examine the Bidco regulations in detail and recommend changes. At the conclusion of the review process the Superintendent will propose appropriate changes in the regulations, give notice of the proposed changes, and provide an opportunity for comment.

RECENT ACTIONS:

As of September 30, 1981, the 246 state-chartered banks of deposit with 1,562 branches had total assets of $58.3 billion, an increase of $7.4 billion or 14.6% over September 30, 1980. During this period there was an increase of 23 banks and 137 branches.

Fiduciary assets of the trust departments of 36 state-chartered banks, 2 title insurance companies and 13 non-deposit trust companies totaled $62.5 billion, an increase of 28.1% over September 30, 1980. The assets of 90 foreign banking corporations (having 98 offices) increased 31.6% to $35 billion.

As of September 30, 1981, the ratio of equity capital to assets was 5.9, the loans to deposits was 77.4.

During the third quarter of 1981, the Department received 9 new bank applications, approved 4 and issued Certificates of Authority to 6 new banks which opened for business. One pending new bank application was withdrawn.

The Department received 1 merger application and approved 1 merger application. One merger was effected.

One application for a new California Business and Industrial Development Corporation was filed, as was 1 application for an additional office of a California Business and Industrial Development Corporation.

The Superintendent issued Certificates of Authority to 5 agency (branch) offices of foreign banking corporations.

One application for a license to engage in the business of issuing payment instruments was filed.

The Superintendent approved 1 application for a license to engage in the business of issuing travelers checks.

Thirty-three applications for new branch officers were filed, 40 approved, 3 withdrawn, 7 expired and 27 licensed. The Department received 9 applications for new places of business, approved 6 and licensed 5 new places of business. Fifteen applications for extension of banking offices were filed, 16 approved and 1 withdrawn. The Superintendent issued 1 license to establish and maintain an office as a representative of a foreign banking corporation.

The Department received 5 head office relocation applications, approved 4 and issued 5 licenses. It received 7 branch office relocation applications, approved 8 and licensed 8. One such application was withdrawn and another expired. Three foreign banking corporation relocation applications were filed and 3 approved. The Superintendent approved 1 place of business relocation and issued 1 such license.

Three applications for discontinuance of a branch office were filed, 3 approved and 3 discontinued. The Department received 1 application for discontinuance of a place of business and approved 1.

Four applications for change of name were filed, 4 approved and 2 name changes effected.

One pending application for permission to engage in the trust business was withdrawn.

Republic Bank filed an application for permission to sell its Orangethorpe office to Capistrano National Bank.

California Valley Bank filed an application to acquire the Woodland Branch of Cache Creek Bank. American Pacific State Bank acquired the Granada Hills Branch of Mitsui Manufacturers Bank.

On July 3, 1981 Gateway Western Bank (in organization), filed an application to purchase the Banning Branch of First Trust Bank. The Superintendent approved the application on August 26, 1981, and the purchase was effective on October 19, 1981.

Santa Ana State Bank acquired the assets and assumed the liabilities of the banking busiess of the main office of Pan American National Bank of Los Angeles and the Whittier Branch of Pan American National Bank of Los Angeles, effective November 2, 1981. In connection with the acquisition, the name of Santa Ana State Bank was changed to Pan American Bank of Los Angeles, and the head office was relocated from Santa Ana to Los Angeles. The Santa Ana location became a branch office. The Superintendent issued Certificates of Authority reflecting these changes on November 2, 1981.

The Bank of Alex Brown filed an application to relocate its head office from Walnut Grove to the Sacramento Metro office, and to redesignate the Sacramento Metro office as the head office and the existing head office as the Walnut Grove office. The Superintendent approved the application effective November 5, 1981, and issued Certificates of Authority reflecting the changes.

On October 19, 1981 First Interstate Bank of California filed an application pursuant to California Fin. Code § 3560 and 3580, requesting consent to acquire and hold stock in First Interstate Bank of Canada, through its wholly-owned subsidiary, First Interstate Overseas Investment, Inc. The Superintendent approved the application on October 22, 1981.

On October 29, 1981 Capitol Bank of Commerce filed an application to acquire and hold all shares of Commerce Leasing Company, a proposed corporation being formed to engage in the leasing business, and of Commerce Mortgage Company, a proposed corporation being formed to engage in the mortgage banking business. The Superintendent approved the application the same day.

Tokai Bank of California filed an application, pursuant to Fin. Code § 772, to acquire all the outstanding shares of Continental Loan Company. The Superintendent approved the application on November 12, 1981, subject to consummation of the Agreeement of Merger, merging Continental Bank with and into Tokai Bank of California.

On September 15, 1981 the Superintendent ordered "Royal Bank of Africa," located at One Bay Plaza, Burlingame, to cease and desist from using and doing business under that name in violation of California Fin. Code § 3390 et seq., relating to banking business by unauthorized persons.

On October 22, 1981 the Superintendent issued a warning to Union International Bank, Ltd., 4350 Palm Avenue, La Mesa, to cease and desist from transacting business in California without a license.

LEGISLATION:

On September 29, 1981, SB 499, sponsored by Senator Mary Garcia was signed by Governor Brown. The Legislation recognizes the establishment of international banking facilities (IBF's) by amending sections 23044 and 25107 of the California Revenue and Taxation Code, to exempt intangible assets and income derived from IBF activity from corporate tax.

Formation and activities of IBF's are subject to rules adopted by the Federal Reserve Board, and do not require formal application to the State Banking Department. However, institutions establishing IBF's must submit to the State Banking Department a copy of the notification letter sent to the Federal Reserve Bank.

Under rules adopted by the Federal Reserve Board, IBF's may accept certain

deposits from foreign residents (including banks) or from other IBF's. However, an institution establishing an IBF is restricted to activities permissible under its state charter. Agencies of foreign banks not licensed to accept deposits, such as nondepository agencies, may establish IBF's, but cannot accept foreign deposits. Representative offices, which are restricted to representational functions, cannot establish IBF's.

According to the federal rules, institutions establishing IBF's are limited to one IBF for each reporting entity. Banking institutions with more than one office in this state must follow the federal rule. It is anticipated that IBF's will be operated primarily as record keeping entities, and banks must maintain segregated accounts for IBF activity. The IBF must maintain credit files and other pertinent records to support its operations.

The Department intends to examine each IBF in conjunction with the regular examination of each licensee.

SB 979 (Keene), relating to establishment and discontinuance of ATM branch offices, is presently in joint conference committee.

The Department's fee bill, AB 1059 (Bosco), was signed by the Governor on September 11, 1981.

AB 2164 (Bosco), eliminating the Superintendent's statutory $20,000 revolving fund, and clarifying the notice the Superintendent must give upon taking possession of the property and business of a bank, was signed by Governor Brown on September 25, 1981.

No further action was taken on SB 886 (Ellis), changing the Superintendent's principal office from San Francisco to Sacramento.

## DEPARTMENT OF CORPORATIONS

*Commissioner:*
*Geraldine D. Green*
*(916) 445-7205*
*(213) 736-2741*

The Department of Corporations is a part of the cabinet level Business and Transportation Agency. It is overseen by a Commissioner of Corporations appointed by the Governor. There is no formal Board. Hence, there are no regular hearings and the Open Meetings Act does not apply. There are irregular public hearings pursuant to the Administrative Procedure Act, but only when there is an adjudicatory matter (e.g., the revocation of a license) or where there is a rule change proposal.

The Department, as a part of the Executive, administers several major statutes. The most important is the Corporate Securities Act of 1968. This statute requires the "qualification" of all securities sold in California. "Securities" are defined quite broadly, and may include business opportunities in addition to the traditional stocks and bonds. Many securities may be "qualified" through compliance with the Federal Securities Acts of 1933, 1934 and 1940. If not under federal qualification, a "permit" for security sales in California must be issued by the Commissioner.

The Commissioner may issue a "stop order" regarding sales or revoke or suspend permits if in the "public interest" or if the plan of business underlying the securities is not "fair, just or equitable." The Commissioner may refuse to grant a permit (unless the securities are properly and publicly offered under the federal securities statutes). A suspension or stop order gives rise to APA notice and hearing rights. The Commissioner may require records to be kept by all securities issuers, may inspect those records and may require a prospectus or proxy statement to be given each potential buyer unless the seller is proceeding under federal law.

The Commissioner also licenses Agents, Broker-Dealers and Investment Advisors. Those brokers and advisers without a place of business in the state and operating under federal law are exempt. Deception or fraud or violation of any regulation of the Commissioner is cause for license suspension of up to one year or revocation.

The Commissioner also has the authority to suspend training in any security by summary proceeding and to require securities distributors or underwriters to file all advertising for sale of securities with the Department before publication. The Commissioner has particularly broad civil investigative discovery powers; he can compel witnesses to be deposed and require production or documents. Witnesses so compelled may be granted automatic immunity from criminal prosecution.

The Commissioner can also issue "desist and refrain" orders to halt unlicensed activity or the improper sale of securities. A willful violation of the securities law is a felony. Securities fraud is a felony. These criminal violations are referred by the Department to local district attorneys for prosecution.

The Commissioner also enforces a group of more specific statutes involving similar kinds of powers; Franchise Investment Statute, Credit Union Statute, Industrial Loan Law, Personal Property Brokers Law, Health Care Service Plans Law, Escrow Law, Check Sellers and Cashers Law, Securities Depositor Law, California Small Loan Law, Security Owner Protection Law.

MAJOR PROJECTS:

The Department is faced with this situation: The buyer of an expensive home assumes the seller's first trust-deed at a reasonable interest rate. However, he does not have enough money to cover the balance after his down payment so he must find a lender to help him cover the remainder of the purchase price. He can go to a bank, but today's high interest rates are too high. Instead he seeks out a mortgage broker who will find a private party willing to loan him the money at a lower than commercial rate through a second trust deed. The broker is more than happy to help, but because the home is expensive, the money needed exceeds most private lender's ability to pay, so the broker finds two or more individual private lenders to go in together and loan the buyer his much needed cash. If only one lender were used, this transaction would be under the control of the Department of Real Estate, but since a multiple lender transaction is used, this qualifies as a security under California law and is controlled by the Department of Corporations.

Until recently, the Department has not paid too much attention to these transactions. However, with the increasing costs of homes forcing brokers to make these loans and the recent collapse of some mortgage companies, the Department decided it was time to more carefully regulate this area and write new regulations.

There is no specific legislative edict to write these rules. Instead, the Department gains its authority through the use of an exemption procedure. Corporations Code Section 25204 states: "The Commission may by such rules as he/she deems necessary or appropriate in the public interest or for the protection of investors, either unconditionally *or upon specified terms and conditions* ... exempt from the provisions ... any class of persons specified in such rules." The Commissioner has decided to follow this rule and exempt multiple lender transactions upon specified terms and conditions.

In general, these terms force greater accountability upon brokers who use multiple lender transactions. It is not clear how many of these transactions are used today, but individual companies make from 20% up to 90% of their loans in this fashion. The more significant provisions require:

(1) Quarterly inspection of records by independent Certified Public Accountants (CPA) if the activities exceed a certain level. (An inspection requires less scrutiny than a complete review of books).

(2) A complete yearly review of all account records by an independent CPA.

(3) Since multiple lender transactions split up or "fractionalize" interests in the property held as security, a separate account is required to include these interests. This is so a CPA looking over the books can easily count up the fractions to be sure there is a whole or not more than a whole interest sold in the land.

(4) Each broker must file reports of all transactions with the Department.

(5) The number of purchasers cannot exceed ten and they must fit within specified net worth or gross income requirements. A purchaser cannot invest if his purchase exceeds 10% of his gross income or net worth.

RECENT MEETINGS:

On November 2 and 4, 1981, the Commissioner held public hearings on these proposals. Chaired by Robert La Noue, Assistant Commissioner, the participants consisted of real estate brokers and dealers. No investors were present at the meetings. While their overall objections were muted, there were some specific objections to sections of the proposed regulations.

Some brokers complained about the necessity of setting up a separate account, as explained above, when they have computers that can eaily find and identify these partial interests for the CPA. They saw a costly burden upon their business with no resulting benefit. Mr. La Noue, who acted as a verbal counterpuncher throughout the meeting, apparently to balance the transcript later to be submitted to the Office of Administrative Law (OAL), noted their concern. The problem here is that many brokers don't have the resources to afford a computer and they must be watched as well. While various possible solutions were thrown about, this issue was left very open.

Some brokers also voiced their objections over the minimum net worth or gross income requirements. One broker stated his clients don't like being told by government what they can and cannot do with their money. Mr. La Noue strongly defended this test in lieu of a less restrictive "know your customer" rule that would shift the burden of determining the fiscal capacities of each consumer upon the broker and increasing the potential of mistake or abuse.

This proposal will be submitted for final approval before OAL before the end of this year.

In response to the passage of AB 1518 (Imbrecht), the Department has promulgated rules exempting from the Corporate Securities Law offers or sales of property not involving public offerings. The most significant aspect of this bill and the ensuing regulations is the increase of allowable persons in such transactions from 10 to 35. The Department supported this increase to ease restrictions in an area they felt needs less regulation due to the perceived extra investment knowledge and expertise of these persons. However, in release 67-c, the Department notes its continuing concern. "Surveillance and related enforcement activities with respect to the new exemption will be one of the priorities of the Department's Enforcement Division." It is hoped easing such restrictions in less troubled waters will allow for better enforcement in problem areas.

This rule was approved by OAL as an emergency order on October 26th. On November 1, 1981 it became effective. Public hearings must be held within 60 days of this date.

The Department's high activity in the real estate area, given a Department of Real Estate, has been a subject of note. Much of this stems from the collapse of a few mortgage companies within the past year and the resulting adverse publicity hurting the entire brokerage industry. For many years industry interests fought the inclusion of many broker transactions within the Corporate Securities Act although they could easily qualify. The primary rationale was the Department of Real Estate adequately policed the industry and an additional layer of regulation was unnecessary and costly. However, upon the widespread news hundreds of investors lost millions of dollars through alleged fraud and mismanagement, the industry decided additional regulation to weed out the unscrupulous was necessary to protect themselves as a whole. Steven Gorley of the Department's Enforcement Division stated: "The industry bit the bullet and got themselves under the Corporate Securities Law. That was a momentous event within this department." Thus, in these days when it seems all industry wishes regulation would go away, here is another example of a group lobbying for new regulation to protect themselves.

AB 1111:

The public comment stage for review of the Department's General Provisions has ended. The staff is now in the process of review of all materials received. Public comment for review of the Corporate Securities Law and Franchise Laws will end in December, 1981.

FUTURE MEETINGS:

The Department does not hold regularly scheduled meetings. No hearings on proposed rules are currently scheduled.

## DEPARTMENT OF INSURANCE

*Commissioner: Robert C. Quinn*
*(415) 557-1126*

The Department of Insurance is vested with the right and duty to regulate the insurance industry in California. The Department is directed by a Commissioner and divided into various divisions, each responsible for a particular task. For example, the License Bureau processes applications for insurance licenses, prepares and administers written qualifying license exams and maintains license records. The Receipts and Disbursements Division manages security deposits and collects fees, gross premium taxes, surplus line taxes and other revenues. The Rate Regulation Division is responsible for the enforcement of California's insurance rate regulatory laws. The Consumer Affairs Division handles complaints and makes investigations of producers and insurers. In all, there are some seven divisions doing the work of the Insurance Department.

The Department has no regular meetings, but does hold public hearings pursuant to the Administrative Procedures Act, when role changes are proposed or licensing controversies arise. The Department published a monthly bulletin in order to keep interested parties informed of its activities.

MAJOR PROJECTS:

One of the Department's major ongoing projects is the regulation review mandated by AB 1111. Initially, the Director of the Review, Leo Hirsch, distributed a general request for comments about existing regulations. Although this request brought some response, it was disappointing. As a result, the Department has hired recent law school graduate, Carole Fistler, and a law student, to assist with the review. The two are responsible to examining the regulations and various transcripts to identify individuals who are or were interested in specific regulations. Letters are then sent to these individuals to elicit comment. The primary problem for the Department, as with many of the other Departments and agencies, is a lack of response. Ms. Fistler is hoping that by requesting information from interested individuals this problem will be overcome.

Mr. Hirsch indicated that a second continuing problem involves the OAL's refusal to allow forms or instructions for forms in regulations. The insurance commissioner believes he has a duty to promulgate forms, which should appear in the regulations. If they do not constitute a part of the regulations, then they

must be distributed as bulletins or guidelines. Would these bulletins or guidelines then be reviewable by the OAL, or be outside of its authority?

The Department, as with much of the Executive Branch, is confused by current OAL guidelines. Recently the Department has begun to investigate and deal with the problems of mortgage guarantee deposits. Presently, these deposits are placed with the State Treasurer. Early next year the Department of Insurance will propose that these deposits be placed with banks to insure easier withdrawal.

The issue of territorial rating, presently in controversy in the County of Los Angeles, is unresolved and a pending matter of continuing concern.

FUTURE MEETINGS:
To be announced.

## DEPARTMENT OF REAL ESTATE

*Commissioner: David H. Fox*
*(916) 445-3996*

The chief officer of the Department of Real Estate is the Real Estate Commissioner. He is appointed by the Governor and must have five years experience as a real estate broker. The Commissioner appoints a Real Estate Advisory Commission. As its name indicates, the Commission has an advisory role only. There are ten members; six members must be licensed real estate brokers and four must be public members.

The Department regulates two areas of the real estate industry; broker and salesperson licenses and subdivisions. In order to be licensed as a real estate broker, an applicant must have worked as a real estate salesperson for two of the previous five years, taken six specified courses and pass an examination. In order to be licensed as a salesperson an applicant must pass an examination. There is a continuing education requirement for both brokers and salespersons. Licenses may be suspended or revoked for disciplinary reasons.

The other area the Department regulates is subdivisions offered for sale in California, whether or not they are located in the state. A standard subdivision is improved or unimproved land divided or proposed to be divided for the purpose of sale, lease or financing. The Department has jurisdiction over undivided interests, with certain exceptions. Types of subdivisions include the creation of five or more lots, a land project, which consists of 50 or more unimproved lots, a planned development containing five or more lots, a community apartment project containing five or more apartments, a condominium project containing five or more condominiums, a stock cooperative having or intended to have five or more shareholders, a limited equity housing cooperative and a time share project consisting of twelve or more interests having terms of five years or more or terms of less than five years with options to renew.

The Department protects the public from fraud in connection with the sale of subdivisions through the use of the "public report." The public report contains a legal description of the land, a statement on the title to the land, including any encumbrances, a statement of the terms and conditions of sale, a statement of the provisions made for public utilities, a statement of the use or uses for which the subdivision is offered and other such information. Some types of subdivisions must have additional information in the report. The person who intends to offer a subdivision for sale submits this information to the Commission on a questionnaire, and when the Commissioner finds that the application is substantially complete, he will issue the public report. The Commissioner will not issue the report if there was failure to comply with any provision of the law regulating subdivisions, the sale or lease would constitute fraud of the purchasers or lessees, inability to deliver title or other interested contracted for, inability to show that certain adequate financial arrangements have been made or if other "reasonable arrangements" have not been made. A prospective purchaser or lessee of a subdivision must be given a copy of the report.

MAJOR PROJECTS:

Brokers: AB 1212 passed in the 1981 session. It changes the definition of a broker, allows certain activities under a permit which were previously prohibited, imposes requirements on mortgage loan brokers in order to protect investors, authorizes the Real Estate Commissioner to issue interpretive opinions with respect to certain provisions of the Real Estate Law and eliminates certain requirements as to advertising and reports by mortgage loan brokers.

Under previous law, the definition of a real estate broker included a person who engages as a principal in the business of buying from, selling to, or exchanging with the public, real property sales contracts or promissory notes secured by liens on real property. AB 1212 provides that the terms "sale," "resale" or "exchange" include every disposition of any interest in a real property sales contract or promissory note secured by a lien on real property.

Previous law prohibited mortgage brokers from accepting any purchase or loan funds from a prospective purchaser or lender, or causing such funds to be held in escrow, except as to a specific loan or specific real property sales contract, i.e. that banking lenders' or purchasers' funds was prohibited. The law would permit this only where authorized by permit issued under the corporate securities laws or real estate law provisions covering real property securities dealers.

AB 1212 also imposes requirements on mortgage loan brokers to protect investors. Generally, the requirements apply to mortgage loan brokers who intend or reasonably expect, in any 12 month period, to negotiate 20 or more new loans and sales (or exchanges of existing promissory notes and real property sales contracts) of an aggregate amount of over two million dollars. Excepted are situations where any broker proposes to solicit or accept funds for a purchase or loan transaction in which the broker will benefit from the funds (other than by commissions). As provided by law for the broker's services as agent, the broker must supply a disclosure statement to the person solicited. The disclosure statement must be signed by the broker and the person solicited and filed with the Department no later than 24 hours before the acceptance of any funds.

Some of the information contained in the disclosure statement which must be given to prospective purchasers or lenders includes: address or other means of identification of the real property that is to be the security; estimate of the fair market value of the securing real property and if the broker is relying on an appraisal, the date it was made and the name and address of the appraiser; age, size, type of construction, and a description of the improvements to the property; information as to the borrower's ability to meet his or her obligation; terms of the note; provisions for servicing the note, including late fees or prepayment penalties; and if the broker benefits directly or indirectly from the funds solicited, an explanation of the nature and extent of the benefits.

The new law requires that proposed advertisements must be submitted to the Department for approval prior to publication.

An annual audit of the broker's business activites must be filed with the Department. The audit must include information on the receipt and disposition of funds of others to be applied to the making of loans and the purchasing of promissory notes or real property sales contracts; the receipt and disposition of funds of others in connection with the servicing of the accounts of owners or promissory notes and real property sales

contracts, including installment payments by obligors; and a statement at the end of the fiscal year to include an itemized trust fund accounting and a confirmation that the trust funds are on deposit in an account maintained by the broker at a financial institution.

The broker must also annually file a report with the Department specifying the number and dollar amount of loan, trust deed sales, and real property sales contract transactions; number and dollar amount of promissory notes and contracts services by the broker; number and dollar amount of late payment charges, prepayment penalties, etc.; default and foreclosure experience; and commissions received by the broker.

AB 1212 also authorizes the Commissioner to issue interpretive opinions upon requests from interested persons with respect to Article 5 (transactions in trust deeds and real property sales contracts) and Article 6 (real property securities dealers) of the Real Estate Law.

Other requirements as to advertising and annual reports were eliminated because the new law covers these areas.

The Department of Corporations has enacted regulations covering mortgage loan transactions. See the Department of Corporations summary in this issue.

Subdivisions: As reported previously (see CRLR Vol. 1, No. 3 (Fall 1981)) the Department has begun extensive regulation of time share interests. SB 355, which affords more protection for prospective buyers of time-share projects, passed in the 1981 session. The law provides that a person who has made an offer to purchase a time-share estate or a time-share use in a time-share project has the right to rescind any contract resulting from the acceptance of the offer until midnight after the third calendar day following the day on which the prospective purchaser has executed the offer to purchase.

The law further provides that the owner of the time-share project, or his or her agent, shall disclose to all prospective purchasers the ricght to rescission, and shall furnish each prospective purchaser a form, as prescribed by regulations of the Commissioner, for the exercise of the right to rescission.

## DEPARTMENT OF SAVINGS AND LOAN

*Commissioner: Linda Tsao Yang (415) 557-3666*

The Department of Savings and Loan (DSL) is organized under a Commissioner charged with the administration and enforcement of all laws relating to or affecting state licensed savings and loan associations. As an executive department, it is not subject to the Open Meetings Act. The Commissioner does not hold regularly scheduled meetings, although public hearings are held where required by the Administrative Procedure Act.

