

REPORT BY THE
AUDITOR GENERAL
OF CALIFORNIA

**THE STATE COULD EXPEDITE
THE APPROVAL OF REGULATIONS**

REPORT BY THE
OFFICE OF THE AUDITOR GENERAL

P-482

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THE APPROVAL OF REGULATIONS

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Honorable Art Agnos, Chairman
Members, Joint Legislative
Audit Committee
State Capitol, Room 3151
Sacramento, California 95814

Dear Mr. Chairman and Members:

The Office of the Auditor General presents its report concerning the Office of Administrative Law's review of state regulations. The report indicates a need for the Office of Administrative Law to expedite the process for approving regulations.

Respectfully submitted,


THOMAS W. HAYES
Auditor General

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SUMMARY

The State of California is taking too long to produce some of its regulations, resulting in unnecessary costs to the State and delays in implementing regulations. Although the Office of Administrative Law (office) approved 92 of 96 regulations that we reviewed, approval of 13 regulations adopted after July 1, 1980, was delayed because agencies initially withdrew the regulations or the office initially disapproved the regulations. The agencies subsequently corrected the regulations and resubmitted them to the office for approval. Sending regulations back and forth between the office and state agencies results in increased costs and delays in implementing regulations. Furthermore, the office has not completed all discretionary reviews that it initiated for regulations adopted before July 1, 1980.

The Process for Approving Regulations Takes Too Long

State agencies submit to the office for approval regulations or amendments to or repeals of regulations adopted after July 1, 1980, emergency regulations, and amendments to or repeals of regulations adopted before July 1, 1980. The office reviews regulations developed by state agencies to ensure that the regulations are necessary, comprehensive and clear, authorized by statute, and consistent with existing laws. The Administrative Procedure Act (act) specifies the periods within which the office must review and either approve or disapprove the regulations.

We analyzed a sample of 96 of the 796 regulations that four state agencies submitted to the office for review from January 1, 1981, through October 20, 1984. The office approved 92 regulations and disapproved 2; agencies withdrew and did not resubmit 2 regulations. Although the office completed its initial review and either approved or disapproved regulations within periods specified by law, it took

several months from the time agencies initially submitted some regulations to the office until the regulations were finally approved.

Seventy of the regulations were regulations and amendments to or repeals of regulations adopted after July 1, 1980. The office initially reviewed and approved, disapproved, or allowed agencies to withdraw all of these regulations within the 30 days required by the act. However, approval of 13 (19 percent) of these regulations took from 35 days to 11.6 months. Approval was delayed because agencies initially withdrew regulations to correct problems the office identified during its review or because the office initially disapproved the regulations. The office subsequently approved the regulations after agencies corrected and resubmitted them.

The office most often allowed an agency to withdraw a regulation or disapproved a regulation because the agency did not demonstrate that the regulation was necessary, did not write the regulation clearly, did not demonstrate its legal authority to adopt a certain regulation, or did not submit sufficient documentation to demonstrate compliance with procedural requirements of the act.

Because 13 regulations were sent back and forth between the office and agencies for revision, there was a delay in implementing these regulations, and the office and state agencies incurred additional costs. For example, we estimate that one regulation submitted by the Contractors' State License Board initially cost the board \$3,105 to develop and \$52 for the office to review. However, because the regulation was returned to the Contractors' State License Board twice for revision, the board incurred an additional cost of \$2,557 in twice correcting the regulation, and the office incurred an additional cost of \$680 in its two additional reviews.

Reviews of Existing Regulations Are Not Complete

Although the office initiated reviews of regulations addressed in 532 Statements of Review Completion, the office has not completed its review of regulations addressed in 382 Statements of Review Completion. State agencies submit these statements following their internal reviews of regulations adopted before July 1, 1980. In their Statements of Review Completion, agencies specify which regulations they want to retain, amend, or repeal. In addition to not completing its review of regulations, the office has not made a final decision on 68 unresolved orders to show cause why agencies' regulations should not be repealed. The office issues orders to show cause when it determines that existing regulations do not meet the standards of the act.

An amendment to the act effective January 1, 1985, requires the office to publish all Statements of Review Completion in the California Administrative Notice Register; publication in the register invites public comment. The amendment also requires the office to make a decision on certain unresolved orders to show cause by April 30, 1985. However, because the amendment does not apply to 5 of the 68 unresolved orders to show cause, there is no deadline for resolving these 5 orders.

Recommendations

To expedite the approval of regulations, the Office of Administrative Law should issue written instructions to agencies specifying what should be included in a regulation and its supporting documents to satisfy each of the legal standards in the Administrative Procedure Act. The office should also adopt regulations to govern the procedures it uses in reviewing regulations submitted to it.

In addition, the office should resolve the disposition of those Statements of Review Completion for which the office has initiated but not completed reviews. Further, the office should consider initiating reviews of Statements of Review Completion only for regulations that receive significant public comment subsequent to their publication in the California Administrative Notice Register. Finally, the office should resolve all unresolved orders to show cause by April 30, 1985.

INTRODUCTION

The Office of Administrative Law (office) is the central agency in state government with the power and duty to review and approve regulations developed by state agencies. The office was established in 1979 by legislation amending a section of the California Government Code known as the Administrative Procedure Act (act). By creating the office, which became operative in 1980, the Legislature intended to reduce and improve regulations adopted by state agencies.

The primary goal of the office is to bring regulatory reform to California. The office has four main responsibilities. First, the office is responsible for ensuring that all regulations and emergency regulations adopted by agencies after July 1, 1980, comply with the provisions set forth in the act. Second, the office must coordinate and oversee reviews by state agencies of all regulations adopted before July 1, 1980. In addition, the office has discretionary authority to conduct independent reviews of these same regulations to ensure that the regulations conform to provisions in the act. Third, the office is required to publish and update the California Administrative Code. Finally, legislation that became effective in January 1983 authorizes the office to determine if agencies' informal rules should be adopted as regulations. As of January 1, 1985, the office had not taken action in this area.

In performing its responsibilities, the office is required to review three types of regulations: regulations and amendments to and repeals of regulations that were adopted after July 1, 1980; emergency regulations (regulations that are "necessary for the immediate preservation of the public peace, health and safety, or general welfare"); and amendments to or repeals of regulations adopted before July 1, 1980. According to the office's fourth annual report, from fiscal year 1981-82 through fiscal year 1983-84, the office has reviewed 1,806 regulations. (As used by the office in this instance, the term "regulation" may include one regulation or a number of closely related individual regulations; thus, the total number of regulations that the office reviewed exceeds 1,806.)

The office's budget for fiscal year 1984-85 is \$2,436,000. The office currently focuses the majority of its resources and time on reviewing regulations and amendments to and repeals of regulations adopted after July 1, 1980.

The Process for Reviewing Regulations Adopted After July 1, 1980

The Administrative Procedure Act specifies the procedural requirements that agencies must follow in adopting regulations. According to the act, the agency that develops the regulations must prepare documents for public review that explain the basis for and purpose of the regulations as well as any costs or savings attributed to the regulations. Also, the agency must develop a document that

notifies the public of the proposed regulations. The office must review and approve this notice before it is published in the California Administrative Notice Register. The notice must be published at least 45 days before the date of the close of the period for public comment.

The notice remains effective for one year. If the agency does not complete the regulatory process during this year, the notice expires and a new notice must be issued. Following the conclusion of the 45-day comment period, the agency must respond to all public comments. Furthermore, the agency either must incorporate any public comments into the regulations or must document why it did not incorporate the comments.

Following completion of these procedures, the agency submits the regulations to the office along with a "rulemaking file." This file may include one or more regulations and must include any written comments from the public, transcripts of hearings, any studies submitted during the 45-day comment period, and the original and modified texts of the regulations.