MAJOR PROJECTS:

The department amends its regulations on an ongoing basis to bring them into substantive conformity with regulations issued by the Federal Home Loan Bank Board relating to the operation and management of federally chartered associations. The purpose of such amendments is two-fold: 1. to maintain parity of lending powers between state and federally licensed associations and 2. to prevent a comparative advantage in any phase of operation of federal associations in California over state associations. The California Administrative Code sections affected by such amendments and a brief summary of each are listed below. All refer to Chapter 2, Title 10 of the California Adminsitrative Code.

Sections 218 (d)(2), (d)(3), (e)(4) and (f)(1), (2), (3) and (4) of Subchapter 11 (September 14, 1981) to authorize state licensed associations to extend certain exceptions to "domestic" marketable certificates of deposit available to federally licensed associations. The department has asserted that the change will enhance the department's ability to attract deposit funds. The certificates involved are those with face amounts of $100,000 or more.

Sections 103 of Subchapter 1 and section 164(b) of Subchapter 5 (September 16, 1981) to liberalize procedures relating to gains or losses on sales of loans. The federal government recently amended its regulation of federally licensed associations to allow deferral of gains or losses from such sales. Former regulations required that the association currently report any gain or loss from the sale of loans, resulting in an errosion of net worth where losses were incurred. The new regulation (Section 103) would allow an association to defer any gains or losses when the association intends to reinvest sale proceeds in real estate loans. Further, the association may now amortize any gain or loss over the normal remaining life of the loan sold. A Certified Public Accountant may qualify or withhold an opinion on the financial statements from an association amortizing such sales. Section 164(b) would authorize the department to accept such qualifications.

Section 235.44 of Subchapter 17 (October 19, 1981) to remove geographic limitations in and broaden the definition of a branch facility. Current state savings and loan association law (California Financial Code Section 5056) defines a branch as "any office or other place of business in this State owned and operated by an association, other than its principal office in this State ..." The regulation effectively removes the geographic determination of a branch, thus enabling the state to implement interstate branching as is authorized by the Federal Home Loan Bank Board to federally licensed associations. This modification illustrates an ongoing problem faced by the department to provide parity regulations to state licensed associations competing against federally licensed counterparts. Many modifications affecting federal associations which the Federal Home Loan Bank Board accomplishes through regulation must be accomplished by both regulatory and statutory changes with respect to California associations. Although the modification to Section 235.44 provides the regulatory framework for interstate branching by state associations, a statutory change, with its attendant increased time lag, is still necessary to enable state associations to compete on equal footing against federal associations.

The DSL has proposed a repeal and recreation of Subchapter 7 (Sale of Loans and Participating Interests Therein). The Federal Home Loan Bank Board has removed all limitations on the sale or purchase of loans or participating interests in loans for federally licensed associations. Existing DSL regulations are limiting to the type and extent of such sales and purchases by state associations. The repeal and recreation of subchapter 7 will remove such limitations and provide parity in regulation of state associations in order that they may compete effectively with federal associations.

The DSL has proposed the review of seven existing subchapters of Chapter 2 (10, 11, 12, 13, 14, 15 and 16) pursuant to Section 11349:7 of the California Government Code (AB 1111). The proposed review is to ensure the conformity of each regulation with the statutory guidelines of necessity, authority, clarity, consistency and reference (Section 11349.1 Cal. Gov. Code).

The subchapters relate to Applications and Hearings for Mergers, Consolidations, or Transfers of Property and Assets of Existing Associations, Investment Certificates and Withdrawable Shares, Investments — Service Corporations and Business Development Credit Corporations, Investments and Borrowings, Other Amoritized Loans, Loans on Mobile Dwellings, and Loans on Low-Rent Housing. DSL has solicited written comments relevant to the proposed review.

Apart from regulatory modifications, the Department deals with routine mat-

ters pursuant to its statutory responsibilities. Thus, DSL considers and decides upon applications for branch licenses, mergers, location changes and articles of incorporation. Such applicants are entitled to a hearing before the Department. The DSL announces pending applications and the status of previously submitted applications on a weekly basis.

FUTURE ACTIVITIES:

A growing number of larger state associations are converting to the federal system of regulation. One consequence of these conversions is a reduction in the amount of fees collected by the Department for examinations of state associations to ensure stability and sound accounting practices. The fees are assessed against the associations according to their size. The problem is becoming acute since the associations leaving the state regulatory system are among the largest savings and loans in California. Furthermore, smaller associations usually require more extensive examination since errors committed in their operation tend to be reflected as a larger percentage of their total assets. DSL will continue to monitor the situation and explore the possibility that examinations be conducted by the Federal Insurance Corporation (FSLIC) on a more frequent basis than is now the case. To discourage the trend of conversion, DSL will continue to revise and establish regulations affecting state licensed associations to maintain a regulatory parity with federal associations doing business in California.

# Department of Industrial Relations

## CAL/OSHA

*Director: Don Vial*
*(415) 557-3356*

California's Occupational Health and Safety Administration (CAL/OSHA) is an integral part of the cabinet level Department of Industrial Relations. Its purpose is to administer California's own program to ensure the safety and health of California's wage-earners.

CAL/OSHA was created by statute in October of 1973 and its authority is outlined in Labor Code §§ 140-149. Its components include the Occupational Safety and Health Standards Board (OSB), the Division of Occupational Safety and Health (DOSH), which includes the CAL/OSHA consultation service and the Hazard Evaluation System and Information Service (HESIS), and finally the Appeals Board.

OSB is a quasi-legislative body empowered to adopt, review, amend and repeal health and safety orders which affect California employers and employees. Under section 6 of the federal Occupational Safety and Health Act of 1970 California's safety and health standards must be at least as effective as the federal standards within 6 months of the adoption of a given federal standard. In addition, the Standards Board may grant interim or permanent variances from occupational safety and health standards to employers who can show that an alternate process would provide equal or superior safety to their employees.

The duty to investigate and enforce the safety and health orders rests with DOSH. DOSH issues citations, abatement orders (granting a specific time period for remedying the violation) and levies civil and criminal penalties for serious, willful and repeated violations. Not only does DOSH make routine investigations, but they are required by law to investigate employee complaints, any accident causing serious injury, and to make follow-up inspections at the end of the abatement period.

Within DOSH, the CAL/OSHA Consultation Service provides on-site health and safety recommendations to employers who request assistance. This consultation guides employers in adhering to CAL/OSHA standards without the threat of citations or fines.

Another subdivision of DOSH is HESIS which was developed to provide employers and workers with up-to-date critical information on the health effects of toxic substances and methods for using these substances.

Finally, the Appeals Board adjudicates disputes arising out of the enforcement of CAL/OSHA's standards.

MAJOR PROJECTS:

Compliance with AB 1111 is one of the Department of Industrial Relation's major ongoing projects. The process of reviewing the over 3,000 pages of health and safety standards has been moving very slowly. The OSB submitted a plan to the OAL to re-evaluate these health and safety standards over the next 4 years. This plan assumed that the Board would be able to fill 9 positions to aid in the review project. However, FED/OSHA will not provide matching funds as originally anticipated and only 4 positions can be filled. Thus, it is uncertain at this point whether the 4 year timetable is still feasible.

The OSB's major ongoing projects include the amendment and repeal of existing safety orders so that they conform to current industrial working conditions, and the consideration of variance applications submitted by employers. If an employer can demonstrate by a preponderance of the evidence that its proposed variance from the "condition, practices, means, methods, operations or processes" will provide employment conditions which are at least as safe and healthful as existing safety orders require, the OSB may grant a variance.

RECENT MEETINGS:

The most controversial recent actions of CAL/OSHA have concerned the OSB's attempt to restrict 2 toxic chemicals, PCB's and EDP's.

Polychlorinated Biphenyls, (PCB's) are not only carcinogenic, but are also responsible for other long term adverse effects on health including infertility and hepatic injury. The United States Congress considered PCB's so dangerous that their production was banned in the 1976 Toxic Substances Control Act. The regulations promulgated by CAL/OSHA were aimed at protecting those workers who must still come into contact with PCB's. The primary emphasis of the standard is to control skin contact and contamination of food and water in order to prevent skin absorption and ingestion, since these are the major routes of entry

for workers exposed to PCB's. The impetus for the proposed regulations was a petition from a union claiming that the severe hazards of PCB's were not recognized and workers are not adequately protected. Thus, the regulations included standards for engineering controls, respiratory protection, training and information, signs and labels, protective equipment and clothing, medical surveillance and exposure limits. At public hearings, impressive worker testimony was directed at lowering the proposed maximum exposure limit from 50 ppm to the "lowest detectable level." Those opposing the standards, the great majority of which were utility companies, felt that 50 ppm standard was too stringent. While the Center for Public Interest Law supports the OSB's initiative in proposing these regulations, they have called upon the OSB to adopt stronger standards regulating any contact with PCB's but to do so by enforcement mechanisms of less complexity than those proposed. Due to the controversy surrounding these regulations, their adoption is speculative.

The OSB also followed up on DOSH recommendations for standards regulating the exposure of agricultural workers to airborne ethylene dibromide (EDB) a fumigant used on fruits and citrus. Once again, the primary disagreement centered on the proposed maximum exposure of 130 ppb. Industry representatives and members of the agricultural hierarchy opposed the standard and feared that its adoption would wipe out many in the industry. Organized labor and worker representatives called for an even stronger standard and supported the adoption of 10 ppb as a maximum exposure limit.

Questions about CAL/OSHA's jurisdiction to enact these regulations were raised given, et al, farm worker regulation by other entities. Resolution of that concern is addressed by AB 1150, a bill introduced by Assemblyman Tom Bates which would transfer the responsibility for farm worker health to CAL/OSHA.

OSB is also considering a number of narrow standards. E.g. the Board is looking into compliance with permissible exposure limits (PEL) and other proposed revisions to standards for occupational exposure to lead and OSB is considering telecommunications safety orders, and machinery, press brake, hydraulic and pneumatic press and riveter guarding.

OSB has recently adopted General Industry Safety Orders dealing with unfired pressure vessels, emergency action plans, fire prevention plans, and various other fire protection regulations, construction safety orders and low voltage electrical safety orders.

FUTURE MEETINGS:

The existing rules of procedure for the conduct of variance proceedings and appeals from temporary variances by OSB are being revised. Such revisions include 1) expanded requirements that variance applicants notify employers of their rights to full party status; 2) revised provisions for the denial of defective variance/appeal applications; and 3) revised rule for the assignment of the hearing panel to consider variance/appeal applications. Hearings on these rule revisions are expected in early 1982.

# Department of Food & Agriculture

Marketing orders may be covered in future issues.

# Health & Welfare Agency

## OFFICE OF STATEWIDE HEALTH PLANNING AND DEVELOPMENT

*Acting Director: Paul Smith*
*(916) 322-5834*

On January 4, 1975 President Ford signed into law the National Health Planning and Resources Development Act of 1974 (Public Law 93-641). This Act was a major experiment in the organization and regulation of health care industry and was designed from the federal government's past experience in health planning dating back to World War II. The Act attempts to establish a rational and workable mechanism for the development of new services and consolidated several overlapping programs and organizational structures already developed.

The Act delineated specific national health priorities and established a 15-member National Council on Health Planning and Development. The Council advises the Secretary of Health and Human Services on health care programs and proposes legislation to achieve goals consistent with the Act.

At the state level, the Act provided for the designation of a single state health planning and development agency. The Act also divided the country into approximately 200 "Regional Health Services Areas," the geographic and demographic characteristics of which make these areas well-suited "units" for health planning and resource development. Each of these areas was required to establish an area wide Health Systems Agency (HSA), which may be a private, nonprofit corporation, an agency of the local government or a public regional planning body.

In California, the state planning agency is the Office of Statewide Health Planning and Development (OSHPD). It was created in 1978 under the guidelines of the National Health Planning and Resources Development Act. The Advisory Health Council, a 21-member board of consumers and providers, serves a function analogous to the National Council on Health Planning and Development.

The state planning agency (OSHPD) is divided into four divisions: the Health Professions Division, the Facilities Development Division, the Health Planning Division and the Certificate of Need Division. There are also several administrative offices, information processing and data gathering offices and specialty offices. These include the Health Data System office, the Legal office, the Civil Rights office (which also administers the Hill-Burton program) and the Special Studies Unit. There is a special public relations office which publishes a monthly newsletter called UPDATE. In terms of numbers, the OSHPD has approximately 180 employees and its 1980-81 budget was $16,571,086.

In addition to the Advisory Health Council, two other statutorily-created boards were set up to advise the OSHPD. The Building Safety Board supervises programs dealing with the physical structure of hospitals and other health care facilities. The Health Manpower Policy Commission promotes equality of access into the health care professions as it attempts to ensure an equitable distribution of health manpower. Members of all three of these boards are appointed by the governor.

The functions of the Advisory Health Council include:

1. divide the state into health planning areas;
2. evaluate and designate annually one agency for each health planning area;
3. integrate area plans into a single Statewide Health Facilities and Services Plan;
4. adopt a Statewide Health Facilities plan;
5. hear appeals of certificates of need decisions rendered by OSHPD;
6. request public agencies to submit data on health programs pertinent to effective planning and coordination; and
7. advise OSHPD about health planning activities and regulations and to help OSHPD set priorities in accordance with the statewide health facilities and services plan.

The area planning agencies designed by OSHPD have been the Health Systems Agencies. There are 14 HSA areas in California, 13 of which have functioning HSA's. These agencies vary in structure and in activities but they uniformly seek to meet the health planning needs of their respective areas. The goals described by the San Diego-Imperial County HSA typify these agencies. These goals are:

1. improve the health of residents of the area;
2. improve the quality, accessibility and continuity of health services provided to residents;
3. minimize increases in costs of health care services;
4. prevent duplication of health resources; and
5. preserve and improve competition in the health services area.

The HSA's also participate in the Certificate of Need Program. A Certificate of Need (CON) is an advance approval of health care projects required by OSHPD. The program is set forth in California Health and Safety Code section 437.13. A CON must be obtained for new health facilities, expansions of already existing facilities or major capital expenditures such as the purchase of a Computer Axial Tomography unit ("CAT scanner"). The certificate represents a finding by OSHPD that the project is necessary and desirable.

INTRODUCTORY COMMENTARY ON THE APPROACHING HEALTH-CARE CONFLICT:

The procedure for obtaining a Certificate of Need is complex. The procedure was outlined in CRLR Vol. 1, No. 2 (Summer, 1981), page 56. The CON program represents the major thrust of the state's effort to control the costs and the distribution of health care.

The CON program is a relative newcomer to health care planning vaguely outlined by the Federal Health Planning Act but specifically spelled out by state legislation. It represents a shift in philosophy of health care delivery. In the late 1950's and early 1960's health planning authorities were advocating a health care system that was accessible to everyone. In order to make health care easily available to all members of the Great Society, the Johnson administration began an unparalleled program of government spending. Government spending in health care more than doubled in only 4 years: from $9.5 billion in 1964 to more than $20 billion in 1968.

Behind this expansion was the notion that health care costs would respond to the law of supply and demand. However, as the supply of medical services increased so did the demand for them. The result was an unexpected increase in medical costs to new prohibitive levels. Because the costs of medical services accelerated at such a rapid pace, a dependence upon government funding was soon created. The average person could not afford health care unless the government subsidized it.

Reevaluation of the Great Society plan took into account this seemingly unique behavior of the health care system in which a greater supply of health care services did not lower their costs. Cost-effective analyses were introduced because economists held that the system didn't obey traditional economic laws must be inefficient. They maintained that health care services had little incentive to be cost-effective because of the monopoly-like nature of these services. Obviously, the patient who has suffered multiple injuries in an automobile accident could hardly afford to bargain with competing health care facilities.

The question became out of control of business policies in health care facilities. Many economists felt that if the patient did not control these policies then the physician must. Indeed health care facilities often operate on the assumption that the more attractive the facility is to the physician (not the patient) the more business it will be able to do. As a result, many hospitals competing for physicians were anxious to fill their hospitals with the latest state-of-the-art equipment. This type of competition often meant increased costs to consumers in exhange for inefficient, often unnecessary equipment and services.

This realization that overbuilding in the health care area contributes greatly to escalating costs has put the government in an anomalous position. The government is now initiating programs to eliminate equipment and services that it earlier subsidized. The resulting policy of allowing expansion of equipment and services only when (and where) a documented need for such expansion exists is the essence of the CON program in California as it is in many other states.

In recent years the CON requirement for new equipment and services has survived constitutional challenges. But the extension of the CON requirement into the areas of preexisting services and equipment is currently being debated. Here the idea is not expansion but replacement or remodeling. Providers argue that a denial of a Certificate of Need in this situation is a taking of property without due process of law. Other providers maintain that even if such a taking is not prohibited by due process, it is nonetheless a compensable taking by analogy to eminent domain procedures.

Even more controversial is the yet-to-be implemented program of Appropriateness Review. The original idea behind this program was to make health care facilities justify their already existing equipment and services in terms of consumers' needs. Those services which could not be justified would be decertified. This idea has been modified so that services justification will be done on an area-specific basis, not an institution-specific basis and no decertification would result. The OSHPD has also renamed the program the Planning Policy Section to emphasize a reorientation to future needs analysis.

Many at OSHPD feel that the Reagan administration will change the health planning climate. However, few are willing to speculate on the extent of those changes. The Reagan administration has already demonstrated a firm belief in competition and a disdain for regulation and subsidy. Funding for such programs as Professial Standards Review Organizations (PSRO's) and even the HSA's has been cut. Ceilings on grants to states for Medicaid programs are being set and direct subsidies to Health Maintenance Organizations (HMO's) are being discontinued.

In the area of health planning, no specific programs have been formulated. But there are signs that reorganizing the health care system will reject the hypothesis that health care costs do not respond to competition.

The past may serve as a guide to the future. As governor of California, Reagan attempted to cut Medi-Cal expenditures through a system of Prepaid Health Plans (PHP's). These PHP's, similar to HMO's, were given X-amount of government dollars to take care of X-amount of Medi-Cal recipients. This put the provider in the position of allocating medical services. Thus, the potentially limitless demand for medical

services would be curtailed by having the providers, not the consumers, determine the need for those services. President Reagan may well encourage the states to set up PHP's or other HMO-type facilities to delivery medical care to the poor.

Taking this projection one step further, the Reagan administration may try to institute a system of competing layers of HMO-type facilities. These prepaid plans will be paid for by a combination of employer-employee contributions. Employers will be required to pay a fixed amount towards the premium. Since each HMO will offer a defined set of benefits, monthly premiums will vary. Employees, especially the young and the childless, will be free to choose plans that offer medical care on a limited basis (only in the event of sudden illness or accident, for instance) which have low premiums, even lower than the amount contributed by the employer. The employee would be permitted to pocket the difference and consider it part of his wages. This type of system would provide incentives to consumers not to use medical facilities for minor illnesses or for conditions resulting from temporary social stresses (such as insomnia, anxiety, fatigue, etc.).

Of course, the employee may choose a plan that offers a different spectrum of medical care according to his circumstances. A choice for a higher level of benefits may result in the employers contribution equaling the HMO premium to be paid. A choice for a still high level of benefits may mean that the employee would have to pay a significant part of the premium himself. This type of choice based on the observation that the perceived medical needs of the consumer differ from his actual medical needs as documented by the provider will serve to discourage excess consumption of medical care.

This type of system will mean a shift in focus. Instead of trying to eliminate so-called provider abuses with the emphasis on regulation, the impetus will be to eliminate consumer abuses by not subsidizing the overutilization of health care services and forcing the overutilizing consumer to pay his own way.

Much of this speculation over the Reagan administration's future health care programs may be problematic. Nonetheless, most planners feel that the Reagan administration is likely to introduce a system that focuses more on provider capabilities and skills rather than on consumer demands. Such a system may contain aspects of the free market competition that the administration favors. And such a system would probably minimize the regulatory demands imposed by several overlapping layers of planners.

This orientation of the Reagan administration is in direct conflict with the policies of the Office of Statewide Health Planning and Development which was created under a pro-regulatory climate. It appears as if the OSHPD is digging in to oppose the coming Reagan assault.

Anticipating state-federal conflicts, Senator Ken Maddy (R-14th Senate District) introduced in 1981 SB 930 for the purpose of bringing California health planning laws into compliance with the National Health Planning and Resources Development Act of 1974 in order to avoid federal penalties. If California were in non-compliance with federal requirements by January 5, 1982, federal law authorized the Department of Health and Human Services to phase out over a four year period federal grants under this Act. The state could have lost an estimated $150 million in 1982, $300 million in 1983, $450 million in 1984, and $600 million in 1985.

The major thrust of this bill as introduced was to strengthen community planning by shifting the planning process from the centralized state agency to the community level. The health system agencies (HSA's) were to be the community health planners with the Office of Statewide Health Planning and Development (OSHPD) being the state coordinator. OSHPD opposed SB 930 originally.

The major provisions of SB 930 as originally proposed included:

1. Statewide Health Coordinating Council (SHCC) would have been created with expanded powers to review the activities of OSHPD with the existing Advisory Health Council being abolished;

2. OSHPD and HSA's would have been given the minimal duties required under federal law. OSHPD would have been required to develop a system to issue "letters of reviewability" that would have been finding formal legal opinions on certificate of need (CON) matters and could have been reviewed in court;

3. CON coverage and procedures would have been changed. Specifically, the burden of proof of justifying replacement or remodeling costs to maintain facilities would have been shifted from the health care facilities to the state; and

4. The Health Resources Appeal Board would have been created to exercise its independent judgment on CON cases.

During the lengthy negotiations that preceded legislative approval, OSHPD transformed the bill into a state health planning measure in anticipation of federal withdrawal of funds to the HSA's. The bill went to Governor Brown as a result of joint efforts by OSHPD and health industries representatives encouraged by bipartisan legislative support. On September 26, 1981, the Governor signed this state health planning reform measure. SB 930 will become law on January 1, 1982.

Some of the major provisions of SB 930 include:

1. Wider discretionary authority is provided to the OSHPD director in suspending CON review of nonpatient-case-related projects and in relaxing certain restrictions in remodeling and replacement projects;

2. The Governor is authorized to request the Secretary of the Department of Health and Human Services to eliminate the designation of HSA's if Congress terminates or fails to fund the National Health Planning and Resources Development Act of 1974;

3. The capital expenditure threshold for CON review is raised to $400,000 for diagnostic or therapeutic equipment and to $600,000 for capital expenditure projects;

4. HSAs are prohibited from conducting appropriateness reviews;

5. HSAs are authorized to waive participation in CON proceedings;

6. General acute-care hospitals are permitted under certain conditions to increase their bed capacities by 10 beds or 10 percent, whichever is less, without a CON;

7. Expedited CON procedures are established for capital outlay projects not related patient care;

8. Public hearings concerning CON applications is required to be conducted by independent hearing officers in the Office of Administrative Hearings (currently the hearing officers are employed by OSHPD) using formal rules of administrative adjudication; and

9. An 11-member Health Planning Law Revision Commission is created to make recommendations to the Legislature and the Governor concerning health planning in case of changes in federal law and funding. The purpose of the Commission is to assure rational planning for the efficient distribution and use of health resources in a manner which assures equal access to quality health care at reasonable costs. The Commission will cease to exist on March 1, 1983.