After receiving the rulemaking file, the office reviews and either approves or disapproves the proposed regulations based on procedural requirements and six legal standards stated in the Administrative Procedure Act. If the office approves the regulations, they are filed with the Secretary of State and become law effective 30 days after the date of filing, unless the specific regulation requires another date or the agency requests another date.

If the office identifies problems with the regulations, it may either disapprove the regulations or give the agency the option of withdrawing the regulations. If the office disapproves the regulations, it returns them to the agency with a letter specifying the reasons for disapproval. At this point, the agency can revise and resubmit the regulations, or the agency can appeal the disapproval to the Governor within 10 days of receipt of the office's disapproval letter. If the agency chooses to withdraw the regulations, it can also revise the regulations and resubmit them to the office. However, if the agency withdraws the regulations, it may not appeal to the Governor unless it has resubmitted the regulations and the regulations have been disapproved.

The Process for Reviewing Regulations
Adopted Before July 1, 1980

The Administrative Procedure Act requires agencies to conduct internal reviews of the regulations they administer that were adopted before July 1, 1980. Once an agency completes its review, the agency must submit a statement to the office that certifies that the agency has completed the review. This document, the Statement of Review Completion, specifies the actions that the agency intends to take as a result of its review. An agency may submit one or more Statements of Review Completion depending upon the number of regulations it has to review and the manner in which it conducts its review. In the Statement of Review Completion, the agency identifies regulations that it has determined comply with the act and should, therefore, be

retained; the agency also identifies regulations that failed one or more of the standards specified in the act and should, therefore, be amended or repealed. Agencies must complete their reviews and submit the Statements of Review Completion to the office according to a timetable established by the act. Agencies must complete their reviews by June 30, 1986.

If an agency reports in a Statement of Review Completion that it will amend or repeal a regulation, the agency must complete and submit the amendment or repeal to the office within six months after submitting the Statement of Review Completion. After an agency submits the amendment or repeal to the office, the office has six months to review and either approve or disapprove the amendment or repeal.

In addition, within six months after the office receives an agency's Statement of Review Completion, it may initiate a discretionary review of any regulation addressed in the Statement of Review Completion. During such a review, the office may request an agency to submit information to justify not repealing a regulation. The agency must answer this request within 14 days. The Administrative Procedure Act does not specify a date by which the office must complete this review. However, if the office does not initiate a review within six months after receiving a Statement of Review Completion, it automatically waives its jurisdiction over review of the regulations addressed in the statement.

If the office determines that a regulation adopted before July 1, 1980, does not meet the standards of the Administrative Procedure Act, the office is required to issue to the agency an "order to show cause" why the regulation should not be repealed. Within 60 days (or 90 days if the office has granted an extension) of receiving an order to show cause why the regulation should not be repealed, the agency must respond in writing to the office. The office must then determine whether the regulation meets the standards of the act. If the office determines that the regulation does not meet the standards of the act, it repeals the regulation. If the office determines that the regulation does meet the standards of the act, the regulation remains effective. Until January 1, 1985, the act did not specify a deadline by which the office had to decide whether to repeal or retain regulations addressed in an order to show cause.

SCOPE AND METHODOLOGY

This audit focused on the Office of Administrative Law's review of regulations. We examined the final disposition of regulations submitted to the office, reasons the office stated for not approving regulations, and costs incurred by the office and state agencies during the process of developing and reviewing regulations. We also reviewed data on the office's discretionary reviews of Statements of Review Completion and its disposition of orders to show cause why regulations should not be repealed.

To evaluate the office's review of regulations, we examined regulations that four agencies submitted to the office from January 1, 1981, to October 20, 1984. These agencies are the Air Resources Board, the Contractors' State License Board, the Fish and Game Commission, and the Department of Health Services. We selected a random sample of 100 of the 796 rulemaking files that these agencies submitted to the office during this period. Although some rulemaking files contained more than one regulation, the regulations in each rulemaking file were generally closely connected. In this report, therefore, we use the term "regulation" to refer to all regulations in an individual rulemaking file. Because regulations in 2 of the rulemaking files in our sample duplicated other regulations and the office could not locate 2 other rulemaking files, our review included 96 different regulations.

In addition to reviewing the 96 regulations, we interviewed staff from each of the four agencies to further determine reasons why regulations were not approved. We also asked staff of the four agencies about the effects of delays in approving regulations.

To evaluate the office's overall costs of regulatory review, we examined employee timesheets for fiscal year 1983-84 and identified the office's direct costs for review of the three types of regulations: regulations and amendments to or repeals of regulations adopted after July 1, 1980; emergency regulations; and amendments to or repeals of regulations adopted before July 1, 1980. We then projected and

allocated the remaining indirect costs and operating expenses to the reviews of these three types of regulations.

Finally, to determine the office's costs for reviewing specific regulations in our sample, we examined employee timesheets and interviewed office staff to obtain the direct costs of the office's review of the regulations. In addition, we obtained data on costs that agencies incurred in developing specific regulations and in revising the regulations to correct problems that the office identified. Since the four agencies in our sample do not record costs by regulation, we interviewed agency staff to estimate direct and indirect costs that the agencies incurred in developing and revising these regulations.

Finally, we reviewed the office's statistics pertaining to its action on agencies' Statements of Review Completion and its orders to show cause why regulations should not be repealed. These statistics cover the period from July 1, 1980, through December 31, 1984.

AUDIT RESULTS

THE STATE IS TAKING TOO LONG TO PRODUCE REGULATIONS

The Office of Administrative Law (office) approved 92 of the 96 regulations in our sample. Although the office completed its initial review of all regulations within time limits specified in the Administrative Procedure Act (act), 13 of these regulations were not approved until 35 days to 11.6 months after agencies originally submitted them to the office. Approval was delayed because agencies initially withdrew the regulations to correct problems that the office identified during its review or because the office initially disapproved the regulations. The office finally approved the regulations after agencies corrected the regulations and resubmitted them. As a result of these delays, agencies and the office incurred additional costs, and there were delays in implementing these regulations.

In addition, the office initiated discretionary reviews for regulations addressed in 532 Statements of Review Completion that state agencies submitted, but it has not completed the reviews for regulations in 382 of the Statements of Review Completion. Moreover, the office has not made a final decision on 68 unresolved orders to show cause why agencies' regulations should not be repealed.

The Office Approves Most Regulations It Reviews

We examined a sample of 96 of the 796 regulations that four state agencies submitted to the office from January 1, 1981, through October 20, 1984. The office approved 92 regulations (96 percent) and disapproved 2 regulations (2 percent). In addition, agencies withdrew 2 regulations (2 percent) but had not resubmitted them as of October 20, 1984. Of the 92 regulations that the office approved, the office approved 77 without returning them to the agencies; it approved 68 of these as originally submitted, and 9 after making minor changes to them. It approved the other 15 regulations after agencies corrected and resubmitted them. Fourteen of the 15 regulations were regulations adopted after July 1, 1980; one of the 15 was an emergency regulation. Table 1 on the following page shows the disposition of the 96 regulations.

One of the two regulations that the office did not approve was disapproved in September 1981. The agency appealed this decision to the Governor who overruled the disapproval and directed the office in October 1981 to file the regulation with the Secretary of State. The office disapproved the other regulation in July 1984; as of October 20, 1984, the agency had not resubmitted the regulation. One of the two regulations that agencies withdrew but had not resubmitted was withdrawn in January 1984, resubmitted, and withdrawn again in August 1984; the other was withdrawn in September 1984.