OSHPD Acting Director, Paul Smith, has promised rapid implementation of SB 930. "It is our intent to complete the necessary regulatory steps and issue appropriate policy statements that will permit a smooth transition when the bill becomes law on January 1, 1982," he stated. OSHPD has adopted four new policies to meet this intent. In letters sent to all health care facilities outlining the policy actions, the Acting Director called

for cooperation between the state and health industry to "design a long-range state health planning program." The four policies are:

1. OSHPD plans to notify each health facility or clinic which has an application pending that is below the threshold requirements for a CON. The CON will not be required for these facilities after January 1, 1982;

2. Any health facility which has a public hearing scheduled on a pending CON application for a project which will no longer be reviewable after January 1, 1982, may request that the public hearing be cancelled;

3. OSHPD is developing application forms to implement the provision concerning increasing the number of general acute care beds without a CON. OSHPD intends to notify all facilities with pending CON applications which may be eligible for exemption under this provision; and

4. OSHPD is developing a separate CON application form for projects not related to patient care. This application form will contain the limited review criteria authorized by SB 930. It will be available for review and comment prior to January of 1982 so it can be used as soon as SB 930 takes effect.

For additional information regarding either the current CON law or the new CON requirements after January 1, 1982, contact Joe Egan, Chief of the Division of Certificate of Need, at (916) 445-1945.

MAJOR PROJECTS:

AB 1111: The OSHPD is conducting a comprehensive review of its regulations as mandated by the Office of Administrative Law (AB 1111 review). Chapter 1, "Health Planning and Resources Development," Division 7, Title 22 of the California Administrative Code is being modified to reflect the statutory language of SB 930. Dr. Ken Umbach is the staff member responsible for Chapter 1. An information hearing will be scheduled for some time in January of 1982. If you want your name to be placed on the mailing list regarding this information hearing, contact Gary Chan, Regulations Coordinator, Office of Statewide Health Planning Development, 1600 9th St., Room 435, Sacramento, California 95814.

*Statewide Cardiac Care Task Force.* Free-standing adult cardiac catheterization units will be permitted under a recommendation adopted by the 24-member Statewide Cardiac Care Task Force at its September meeting. The task force was organized to develop a broad policy on which to base changes in state policy and regulations as they relate to the quality and quantity of cardiac care services for adults and children. Further study will include:

1. Creation of an advisory commission to oversee licensing and planning for cardiovascular services;

2. Use of mortality and morbidity figures as triggers for automatic review of cardiovascular programs; and

3. Establishment of a statewide data registry to aid evaluation of an planning for effective methods of treating heart problems.

*California Health Manpower Policy Commission.* At the Health Manpower Policy Commission September meeting, the Commission acted on a financial contingency plan to permit continued operation of the $1.1 million Harbor General Hospital family physician training program eliminated in the Los Angeles County Department of Health Services budget cuts. The Commission recommended to the OSHPD acting director the allocation of $1.7 million for family practice residencies throughout the state.

Twenty-two training hospitals throughout the state have been awarded $1.84 million in contracts to train doctors to become family physicians for California. Funding is made available by annual appropriations from the Song-Brown Family Physician Training Act, which is administered jointly by the Health Manpower Policy Commission and OSHPD. The funds will provide partial support for ongoing three-year medical residency training programs. The contract will become effective on July 1, 1982. The major goals of the program are to:

1. increase the number of family physicians, family nurse practitioners and primary care physician's assistants in California.

2. encourage the graduates of these programs to locate their practice in medically needy areas in California; and

3. decentralize the training programs into community hospitals and institutions.

*Hill-Burton Booklet.* An OSHPD booklet describing the benefits available under the Hill-Burton Act of free and part pay health care for needy persons at 238 statewide nonprofit health facilities is available to the public in three languages (English, Spanish or Chinese). This program provides federal construction assistance to certain health facilities which in turn agree to give 20 years of free and part pay care. These facilities also agreed to permanently provide their services to the community without discrimination including of emergency care to anyone without first questioning a person's ability to pay. Individuals desiring copies of booklet may write to the Office of Statewide Health Planning and Development, 1600 9th Street, Sacramento, California 95814 or telephone the Civil Rights Office at (916) 323-2648.

*Advisory Health Council.* The following appointments and reappointments to the 21-member Advisor Health Council have been announced by Governor Brown. Reappointments include: Dr. Samuel G. Benson of Orinda (term expires July 1, 1984), Dr. Robert C. Davidson of Sacramento (term expires July 1, 1985), Jose Joel Garcia of Oakland (term expires July 1, 1984), Dr. Lawrence Hart of Santa Barbara (term expires July 1, 1985), Thomas McCampbell of Chico (term expires July 1, 1984 and McCampbell currently is Council Chairperson), Frank Mele of Oakland (term expires July 1, 1985), and Manuel Sanchez of Los Angeles (term expires July 1, 1985). The appointees are: Dr. Thomas P. Comer of Encino (term expires July 1, 1985), and Nancy Dobbs-Dixon of Sebastopol (term expires on July 1, 1985). Other members are Cecil Ames, Yoshi Horkawa, Michael J. Krisman, George D. Monardo, Clarence H. Nixon, Robert E. Rath, Carolyn I. Strite, Louis J. Carson, Dr. David B. Horner, Frank D. Lanterman, Honorable Patrick Johnston and Timothy McCarthy. James Gentry is the Executive Secretary of the Advisory Health Council.

FUTURE MEETINGS:

February 26, 1982 in Los Angeles.
April 23, 1982 in San Francisco.
June 4, 1982 in Sacramento.

# Resources Agency

## AIR RESOURCES BOARD

*Executive Officer:*
*James D. Boyd*
*(916) 322-5840*

The California Legislature created the Air Resources Board in 1967 to control air pollutant emissions and improve air quality throughout the state. The Board evolved from the merger of two former agencies: the Bureau of Air Sanitation within the Department of Health and the Motor Vehicle Pollution Control Board. The five members of the Board are appointed by the Governor and have experience in chemistry, meteorology, physics, law, administration and engineering and related scientific fields.

The Board approves all regulations and rules of local air pollution control districts, oversees the enforcement activities of these organizations and provides them with technical and financial assistance.

The Board staff numbers 425 and is divided into seven divisions: Technical Services, Legal and Enforcement, Stationary Source Control, Planning, Research and Administrative Services.

MAJOR PROJECTS:

Major projects of the Air Resources Board (ARB) include (1) developing a control measure for emissions of oxides of nitrogen from process heaters in refineries and (2) the review process of AB 1111.

The ARB and the South Coast Air Quality Management District (SCAQMD) combined their efforts to develop a control measure for the regulation of emissions of oxides of nitrogen ($NO_X$) from boilers and process heaters in refineries. The ARB Staff determined the need for the control measure from evidence indicating that $NO_X$ emissions from boilers and process heaters have contributed to pollutant levels in excess of those established by the federal Clean Air Act, California Health and Safety Code, and federal and state ambient air quality standards. The Staff was also concerned about the effect that $NO_X$ emissions have on the formation of acid rain, particularly in the South Coast Air Basis (SCAB). The control measure is particularly directed at reducing $NO_X$ emissions in the SCAB, San Francisco Bay Area, Ventura County and Kern County.

Current $NO_X$ emissions from refinery boilers and process heaters are estimated to be approximately 55 tons per day in the SCAB, 44 tons per day in the San Francisco Bay Area and 5 tons per day in Kern County. The Staff concluded that the implementation of the control measure will reduce these $NO_X$ emissions by approximately 50% with a statewide cost-effectiveness of approximately $2.00 per pound of $NO_X$ removed. It is estimated that the capital cost of the control equipment required to comply with the control measure is $76.6 million in the SCAB, $61.6 million in the San Franicisco Bay Area and $4.6 million in Kern County.

Four refinery surveys and several workshops were conducted, numerous refineries were visited, individual discussions with refiners and process vendors were held, and several published information regarding existing $NO_X$ control technology were reviewed during the development of the suggested control measures.

The major source of criticism of the control measure comes from the industry which will be affected by the regulations. The industry argues that the regulations are unnecessary. The ARB has deferred a final decision on the suggested control measure until March 1982. In the interim, the ARB plans to conduct workshops in order to reconcile the differences between the cost estimates established by Staff and those prepared by industry.

RECENT MEETINGS:

The ARB approved control measures for the regulation of oxides of nitrogen ($NO_X$) from cement kilns at the October 21 meeting. The Board identified the need to reduce emission of $NO_X$ from stationary sources in the SCAB because the levels of nitrogen dioxide in the Basin exceed both the state and national air quality standards. In addition, emissions of $NO_X$ contribute to violations of state and/or national ambient air quality standards for total suspended particulate matter in SCAB and other air basins.

$NO_X$ emissions from cement kilns are estimated to be 10.3 tons per day in SCAB. The Staff determined that the control measure which should reduce $NO_X$ emissions by 3.9 tons per day is technologically feasible and cost-effective.

The control measure requires that any cement kiln operated on or after July 1, 1984 emit no more than 3.1 pounds of $NO_X$ per ton of clinker produced. The control measure also provides for a technology review after January 1, 1984. Conceivably, adjustments of emission limits could be made at that time.

The approved measure has been forwarded to the South Coast Air Quality Management District with the recommendation by the Board that it should adopt the measure into regulatory form. The Board also transmitted the measure to other districts with the expectation that they will incorporate the measure into their regulatory scheme.

At the November 4, 1981 meeting, the ARB approved a revision of the meteorological criteria for regulating agricultural burning contained in Title 17, California Administrative Code, Section 80260. Prior to the November 4 decision, the Guidelines provided for the declaration of either a no-burn day or a permissibe burn day, three meteorological criteria must be met. Once a permissive burn day is declared, the burning of all types of agricultural wastes is permitted. When a no-burn day is declared, no type of agricultural waste may be burned unless the local air pollution control district issues a permit. In order to receive a permit, an applicant must show that the denial of such a permit would threaten imminent and substantial economic loss.

The new Guidelines were amended by adding to the meteorological critera a section that provides for an optional declaration of a conditional permissive-burn day for the burning of almond orchard prunings only in the northern section of the San Joaquin Valley Air Basin. The requirements for such a declaration are (1) that at least three consecutive no-burn days must have occurred in the period immediately preceding the conditional permissive day declaration; (2) at least two of the three meteorological criteria must be satisfied on the conditional permissive-burn day, and (3) the Board determines that the conditional permissive-burn day will not cause significant adverse air quality impacts.

At the November 18 meeting, the Board approved a regulation dealing with the preparation and submittal of proof of correction for gasoline cargo tanks. The new regulation will be added to Part III, Chapter 1, Subchapter 8 of Title 17 of the California Administrative Code.

The new regulation addresses the procedures a violator of the vapor recovery system must follow in order to avoid criminal penalties involving gasoline cargo tanks. Sections 41970 through 41974 of the Health and Safety Code provide for an optional alternative to criminal penalties in cases where a person has violated a provision relating to vapor recovery pursuant to State, ARB or local air pollution control district regulations.

The optional alternative to criminal penalties permits charges to be dismissed if the person cited provides the court with proof that the violation has been corrected. Proof of correction consists of either certification by a representative of the ARB, State Fire Marshall, air pollution control district or a verification by the owner or operator of the cargo tank.

Section 41972 requires the ARB to adopt regulations for the making and submission of verification of proof correction by the alleged violator. The new regulation fulfills this requirement by requiring the violator to use ARB forms when veryifying the corrections or repairs made. The violator will also be required to sign the extensive form under penalty of perjury that the information submitted is true and correct.

LITIGATION:

As reported in the CRLR (Vol. 1, No. 3 (Fall 1981) p. 63) the ARB has filed suit against the Environmental Protection Agency (EPA) because the EPA has partially and temporarily stayed ARB regulations on construction of new stationary sources of air pollution and modification of existing sources. The temporary stay was to remain in effect for 90 days during which time the EPA would decide whether to continue the stay pending completion of the reconsideration process and, if so, under what circumstances.

The ARB's legal staff will seek injunctive relief if the EPA decides to extend the stay, but will pursue declaratory judgment even if the EPA discontinues the stay to challenge the lawfulness of the initial stay order. The ARB is concerned about the precedential effect of EPA initial stays in future ARB rule decisions.

LEGISLATION:

Senate Bill 33 (Presley) which authorizes yearly inspections of auto pollution control systems gained in the Legislature when the Senate passed it 23-13. The bill has been passed on to the Assembly Transportation Committee for its consideration.

## CALIFORNIA COASTAL COMMISSION

*Director: Michael Fischer*
*(415) 543-8555*

The California Coastal Commission is responsible for land use regulation of the coastal area of California, supplementary local land use controls. When a land use change or major building project involves the jurisdiction of the Commission, plans must be submitted to the Commission for review and approval. Changes substantially affecting the coastal areas of the state cannot be started without a Commission permit where Commission jurisdiction lies. The Commission has jurisdiction to control development in all those areas of the coastal strip where control has not been returned to local governments.

In the past, control of coastal development returned to local governments only upon Commission approval of a Local Coastal Program (LCP). Recent Legislation has accelerated the process and, after January 1, 1982, development permit authority will return to local governments upon Commission approval of a land use plan (LUP). (See Legislation.)

State tidelands and public trust lands along the coastal strip are also under Commission jurisdiction and will remain so as the law is presently written. Any significant development in those areas is subject to Commission review and approval.

The Commission has twelve voting members and three nonvoting members. Six of the voting members are "public Members," and six are local elected officials who represent coastal districts. All voting Commissioners are appointed by either the Governor, Senate Rules Committee or the Speaker of the Assembly; each appoints four commissions: two public members and two elected officials. The Chairman of the Coastal Commission is Naomi Schwartz. Michael Fischer is the Executive Director of the Commission.

MAJOR PROJECTS:

The completion of, and Commission approval of, the Local Coastal Programs (LCP's) is the major project before the Commission. The California Coastal Act of 1976 requires the 67 cities and counties of the coastal strip to prepare LCPs of coastal conservation and development in their respective jurisdictions. These LCP's are reviewed by the Commission and approved if they are found to be in accordance with the Coastal Act. Once approved, the LCP becomes the program guiding development in that city or county.

Each LCP consists of a land use plan (LUP) and implementation zoning ordinances (which carry out the policies and provisions of the LUP). Most local governments submit these in two separate phases. The LCP does not become effective in the city or county until both phases are certified (approved) by the Commission, adopted by the local government, and legally certified by the Commission as conforming with the terms of its original certification.

Staff reports that, as of October 19, 1981, only 18 of the 67 jurisdictions have received Commission approval of their LCP's. An additional 24 jurisdictions have received approval of their LUP's only and need only get Commission approval of the zoning implementation portion to achieve complete LCP approval. Staff further reports that the Commission anticipates further approvals soon and that the count should rise to 24 LCPs approved and 31 individual LUPs approved by the end of 1981.

As originally written, the Coastal Act provided for permit authority to revert back to local governments upon final certification of an LCP. As of October 19, 1981, 7 jurisdictions have been "certified as legally adequate" by the Commission and are now issuing their own permits. Recent Legislation effective January 1, 1982 accelerates the return of permit authority to local governments. Local governments will now regain control upon Commission certification of their LUP and not their complete LCP.

AB 1111:

The Commission filed its Statement of Review Completion for Chapters 1, 2 and 3 of existing regulations with the Office of Administrative Law on April 10, 1981. These Chapters primarily deal with officers, staff, meetings and the scope of the regulations. The OAL responded with an Order to Show Cause why these regulations should not be repealed just three hours short of their six month deadline in early November.

It is possible that OAL issued this order because they didn't have time to effectively review these regulations within the statutory six month period. There is some concern at the Commission that the review process could take much longer than expected, in light of OAL's response to these chapters which contain very little of the authority which the Commission possesses. Already the review process has made extensive demands on the Commission's time. The Commission must now spend additional time formulating a response to the OAL objections. The Commission has sixty days to respond to the OAL order with the possibility of an extension to ninety days subject to the approval of the OAL. The OAL then must respond to the Commissions response to OAL objection.

The Commission was to complete review of Chapters 5-10 by November 30, 1981. Many of these regulations had to be rewritten because of the July 1, 1981 expiration date of the Regional Commissions.

With the added workload brought on by the expiration of the Regional Commissions the AB 1111 review will be a substantial burden on the Commission's work during the next year.

LEGISLATION:

In late 1981, the Legislature passed SB 626 (Mello) and AB 385 (Hannigan). Both bills take effect on January 1, 1982.

SB 626 strips the Commission of its legislative authority to issue conditions to coastal permits that protect, encourage, or provide affordable housing opportunities for families of low and moderate income. The California Coastal Act of 1976 had authorized the Commission to protect and encourage such affordable "housing opportunities for persons of low or moderate income" in the coastal zone. The Commission had carried out this mandate by attaching conditions for approval of coastal permits. These conditions usually provided for the replacement of affordable housing units converted or demolished and for inclusion of affordable units in any new coastal development. These conditions for permit approval had been the source of much controversy and were a common complaint of Commission opponents.

SB 626 deletes that portion of the Coastal Act which authorizes these activities and further provides that "no local coastal program shall be required to include housing policies aid programs." (Pub. Res. Code § 30500.1).

Developments that *remove* affordable housing by demolition or conversion and new construction projects still require coastal development permits. In those limited areas the Commission still has jurisdiction to approve permits. However, after January 1, 1982, the Commission cannot demand its housing policies be fulfilled as conditions to those permits.

SB 626 delegates the protection of affordable housing opportunities to the local governments by the addition on Government Code § 65590. This section provides that local governments must apply specific housing requirements, similar to those used by the Commission, when authorizing development along the coastal strip within their jurisdiction.

The bill, as originally written, conditioned return of control to local governments upon the approval of local housing plans by the State Department of Housing and Community Development. The bill as passed contained no such provision.

SB 626 also provides that coastal permits already issued by the Commission may be amended to remove housing requirements (subject to some specified exceptions) if the amendments are consistent with SB 626. The bill is silent as to where no permit has been issued but the Commission has granted an approval with conditions. Staff recommendations for procedures to be followed in such instances should be discussed at public meetings in December through February. Until January 1, 1982, the Commission retains the power to demand that their housing requirements be fulfilled as a condition to permit approval.

AB 385 (Hannigan) affects Commission activities by accelerating the time table for return of permit authority to local governments. The Coastal Act originally provided that permit authority would be delegated to local governments after an "LCP" had been certified and legal implementation accomplished. AB 385 speeds up this process and delegates permit authority to local governments 120 days after the effective date of an LUP (Pub. Res. Code § 30600.5). After that time, a permit for any development within a local jurisdiction will be subject to approval by the local government and not by the Commission. The bill also provides that prior to certification of its LCP, any action taken by a local government on a coastal development permit may be appealed to the Commission by the executive director of the Commission, any person, including the applicant, or any two members of the Commission. (Pub. Res. Code § 30602). (The Coastal Act generally provides that after certification of an LCP, appeals of local actions to the Commission are limited to specific types of developments.)

Even where permit authority has been delegated to the local government, a permit will still be required from the Commission for certain types of developments including: development upon tidelands; submerged lands; public trust lands; near estuaries and wetlands; near coastal bluffs; between the sea and the first public road paralleling the sea, or within 300 feet of the inland extent of any beach, whichever being greater; and developments which constitute major public works projects or major energy facilities. (Pub. Res. Code § 30601).

AB 385 also requires that the Commission establish a schedule for the submission of all LUP's not previously submitted to the Commission. This schedule will be based upon the Commission's assessment of each local government's current status and progress; but, the bill requires that all schedules specify dates of submission no later than January 1, 1983.

These two bills, SB 626 and AB 385, are the result of compromise between those wanting to strip the Commission of its power or repeal the Coastal Act and those wanting to retain the Commission intact. They were aimed at two areas of major controversy; the Commission housing authority and the delay in resumption of local government control over coastal development.

RECENT MEETINGS:

At the September 17, 1981 meeting in San Diego the Commission directed the State Attorney General to file suit against the Self Realization Fellowship (SRF) in Encinitas for bulldozing ocean bluffs without a coastal permit. The illegal action apparently took place in April of 1981 without any notification to the Commission. Staff reported that the grading caused a 600 foot section of the bluff to collapse, which exposed unstable soil and blocked public beach access. The Commission thereupon ordered the organization to provide a 600 foot long public walkway along the bluffs. In a creative argument, SRF attorney Richard Chernick claimed the walkway would interfere with the foundation's free exercise of religion and would therefore violate the United States Constitution.

The September action by the Commission took place in executive session following a public hearing in which the Commissioners refused to reconsider the SRF petition to continue its bluff landscaping project without meeting the public access requirements imposed by the Commission.

Deputy State Attorney General Anthony Summers indicated that he would file the action which could include civil penalties of $10,000 in addition to court orders requiring SRF to stabilize and restore the eroding bluffs.

Coastal Commission public meetings, both recent and in the past, are generally consumed with Commission consideration of development permit applications, amendments to permits previously issued by the Commission, and appeals from previous permit decisions made by the expired Regional Commissions. Through these routine procedures, the Commission fulfills the land use policies set forth in the Coastal Act in those areas where the Commission still retains jurisdiction.

In addition to control of land use along the coastal strip, the Commission also has full authority over development in the state tidelands, and some limited authority in the federal offshore waters. The Commission has authority over state tidelands to the limits of the state's jurisdiction and any significant development within this area must meet with Commission approval. The Commission also has limited input in the control of development in the federally controlled Outer Continental Shelf (OCS). Through a process mandated by the Federal Coastal Zone Management Act of 1972 the Commission must agree that any development on the OCS is consistent with the provisions of the California Coastal Act. Such Commission control either through per-

mit approvals in state tidelands or Federal Consistency Certifications in the OCS, is of major importance as these areas, especially the Santa Barbara Channel, are experiencing an increase in offshore oil development.

In recent meetings, the Commission dealt with activities in both these areas. At a November 17, 1981 public meeting in Huntington Beach, the Commission gave only the second approval for new oil exploration in state waters since the 1969 Santa Barbara Oil Spill. In June, 1981 Arco was granted conditional approval to drill up to nine exploratory wells in the Santa Barbara Channel. At the Huntington Beach meeting, the Commission gave Union Oil approval to drill up to 4 exploratory wells 2.75 miles off Point Conception. The permit was approved upon conditions similar to those required in the Arco permit: approval by the Santa Barbara Air Pollution Control District, maintenance of oil spill clean-up equipment at the drilling sites, and adequate response to an unscheduled, simulated, instantaneous oil spill. Also, a new permit will be required of Union Oil if they intend to go into oil production at the site.

Apparently the tremendous effect the Santa Barbara Oil spill had upon the public has abated with time since no public opposition was presented. The Commission unanimously approved the Union Oil permit. This prompted Chairman of the Commission Naomi Schwartz to comment that a major development in the return to offshore oil exploration in California had gone by "relatively unnoticed." The Commission expects an increase in oil development activity in the State tidelands, paralleled with an equal increase in OCS activity. The State Lands Commission has approved resumption of drilling requests from Shell and is currently reviewing requests from Texaco and Arco/Aminoil. These requests, when approved by the State Lands Commission, will come before the Commission for development permit approval.

The drilling of exploratory wells on the OCS was also an issue at the November meeting. Exxon sought Commission approval of a federal consistency certification to the effect that its proposed activity on the OCS was consistent with California's Coastal Management Program. Such approval of the oil company certification is required before the United States Geological Survey can grant a permit for proposed activities.

Exxon's OCS Plan of Exploration called for up to 44 wells on OCS tracts, but at the November meeting, Exxon requested that the Commission review only the first well to be drilled. The California Air Resources Control Board (ARB) had expressed concern over air pollutant emissions from the OCS activities. The Commission, ARB, and representatives of Exxon were meeting to resolve the problem, but Exxon requested approval of the one well to meet certain contractual deadlines. The Commission has, in the past, and in the present case expressed concern over "splitting" such projects and their regulations do not provide for such a piecemeal approach, but the Commission found that such an approach was needed in this instance. The Commission must act upon Exxon's complete OCS plan, which includes all 44 wells, by March 21, 1982.

The approval of Exxon's consistency certification presented an issue of major concern to the Commission; mitigation of possible adverse environmental effects of such drilling activities. The Coastal Act provides that even though new or expansions of coastal-dependent industrial facilities cannot be accommodated consistent with policies of the Coastal Act, these developments may nontheless be permitted if: (1) alternative locations are infeasible or more environmentally damaging; (2) to do so otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible. (Pub. Res. Code § 30260.) The Commission stated that while the oil spill clean-up equipment specified by the Exxon application could not assure protection of marine resources or prove effective in containment and clean-up as required by the other sections of the Coastal Act, the equipment did provide the "maximum feasible mitigation" of any adverse environmental effects and therefore the plan was consistent with the Coastal Act.

The Commission has expressed concern over the problem of "mitigation" of adverse environmental effects and in this case made it clear that approval of Exxon's certification was not an indication of satisfaction with the degree of protection afforded coastal resources by the specified equipment.

The standard of review used by the Commission in its feasibility determination is based on the maximum feasible capability to reduce the impacts of a spill, if one occurs. A major factor to be considered is the state-of-the-art in oil spill control technology. The Commission is currently studying the capabilities of oil spill equipment and those findings will be used in future consistency determinations and permit reviews.

LITIGATION:

On November 18, 1981, the United States Supreme Court returned the Sea Ranch challenge of the California Coastal Act to a lower court to determine the effect of recent California law on the controversy.

Sea Ranch claimed the 1972 and 1976 laws deprived their homeowners of their property rights. The Commission under the authority of those acts ordered Sea Ranch to turn over private property for public access to six beaches and a bicycle trail. Another condition required the removal of 2,500 trees to guarantee a public view of the ocean in certain locations. Further building would be denied coastal permits by the Commission until these conditions were satisfied.

Sea Ranch contends that the access conditions are an unconstitutional condemnation of property without compensation. But a three judge federal panel on April 7, 1981 found that "The public need for access to state beaches on foot or visually and the importance the people of California place on that need have been embodies in the law."

The Supreme Court decision technically set aside this decision and ordered the lower court to consider whether recent additions to the California Public Resources Code make the case moot.

FUTURE MEETINGS:

January 19-22, 1982, San Diego.
February 3-5, 1982, Burlingame.
February 16-19, 1982, Santa Barbara.

## COLORADO RIVER BOARD

*Chair: Patricia C. Nagle*
*Chief Engineer:*
*Myron B. Holburt*
*(213) 620-4480*

The Colorado River Board was created by the California State Legislature in 1937 to protect the interests and rights of California, its agencies and its citizens in the water and power resources of the Colorado River System. Due to the wide demand for Colorado River resources, California's interests must be promoted on intrastate, interstate, federal and international levels. The Board analyzes engineering, legal and economic matters and develops a single position among the California agencies having the major water and power rights in the Colorado River. The Board also interacts with counterpart Colorado River agencies established by the other six "basin states" (Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming), serves as liaison with the Department of the Interior and other federal agencies, and monitors all issues involved in the 1944 Mexican Water Treaty obligation to deliver Colorado River water to Mexico.

California's rights and interests in the Colorado River Basin must be preserved

in order to continue the successful irrigation of about 650,000 acres in the Palo Verde, Yuma, Imperial and Coachella Valleys of California and the furnishing of municipal, industrial and agricultural water supplies and hydroelectric energy to portions of the six counties comprising the coastal area of Southern California. California's present uses are approximately equal to the combined uses of the other six basin states. Currently, the Colorado River supplies approximately 65% of the water used in Southern California.

The Board consists of eleven members appointed by the Governor. Six members are appointed from agencies in Southern California with entitlements to Colorado River water. These agencies are: Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, San Diego County Water Authority and City of Los Angeles Department of Water and Power. The other Board members are the directors of the Departments of Water Resources and Fish and Game and three public members.

MAJOR PRODUCTS:

The Board's statutory responsibility for monitoring almost every aspect of Colorado River water, including quality, quantity, storage, hydroelectric power production, diversion procedures, flood control measures and augmentation projects, necessarily involves it in a wide range of activities. Following is a description of several of the Board's long-term projects.

(1) The Board is attempting to stifle a major controversy which is brewing between allottees of hydroelectric power from the Hoover Dam. The states of Arizona, Nevada and California purchase power from the Dam under a 50-year contract scheduled to expire in 1987. Under the existing contract, California is entitled to approximately 65% of the hydroelectric power produced at the Hoover Dam. Arizona and Nevada are each entitled to 17.5%. Arizona and Nevada claim that, upon expiration of the existing contracts, all three states have a legal right to one-third of the power produced, pursuant to the Boulder Canyon Project Act of December 21, 1928. The California allottees (the Metropolitan Water District and several other California entities) maintain that they are entitled to an absolute renewal of their existing contracts. Partly because of this impasse, Congress has refused to act on several bills authorizing modifications at the Hoover plant which would increase its generating capacity. As a result, Arizona and Nevada have joined together in advancing to the Department of the Interior a proposal for non-federal financing of Hoover Powerplant improvements, including the addition of a new powerplant and the uprating of some existing generator units. The two states plan to issue revenue bonds to finance the project, repay the bonds with revenue from added peak-demand power sales and share the additional new capacity between themselves. While the California allottees (as represented by the Chief Engineer of the Colorado River Board) support non-federal financing as a necessary step in light of the current Department of the Interior's opposition to federal financing, they strongly object to the formation of any committee on Hoover improvements which excludes representatives from California (which had been suggested by Arizona and Nevada), and urge that a three-state agreement on all aspects of the Hoover resource — marketing criteria, uprating and modification — is an essential prerequisite for the success of any proposal. The Board is continuing to analyze and monitor both the contract controversy and the modification proposal.

(2) The Board also actively participates in the Colorado River Basin Salinity Control Forum. The Forum consists of up to three water resource and water quality representatives appointed by the Governors of each of the seven basin states, and was formed to develop uniform numerical salinity standards for the Colorado River that would be acceptable to the EPA (pursuant to a requirement in the Federal Water Pollution Control Act Amendments of 1972) and to the Colorado River Basin states, and to foster interstate cooperation in salinity control activities. The Forum is currently involved in a triennial review of its water quality standards for salinity.

(3) In addition to concern for the quality of Colorado River Water, the Board is also investigating potential methods for augmenting the quantity of water available. Augmentation of the river's flow is a continuing concern because operative allocations were made based on the wettest year in the River's history; thus, utilization of each state's full allocation and complete fulfillment of Mexican Water Treaty obligations would be an amount in excess of the long-term average runoff. This objective becomes increasingly significant as the basin states built projects (such as the Central Arizona Project, which is scheduled to begin operation in 1985) which allow those states to divert their full allocation of water. The Colorado River Board and other basin states are currently supporting studies of increasing the runoff in the basin by cloud seeding and upland vegetative management, both of which appear to have a potential for comparatively low cost augmentation of the river's flow. At a Board meeting on November 10, 1981 Dr. Bernard A. Silverman, Chief, Office of Atmospheric Resources Research, Bureau of Reclamation, made a presentation on weather modification, urging the Board to support the Bureau of Reclamation's Colorado River Weather Modification Demonstration Program as a first step in proving the augmentation potential of such a procedure if undertaken by Congress on a long-term basis.

RECENT MEETINGS:

It was reported at a recent meeting that the earth and rockfill San Luis Dam (northwest of Fresno) has been damaged due to an earthslide, and that the San Luis Reservoir may be inoperable until repairs are made. The San Luis Reservoir normally stores up to 2 million acre-feet of State Water Project water which is used to irrigate San Joaquin Valley agriculture during spring and summer. The loss of this water may require increased use of Colorado River water. Negotiations are also being made with water contractors from the State Water Project, the Department of Water Resources and the Bureau of Reclamation.

AB 1111:

The Board invited comments from the public on its regulations from August 21 to October 14, 1981. The Board has reviewed those comments and completed its AB 1111 review. No changes will be made in the Board's regulations.

FUTURE MEETINGS:

December 16, 1981 at 10:30 A.M. at the Colorado River Board of California, Room 8103, 107 South Broadway, Los Angeles, California 90012.

## BOARD OF FORESTRY

*Executive Officer:*
*Dean Cromwell*
*(916) 445-2921*

The Board of Forestry is a nine member board appointed by the Governor to guide policy and oversee the administration of the Z'berg Nejedly Forest Practice Act, the State Forest system, and the State's wildland fire protection system. It writes forest practice rules, provides policy guidance to the Department of Forestry, and must determine, establish and maintain an adequate forest policy. California Public Resources Code section 731 requires that five members of the Board be selected from the general public, three from the forest products industry and one from the range livestock

industry.

Advising the Board in the establishment and revision of the district forest practice rules are three district technical advisory committees (DTAC). Like the Board, each DTAC is made up of nine members representing various segments of the community. Among other duties, the DTAC's are required to consult with and carefully evaluate the recommendations of the Department of Forestry, concerned federal, state and local agencies, educational institutions, civic and public interest organizations, and private organizations and individuals. Members of each DTAC are appointed by the Board and receive no compensation for their services.

The Board also licenses Registered Professional Foresters (RPF). An RPF is a person who, by reason of his knowledge of the natural sciences, mathematics and the principles of forestry, acquired by forestry education and experience, perform services including, but not limited to, preparation of timber harvesting plans (THP), consultation, investigation, evaluation, planning and supervision of forestry activities when such professional services require the application of forestry principles and techniques, or knowledge of forest practice rules.

MAJOR PROJECTS:

The Board is considering revised silvicultural rules dealing with the practice of controlling the growing of forests. They deal especially with regeneration, including the type and extent of cutting allowable to maintain the land at or near its productive capacity. The new rules were introduced to standardize terminology and remove ambiguity of terms used to describe silvicultural operations in timber harvesting plans. The changes better enable the Department in its THP review to analyze the impact of logging and to know which rules apply to specific silvicultural systems. Costs to the private sector are estimated to be about $3.5 million annually. The Board is currently considering these rules, and the hearing is now closed. Final Board action is expected by January, 1982.

In September, 1981 the Board adopted new rules for the protection of water courses and lakes. These rules were the subject of much discussion and remain somewhat controversial (see CRLR, Vol. 1, No. 3 (Fall, 1981)). Orientation of the rules is toward the beneficial uses of water potentially affected by harvesting operations. The new rules make it clear that water quality is to be protected. A range of strong protection measures is specified, but substantial flexibility is given to RPF's to propose alternative measures which meet the same standard of protection. Costs to the private sector are estimated to be between $6.9 and $11.7 million per year. The Board is presently awaiting OAL approval before the rules become final.

The Board has recently passed regulations requiring that notice be given to nearby landowners before timber operations may take place (see CRLR, Vo. 1, No. 3). The costs of the required notice will be shared by landowners and the state, with free notice of the submission of a THP provided to the public. The Board estimates that the costs to landowners will be between $40,000 and $248,000; and to the state about $22,000. The regulations have not been filed as of this date because of funding problems.

The Board is in the process of reviewing its rules under AB 1111. The scheduled date of completion is January, 1982. Due to workload and funding problems, the Board and Department are currently about two months behind schedule. Extra staff has been added to alleviate the problem.

RECENT MEETINGS:

In its October meeting, the Board continued hearings on proposed changes in the boundaries of state responsibility areas (SRA). These are the geographic areas in which the state has primary responsibility for fire protection. Local responsibility areas (LRA) are those areas primarily under the protection of the appropriate local firefighting entity. Final Board action is expected by February, 1982.

In the November meeting, the Board conducted hearings for proposed regulations relating to the construction and maintenance of logging roads and landings used for timber harvesting. The purpose of the proposed rules is to prevent erosion and subsequent water pollution caused by improperly constructed roads. During the hearings it was recognized that a balance must be struck between the need to control roadbuilding procedures and the need to minimize the costs of building and maintaining such roads. The hearings are now closed and final Board action is expected early in 1982.

Also at the November meeting, hearings were held regarding the establishment of interdisciplinary review teams to aid the Director in evaluating proposed timber harvesting plans and their effect on the environment. It was proposed that review teams consist of a representative from each of the following agencies: Regional Water Quality Control Board, Department of Fish and Game, Department of Parks and Recreation, California Coastal Commission (for plans in the coastal zone), California Tahoe Regional Planning Agency (for plans in the Tahoe Basin) and the Department of Forestry.

Review teams were first established by executive order issued by the Governor in early 1975. In 1976, the court ruled in *NRDC v. Acata National* that Environmental Impact Reports (EIR's) pursuant to the California Environmental Quality Act (CEQA) would be required for timber operations conducted under the Z'berg-Nejedly Forest Practice Act. To streamline the EIR process, the Legislature has established a "functional equivalent process" provided in section 21080.5 of the Public Resources Code, to allow an agency to qualify as meeting the provisions of CEQA if certain statutory tests are met. Review teams serve as an essential element of the Department of Forestry's functional equivalent process.

From 1976-1981 the Board has come to rely on the review team process to assist in carrying out the Forest Practice Act. The Board believes that the review team is necessary and therefore should be formally established and provided for in the Board rules.

The Department of Forestry estimates that the review team process costs the Department approximately $600,000 each year. No additional costs are anticipated as a result of the proposed formalization of the process.

Final Board action is expected early in 1982.

## SOLID WASTE MANAGEMENT BOARD

*Executive Officer:*
*John W. Hagerty*
*(916) 322-3330*

The Solid Waste Management Board (SWMB) is charged with managing solid wastes in this state to protect the public health, safety and to preserve the environment. The Board must provide for the maximum reutilization and conversion to other uses of the State's diminishing resources. The Board is comprised of two representatives from local government; three public members; two members from the private sector of the solid waste management industry; a civil engineer; a representative of the public with specialized education and experience in natural resources, conservation and resources recovery, and three nonvoting ex officio members.

MAJOR PROJECTS:

In December 1981, the Legislative Analyst issued its "Final Report on Litter Control, Recycling and Resource Recovery." The report (81-19) provides a history of the Board's SB 650 program and contains recommendations for the future SB 650 program.

Basically, the Board's SB 650 grant program (as amended by SB 261, 1980) involves the Board expenditure of grant money in four grant category areas: litter control; resource recovery; recycling; and public awareness. In the first three years of the SB 650 grant program the Board expended approximately $27 million in the four grant categories. The 1981 Budget Act appropriated $5.2 million to the Board for additional SB 650 grants, a significant reduction in the Board's SB 650 budget.

The 1981 Budget Act eliminated all litter control grant money, a reduction of $3,176,666 from fiscal year 1980-81. The resource recovery grant program was increased $300,000 to $2,987,948. The recycling program was cut in half to $1,466,153. The public awareness grant program was funded at the same level as in FY 1980-81 — $977,436.

This severe budget reduction represents a fundamental shift in Board direction. Whereas, the SB 650 program has not been a failure, the grant program has not been as successful as originally anticipated. The Board has admitted to "pouring some down rat holes," spending some money where it should not have, and awarding some grants too quickly.

In defense of the Board, the report notes that state statute requires the Board to spend grant money in prescribed areas in prescribed amounts — often when qualified grantees are not available. Similarly, the Board is reluctant to revoke grants when grantees are failing to perform as required because any such revoked grant money is not returned to the Board, but rather, to the General Fund. However, it should be noted that at its December 1981 meeting, the Board cancelled the unused $170,000 on a $204,000 grant to Coastal Recycling, Inc. (Santa Maria) because of the grantee's continuing financial instability.

The report notes, that many of the Board's resource recovery grant supported projects are not yet operating and many of the projects are not scheduled to commence operations for some years, some as late as 1986. The report concludes that the Board has funded too many projects with the result that too many projects are underfunded.

In terms of grant recycling programs the report, again, concludes that the Board has not been notably successful in its ultimate goal — to divert materials from disposal to landfills. However, the report does defuse the persistent industry arguments that Board subsidized recycling projects are:

1. Giving Board grantees an unfair competitive advantage by allowing Board grantees to offer lower subsidized prices for recyclable materials to the public; and

2. Saturating the market for recyclable materials, reducing the price that can be offered by recyclers for recyclable material, and ultimately restraining the growth of the fledgling recycling industry.

The report states that there is no evidence to support either industry claim. Moreover, the Board has taken steps to ensure that its projects do not unfairly harm established recycling enterprises. All grant applications are reviewed to determine possible injurious effects on existing recyclers and all approved grantees are required to sign a contract that permits them to recycle only those materials that "would not otherwise be recycled."

The report also concludes that the market for recyclable materials is not saturated. Only a very few of the Board's recycling projects are operating at or near capacity. However, the report does note that the Board has not actively pursued the development of the secondary materials market. To the extent that the Board fails to promote the development of the secondary materials market while actively encouraging the collection of recyclable materials, it could be creating a market saturation problem.

The Board has noted this problem and is shifting its attention in this direction. The Board has contracted with Arthur Young and Company to conduct a study on secondary markets and consumer response to products containing recycled materials (packaging, etc.). The study is due for submission to the Board in early 1982.

The Legislative Analysts report concludes, and it appears, that in the future, the Board will concentrate less on funding new specific grant projects and more on market development and increasing public awareness of and demand for recycled products.

All Board members (and staff) felt the report was fair and in most instances accurate. A short response, correcting a few, relatively minor inaccuracies, is being drafted.

**AB 1111:**

The Board's review of existing regulations is behind schedule. To date, the Board has devoted its entire AB 1111 review effort to Chapters 2 (Planning Guidelines and Procedures for Preparing, Revising and Amending County Solid Waste Management Plans) and 3 (Minimum Standards for Solid Waste Handling and Disposal). The results are impressive. Chapter 3 has been entirely rewritten, with substantal and innovative changes.

As presently written, Chapter 3 prescribes minimum landfill standards that, with few exceptions, all operators throughout the state must comply. The newly-written Chapter 3 adds performance standards. When adopted, Chapter 3 will offer landfill operators a regulatory choice. The operator may continue to operate under the prescriptive, operational standards or he/she may, if Board approved, operate under the performance standards. The latter standards will afford operators greater flexibility and permit more efficient operators. The previous requirements of daily cover, intermediate cover, etc. will no longer apply if the operator and his engineer can devise a method of operation that will meet the new performance standards.

The Board has been contemplating the adoption of performance standards for some time. The AB 1111 review process provided a perfect mechanism for implementation. However, the AB 1111 review process has also put the Board in an ironically difficult position.

The Board involved a large number of people in its Chapter 3 review. Landfill owners, operators, LEA's (local enforcement agencies), and public representatives all participated. The result was a near unanimous revision of Chapter 3 to include performance standards. However, the Board must now file its Statement of Review Completion, wait six months for OAL review, rebut the anticipated orders to show cause, and conduct the normal regulation adoption procedure (a minimum of 105 days and a second OAL review) before it can lawfully allow its licensees to operate under the unanimously supported, less restrictive, deregulatory performance standards.

The Board cannot simply notice and adopt the new standards. Recent amendments to the APA state that any regulatory amendments filed with OAL in conjunction with the review of existing regulations, may be reviewed by OAL for six months, not just thirty days.

In an effort to surmount the bureaucratic, OAL roadblock, there has been some discussion that the Board may informally stop enforcing operational standards for those operators who submit plans that will meet the new performance standards.

The Board's Statement of Review Completion for Chapters 2 and 3 will be filed with OAL in January, 1982. Subsequently, the Board's remaining Chapters will be reviewed.

## STATE WATER RESOURCES CONTROL BOARD

*Executive Officer: Clint Whitney*
*(916) 445-3085*

The Water Resources Control Board, established in 1967, regulates state water

resources. The State Board and the nine California Regional Water Quality Control Boards are the state agencies principally responsible for the control of water quality in California. The State Board consists of five full-time members who are appointed by the Governor. Each regional board consists of nine part-time members appointed by the Governor for four year terms.

MAJOR PROJECTS:

The State Board has used its broad powers to institute diverse programs. Water quality regulatory activity includes issuance of waste discharge orders, surveillance and monitoring of discharges and enforcement of effluent limitations. The Board engages in areawide water quality control planning and assistance to waste-water facility construction. It does research and provides technical assistance on agricultural pollution control, wastewater reclamation, groundwater degradation and the impact of discharges on the marine environment. The Board is responsible for administering California's water rights laws. In performing this duty, the Board licenses appropriative rights. The Board may exercise its investigative and enforcement powers to prevent illegal diversions, wasteful use of water and violation of license terms.

Board activity affecting water quality in California operates at two levels. The first level consists of regional control. Each of nine Regional Water Quality Control Boards adopts Water Quality Control Plans, referred to as Basin Plans, for its area. These plans list uses of the waters within the region and establish the standards of water quality required to support those uses. Basin Plans serve as a basis for further Regional Board action. For example, waste discharge permits will not be issued unless they conform to the requirements of the Basin Plan, applicable state plans and federal standards. The second aspect of water resource control is at the state level. The State Water Resources Control Board is charged with approving all regional Basin Plans and Basin Plan Amendments. In addition the State Board acts on petition of any interested party who is dissatisfied with a Regional Board decision.

As a consequence of this agency structure, regional board meetings often consist of public hearings on Basin Plan Amendments and waste discharge requirements for various facilities, as well as discussion of whether to issue cease and desist orders against dischargers. At State Board meetings, petitions relating to Regional Board actions are heard and items independent of Regional Board activity are addressed. These matters include authorization of construction grants, determinations of water rights and negotiation of agreements with other state agencies such as the Department of Fish and Game.

RECENT MEETINGS:

*Oxnard Seawater Intrusion:* By a 3-0 vote at its November 19 meeting, the Board took another procedural step toward adjudicating a thirty year groundwater deterioration in Ventura County's Oxnard Plain Groundwater Basin.

Earlier hearings, ending in August, established that extensive groundwater pumping caused seawater intrusion and substantial deterioration of fresh water supplies in a 20 square mile area. California Water Code, Section 2100, empowers the Board to protect groundwater by seeking a Superior Court injunction to restrict pumping and/or impose physical solutions. In fact, the vote started the clock running on a 90 day period during which the Board must determine whether any local agency will file an action to protect the water supply.

Certain local actions, already begun, may forestall a State initiated suit. First, Ventura County and the United Water Conservation District approved a joint powers agreement to engineer, finance and construct a pumping trough pipeline needed to eliminate the salinity. Second, an election to form a Seawater Intrusion Assessment District will be completed in January, 1982, approximately six weeks prior to the earliest possible date of an Attorney General filing.

Although the State Action may never be initiated, Board members commented that their November resolution would underscore their intent to see the salinity problem alleviated.

Because the Board's current year budget contains no appropriations for groundwater adjudication, a State action would require drawing staff from other work. By one staff estimate, protracted litigation could require almost five staff members per year for 5 to 10 years. The Brown Administration earlier denied a Budget Change Proposal related to the Oxnard problem, indicating that it was a local, rather than State, issue.

*Sacramento River Water Rights:* Also in November, the Board adopted a mathematical formula to determine when water rights of certain users in the Sacramento River watershed could be restricted under a "Standard Term" included in recent permits and licenses. Severe drought conditions in 1976 and 1977 gave rise to Standard Term 91, which assures priority to maintaining water quality standards in the Sacramento River delta. The unanimous vote followed assurances that the Peripheral Canal issue is unaffected by the formula and that a new formula would be required should the canal initiative pass in June, 1982. In essence, the formula first determines whether the Central Valley and State Water Projects are releasing imported or stored water to meet the needs of the delta. When such release occurs, designated permittees and licensees would be required to curtail their use. In accepting the formula, the Board took the final step to make the "Standard Term" effective.

*Clean Water Grants:* As of late November, a $2.4 billion federal appropriation for wastewater treatment projects remained stalled pending conference committee negotiations on Clean Water Act amendments. The amendments address allocation formulas and types of projects to be funded.

In September, the Board approved a priority listing of California projects for submittal to the Environmental Protection Agency. Assuming federal approval at the $2.4 billion level (a 35% cut from the Carter Administration's last budget), California's current year share would be about $190 million. Existing active projects for California alone may require as much as $3 billion (multi-year) to complete.