TABLE 1
DISPOSITION OF 96 REGULATIONS BY TYPE
(as of October 20, 1984)

Type of Regulation	Disposition							Total
	Approved as Submitted	Approved After Minor Revisions	Withdrawn, Resubmitted, Approved	Disapproved, Resubmitted, Approved	Disapproved, Not Resubmitted	Withdrawn, Not Resubmitted		
Adopted after July 1, 1980	46	6	6	8	2	2	70	
Emergency	19	1	1	0	0	0	21	
Adopted before July 1, 1980	<u>3</u>	<u>2</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>5</u>	
Total	<u>68</u>	<u>9</u>	<u>7</u>	<u>8</u>	<u>2</u>	<u>2</u>	<u>96</u>	

Types of Regulations
the Office Reviews

Of the 96 regulations in our sample, 70 were regulations or amendments to or repeals of regulations adopted after July 1, 1980; 21 were emergency regulations, and 5 were amendments to or repeals of regulations adopted before July 1, 1980. We estimate that, during fiscal year 1983-84, the office spent \$1.3 million to review regulations and amendments to or repeals of regulations adopted after July 1, 1980, \$222,500 to review emergency regulations, and \$175,400 to review regulations adopted before July 1, 1980.

Our sample contained both substantive and nonsubstantive regulations or changes to regulations. (The office defines "nonsubstantive regulations" as nonregulatory; these regulations do not result in a regulatory effect on public activity.) Of the 96 regulations we reviewed, 14 regulations (15 percent) contained nonsubstantive changes that agencies were making to regulations. For example, an agency requested that the name of a plant on the State's endangered species list be printed in italics instead of in quotation marks. Another nonsubstantive change involved an agency's correcting the title of a document used as reference material to support the regulation.

The other 82 regulations (85 percent) were substantive regulations or changes to regulations. For example, the Air Resources Board submitted a regulation concerning vehicle exhaust and air quality

standards, the Contractors' State License Board submitted a regulation defining work to be done by certain contractors, the Fish and Game Commission submitted several regulations concerning commercial fishing, and the Department of Health Services submitted several regulations concerning Medi-Cal reimbursement.

Problems the Office
Identifies During Its Reviews

The office is responsible for ensuring that all regulations adopted by state agencies comply with provisions set forth in the Administrative Procedure Act. These provisions include the procedures that agencies must follow when adopting a regulation, the contents of the agencies' rulemaking files, and six legal standards that all regulations must meet. As specified in the act, these standards are the following: authority--"the provision of law that permits or obligates the agency to adopt, amend, or repeal a regulation"; clarity--"the meaning of the regulations will be easily understood by those persons directly affected by them"; consistency--the regulation is "not in conflict with or contradictory to existing statutes, court decisions, or other provisions of law"; necessity--the agency "demonstrates by substantial evidence the need for a regulation"; nonduplication--"a regulation does not serve the same purpose as another state statute or regulation"; and reference--the agency correctly identifies "the statute, court decision, or other provision of law that the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation."

Nineteen of the regulations in our review were initially disapproved by the office or withdrawn by agencies after the office indicated that the regulations could not be approved as submitted. The office most often disapproved a regulation or an agency withdrew a regulation because the office determined that the agency had failed to demonstrate the necessity of the regulation. The office also frequently identified other problems with individual regulations. For example, the office stated that agencies failed to demonstrate their legal authority to adopt certain regulations, failed to write regulations clearly, submitted regulations that were not consistent with other laws, and cited incorrect statute numbers in reference to laws to which their regulations pertained. In addition, agencies failed to submit to the office sufficient documentation to demonstrate their compliance with procedural requirements of the Administrative Procedure Act and did not follow appropriate procedures when adopting regulations. Table 2 on the following page shows the problems the office identified in regulations that the office initially disapproved or that agencies initially withdrew.