*Regulatory Review:* AB 1111 review neared its scheduled year end completion, as the Board noticed for public comment five water rights subchapters and renoticed one water quality subchapter (all in Chapter 3, Title 23, Cal. Admin. Code).

The water rights review covers procedures to appropriate water, stock pond rights, procedures to determine disputed rights, recording requirements to extract or divert water in four specified counties and procedures to protect instream beneficial uses such as fish and wildlife protection and recreation. Board staff consider the changes to be mainly editorial.

As a result of substantial public comment and consequent changes to subchapter 15, Waste Disposal to Land, the Board reissued these regulations. Comment focused on coordinating the various agencies which regulate disposal sites (Solid Waste Board, Water Quality Control Boards, and State Department of Health Services); classification schemes for disposal sites; and effects of disposal site discharges on useable groundwater.

At its October 15 meeting, the Board adopted minor changes to other water quality subchapters for submittal to the Office of Administrative Law. These related to petitions for review of Regional Board actions, waste discharge requirements, oil spill cleanup agents, enforcement proceedings against waste dischargers, and regulations to effectuate the California Environmental Quality

Control Act of 1970.

*Pesticide Management:* In a very brief meeting on December 17, 1981, the Board adopted a Memorandum of Understanding on pesticide management with the State Department of Food and Agriculture (DFA). See earlier discussions of jurisdictional issues, CRLR Vol. 1, Nos. 2 and 3, Summer and Fall, 1981. The memorandum elaborates each body's interest in pesticide management and formalizes a working relationship. In essence, the Board agrees to identify pesticides requiring water quality standards and to participate in DFA's Pesticide Advisory Committee and Pesticide Registration and Evaluation Committee. DFA agrees to provide pesticide registration data. A subsequent agreement will address trade secret protection.

*Miscellaneous Business:* On its uncontested items calender, the Board approved a Water Quality Control Plan Amendment for the Santa Ana River Basin, agreed to extend a Sacramento-San Joaquin Delta agricultural study, modified a loan repayment schedule for the Humboldt Bay Wastewater Authority and denied a private party petition from the Coachella Valley regarding an action by the Colorado River Regional Board. The Delta study extension provides $100,000 to collect data for 15 more months on the soil salinity tolerance of corn. The Board helped finance the original three year $500,000 study in conjunction with the Department of Water Resources, the University of California and the U.S. Salinity Laboratory in Riverside.

The Board had intended to take up its Bulletin 4, "Policies and Goals for California Water Management for the Next 20 Years," but withdrew the item to allow staff time to consider some last minute public comments. The item may be reviewed in January.

FUTURE MEETINGS:

Regularly scheduled meetings of the Board will be held on January 21, February 18, March 18, and April 22, 1982, in the Resources Building Auditorium, 1416 9th Street, Sacramento. In addition to regularly scheduled meetings, the Board holds numerous workshops on specific issues. These are separately noticed.

# Independents

## BOARD OF CHIROPRACTIC EXAMINERS

*Exectutive Secretary: Edward Hoefling*
*(916) 445-3244*

The Board of Chiropractic Examiners was created by an initiative measure approved by the citizens of California on November 7, 1922. The Board's duties include examining chiropractic applicants; licensing successful candidates; approving chiropractic schools and colleges; approving continuing educational requirements and courses; and maintaining professional standards through the invocation of prescribed disciplinary measures.

The Board has seven members, two public members and five licensed professionals.

MAJOR PROJECTS:

A comprehensive and stringent set of penalty guidelines for violators of disciplinary rules are currently being drawn up and are expected to be presented to the full Board for approval at its January 21 meeting. The guidelines provide that any chiropractor placed on probation must agree to obey all laws, file quarterly reports, cooperate with the probation surveillance program and post a notice of the disciplinary order in a conspicuous place.

The penalty guidelines also address the problem of sexual misconduct within the profession, a problem which has been the subject of numerous consumer complaints. The proposed penalties provide for a minimum penalty for a first-time sexual offender of six months suspension and three years probation. The minimum penalty for a second violation under the proposal is one year suspension and five years probation. The minimum penalty for multiple violations is revocation of license. The maximum penalty for any offense is license revocation. According to Executive Secretary Edward Hoefling, the penalties are designed to prohibit any chiropractor from using his office as a massage parlor or prostitution ring. He said the maximum penalty of revocation for sexual offenses will be favored.

One of the strictest penalty provisions requires any chiropractor who has his or her license revoked or suspended to notify every patient of the disciplinary action. Other probation terms could include enrollment in drug or alcohol abuse programs or seeing a psychologist.

The Board is also finishing up its mandated AB 1111 review of existing regulations. According to Hoefling, the review hearings have not stimulated much controversy or public input. The most significant testimony has been on the issue of Board certification of chiropractic college in California. A number of years ago, the Board delegated its accreditation authority to the National Council on Chiropractic Education (CCE). The Board only recognizes those chiropractic institutions that receive CCE accreditation. Consequently, there is some question why the Board should retain its regulations on scholastic institutions. The Board will review AB 1111 proposals and receive comment at its January meeting. Its Statement of Review Completion is slated to be filed with OAL on February 18, 1982.

AB 868, which more clearly defines the scope of chiropractic practice and cites chiropractors as "primary health providers," is scheduled to be voted on in the Senate in January. It has already passed the Assembly.

FUTURE MEETINGS:

The Board is scheduled to meet January 21, 1982 in San Diego to review penalty guidelines and AB 1111. Also on the agenda is election of chairman, vice chairman and secretary of the Board.

## CALIFORNIA ENERGY COMMISSION

*Chairman: Russell Schweickert*
*(916) 920-6811*

In 1974, the Legislature created the state Energy Resource Conservation and Development Commission, better known by its short name, the California Energy Commission. The Commission is generally charged with assessing trends in energy consumption and energy resources available to the state; reducing wasteful, unnecessary uses of energy; conducting research and development of energy sources alternative to gas and electricity; developing contingency plans to deal with possible fuel or electrical energy shortages; and, in its major regulatory function, siting power plants.

There are five Commissioners appointed by the Governor for five year terms. Four Commissioners have experience in engineering, physical science, environmental protection, administrative law, economics and natural resource management. One Commissioner is a

public member.

Each Commissioner has a special advisor and supporting staff. The entire Commission staff numbers 500.

The five divisions within the Energy Commission are: Conservation; Development, which studies alternative energy sources e.g., geothermal, wind, solar; Assessment, which is responsible for forecasting the state energy needs; Engineering and Environment, which does evaluative work in connection with the siting of power plants; and Administrative Services.

MAJOR PROJECTS:

Projects of the Commission include: Rehearing for certification of one geothermal plant; preliminary hearings for new nonresidential building standards; assessment of the adequacy of electric utility systems; and changes to the Residential Conservation Service.

Problems continue with the California Energy Commission's (CEC) September 30th approval of the Pacific Gas and Electric Comany's geothermal plant No. 16 in the Geysers area of Northern California. Pursuant to Public Resources Code Section 25530, four parties filed petitions with the CEC riquesting reconsideration of their decision to override local standards and allow transmission lines to be strung across state parks and residential areas. (For a detailed report on this decision see CRLR Vol. 1, No. 3 (Fall, 1981) p. 70).

The Commission is empowered under this section to reconsider a decision or order "on the basis of all pertinent portions of the record together with such argument as the Commission may permit, or the Commission may hold a further hearing, after notice to all interested persons."

Petitioners include the County of Sonoma which is contesting the plan as not conforming to state environmental standards; a private citizen and property owners association claiming improper notice and opportunity to be heard; and, the Northern California Power Agency, a competing utility, contending the power lines must conform with local land use plans.

On December 10, 1981, the rehearing was held in Sacramento. Each complaint was heard separately and each was rejected by a vote of 3-0. It appears at least two of the petitioners will now file suit to stop the transmission lines. Mr. Garret Shehan, advisor to the rehearing, said the County of Sonoma, whose land use ordinance was overruled, and Mr. Robert Lapham, the private citizen petitioner whose property is 700 feet from the proposed transmission line right of way, have indicated they will continue their battle past the now completed administrative review stage. If this occurs, Mr. Shehan expects a further delay of the project.

The CEC began preliminary hearings on nonresidential building standards the week of November 15. Mandated by Public Resources Code Section 25402.1, the CEC is required to develop new energy performance standards for the design of nonresidential and governmental buildings. The standards must include cost effective passive and solar conservation measures. For example, the CEC will consider such techniques for lowering energy use as reflective or heat absorbing glass, roof ponds, heat exchangers, cogeneration units or solar panels for space and water heating. Additionally, the Commission will implement professional education, development and implementation programs directed at affected persons in the building industry.

The Nonresidential Standards Program was developed jointly by the CEC and representatives of the California building industry. The program includes three major elements:

1. Energy design manuals will be written and simple design "tools" used at early stages in the design process to check energy performance and to verify compliance will be developed.

2. A set of energy budget standards for each nonresidential building type in each California climate will be determined.

3. An industry based implementation program will be designed including a building demonstration program and a financial and informational incentives program.

As with the residential building standards program recently approved and to become effective July 1, 1982, the CEC hopes the plan will be flexible and allow for a variety of ways for compliance. A final timetable for further hearings and implementation will be set in mid-1982.

The joint staff report of the CEC and the Public Utilities Commission (PUC) has been published assessing the adequacy of electric utility systems from 1982 to 1985. In considering factors such as current and projected electric output by the utilities, projected consumer demand of electricity, projected electric system reliability, availability of out-of-state power and maintenance needs, the staff came to the following conclusions about the state's energy future for the next three years:

— Even under worst-case conditions, sufficient resources should be available to the utilities to exceed the staff's proposed minimum margin of 5 percent even after unforeseen outages (plant breakdown) and maintenance.

— In the 1982 to 1985 period, 1982 is the year in which contingencies analyzed by the staff could have the most adverse effect on system reliability. After 1982 the staff expects new nuclear plants to be on line. Diablo Canyon 1 is not expected to be on line in summer of 1982.

The utilities were hit by the report for their exclusive use of the trending method to predict future maintenance costs. This method looks at past maintenance costs to calculate future needs. As a consequence, utilities have consistently underestimated future costs. Furthermore, this system offers little apparent incentive for the utilities to improve power plant reliability. Two recommendations were made:

1. The best alternative to the current use of the trending maintenance expense forecast is to supplement trending with a contingency fund that could be used for unexpected maintenance problems.

2. In addition to a maintenance contingency fund, the PUC should implement an incentive program that rewards utilities for exceeding a standard level of power plant performance and penalizes them for performance below the standard.

Initial public hearings on these conclusions and recommendations will take place in San Francisco and Sacramento between January 4 and 15, 1982. The number of hearings will be determined by the number and complexity of the issues.

Residential Conservation Service: In November, three RCS state advisory groups met to consider revision of the state Residential Conservation Service (RCS) plan (see CRLR Vol. 1, No. 3 (Fall, 1981)). Recent Department of Energy regulations giving states greater flexibility in determining home energy audit standards have prompted the changes. The proposals are currently in the staff stage and will be presented to the Commission by January, 1982.

A suit has been filed by the Insulation Contractors Association challenging the implementation of the RCS plan. The suit contends that the Commission has no specific statutory authority authorizing it to implement the plan. The contractors are concerned that the linkage between the audit standards and the zero interest and 55% tax credit programs of the state overly restricts the ability of insulation contractors to market their product.

LITIGATION:

(See Litigation section of this *Reporter* for the consolidated suits of *Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission; Pacific Gas & Electric Co. v. State Energy Commission* (9th Cir. 10/7/81).

Among the duties of the Energy Commission is assuring the coordinated devel-

opment of economical electric power conservation and supply alternatives for California, including the receipt of power from the Bonneville Power Administration (BPA) and utilities in the Pacific Northwest.

The BPA markets electric power from the Federal Columbia River Power System, which in the 1980 operating year (July 1, 1979-80) produced about 81,000 gigawatt-hours (GWh) of electricity, over 90 percent from the 30 federal hydroelectric projects constructed on the river and its tributaries since 1909. BPA sells most of this power on a firm (guaranteed) non-interruptible basis to utilities and industries in the Pacific Northwest (essentially Washington, Oregon, Idaho, and the portion of Montana west of the continental divide).

Since 1974, three high voltage transmission lines spanning nearly 1,000 miles each connect the huge federal dams on the Columbia with the Southern California power grid. The transmission lines, collectively known as the Pacific Inertie (4,100 MW total capacity), have delivered about 13,400 GWh per year to the California utilities, or about 7 percent of California's current annual electricity consumption.

This energy is available to California when hydrological conditions prevents continued storage in the Pacific Northwest reservoirs and there exists no market for it in the Northwest at an established rate.

Thus, California purchases from BPA "non-firm" surplus energy, that is, energy in excess of the amount purchased by BPA's customers.

Due to the large natural fluctuations in precipitation and runoff during each year and the limited storage capacity of the system's reservoirs, most of the nonfirm surplus energy is available during the spring and early summer.

BPA sales of nonfirm surplus energy to California benefits both regions. California benefits by using less oil-fired generation, the state's most expensive power at a cost now approaching 70 mills (1 mill = 0.1 cent) per kilowatt hour (kWh). The Pacific Northwest benefits by receiving revenue for power that would otherwise be wasted by spilling water over or through hydroelectric dams without generating electricity. Thus, keeping the Intertie as full as possible enhances the economic interests of both regions and furthers the national policy of reducing oil-fired generation.

The waste occasioned by "spilling water" could be greatly reduced by construction of additional intertie capacity between the Pacific Northwest and California. The necessary transmission lines within the Northwest are already under construction, but the financial feasibility of starting construction on the complementary transmission line in California depends upon the anticipated price of the power it would deliver.

Until December 1979, BPA sold nonfirm surplus energy at a price of 3 mills/kWh, collecting from California utilities an average of about $20 million per year. From December 1979 through June 1981, BPA charged a new, higher rate — about 7 mills/kWh. The California utilities and other parties challenged the validity of this rate before the Federal Energy Regulatory Commission (FERC), which remanded the 1979 rates back to BPA. In June 1981, BPA returned the same rates with further documentation to FERC, which has yet to confirm or approve them. BPA may eventually be required to refund amounts unlawfully collected under the 1979 rates.

The Pacific Northwest Electric Power Planning and Conservation Act of 1980 (here, "Regional Act") established new substantive and procedural requirements for BPA ratemaking. On June 24, 1981, BPA made a "final decision establishing rates" pursuant to section 7(i)(5) of the Regional Act, 16 U.S.C. section 839e(i)(5). These rates were immediately confirmed and approved by an Assistant Secretary of Energy and placed into effect on an interim basis commencing July 1, 1981. 46 Federal Register 33542 (June 30, 1981). Among these rates appears a new pricing scheme for BPA sales of nonfirm surplus energy — the "NF-1 rate."

Under this new NF-1 pricing scheme, BPA keeps an account of the cost of (1) its short-term power purchases from utilities and industries, and (2) the power it receives under long-term contracts from its "resources operated." This latter category now comprises the Hanford nuclear project and portions of the Trojan nuclear power plant and the Centralia coal-fired generating station. Later it will include the very expensive Washington Public Power Supply System (WPPSS) nuclear projects 1 and 2, and 70 percent of project 3, when these facilities begin producing power (now scheduled for 1984-86). When reservoir conditions require the sale of nonfirm surplus energy, BPA intends to recoup the cost of its previous power purchases from both categories by setting new NF-1 prices on a daily basis.

BPA has already begun its daily NF-1 pricing operation. On July 25-31 and August 4-7, 1981, however, BPA sold nonfirm surplus energy (1,185 GWh) to California at prices ranging from 11 to 18 mills/kWh while simultaneously selling nonfirm surplus energy (399 GWh) to customers in the Pacific Northwest at only 7 mills/kWh.

The CEC believes that this regional NF-1 price discrimination is unlawful because it is inconsistent with BPA's cost of providing firm energy (including the cost of thermal power plants already operating or under construction). BPA rejected this proposal, which would have permitted BPA to collect from California over $37 million per year (average water conditions) in excess of its costs.

The Regional Act directs BPS to acquire sufficient resources to meet its contractual obligations as long as those resources are consistent with Section 4 criteria and considerations. Section (4)(e)(l) establishes ... priority to resources which the Council determines to be cost-effective. Priority shall be given: first, to conservation; second, to renewable resources; third, to generating resources utilizing waste heat or generating resources of high fuel conversion efficiency; and fourth, to all other resources.

The CEC asserts that a recent BPA study allocates insufficient funds for maximum practicable development of cost-effective conservation and alternative resources, resulting in overestimation of loads, underestimation of revenue required from the rate pools to which these costs are finally assigned, and inflated projections of revenue to be received from NF-1 customers. The CEC further charges that efforts to achieve cost-effective conservation in the Pacific Northwest are impeded by BPA's rate structure, which melds the high cost of new supply with the low cost of federal hydropower to create the rate now applicable to most BPA firm power sales within the Northwest. Thus, most BPA customers pay only about 17 percent of the cost of new supply, and their economic motivation to pursue cost-effective conservation and alternative supply supply resources is severly diminished. During the 1981 rate proceeding the CEC proposed two methods for resurrecting the economic incentive, both of which BPA rejected.

On November 10, Dan Meek and CEC Chairman Russell Schweikart testified in joint hearings of two subcommittees of the House of Representatives Committee on Energy & Commerce: Subcommittee on Energy Conservation & Power and Subcommittee on Oversight & Investigations.

Meek and Schweikart gave essentially the above information in their statement to the subcommittees. The General Accounting Office, directed by Congress to look into BPA's operations, and

present at the hearings, reprimanded the BPA (represented by Administrator and Deputy Administrator Earl Gjelde) for not pursuing conservation more vigorously.

"The members of the Committee were extremely critical of Bonneville," Meek said. "This is the first time this thing is brought to light."

Congress, Meek pointed out, has no direct authority to influence BPA's actions except either by passing legislation or not approving the BPA budget.

BPA's NF-1 pricing system is "incredibly complex," according to Meek. He claims to be the only one in the CEC who understands it. "I think they do it purposely to confuse everyone else," he said.

FUTURE MEETINGS

The Commission meets every other Wednesday in Sacramento.

## CALIFORNIA HORSE RACING BOARD

*Chairman: Nathaniel Colley*
*(916) 322-9228*

The California Horse Racing Board is an indendent regulatory board consisting of seven members appointed by the Governor. If an individual, his or her spouse or dependent holds a financial interest or management position in a horse racing track, he cannot qualify for Board membership. An individual is also excluded from Board membership if he/she has an interest in a business which conducts parimutuel horse racing or a management or concession contract with any business entity which conducts parimutuel horse racing. Horse owners and breeders, however, are not barred from Board membership, and the Legislature has declared that Board representation by these groups is in the public interest. The Board regulates by licensing horse racing tracks and allocating racing dates. The Board also has regulatory power over wagering, horse care and "all persons or things having to do with the operation" of horse racing meetings. As with the Athletic Commission, this Board is not subject to Administrative Procedure Act notice, discover and hearing requirements, and may regulate more freely than other agencies.

MAJOR PROJECTS:

The Board is currently in the process of allocating racing dates for 1982, 1983 and 1984. This is one of the Board's most important regulatory functions. The process begins with surveying licensed racetracks to see if improvements can be made over schedules set in previous years. The Board will then discuss these findings and formulate tentative racing schedules. Racetrack operators are then allowed to go before the Board and voice objections to the date allocations. The Board considers these objections when reaching its final decision. This allocation function would be a per se antitrust violation if done without state authority.

Another important area of Board concern is the use of drugs on race horses. The Board is constantly formulating standards for drug administration and evaluating the dangers resulting from the use of various types of drugs. The Board sees this role as an important step toward ensuring the safety of race horses.

RECENT MEETINGS:

The Board discussed regulations regarding the coupling of race horses. Coupling is the combining of wagering interests into a single bet on 2 or more horses in the same race. Coupling occurs when 2 or more horses in a single race are owned or trained by the same person. This practice is designed to eradicate appearance of conflict of interest which occur where there is common ownership or training.

The OAL had previously rejected a regulation, repealing all coupling, for insufficient notice. Coupling is not practiced in most states where parimutuel betting is allowed and the Board favors its discontinuance in California. The Board believes that other procedures and safeguards adequately protect the consumer without resort to coupling. The horse racing industry also favors abolition of coupling.

The Board also discussed the allocation of costs for its new horse identification project. Horses are presently identified by lip tattoos, but the new program, adopted by the Board, requires that each horse have a laminated I.D. card with a color picture on it. The I.D. card would be issued by the Board.

Under the lip tattooing program the horse racing associations pay the total $20 cost. The associations are opposed to paying an additional $20 for I.D. cards. The Board considers the I.D. card program an important consumer protection measure. Therefore, the Board passed a motion proposing that the state pay for the I.D. card system. The state funding would come either by way of legislation or allocation from the Department of Finance.

FUTURE MEETINGS:

The Board will meet January 22, 1982 in Inglewood.

## NEW MOTOR VEHICLE BOARD

*Executive Secretary:*
*Sam W. Jennings*
*(916) 445-1888*

According to the Automobile Franchise Act of 1973, the major function of the New Motor Vehicle Board is to regulate the establishment of new motor vehicle dealerships, relocation of existing dealerships and manufacturer termination of franchises. The majority of those subject to the Board's authority deal in cars or motorcycles. For a discussion of the protest process, *see* CRLR Vol. 1, No. 1 (Spring, 1981) at 52.

Another function of the Board is to handle disputes arising out of warranty reimbursement schedules. When a dealer services or replaces parts in a car under warranty, he is reimbursed by the manufacturer. The manufacturer prepares a schedule of reimbursement rates which are occasionally challenged by the dealer for unreasonableness. Infrequently the manufacturer's failure to compensate the dealer for tests performed on vehicles.

The Board consists of four dealer members and five public members. It has no manufacturer members. The Speaker of the Assembly appoints one public member, the Senate Rules Committee appoints one public member and the Governor appoints the remaining seven. The Board's support staff consists of an Executive Secretary, three assistants (all graduates of or law students at McGeorge Law School) and two secretaries.

RECENT MEETINGS:

The Board overruled three protests to the establishment, relocation and termination of new car franchises at a specially convened Board meeting December 11 in San Francisco. In *Shepherd Pontiac Inc. v. Pontiac Motor Division, General Motors Corporation,* the Board ruled that Pontiac Motor Division could establish a new franchise at 3484 Mt. Diablo Blvd. in LaFayette, CA, under Vehicle Code 3062.

In separate action, the Board overruled a protest to the relocation of a franchise in the case of *Pierotti Motors Inc., DBA Pierotti Fremont Imports V. Nissan Motor Corp. in U.S.A.* Pursuant to Vehicle Code 3062, the Board held that Nissan's could relocate Hayward Datsun Inc. from 21854 Mission Blvd. to 25497 Mission Blvd. in Hawyard, CA.

Finally, the Board decided in *49er Chevrolet v. Chevrolet Motor Division, General Motors Corp.* that defendants established good cause to terminate the 49er franchise. The Board found that there was a total breakdown in the franchise-corporation relationship and that

49er Chevrolet failed to sell or market the number of vehicles it could at its Angels Camp, CA location.

FUTURE MEETINGS:

The next meeting is tentatively scheduled for late January or early February with election of president and vice president slated on the agenda.

## PUBLIC UTILITIES COMMISSION

*Executive Director:*
*Joseph Bodovitz*
*(415) 557-1487*

The California Public Utilities Commission was created in 1911 and strengthened in 1946 to regulate privately owned utilities and ensure reasonable rates and service for the public. The Commission oversees more than 1,500 utility and transport companies including electric, gas, water, telephone, railroads, airlines, buses, trucks, freight services and numerous smaller services. More than 19,000 highway carriers fall under its jurisdiction.

Overseeing this effort are five commissioners appointed by the Governor with Senate approval. The Commissioners serve staggered six-year terms in an increasingly complex full-time endeavor.

MAJOR PROJECTS:

With the advent of high foreign fuel dependency and its correspondingly high cost, regulating energy has received unprecedented attention from the public. Sensing deficiencies of traditional regulation, limited often to policing service and restricting monopoly power price excesses, the Commission has sought new ways to lessen oil import dependency and provide long-term energy resources. The alternatives investigated have been politically controversial and have stimulated an increased adversarial relationship between the regulators and regulated.

One particularly controversial policy by the Commission is one aimed at heightened conservation by small energy users. The program has been labeled "ZIP," since it provides Zero Interest Loans for energy conservation and weatherization improvements upon residences. The loans are repaid through utility bills beginning on June 30 of the year following the year in which the loan is approved.

The first implementation of this ZIP program will be in PG&E's San Joaquin Division where 14% of the company's 3.3 million electric customers and 10 percent of its 2.7 million natural gas customers reside. The $10 million experimental program boasts a financing arrangement new to conservation financing. Called "project financing" it calls for loans granted by banks and institutional lenders without an exchange of collateral security. The flow of funds from the specific project are substituted for the traditional overall credit of the corporation.

Meanwhile, SDG&E has proposed its own $1.55 million trial program targeted for 6,000 homes. The loans would be provided and serviced by local banks with SDG&E paying the 16% interest in lieu of the customer. The average 5 year loans will range from $120-$3,500 and are expected to be applied primarily to ceiling insulation installations.

In November rate hearings, SDG&E and most public interest spokespersons called for a one year test program for ZIP. Cost-effectiveness and the need to minimize rates in any way possible were most frequently cited as reasons for requiring a test program before a full implementation decision.

RECENT MEETINGS:

An approximate $220 million basic utility rate increase for 1982 by San Diego Gas and Electric is presently pending before the PUC. A December 1, 1981 decision on the SDG&E rate increase was rescheduled for later in the month. Many hope the decision will not reflect the spirit of the coincident season. The PUC staff, specifically, recommended limiting the increase to almost one-half of SDG&E's request.

At an October 21 public hearing which culminated the 60 day fact finding hearing, SDG&E argued that a 19.9% rate of return and other incentive plans were required to restore the utility's financial standing to an "A" rating. The company is presently rated "BBB." The President of SDG&E, Thomas Page, termed the requirement for improved capital access as "critical." The proposed increase would translate into a 23% increase in electric and gas rates, on top of 67% increase in rates San Diego has experienced over the past 14 months.

Page predicted 1982 and 1983 would be "tough years" for the company requiring massive capital borrowing to cover the costs of San Onofre and its Interconnection Project to Arizona electrical generating units. In addition to the unprecedented rate of return, Page urged adoption of "cash flow incentives." These incentives include depreciation and amortization rescheduling, sales balancing accounts and construction work in progress (CWIP) financing.

The PUC staff proposed a significantly smaller increase of between 14-16%, allotting a 1-2% risk premium. While agreeing that a higher bond rating is desirable, the staff asserted that completion of San Onofre, not high rates of return, would achieve that desired goal. The "cash flow incentives" were generally denounced as unnecessary and/or excessive. The PUC staff encouraged increased conservation efforts. It recommended doubling SDG&E's proposed insulation program and instituting the aforementioned ZIP program.

Intervenors in the hearings generally supported the PUC staff position. CalPIRG representative Dave Durkin questioned the need to include the 45.3 million dollar site costs of the ill-fated Sundesert Nuclear Project in Blythe. SDG&E had stated no intentions of constructing any new generation units, thus confirming the non-utilized fate of the site. General support also came from the San Diego City Attorney's Office.

The largest rate increase ever requested by an American utility came before the Public Utilities Commission in the final months of 1981. Pacific Gas and Electric (PG&E) requested an unprecedented $1.4 billion general rate increase scheduled to take effect in January 1982. The PUC staff, assigned with the task of reviewing the requested rate increase, felt that the PG&E request was nearly $500 million in excess of what was really necessary.

During the final public hearing for the general rate increase, held in San Francisco on November 12, Frederick W. Mielke, Chairman of the Board of PG&E, testified that the PUC staff estimates were grossly unrealistic; the staff underestimated projected costs and overestimated expected revenues. Mielke stated that the Commission's tendency to set utility rates below the actual cost of service had resulted in a $1.4 billion deficit to the utility for the past ten years, with an additional shortfall of $311 million expected for 1981. According to PG&E, the utility faced serious financial difficulties; it had been forced to borrow extensively and at high interest rates, the company's stock had plummeted in value and it was unable to find additional sources of funding. PG&E claimed that the full $1.4 billion increase was not only necessary if the utility was to continue to provide adequate service to its customers and make needed facility improvements, but was necessary if the utility was to receive a "reasonable" rate of return and a "reasonable" return on equity which it placed at 12.86% and 18%, respectively. The PUC staff recommended a 11.61% rate of return and a 15% return on equity.

PG&E also disagreed with the PUC staff in other aspects of the general rate increase. Contrary to the recommendations of the PUC staff, PG&E wanted the Commission to authorize the utility to

raise an estimated $101 million in additional revenue by adopting a non-earning asset ratio, or NEAR proposal. Under the NEAR plan proposed by PG&E, once non-earning assets exceed 10% of earning assets the amount in excess of 10% would be placed in the rate base. The plan was designed to enable the utility to finance expensive facility construction, but critics contended that the NEAR proposal would negate any incentive the utility may have to scrutinize the costs of new projects.

PG&E also stressed the need for the Commission to permit normalization of the tax benefits provided to public utilities under the Economic Recovery Tax Act of 1981 which permits utilities to defer paying a portion of their taxes until a later date. Normalization of the benefits by the PUC would permit the utility to collect the full tax from its customers and invest the funds in facility improvements.

In addition, PG&E sought authorization from the Commission to accelerate the depreciation of electrical production plants so that the utility could raise an estimated $70 million to provide for the cost of replacing worn-out plants and equipment. The PUC staff also rejected PG&E's estimate that $253.1 million in additional revenue would be needed to meet inflationary price increases and expanded operations in 1983; it felt that $129 million was a more realistic figure. And, finally, the PUC staff recommended that the utility could save an additional $53.1 million in administrative and general expenses.

In short, the PUC staff recommended that PG&E be held to a general rate increase of $596.1, far short of the $1.4 billion increase requested by the utility. Should the Commission grant the entire increase requested by the utility, which is highly unlikely, the average homeowner bill will increase by 25%.

Final decision on the general rate increase will be made by the Commission on December 30, 1981.

Just prior to the sought January 1982 *general* rate increase, PG&E received authorization in October from the PUC to raise its electricity rates $325.7 million specifically to meet increased fuel costs. The rate increase, effective November 1, 1981, came in two parts: (1) $36 million for the Annual Energy Rate (AER), (2) $289 million for an Energy Cost Adjustment Clause (ECAC) increase. The purpose of the AER increase is to recover in rates the estimated cost forecast for the twelve month period beginning August 1, 1981 associated with fuel oil inventory in rate base, estimated expense for facilities charges and underlift payments made to oil suppliers for oil contracted but not taken, gains and losses made from the sale of fuel oil and 2% of the fuel cost included in the ECAC. Of the $289 million associated with the ECAC adjustment, about $245 million is to reduce the undercollection amount in the balancing account.

Factors contributing to the increase were the increased cost of natural gas purchased outside the State and poor rainfall last season which reduced the amount of cheap energy coming from hydroelectric sources. The average residential customer, who uses 500 kwh of electricity per month, experienced in November an increase of $7.99 on a monthly bill; from $29.02 to $37.01.

PUC Compensation for Public Interest Advocacy: Significant news for public interest and lobbying groups centers around a proposal by the PUC to award compensation for participants in agency hearings. The Commission ruled that fees may be awarded for expert witnesses and legal costs to parties who oppose a Commission position in quasi-legislative proceedings and succeed in having their position substantially contributed to the Commission's decision.

This policy announced at a public conference on November 13 goes one step further than a recent ruling by the California Supreme Court in *Consumer Lobby Against Monopolies v. PUC,* 25 Cal 3d 891 (1980). The opinion granted fees to parties in quasi-judicial proceedings who substantially add to a ruling contrary to a PUC staff position. However, quasi-legislative (rulemaking or ratemaking) actions were not deemed compensable. The court argued "the decision to include such public participation costs in ratemaking proceedings is more appropriately within the province of the Legislature." Id at 912.

The Commissioners expanded upon this language by Justice Mosk and the example set by Federal agencies (43 Fed. Reg. 104050 (April 4, 1978)). They agreed that as a quasi-legislative body the PUC will award compensation in its quasi-legislative proceedings. The criteria used to determine what constitutes a "sufficient" substantial contribution has not been formulated yet. The PUC expects its decision to be reviewed by the state Supreme Court; the decision will not be effective until the result of that review. Based upon the *CLAM* decision, the decision should be affirmed.

The initiator of the new policy was the Environmental Defense Fund which sought attorneys fees for its intervention in the abandoned Harry Allen-Warner Valley Project. EDF was the sole party to argue that the plant should not be built; the plans were abandoned by California utilities 105 days into the public hearings. Nonetheless, the PUC reserved its decision on the EDF intervention compensation pending further arguments by EDF on its own behalf.

SDG&E Transmission Line: The PUC officially granted SDG&E permission to build a $300 million electrical transmission line between San Diego and Arizona. Called the "Interconnection Project," the giant transmission line will provide cheap coal-fired electricity to oil dependent San Diego. The decision was anticipated by those close to the decision; it was suggested that the Project's approval was enchanced by the earlier abandonment of the Sundesert Nuclear project.

The advantages to the project are said to be numerous. Arizona will be supplying 4¢ per kilowatt-hour electricity to San Diegans who pay 10-12¢ p/kwh. The linkage will be accessible to geothermal electricity producers in the Imperial Valley and future sales of inexpensive electricity by Tucson and Mexico. The disadvantages are the esthetic and environmental harms imposed by construction and high voltage non-ionizing radiation. The PUC assured the opponents of the project that precautions would be taken to monitor radiation effects and minimize environmental damage. At least one opposing group plans to appeal the decision.

Telephone Deregulation: The spectre of a drastic change in residential phone rates will haunt California for the next three years. On November 13, at a bimonthly public conference, the PUC offered a startling scenario that calls for at least tripling of basic telephone rates by 1985 if the Federal Telecommunications Competition and Deregulation Act of 1981 is enacted into law. President John Bryson warned that the bill will jeopardize the universal availability of telephone service to residents as well as threaten state regulatory control of utilities.

The Telecommunication Act (S.898) passed overwhelmingly in the Senate during October. The bill is now being considered in the House. Essentially, it does two things: (1) creates a new unregulated affiliate of AT&T whose full separation from its formidable parent is a "mirage," according to Bryson; (2) permits the shifting of the costs of basic service from businesses and users of exotic telephone services to residential users. Residential ratepayers will markedly cross subsidize new advancements in telecommunications, arguably benefitting future ratepayers who could be required to pay, or business users.

The PUC is presently lobbying in D.C. against the bill's passage. If that effort fails, the Commission feels it would be powerless to stem the subsidy shifting

that it fears. Additionally, Bryson warned of increases in basic monthly charges resulting from reduction in long distance rates. All of these potential increases do not include the inevitable rises in labor, capital and inflation costs. The Commissioner contended the alarming new policy as the result of Washington being "so excited about the exotic telephone services available, it has forgotten about the long standing goal of ensuring universal telephone service."

Telephone Accounting Change: A $338 million increase in California's telephone utility revenues proved that when the Federal government changes its accounting practices, more than accountants are affected. The accounting change considers all interior wiring of customer's premises as an expense, rather than a capital investment. The increase, which figures to cause an 8% rise in basic rates for PT&T customers, may balance out in the long run. It reduces the need for utility borrowing to cover capitalized costs. The move, however, can be interpreted as opening the door for other items to be capitalized, filling the void left by interior wiring costs. In a gesture to consumers, the Commission provided for customers to handle the wiring on their own or by private contracting, in order to minimize the costs of the servicing.

Telephone Solicitation Nuisances: The PUC closed its investigation of potential telephone solicitation abuses stemming from commercial use of automatic dialing and announcing devices (ADAD). The action rejected a proposal that California residential subscribers be empowered to place their telephones off limits to certain types of commercial sales messages. The Commission reasoned that ADAD has been in use for a few years without noticeable abuses. Most telephone solicitors use a street address directory which excludes households who do not wish to be subject to solicitation.

Commissioner Grew expressed concern that few residential customers know of the option to be excluded from the address directory (not to be confused with the White Pages). A notice sent out to all telephone customers in November was to address that malinformation.

Deregulation: The PUC is continuing in its efforts to increase utility efficiency through the use of free market concepts. The Commission is presently studying the feasibility of partially deregulating the large electricity utilities in the state. Options under study include a plan for free market competition in the field of electricity generation, with continued regulation of the companies which transmit and distribute the power to customers. Such a move could split up the big companies, such as: SDG&E, Southern California Edison (SCE) and PG&E and encourage cost productive energy generation. But, some critics contend that the new producers of electricity under the scheme would eventually get swallowed up by the massive companies and inflated costs would result.

Other deregulation efforts made by the PUC have been in the area of inter-city bus transportation and tour line bus services. A team of PUC staff members have been organized to study the possible benefits in deregulating inter-city bus transportation. Such deregulation could lead to decreased fares for certain routes, but may lead to increased fares and a decline in services for less popular routes. Also, on November 13, the Commission ruled that tour bus operations are not passenger state operations, since tour buses operate in a "loop," not between fixed termini, as required for stage operations. The Commission reached the decision after many months of rigorous litigation when it decided to grant an operating permit to Pacifico Creative Services, a tour bus line which caters primarily to Japanese tourists. Numerous domestic tour-bus operators objected to the issuance of the permit on the grounds that Pacifico should be subjected to the same regulations as they are. The Commission decided that it will not prohibit any new operator from entering into the tour-bus business, nor will it provide a regulatory blanked of protection to those who currently hold permits. The Commission determined that the tour-bus industry is an area which should not be subjected to regulation. The order which became effective in the beginning of December is subject to judicial review.

Construction Overruns: The cost overruns of recent power generation construction projects have become legend nationwide. California has seen massive overruns at its three recent large scale power projects: Diablo Canyon, Helms and San Onofre. The Commission has talked in the past of establishing some measures that would discourage the overruns, but no action was taken.

A recent application for construction certificates by SDG&E for its Interconnection Project between San Diego and Arizona sparked new debate on the role of the PUC in providing overrun disincentives. Tempered by Commissioner Calvo's warning of assuming an inappropriate management role, the Commission launched an investigative inquiry into the ways of monitoring the construction projects without exceeding its delegated authority. President Bryson suggested an analogy of a Board of Directors of a private company requiring full scheduling and in-progress reports. The critical question seems to focus on available sanctions if overruns occur despite the monitoring.

Utility Employee Discounts: More heated debate has been sparked by California utilities' practice of providing employee discounts for power service in labor contracts. The issue erupted during the November 13 PG&E rate hearings and continued into the Commission's bimonthly public conference. Commissioners Gravelle and Grimes questioned the conservative effect and equity of charging employees of utilities less than all other ratepayers. Strong feelings that ratepayers should not subsidize such arrangements were evident on the Board, despite arguments that the discounts may be less costly to ratepayers than comparably valued perquisites. An investigative inquiry into the matter was approved.

Natural Gas Increases: Increases in natural gas prices may bring further attention to the role of the PUC. Natural gas prices are scheduled to reach parity with the price of oil in 1985. However, when the 1978 Deregulation Act was passed, oil was $18 per barrel; this is the figure gas is scheduled to be phased up to in 1985. Upon reaching that price, gas prices will then be released to reach oil parity. In 1985, it is estimated that oil prices will be well above $40 per barrel. The Reagan administration is considering accelerating deregulation to prevent the forecasted quick doubling in 1985. Regardless of whether acceleration is employed or not, the inevitable deregulation will hit California hard. The present rate escalation is costing California consumers over $900 million per year.

A proposed $40 billion natural gas pipeline form Alaska will push gas prices even higher, according to the PUC. The Commission has begun lobbying against the pending federal bill which might require ratepayers to begin paying construction costs of the project before the project is completed. The government refuses to provide loans and private financiers are wary of the risks. The bill has passed through the Senate Energy Committee and is soon to be voted upon by the Senate.

FUTURE MEETINGS:
To be announced.

## STATE BAR OF CALIFORNIA

*President: Sam Williams*
*(415) 561-8200*

The State Bar of California licenses and regulates all attorneys practicing law in the State of California, subject to the supervision of the State Supreme Court. The Bar is administered by a Board of Governors consisting of 16 attorneys and 6 public members.

# REGULATORY AGENCY ACTION

MAJOR PROJECTS:

The Bar's current projects include: analysis of the pilot program on specialization, publication and distribution of a consumer-information pamphlet on lawyer discipline, and revision of the 1982 bar exam.

The Bar has been administering its pilot program on specialization for nine years. The program, which involves certification of specialists in various legal areas, has encountered severe opposition, particularly from young lawyers who charge that the program is unfair to those who are trying to build careers. At its recent meeting, the State Bar Conference of Delegates voted overwhelmingly to kill the program. However, that vote is merely advisory. The Board of Governors, which held public hearings on the program on November 10 in Los Angeles and November 18 in San Francisco, must ultimately decide the fate of the program.

The Bar's proposed consumer-information pamphlet on lawyer discipline, entitled *What Can I Do if I Have a Problem With My Lawyer?,* has also been the subject of some controversy within the bar. The pamphlet has been in the making for two and one-half years and is now in its sixth draft. This draft was recently circulated to local bar associations and some individual attorneys. Letters received from local bars indicate that there is some opposition to the pamphlet in its present form. Opposition from local bar associations and from some members of the Board of Governors is based on several purported concerns: that the number of spurious and frivolous complaints will increase, thus increasing the costs of investigating complaints; that the pamphlet will undermine the confidential attorney-client relationship; that the pamphlet creates a negative impression of attorneys in the reader's mind by emphasizing the bad and ignoring the good; and that consumers will not understand the disciplinary system even if they read the pamphlet. Supporters of the pamphlet argue that the information is needed by consumers, that opposition from the bar does not change this consumer need or the Board's duty to fulfill the need, that the pamphlet is not negative but simply accurate, and that the pamphlet will serve public relations as well as educational purposes. Furthermore, supporters argue that the pamphlet's impact will not be to increase costs, but might involve a slight shifting of workload to local bar client-relations committees when consumers realize that certain problems do not rise to the level of disciplinary proceedings. After a considerable amount of discussion at its November 20 meeting, the Board of Governors voted to distribute the pamphlet after it has been redrafted (taking the criticisms into consideration) and approved by the Board. The seventh draft will therefore be submitted to the Board for its approval at the February 1982 meeting.

The Committee of Bar Examiners, in response to the initial results of a 1980 study, has decided to give examinees fifty percent more time to answer several essay questions on the bar exam. Study reports indicate that sample groups of examinees given ninety minutes per question scored, on the average, four points higher per question than those who were given fifty-five minutes per question. Since the number of points required to pass the exam will not change, this increase in scores could result in more applicants passing the bar exam.

RECENT MEETINGS:

The State Bar of California held its fifty-forth annual meeting in San Diego at the Town and Country Hotel from October 9 through October 14. The Conference of Delegates, whose 500 members represent local bar associations throughout California, considered 126 resolutions, ranging from a proposal to create a privilege in local grievance proceedings for information transmitted between the complainant or the attorney and the local bar association (approved) to a proposal to require the Public Utilities Commission to consider "social costs" of nuclear power plants in certification proceedings (disapproved). Two items of particular interest were the delegates' advisory vote to kill the Bar's pilot specialization program (see Major Projects, above) and the delegates' approval of a motion that individual committees of the State Bar should not take a position as representatives of the Bar contrary to the position of the Conference of Delegates.

The Board of Governors' November 20 meeting was held at the Bar's San Francisco headquarters, 555 Franklin Street. The Board took up several matters in its public session, including libel insurance protection for the *California Lawyer* editorial staff and replacement of the outside advertising firm now working for the *California Lawyer* with an in-house advertising director. After very little discussion, the Board voted in favor of proposals to co-sponsor, with the Constitutional Rights Foundation, a statewide Mock Trial Competition for California high school students; to co-sponsor, with the American Bar Association Special Committee on Housing and Urban Development Law, a regional institute on floodplains and wetlands to be held in April in San Francisco; to tentatively adopt (subject to a ninety-day comment period) procedures for expanded enforcement activities by the State Bar's Unauthorized Practice of Law Department; and to waive the 1981 active membership fee for those persons who pass the fall, 1981, bar exam.

Representatives of Public Advocates, Inc., a San Francisco public interest law firm, were unsuccessful in their attempt to convince the Board of Governors to back a one-year moratorium on "rent-a-judge." Under the "rent-a-judge" system, parties to a lawsuit may retain a retired judge to hear their case outside of the regular judicial process. The purpose of the proposed moratorium was to allow a year for study of the system and public hearings. Public Advocates' major objections to the system are that it will create two classes of justice — one for the rich and one for the poor — and that it will be a disincentive for the rich and powerful to reform the present system. Furthermore, Public Advocates claims that "rent-a-judge" will not substantially ease the backlog of cases. Public Advocates representatives also expressed concern about problems with intervention, jury trials, public notice and access, and taxpayer subsidy on appeals. The Board declined to back the moratorium, but voted to aid the Judicial Council of California in a study of the system.

The remainder of the public portion of the November 20 meeting was devoted to discussion relating to the proposed lawyer disciplinary pamphlet (see Major Projects, above) and legal services for the poor. Discussion of the Committee on Professional Responsibility and Conduct's draft ethics opinion on ethical obligations of legal services attorneys who have been laid off was continued until December. The Board of Governors adopted resolutions encouraging more aid and participation in legal services programs and requesting that appropriate State Bar sections and committees within sixty days prepare recommendations to assist the courts and legal-services attorneys in handling withdrawals from cases without prejudice to clients.

FUTURE MEETINGS:

February 5 and 6, 1982 in San Francisco.

## TOXIC SUBSTANCES COORDINATING COUNCIL

*Coordinator: Peter H. Weiner*
*Governor's Office*
*Statue Capitol Building*
*Sacramento, CA 95814*
*(916) 322-7691*

On February 11, 1980, by Executive Order, Governor Brown created the Toxic Substances Coordinating Council. The Council is comprised of the following members: Director of the Department of Food and Agriculture, Director of the Department of Industrial Relations, Director of the Department of Health Services, Chairperson of the Air Resources Board, Chairperson of the State Water Resources Control Board, Secretary of the Resources Agency, Secretary of the Business and Transportation Agency, Director of the Office of Planning and Research, and the Council's Coordinator, Mr. Peter Weiner, Special Assistant to the Governor for Toxic Substances Control.

The Executive Order states that the Council shall:

- Promote the use of safer chemicals, encourage recycling and minimize the need for landfill waste disposal;
- Monitor the state's efforts in protecting the citizenry from toxic materials;
- Encourage interagency cooperation and joint projects;
- Promote regulatory consistency and reform;
- Coordinate epidemiological research; and,
- Develop policy to minimize the hazards of toxic substances use and disposal.

The Council generally meets every second Tuesday of each month in the Governor's Office Conference Room. However, both time and place are subject to movement. Council meetings are open to the public.

RECENT MEETINGS:

The Council has not convened since its last reported meeting of September 16, 1981. Conversation with Council Coordinator Weiner revealed that the Council will next meet in January, 1981 and from thereafter only on a quarterly basis. With the creation of the Division of Toxic Substances Control within the Department of Health Services, the Council appears to be undergoing a transformation. (See the report on The Office of the Auditor General, "Internal Government Review of Agencies" section, this *Reporter*.)

The Council's annual November 1 report to the Governor will not be ready for distribution to the public until January, 1982.

# LITIGATION

## United States Supreme Court

Watt, Secretary of Interior v. Energy Action Educational Foundation
42 CCH U.S. Supreme Court Service 351 (12/18/81)

**The Secretary of Interior has broad discretion to fashion bidding systems for continental shelf oil leases in response to Congressional mandate to experiment with bidding alternatives that do not favor the large oil firms.**

The Outer Continental Shelf Lands Act of 1953 gave the Secretary of the Interior the authority to lease tracts of the continental shelf for oil exploration and development. The law provided for two bidding methods royalties of not less than 12½% or a cash bonus with bids on the royalty rate.

Historically, most bids were made on the basis of competition for the cash bonus. The system of competing on the cash bonus tended to exclude from possible awards all bidders except for the very largest oil firms.

In 1978 the statute was amended in order to make it possible for smaller bidders to compete. The Secretary of Interior was compelled to increase the number of possible new bidding systems so that there would be ten different bidding systems. The new law directed the Secretary to develop a plan of experimentation, trying other bidding systems not involving a fixed royalty with bidding on the cash bonus. These experimental systems of bidding had to include from 20 to 60 percent of the total lease area offered each year.

Although the Secretary of Interior had complied with the statute, he had done so only by varying the size of the cash bonus as a variable. The Energy Action Educational Foundation, joined by the State of California, filed suit contending that the "experimentation" required in the new statute in 1978 was not being complied with by the Secretary, because he was not setting up a bidding system which would avoid cash bonus competition, and was thereby thwarting the Congressional intent of allowing smaller companies to bid for these leases.

The Court of Appeals of the District of Columbia held for the plaintiffs, concluding that the Secretary was obliged to experiment with at least some bidding systems that did not use the size of the cash bonus as the critical variable.

The Supreme Court reversed the Court of Appeals. The Supreme Court held that California had standing to challenge the Secretary of Interior's choice of bidding because under federal law California received a share of the revenues from the leases. Hence, if the bidding systems limited the supply of possible bidders, it is possible that the return recieved for the leases might be lessened thereby damaging California.

However, the Supreme Court held that the Court of Appeals had erred in compelling the Secretary to experiment with any particular system including a new cash bonus type of system. The Supreme Court found that the Congress had not intended to single out the cash bonus system for special consideration as the only type of bidding which might discriminate against the smaller firms. The Supreme Court deferred to the judgment of the Secretary of the Interior in formulating the detailed experimental bid systems to be implemented under the statute. The Court implied in its opinion that the question of Congressional intent abuse by the Secretary of the Interior on this recently passed statute would best rest with the Congress in the exercise of its given oversight powers.

Note that this opinion is the first written by new Justice Sandra Day O'Connor.

## United States Ninth Circuit Court of Appeals

**Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission; Pacific Gas & Electric Co., Southern California Edison Co. v. State Energy Commission**
F 2d (9th Cir.) (10/7/81)

**A state agency is not preempted by the Atomic Energy Act from regulating nuclear power plants for purposes other than protection against radiation hazards.**

These two cases were consolidated on appeal. In the Pacific Legal Foundation case, the district court had granted partial summary judgment, dismissing out plaintiff Thornberry for lack of standing. Remaining defendants included the Pacific Legal Foundation, the San Diego Coalition, the San Diego Section of the American Nuclear Society and the San Diego County Building and the Construction Trades Council. All plaintiffs brought suit to challenge California's three Nuclear Laws. These laws impose a moratorium on the certification of any new nuclear power plants until the state Energy Commission makes certain findings and submits them to the California Legislature for approval.

**Thornberry Standing**

Plaintiff Robert Thornberry, a nuclear engineer, was hired by San Diego Gas & Electric Co. (SDG&E) to work on a proposed nuclear plant known as Sundesert. The Sundesert project was abandoned on May 3, 1978 by resolution of SDG&E's board of directors, and Thornberry lost his job. According to the SDG&E board resolution, the Sundesert project was abandoned both because SDG&E had failed to obtain an exemption from the Nuclear Laws, and because the California Public Utilities Commission had denied SDG&E's application for a rate increase. Thornberry's claim of standing rested on two premises: (1) that the moratorium imposed by California Public Resources Code section 25524.2 (prohibiting certification of all types of nuclear plants until the Energy Commission finds that a federally approved method of disposing of nuclear wastes exists) caused SDG&E to cancel the Sundesert project; and (2) that cancellation of the Sundesert project caused Thornberry to lose his job.

Ruling on Thornberry's motion for summary judgment, the district court held that there was sufficient causal connection between the nuclear laws and Thornberry's losing his job to provide Thornberry with standing. The court found Thornberry's challenge to sections 25524.1 and 25524.3 to be moot, but declared section 25524.2 to be preempted by the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1976 & Supp. III 1979).

The Court of Appeals reversed the district court's finding of standing because (1) a trier of fact could conclude from all the evidence that the Sundesert project failed for economic reasons; (2) the doctrine of standing required that plaintiff Thornberry prove a "substantial likelihood" that the relief requested would redress the injury claimed; and (3) plaintiff could not prove: (a) invalidation of § 25524.2 would revive the Sundesert project, or even if it did, (b) that he would get his job back as a result.

**Utility Standing and Summary Judgment of the Merits**

In the Pacific Gas & Electric (PG&E) case, the plaintiff utilities claimed that uncertainties caused by California's Warren-Alquist Act (the act creating the Energy Commission) and the nuclear laws (1976 additions applicable only to nuclear plants) had caused them to cancel plans to build nuclear power plants. PG&E had cancelled a specific project known as Stanislaus, and Southern Cali-

fornia Edison had abandoned general plans to build two nuclear plants at some future time.

The district court held that the utilities would have proceeded with their plans but for the nuclear laws and other provisions of the Warren-Alquist Act. The court thus concluded that the utilities had standing to sue. The Court of Appeals could not say that the district court's findings of fact were clearly erroneous and therefore upheld standing for the utility plaintiffs.

The district court had granted summary judgment in favor of the utilities not only on the question of their standing, but on the merits of their claim. The court invalidated the state nuclear laws in their entirety as transgressing the exclusive authority of the federal Nuclear Regulatory Commission (NRC).

The Court of Appeals held that the challenged provisions of the Warren-Alquist Act relating to the general certification scheme of nuclear power plants were not ripe for review. "[T]he threat that procedural burdens might someday be imposed or that certification might be denied for failure to meet Energy Commission standards is remote at best," the court said.

Likewise, the court found unripe the provision requiring a utility to acquire development rights so as to limit the population density surrounding plants. The court did, however, find that the section requiring a utility to include at least three alternate sites in its Notice of Intention to build a nuclear plant *was* ripe because "[u]nlike the other challenged provisions, the validity of this section is unlikely to depend on the factual setting in which it is applied," the court said.

As for the three specific nuclear laws, two, in the court's view, did not present justifiable controversies. Those were California Public Resources Code §§ 24424.1(1) barring nuclear plants which require fuel rod reprocessing (no such plants are currently being planned); 25524.1(b) requiring the Energy Commission to determine the adequacy of nuclear plants' spent fuel storage capacity; and 25524.3 imposing a moratorium on certification of nuclear plants pending submission of a certain report to the California Legislature (the evidence showed the report had been submitted). However, section 25524.2, (also known as "the moratorium provision") imposes a moratorium on new nuclear plant certification until the Energy Commission has found and informed the Legislature that a federally approved method of nuclear waste disposal exists, *was* held to be ripe for review. "Postponement (of review) could ... work substantial hardship on the utilities," the court wrote.

The court analyzed certain provisions of the federal Atomic Energy Act of 1954. Section 274(c) gives the NRC sole authority to regulate the construction and operation of nuclear power plants. It also authorizes the NRC to delay licensing of any further nuclear plants until a method of waste disposal is developed and requires utilities to submit alternative sites for their proposed plants. The utilities argued that the Act thus necessarily takes away the states' power to regulate.

The Court of Appeals held, however, that specific non-preemption language contained in §§ 271 and 274(k) of the Act must control the general language of § 274(c). Section 271 provides that nothing in the Atomic Energy Act "shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities by the (Nuclear Regulatory) Commission." Citing the Congressional Record, the court noted "Congressional intent with respect to these powers is clear: the states are permitted to treat nuclear plants exactly as they would all other power plants."

Section 274(k) provides that "[n]othing in this section shall be construed to regulate activities for purposes other than protection against radiation hazards," § 274(k), 42 U.S.C. § 2021(k). Citing *Northern States Power Co.* v. *Minnesota,* 447 F 2d 1143 (8th Cir. 1971) which construed §§ 274(k), the Court of Appeals concluded that Congress intended to preempt only state regulation of radiation hazards associated with nuclear power and not state regulation *for other purposes.* The court further concluded that the California statutes at issue were not aimed at radiation hazards.

The court traced the history of the moratorium provision, which was part of a legislative package enacted as an alternative to a proposed voter initiative, Proposition 15. Proposition 15 would have ultimately barred any nuclear plants in California, unless (1) the federal limit on liability for nuclear accidents, 42 U.S.C. §§ 2012, 2014, 2073, 2210 (1976 & Supp. III 1979) (the Price-Anderson Act), was removed; (2) the California Legislature determined reactor safety systems to be adequate; and (3) the California Legislature determined that nuclear wastes could be stored without danger to the public.

> "While Proposition 15 would have required California to Judge the safety of a proposed method of waste disposal, section 25542.2 leaves that judgment to the federal government. California is concerned not with the adequacy of the method, but rather with its existence.
>
> "Until a method of waste disposal is approved by the federal government, California has reason to believe that uncertainties in the nuclear fuel cycle make nuclear power uneconomical and uncertain source of energy. The Legislature has chosen to mandate reliance upon other energy sources until these uncertainties associated with nuclear power are resolved. We find that such a choice is expressly authorized under sections 271 and 274(k) of the Atomic Energy Act of 1954," the court said.

The Atomic Energy Act does not prevent California from imposing a three-site requirement for nuclear plants, the court held, noting that a regulation that actually *conflicted* with federal law *would* be preempted.

The court ageed with the utilities' argument that the introductory sections of the Atomic Energy Act established a Congressional policy to promote the private development of nuclear power plants. Even so, "[t]hey also express Congress's intent that the development of nuclear power be 'directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.' Section 1, 42 U.S.C. § 2011. In these objectives we do not find an intent to promote nuclear power *at all costs* (emphasis added)."

The court found, in viewing the Atomic Energy Act as a whole, that "Congress struck a balance between state and federal power to regulate. Inherent in the state's regulatory authority is the power to keep nuclear plants from being built, if the plants are inconsistent with the state's power needs, or environmental or other interests." Even the NRC has agreed that a state could under the authority of the Clean Air Act Amendments of 1977, prevent nuclear plants from being built, the court noted.

A concurring opinion by Judge Ferguson expressed the view that the Atomic Energy Act does not empower private entities such as utilities to impose on the states their own interpretations of the Act. Ferguson said that only the NRC may challenge California statutes as being preempted by the Act and standing to challenge the constitutionality of a statute does not in itself confer enforcement rights under that statute.

The 57 page slip opinion borrowed substantially from the Energy Commission's appellate briefs, one of which was

authored by Laurence H. Tribe, well known authority on constitutional law. Amicus briefs were filed by 29 states on the PG&E appeal, generally supporting California's position.

## California Supreme Court

**In re Elroy Richard Giddens**
30 C 3d 110 (11/27/81)

**Attorney convicted of financing drug dealing disbarred, abandonment of illegality prior to indictment not a defense.**

Petitioner Giddens was convicted, pursuant to a plea of guilty, to a federal charge of conspiring to distribute controlled substances (amphetamines). He was sentenced to a term in federal prison. After his release, the petitioner returned to California where he was employed by a mortgage company. During this period, he had retained his license to practic law, although he had not done so.

In 1980 the State Bar Hearing Panel recommended his disbarment. Although the Supreme Court agreed that the State Bar recommendation was defective because of a lack of opportunity of the petitioner to present a defense, the Supreme Court ordered the petitioner disbarred. The Court held that regardless of the defect in State Bar recommendation proceedings, the Supreme Court was here exericising its independent judgment in determining the proper discipline. The Court write that the purpose of disciplinary proceedings is "protection of the public, the Courts and the profession," not the punishment of the petitioner. The Court then noted that the attorney's only defense was by way of mitigation. I.e., the attorney contended that he had abandoned his financing of drug dealings prior to his indictment. However, the Court noted that the petitioner had committed the federal crime over several months, had committed several different transactions, could offer no explanation for his conduct and had no excuse by way of physical, financial or emotional hardship. The Court noted that the attorney may have an opportunity at a future date to seek reinstatement.

**Crane v. State Bar**
30 C 3d 117 (11/27/81)

**Attorney altering documents and communicating directly with represented adverse parties placed on one year probation and required to pass a professional responsibility exam.**

Attorney Fred R. Crane specialized in real estate matters. He had no prior disciplinary record. In 1981, the State Bar Court placed attorney Crane on probation for one year and compelled him to take and pass a Professional Responsibility examination. Failure to accept the one year probation or to take and pass the Professional Responsibility examination would result in a one year suspension from practice. The Supreme Court upheld the discipline recommendation of the State Bar Court.

The charges against the attorney involved a 1978 real estate transaction where terms and an outstanding indebtedness were changed by the petitioner and then forwarded to an escrow company without the authorization of the signator. A second charge involved the attorney directly communicating with two parties who were represented by another attorney. Further, the petitioner sent a letter to these two individuals threatening a litigation if they did not comply with his demands.

The State Bar Court found that the first incident involved dishonesty, and the second incident involved the violation of Bar rules concerning required communication with counsel where parties are known to be represented by counsel. Finally, the State Bar concluded that the letter sent to the principals constituted an impermissible threat in violation of Bar Rule 7-104. Petitioner Crane's defense involved a denial of dishonesty as to the first incident, and a contention that the letter in the second incident was the result of an inadvertant error by members of his staff. The petitioner also contended that the State Bar investigation in judgment against him was motivated by the fact that he was counsel in the well known *Wellenkamp* litigation. Note that the *Wellenkamp* litigation invalidated certain due on sale clauses, to the enormous financial detriment of large established financial institutions.

The Supreme Court upheld the State Bar Court in all respects. The Supreme Court noted that the State Bar Court finding of dishonesty on the first incident was supported by the record. The Court also held that an attorney is responsible for the work product of his employees as to the second incident. Finally, the Court held that the motivation in initiating an investigation by the Bar is irrelevant to the sufficiency of the evidence supporting the findings. If the attorney's conduct itself warranted discipline, whatever the basis for the investigation, discipline is warranted. The Court also noted that it believed it was "arguable that the penalty imposed is actually lenient," but adopted the recommendations of the State Bar Court as to the penalty.

## California Courts of Appeal

**Winzler & Kelly v. Department of Industrial Relations**
(5 consolidated cases), 120 CA 3d 120 (9/11/81).

**Department of Industrial Relations Director can determine wage rates and applicable market regions as a quasi-legislative decision without public hearing.**

In 1977, the defendant Department of Industrial Relations was approached by a group of employers who inquired whether surveyor classifications were covered under the State's prevailing wage laws. By letter, the Director advised that they were. Plaintiff employer and others protested both the coverage determination and the failure of the Director to hold a hearing on the subject and petitioned for mandate.

Immediately afterwards, the Director reaffirmed his initial coverage determination and within one week announced he was making a sweeping wage rate determination for surveyors throughout Northern California. In his wage determination the Director placed all 46 Northern California counties in one labor market area. He then declared that the prevailing wage rate in this entire area should be the scale in the San Francisco Bay area that had been agreed to previously by employers with a union in that area.

Several law suits challenging the Director's acts were filed and consolidated. The trial judge held that the issuance of the general determinations concerning the appropriate labor market area and the prevailing wage rate level was quasi legislative in nature and subject to review under a Code of Civil Procedure section 1085. He then held that the Director was required under the Administrative Procedure Act to hold administrative hearings prior to issuing any of the determinations made. The trial court therefore voided the Director's determinations and ordered him to proceed according to APA requirements. The Director appealed.

The Court of Appeals reversed the trial court, holding that there was no requirement for the Director to grant a hearing prior to determining either the relevant market area or the type of work covered. The Court noted that there is no Constitutional requirement to hold a public hearing in quasi-legislative matters. Further, a prior hearing is not required under either the substantive statutes

regulating the prevailing wage law, or under the Administrative Procedure Act.

**Ford Dealers Association v. Department of Motor Vehicles**
122 CA 3d 308 (10/2/81)

**DMV Rules implementing false and misleading advertising ban thrown out as overly broad.**

Under section 11713 of the Vehicle Code, it is unlawful for auto dealers to engage in false or misleading advertising. The law allowed for rulemaking implementation by the Department of Motor Vehicles (DMV). DMV issued seven rules to implement the statute and plaintiff auto dealers filed suit to enjoin enforcement and to obtain declaratory relief. Plaintiffs contended that rules went beyond the statutory authority of section 11713 and violated certain constitutional limitations on regulation of advertising. The trial court held for plaintiffs, issuing an injunction. DMV appealed.

The Court of Appeals affirmed the trial court invalidation of DMV's rules. DMV may adopt rules to enforce Vehicle Code requirements, but may not enlarge statutory prohibitions by administrative act. In the instant case, violations were misdemeanors. Penal statutes, in particular, cannot be administratively enlarged against violators. Specifically, DMV's first rule (13 Ad. Code 402.00) defined "advertising" too broadly, encompassing *any* statements, presumably by any person (including salespersons orally selling a vehicle). The court held that this broad definition exceeded the scope of the statute and could create liability not intended by the Legislature. Further, in 13 Ad. Code 403.00 DMV implied an affirmative duty of proof in requiring that all advertised statements with regard to the sale of a vehicle be "clearly set forth and based on facts." The Court also invalidated an attempt to apply the disclosure rules to rental vehicles apparently not covered by the statute. Finally, the Court upheld the invalidation of DMV's attempt to prohibit a dealer to list as "added charges" amounts that did not in fact cost the dealer the amount listed.

The Court of Appeals also upheld a sanctions award of $8,000 assessed by the trial court against DMV for failure to adequately respond to plaintiff's requests for admissions in discovery.

Fleming dissents.

**Lapekas v. State Personnel Board**
122 CA 3d 387 (10/2/81)

**Remedy for violation of Hearing Officer Discovery Order is not dismissal, but certification to superior court for contempt adjudication.**

Lapekas was an investigator for the Department of Insurance in 1976. He gave confidential departmental information to Assemblywoman England and was suspended without pay for four months. Plaintiff appealed his suspension, alleging violation of *Skelly* due process rights and contending that his suspension was the product of improper "retaliation."

To prove retaliation, plaintiff had offered a tape recording into evidence before the hearing officer considering the suspension order. Plaintiff requested the tape back to make a transcript, but then decided the tape included impeaching evidence as to him, and refused to turn it back to the hearing officer. The hearing officer ordered the tape returned, and when it was not, dismissed plaintiff's appeal.

The trial court reinstated plaintiff's appeal, holding that dismissal is not the proper remedy for an administrative hearing officer confronted with a violation of a discovery order. The Court of Appeals affirmed. The Court noted that under the Administrative Procedure Act (Gov. Code § 11370 et sec) where a party disobeys a lawful order of an agency or a hearing officer, the agency is to certify the facts to a superior court for appropriate contempt proceedings.

**Brown v. Surety Company of Pacific**
122 CA 3d 614 (10/2/81)

**Contractor's surety bond does not cover fraud of contractor action outside license.**

As with all licensed contractors, one Edwards was required to post a bond as a condition of licensure. Edwards secured his bond from defendant Surety Company of Pacific. Edwards then "borrowed" $6,000 from the plaintiff, contending that he needed the money to finish a construction project in Laguna Beach, even taking the plaintiff to the job site where Edwards had placed an "Edwards Construction Company" sign. In fact, Edwards was not involved in the work, used the money for personal debts, and failed to repay the loan. The plaintiff sought to recover from the bond. The trial court granted summary judgment for the plaintiff against the surety.

The Court of Appeals reversed the judgment for the plaintiff, holding the surety not liable. The Court held that the contractor surety bond did not cover all of the contractor's misdeeds, only to fraudulent acts "as a contractor." Contractor acted as a "con man," not as a "contractor" as defined by Business and Professions Code § 7026.

Weiner dissents.

**Roy Brothers Drilling v. Jones**
123 CA 3d 175 (10/16/81)

**Contractor working outside his specialty license entitled to no compensation from consumer for his work.**

The plaintiff Roy Brothers entered into an oral contract to drill caisson holes for a foundation for the Malibu residence of the defendants. Plaintiff performed the work, and the defendant refused to pay. Plaintiff filed suit for $26,000 for its service. The defendant moved for summary judgment on the ground that the plaintiff lacked a proper contractor's license.

The evidence indicated that the plaintiff had a specialty contractor's license permitting its work on sanitation systems but did not have one for the general type of foundation work which it had performed for the defendant. Relying on the general principal that a contractor who is not duly licensed to perform work contracted for cannot recover compensation for that work, the defendant moved for summary judgment. However, before the summary judgment hearing defendant also cross complained. The trial court granted summary judgment for the defendant. The plaintiff appeal.

The Court of Appeals upheld the trial court in dismissing the plaintiff's action to recover recompense for work performed for which he was not duly licensed. First, the Court disposed of the procedural problem that the appeal had been taken by the plaintiff before final judgment had been entered. I.e., that because of the cross complaint of defendant the case had not been entirely disposed of and therefore was not ripe for appeal. The Court ruled that the cross complaint of the defendants had been, in fact, abandoned. Therefore the trial judge grant of summary judgment to the defendants entirely disposed of the matter. Hence, appeal was ripe.

On the merits the Court had held that the State had the authority to make rules and regulations and had properly adopted the rules at issue herein. The Court noted that the plaintiff was authorized to perform excavation and related work "incidental and supplemental to" the execution of contracts for the construction of sewers, sewage, disposal drains or irrigation works, but not to perform the same kind of work that is not incidental and supplemental to such work. Since the work for defendants in this case was purely foundation work and could not be construed as supplemental to any work within the range of the plaintiff's specialty license, the plaintiff was not licensed for it, and cannot recover for it.

**Newberry Electric Corp. v. Occupational Safety & Health Appeals Board**
123 CA 3d 641 (10/30/81)

**Citation and fine for safety rule violation by employee reversed where company had instructed and could reasonably expect employee to obey rule.**

Kane, an experienced foreman for Newberry Electric, supervised a crew moving a public street light in 1977. Under state health and safety rules, no one is to work within ten feet of a high voltage electrical line unless guarded against accidental contact with the wire. Kane's crew was only four feet from a 12,000 volt line and took no precautions. Kane thought the line was "neutral." The pole being moved swayed, cut the high voltage line and it fell, killing Kane. The Division of Occupational Health charged employer Newberry with a violation of the 10 foot rule and fined it $500 for the "serious" breach. Newberry appealed and the administrative law judge determined that Newberry was not at fault for Kane's error, setting aside the penalty. The Occupational Safety and Health Appeals Board reinstated the citation, concluding that the accident was "reasonably forseeable." Newberry sought administrative mandate from the superior court. It was denied.

The Court of Appeals reversed the superior court and the Occupational Health and Safety Appeals Board and ordered the citation and penalty set aside. The first issue was an important procedural argument of Newberry. Newberry contended that the administrative law judge found in its favor and that the Division's petition to the Occupational Health and Safety Appeals Board for reconsideration must occur within 30 days of the hearing examiner decision or the petition is automaticaly deemed denied. Here, the Appeals Board did not act to grant the petition and reverse the hearing examiner until after two years had passed (see Labor Code § 6624). But the Court of Appeals here sustained the Appeals Board position, holding that the Board had taken the petition "under submission" and had "stayed" its decision for two years, thus tolling the 30 day limit the entire time.

However, the Court of Appeals held that the citation was not based on "substantial evidence," upholding the findings of the hearing examiner. The Court held that all of the evidence indicated that Newberry had taken every reasonable precaution in training all of its employees, including foreman Kane, had won numerous safety awards, had a printed safety code and a successful safety program. Of special import, the court held that Newberry "could reasonably" expect Kane to obey the ten foot rule.

Note that the test applied by the court rejects strict liability, and perhaps even agency, as bases for sanction of corporations whose employees violate safety orders. The Division must apparently show not only a violation, but a connection between corporate laxness in training or instruction and that violation.

**California Medical Association v. Lackner, Director, California Department of Health**
124 CA 3d 28 (11/13/81)

**Department of Health has the authority as hospital "regulator" to require waiting period and other prerequisites to informed consent for sterilization operation.**

In 1977 the Department of Health, now the Department of Health Services, issued two rules establishing the proper procedure to obtain the informed consent of a patient for human sterilization. One regulation established procedures pursuant to MediCal patients, the other applied to sterilization performed in "acute care" hospitals, partially regulated by the then Department of Health. Succeeding events narrow the issues in this case to the second regulation of applying to acute care hospitals. The hospital regulations, required that the patient who is sterilized be 18 years of age and competent to understand the content and nature of the informed consent process. The rules detailed the information to be given the patient, and except for certain emergencies, required a 14 day waiting period. The rules were later amended to exclude secondary sterilizations, and to increase the minimum waiting period to 30 days. Physicians who violate the rules are to be reported to the Board of Medical Quality Assurance for discipline. The plaintiff California Medical Association and four physicians contested the validity of these rules.

The trial court denied the plaintiff's preliminary injunction and the rules took effect on December 1, 1977. The trial court then granted defendant's motion for summary judgment. CMA appealed.

The primary CMA contention was that the Department of Health had exceeded its authority in adopting the instant regulations. CMA contended that there was no legislative authority for the actions of the Department of Health. The plaintiff argued that the defendant had no authority to regulate professional treatment, and that the securing of informed consent was part of the process of professional treatment outside the range of hospital regulation.

The Court of Appeals affirmed the trial court, holding that the regulations were reasonably implemented as part of the Department's proper regulatory authority over unnecessary operations. Although the Court admitted that there is no statute which expressly states that the Department may adopt informed consent regulations as to hospitals, the Department does have the power to revoke the licenses of hospitals guilty of unnecessary surgery. (See Health & Safety Code sections 1275, 1276, 1294.) The Court held that informed consent rules are reasonably related to the statutory purpose of preventing unwanted or unconsented to and therefore "unnecessary" sterilization operations.

The Court also rejected CMA's contention that the regulations are unnecessary, finding nothing arbitrary or capricious in rules to prevent unconsented to sterilizations over an alternative tort remedy. Finally, the Court rejected the CMA's final argument that the regulations were too broad and were not supported by evidence produced at the hearings.

**Armistead v. State Personnel Board**
124 CA 3d 61 (11/13/81)

**Automatic termination of state employee without hearing because of employee absence without leave for five consecutive days upheld.**

Plaintiff Armistead began a one man strike against the Department of Water Resources on June 1, 1979. Plaintiff was at the time employed by the Department. Government Code section 19503 provides for automatic resignation of any state employee who was absent without leave for five consecutive days. The plaintiff was told that the deadline on his job would be June 8, 1979. The plaintiff appeared at his job site on that fifth day, remaining for only 45 minutes. He performed no work, and apparently arrived only to toll the statutory period. The plaintiff's employment was terminated and he sought administrative mandate relief. The defendant was granted a general demurrer to the complaint.

The Court of Appeals affirmed the dismissal judgment of the trial court. The plaintiff's termination was "automatic" under the statute. The plaintiff's very "general allegation of a violation of substantial due process and equal protection" were "conclusions of law" and are not admitted by a demurrer. The plaintiff's contentions that other employees were treated differently for similar absences, lacked any factual allegations that their absence without leave status were similar to his, nor any

legal theory that equal treatment for both was required.

Most important, the Court upheld section 19503 against contentions that the Department violated due process and equal protection in its failure to afford any pre-removal hearing safeguard. A hearing, after five days of successive absences, was not compelled by any statutory or Constitutional requirement.

**Department of Forestry v. Terry**
124 CA 3d 140 (11/20/81)

**"Mere mailing" to address given by defendant is insufficient notice to violator of Department of Forestry Rule violations.**

Defendant Terry owned timberland in Lassen County. In 1976 he sought to harvest timber, and pursuant to the Z'Berg-Nejedly Forest Practice Act of 1973, submitted a Timber Harvesting Plan to the Department of Forestry. It included his address in the town of Milford. The plan was approved, but apparently violated. The Department of Forestry sent a registered letter to Terry at the address on his plan application, notifying him of the violation. The letter was returned unsigned. The Department took corrective action under the statutes to repair the land that had been damaged, and assessed Terry $11,822 in costs for the work. The Department recorded a statutory lien for the amount. Terry contested the lien foreclosure in superior court. The superior court held for the Department, ordering a lien sale of the property.

The Court of Appeals reversed the superior court and the Department. The Court held that plaintiff had not been sufficiently served to take corrective action. Although the Court acknowledged that one may not refuse a registered letter, there was no evidence that the defendant refused the letter. "mere mailing" of the letter was insufficient. Apparently, the Court requires proof of receipt of the letter and rejected the obvious estoppel argument that the address used was provided by the defendant. Terry was actually a resident of Los Angeles.

**Keller Industries v. Occupational Safety & Health Appeals Board**
124 CA 3d 469 (11/20/81)

**Occupational Safety and Health Appeals Board can set rule violation hearings sixty miles from site of alleged violation.**

Keller Industries was accused of violating health and safety rules at its plant in Merced. Keller appealed to the Occupational Safety and Health Appeals Board, which scheduled a hearing before an administrative law judge in Stockton, where there is a Board office. Keller sought a change of venue to Merced. It was denied. Keler then petitioned for mandate to the superior court. The petition was denied and plaintiff Keller appealed.

The Court of Appeals affirmed the superior court denial of plaintiff's writ, upholding the Board's decision to hold the hearing in Stockton. The Court noted that the applicable statute provides that the Board "*may* set the time and place of hearing at a location as near as practicable to the place ... where the violation ... occurred" and that the word "may" is permissive, allowing the Board to schedule the hearing a distance away, so long as due process principles are not violated. The hearing site in Stockton is but 64 miles by highway from the Merced plant, and its location in Stockton does not deprive the plaintiffs of due process.

**Wolfe v. The Board of Medical Quality Assurance**
124 CA 3d 703 (11/27/81)

**Podiatry rules of BMQA, differentiating reciprocity rules for pre-1958 medical school graduates, are upheld.**

The plaintiff podiatrist graduated from an Ohio podiatric medical college in 1951. He had been licensed to practice podiatric medicine in the states of Ohio, Florida and Kansas. In September of 1977 he applied for a license by reciprocity to practice podiatry in California. He was denied a license pursuant to Business and Professions Code section 2310, providing that no person graduating from a podiatric school before June 30, 1958, could be eligible for a reciprocity certificate. Hence, the applicant must qualify for and receive a license de novo.

After his application was denied, the statute was changed and moved. The new statute required that all reciprocity applicants pass an oral examination, with certain exceptions. The Board of Medical Quality Assurances thereafter amended its denial basis as to plaintiff by also alleging a failure to pass an oral examination as required by the new statute. The plaintiff petitioned for mandate relief. It was denied.

The Court of Appeals affirmed the denial of mandate relief for the plaintiff. Contrary to plaintiff's contention the statute violated Constitutional rights and discriminated against out-of-state practitioners, the Court held that there was no denial of equal protection or due process rights under the 14th Amendment nor under the California Constitution.

The Court noted that the amendments to the statute requiring an oral examination for reciprocity applicants was designed to ameliorate the complete exclusion of pre-June of 1958 graduates from reciprocity licensure. The Court implied that the total exclusion of pre-1958 graduates for reciprocity licensure might involve Constitutional infirmities, but that as amended, the statute passes muster.

The Court held that the current statute, allowing podiatrists who were certified by the National Board after 1958, and who applied for reciprocity within five years, of that certification, may be treated most favorably. Those certified by the National Board before 1958 must comply with additional requirements, including an oral examination. The Court noted that legislstive classifications need only rest on a rational basis to withstand equal protection scrutiny and that the classifications of different types of podiatrists, including classifications and based on the year of graduation, may bear a rational relationship to the legitimate state purpose of protecting the public from unqualified podiatric practice.

**People ex rel Air Resources Board v. Los Angeles Superior Court**
125 CA 3d 10 (12/18/81)

**Judge Older to hear qualification challenge to Judge Sax before further proceedings occur.**

The plaintiff Western Oil and Gas Association petitioned the Los Angeles Superior Court for a writ of mandate to invalidate numerous rules of the defendant California Air Resources Board. Both parties stipulated to have retired Superior Court Judge Sax hear the matter. After a 1980 hearing he issued a writ of mandate compelling the Board to repeal certain air quality standards. The Board appealed, with the repeal of the sections stayed pending appeal. The Association filed a motion with Judge Sax to order a repeal of the regulations immediately notwithstanding the pending appeal. The Board opposed the motion, arguing that the stipulation as to Judge Sax did not include any post judgment proceedings.

There followed a number of motions, orders and stays from various courts in a rather confused jumble. Most important, another Superior Court judge ruled that Judge Sax had jurisdiction under the stipulation to rule on the motion of the Western Oil and Gas Association to *immediately* revoke the air quality standards pending appeal. The Air Resources Board applied for a prohibition order to stop the assignment of Judge Sax to hear the motion.

The Court of Appeal, issued a writ of

mandate directing the Superior Court to vacate all of the various orders regarding Judge Sax's qualification or disqualification and to order the assignment of a Judge Older to hear the matter of Judge Sax's qualification. Judge Sax was ordered to conduct no further hearings pending the resolution of his qualification. At the hearing on his qualifications, the Board shall be required to challenge Judge Sax for cause under the limits of Code of Civil Procedure section 170 invoked by the Board. The Court noted that it is the purpose of section 170 to insure an impartial and unbiased judicial proceeding. Note that the Court of Appeals included a number of *caveats* to the Air Resources Board concerning what appears to it to be disqualification proceedings not directed at insuring an impartial hearing, but rather to delay the proceedings.

**Vermont and 110th Medical Arts Pharmacy v. State Board of Pharmacy**
125 CA 3d 19 (12/18/81)

**Board of Pharmacy licensees accountable for unlawful prescriptions where reasonable professional would have suspected illegality, notwithstanding facially proper prescriptions.**

During a six week period the plaintiff pharmacy had allegedly filled 10,000 prescriptions written by a small number of doctors for four controlled substances commonly abused. These prescriptions provided for approximately 3/4 million dose units. The names of the persons on the prescriptions appeared to be highly suspicious. The names included, for example, "Henry Ford," "Glen Ford," "Esther Williams," "Wells Fargo," "Pearl Harbor," etc. The State Board of Pharmacy instituted administrative proceedings against the pharmacy, its operator and three of the employee pharmacists. The Administrative Law judge, after hearing, dismissed the charges. The Board, however, reviewed the Administrative Law judge's decision and the record and revoked the pharmacy license and disciplined the employees. The pharmacy and the employees petitioned the Superior Court for mandate relief. The Court denied the petition for mandate, upholding the Board. The plaintiff pharmacy operator and employees appealed to the Court of Appeal.

The Court of Appeal affirmed the trial court's denial of mandate that, supporting the State Board of Pharmacy's revocation of license and other administrative sanctions. The plaintiffs' major argument was that the Board had revoked the license and engaged in other disciplinary proceedings without having first established clear guidelines regarding the duties of the profession as to facially legitimate but extremely suspicious prescriptions. The Court held that the Pharmacy Board was correct in applying a degree of common sense and professional judgment to licensed pharmacists.

The Court noted that when the suspicions of a license are aroused as reasonable professional persons by ambiguities, by sheer volume or, as in this case, when the prescription process is blatantly abused, they are called upon to obey the law and to refuse to dispense. Failure to do so may be gross incompetence, gross negligence or moral turpitude, all statutory justifications for misconduct and proper grounds for Board action. The Court noted in an interesting characterization that society cannot tolerate individuals who abdicate their professional responsibility and allow controlled substances to reach illicit markets and then attempt to justify their abdication by the "juvenilelike complaint 'nobody told me it was wrong.' "

## Attorney General Opinions

**Board of Examiners of Nursing Home Administrators: Transcripts**
(81-408) (9/18/81)

Where a petitioner in an action for administrative mandamus requests the preparation of a transcript the cost of which exceeds the statutory fee chargeable to a petitioner requesting that transcript, the Board of Examiners of Nursing Home Administrators must pay that extra portion.

**Osteopathic Students**
(81-509) (9/18/81)

Under Business and Professions Code section 2052 a student who is in good standing and attending an approved osteopathic school, may engage in the practice of medicine whenever and wherever prescribed as part of his or her course of study.

**Horseracing Dates**
(81-617) (9/18/81)

The California Horseracing Board may allocate racing dates in the Southern zone for harness racing for more than the ten weeks authorized for 1981. However, such excess is justified only if it is caused by an overall revision of schedule for horserace meetings throughout the State because of the 19 legislative amendments to Business and Professions Code sections 15931 and 15932.

**California Health Facilities Authority Speaker Appointee: Removal**
(81-701) (10/2/81)

A state licensing agency may inquire as to sex, national origin or race for prelicensure purposes only: 1) If the information solicited is limited to race, sex and national origin; b) Such information is solicited only on a voluntary basis; c) Such information is used only for record keeping purposes; d) The information must be on a form which is separate or detachable from the application form itself; or e) The information is not used for any discriminatory purposes. Under these limitations Boards may engage in pre-licensure inquires as to race, national origin and sex. I.e., the State Department of Justice is not the only State agency authorized to provide a form requiring such personal data.

Each State licensing Board is responsible for governing its own compliance with the provisions of the California Fair Employment and Housing Act, including those provisions concerning pre-licensure inquiries. The statute governing the scope of permissible inquiry applies not only to the employment application form itself, but also to the application for an examination or testing procedure the result of which may be a license.

The provisions of the California Fair Employment and Housing Act relating to pre-employment inquiries are not applicable to inquiries of the State directed to private contractors doing business with the State.

# GENERAL LEGISLATION

During 1981 the Legislature considered numerous bills relating to government regulation. This issue of the *Reporter* will summarize the major bills affecting the Administrative Procedures Act, OAL and the basic regulatory operations of state government. Specific bills affecting particular agencies are discussed in the Regulatory Agency Action section above.

## SENATE BILLS:

SB 216 (Boatwright):

Amends the APA to require an agency proposing a regulatory action to hold a public hearing of at least 15 days prior to the close of the written comment period if an interested person so requests.

Would prohibit an agency from adopting, amending or repealing any regulation, unless the full text of the proposal has been available to the public at least 45 days prior to the public hearing or close of the written comment period, unless the change is nonsubstantial (i.e., grammatical) or the modification is made available to the public at least 15 days prior to the formal adoption of the proposed regulatory action.

Amends the APA to provide that if an agency indicates in its Statement of Review Completion that it intends to amend or repeal certain regulations, all such amendments and repeals must be completed and submitted to OAL within six months of submission of the Statement of Review Completion to OAL.

Provides that if an agency, in conjunction with its review of existing regulation, submits a proposed adoption, amendment or repeal of a regulation to OAL, that the time for approval or disapproval of the proposed action is six months (and not just 30 days).

Status: Chapter 1091, Statutes of 1981.

SB 257 (Rains):

Enacts the Permit Reform Act of 1981, requiring agencies issuing permits with specified exemptions to establish time limits within which the agency must (a) inform the permit applicant whether his or her application is complete, or whether it is incomplete, and if so, what further information is required; and (b) reach a decision on the permit application.

Requires agencies to establish an appeal process for the resolution of all disputes arising from agency violation of the newly required time limits for processing permit applications and provides for the reimbursement of all filing fees to applicants whose applications are not processed within the prescribed time limits.

Status: Chapter 1087, Statutes of 1981.

SB 479 (Nielsen):

Requires an agency proposing a regulatory action to prepare an economic impact report of (a) the proposed regulation would result in total annual direct aggregate costs to persons or business entities in excess of $1,000,000; and (b) any or all of the statutory authority for the regulation is 10 years old or older.

This program terminates December 31, 1984 and a report by the Department of Economic and Business Development and the Legislative Analyst on the program's effectiveness is due by June 3, 1985.

All declaratory relief actions challenging the absence of an economic impact report must be filed within one year of the effective date of the regulation.

Status: Passed Senate, awaiting vote on Assembly floor.

SB 498 (Presley):

Enacts four amendments to the APA: (a) provides that the enactment of an urgency statute, in and of itself, shall not constitute a justification for emergency regulations; (b) requires the informative digest of a proposed regulatory action, to detail the significant differences, if any, between the proposed regulation and federal statute or regulation; (c) prohibits agencies from adding material to the rulemaking file after close of the public hearing period, unless adequate provisions are made for public comment on the added material; and (d) adds the concept of duplication to the necessity standard and requires an agency to identify and justify any overlap or duplication created by a proposed regulation.

Status: Chapter 983, Statutes of 1981.

SB 526 (Carpenter):

Would create a uniform public hearing process to be used and followed whenever a state agency amends or alters any regional or local element of a state plan that has been mandated by state or federal law.

Status: Senate Governmental Organization Committee.

SB 726 (Beverly):

Provides that the right to judicial determination of the validity of a regulation shall not be affected by the failure to seek reconsideration of a petition filed pursuant to Government Code Section 11347.1.

Status: Chapter 592, Statutes of 1981.

SB 795 (Nielsen):

Requires state agencies (and all regional and local agencies whose regulations are subject to review by state agencies) to make a written finding that any specified technology or equipment required by agency regulation is technologically feasible and available for achieving compliance.

Also prohibits agencies from requiring the use of new or other technology for a period of five years after the initial regulatory mandate.

Status: Vetoed by the Governor.

SB 991 (Marks):

Requires state agencies to send copies of all proposed regulations to the member of the Legislature who authored the statute being implemented, so long as the author remains a member of the Legislature.

Status: Chapter 827, Statutes of 1981.

SCR 18 (Nielsen):

Creates a joint Legislative Oversight Committee with the responsibility of examining selected policy areas. The Committee would be comprised of representatives of each of the policy and fiscal committees with jurisdiction over the policy area selected for review.

Status: Senate Rules Committee.

SCR 32 (Rains):

Requires the Legislative Counsel to include in its digest of bills a statement regarding the regulatory effect of the bill.

Status: Senate Rules Committee.

## ASSEMBLY BILLS:

AB 41 (Young):

Establishes an economic impact statement pilot program identical to SB 479 (see above).

Status: Assembly floor, pending concurrence in Senate amendments.

AB 1013 (McCarthy):

Prohibits any state agency from issuing, utilizing, enforcing or attempting to enforce any guidelines or other policies unless the guidelines or other policies have been formally adopted as regulations.

Additionally, authorizes OAL to make and issue a determination as to whether a guideline or policy is a regulation.

Status: Assembly floor, pending concurrence in Senate amendments.

AB 1014 (McCarthy):

Among other things, deletes the provision in Section 11344(b) requiring OAL to "prescribe regulations for carrying out the provisions of this chapter and replaces

it with Section 11344.6 which merely authorizes OAL to adopt regulation; requires emergency regulations to be formally adopted as normal regulations within the 120 day emergency period; provides for a public hearing, if at least 15 days prior to the close of the public comment period, if an interested person requires a public hearing; provides that OAL may disapprove a regulation, not just for failure to comply with the five standards, but for failure of the promulgating agency to comply with any provision of the chapter; and authorizes OAL to initiate and complete a priority review of any regulation within 60 days of receiving such a request from any standing, joint, or select committee of the Legislature.

AB 1014 also contains provisions identical to, or nearly identical to, SB 498 (see above) and AB 1745 (see below) to avoid chaptering conflicts.

Lastly, it should be noted that both AB 1014 and SB 216 amend the same code section — Government Code Section 11349.7. Because neither AB 1014 nor SB 216 made provisions for chaptering conflicts, when SB 216 was chaptered after AB 1014, 1014's amendments to Section 11349.7 were superseded. Consequently, the provisions in AB 1014 establishing priority review of any regulation by OAL when requested to do so by a committee of the Legislature (Section 11349.7 (m) and (n)) were lost. (However, see AB 2165 below.)

Status: Chapter 865, Statutes of 1981.

AB 1181 (Cortese):

Requires that the notice of a proposed regulatory action include a reference to the fact that (a) the promulgating agency has prepared a statement of reasons, and (b) an interested person may submit in writing to the agency a request to hold a public hearing no later than 15 days prior to the close of the written comment period.

Status: Senate Governmental Organization Committee.

AB 1745 (Leonard):

Among other things, (a) amends Section 11340.1 to read that it is the Legislature's intent that agencies require performance standards instead of prescriptive requirements whenever the former are less burdensome; (b) requires agencies to include in the Statement of Reasons why certain technology is required and why alternative proposals were discarded; and (c) redefines the "necessity" standard so that agencies must demonstrate in the rulemaking file that no less burdensome regulatory approach is available.

Status: Vetoed by the Governor.

AB 1785 (Statham):

Requires the Governor, when overruling a decision of OAL, to transmit to the Rules Committees of both houses of the Legislature a statement of the reasons for the overruling.

Status: Senate Governmental Organization Committee.

AB 1828 (Naylor):

Requires OAL to establish a schedule that will accomplish a complete review of all agency regulations at least every five years.

Status: Senate Finance Committee.

AB 1864 (Leonard):

Requires that an agency's initial statement of reasons include statements concerning (a) why specified technology is mandated (b) which alternatives were considered and why they were rejected, and (c) a written finding of "demonstrated effectiveness" for any specified technology required by regulation.

Status: Assembly floor, pending adoption of Conference Report.

AB 1930 (Brown):

Requires that the notice of a proposed regulatory action include a statement of the potential compliance cost impact of the proposed action on private persons or businesses directly affected by the proposed regulation.

Status: Senate floor.

AB 1931 (Brown):

Amends Section 11347.1 to require an agency which denies a request for reconsideration of a petition to repeal or amend a regulation to transmit to OAL copies of the petition, the request for reconsideration, and the agency's official response. OAL would be authorized to conduct a priority review of the regulation and, if appropriate, seek repeal of the regulation.

Status: Assembly Ways & Means Committee.

AB 2165 (Costa and Deddeh):

Amends Section 11349.7(f) to provide that in addition to its annual report to the Legislature, OAL may make periodic recommendations directly to the Legislature for the repeal or amendment of statutes affecting regulatory agencies.

Amends Section 11349.7 to provide that OAL, at the request of any standing, select, or joint committee of the Legislature, to initiate and complete a priority review of any regulation or series of regulations within 60 days.

Provides that if a state agency reports in a Statement of Review Completion that it will amend or repeal a regulation, the amendment or repeal must be completed and submitted to OAL within 6 months of submission of the Statement.

Requires the Governor to transmit to the rules committees of both houses of the Legislature a statement of reasons for overruling a decision of OAL.

Status: Assembly floor, pending concurrence in Senate amendments.

Typesetting & Graphic Design By STATS of San Diego, Inc.
Printed by Cymac Lithographers, Inc.