TABLE 2

PROBLEMS THE OFFICE IDENTIFIED WITH 19 REGULATIONS THAT THE OFFICE INITIALLY DISAPPROVED OR THAT AGENCIES WITHDREW

Agency	Subject of Regulation	Initial Disposition and Date	Problems							Improper Procedure	Other	Final Disposition and Date
			Authority	Clarity	Consistency	Necessity	Reference	Insufficient Documentation				
DHS	Warning labels on nonprescription drugs	Disapproved 09-11-81	X			X						Disapproved* 09-11-81
DHS	Medi-Cal Treatment Authorization Requests	Disapproved 05-01-81	X	X		X						Approved 01-13-82
F&G	Mariculture	Disapproved 07-31-81		X		X						Approved 12-30-81
F&G	Falconry	Disapproved 09-18-81				X			X			Approved 11-05-81
DHS	Tuberculosis exams	Disapproved 12-07-81	X	X		X						Approved 03-11-82
DHS	Medi-Cal drug prices	Disapproved 02-02-82									X**	Approved 12-13-82
DHS	Medi-Cal vision services	Disapproved 05-03-82		X		X						Approved 09-01-83
CSLB	Contractors who use solar energy	Withdrawn 10-21-83			X	X				X		Approved 11-14-83
F&G	Commercial harvesting of herring	Withdrawn 10-24-83									X***	Approved 11-23-83
DHS	Intercounty transfer of Medi-Cal recipients	Withdrawn 11-08-83	X		X	X						Approved 06-14-84
CSLB	Contractor liens against homeowners	Withdrawn 11-10-83			X					X	X***	Approved 03-06-84
DHS	Hazardous waste informants and rewards	Disapproved 11-14-83		X				X		X		Approved 02-29-84
F&G	Aquaculture disease control	Withdrawn 01-26-84	X	X	X	X		X		X		Withdrawn 08-07-84
F&G	White bass fishing	Withdrawn 01-30-84	X					X				Approved 01-30-84
DHS	Hazardous waste identification	Disapproved 03-26-84							X			Approved 09-26-84
DHS	Hazardous waste management licenses	Disapproved 07-03-84		X	X	X			X	X		Disapproved 07-03-84
F&G	Wildlife management on private lands	Withdrawn 07-09-84	X	X		X		X				Approved 08-16-84
F&G	Anchovy fishing	Withdrawn 09-20-84				X			X			Withdrawn 09-20-84
DHS	Medi-Cal drug prices	Withdrawn 10-04-84	-	-	-	X		-	-	-	-	Approved 10-04-84
Total			7	9	5	12	4	7	6	3		

*This decision was appealed to the Governor and subsequently overruled.

**Could not be determined.

***Problems with the format of the regulation.

Key:

- CSLB - Contractors' State License Board
- F&G - Fish and Game Commission
- DHS - Department of Health Services

Of the 77 regulations in our sample that the office approved without returning them to the agencies, the office identified minor problems in 9 of the regulations and recommended corrections. The agencies agreed with the office's recommendations, and the office corrected and approved the 9 regulations. Most of the problems in the regulations that the office corrected concerned incorrect statute numbers specifying an agency's authority to adopt a certain regulation or specifying the statute the regulation was implementing or making specific.

Approval of Some Regulations Has Been Delayed

According to the Administrative Procedure Act, the office has 30 days to review and either approve or disapprove regulations or amendments to or repeals of regulations adopted after July 1, 1980. The office has 10 days to review and either approve or disapprove emergency regulations, and 6 months to review and either approve or disapprove amendments to or repeals of regulations adopted before July 1, 1980.

For all 96 regulations in our sample, the office met the mandatory time limits for reviewing the regulations and either approving or disapproving the regulations or allowing agencies to withdraw them. However, the process for final approval of 13 (19 percent) of the regulations in our sample extended beyond the period specified in the time limits. The lengthy approval process

delayed implementation of these regulations, and state agencies and the office incurred additional costs.

Of the 92 regulations that the office approved, 15 were approved after being initially disapproved or withdrawn. One of these regulations was an emergency regulation; 14 were regulations and amendments to or repeals of regulations adopted after July 1, 1980. The emergency regulation received office approval within 10 days after the agency originally submitted it. One of the 14 regulations and amendments to or repeals of regulations adopted after July 1, 1980, received approval within 30 days after it was originally submitted. However, the periods required for approval of the other 13 regulations ranged from 35 days to 11.6 months after agencies originally submitted the regulations to the office.

The office's final disposition of these 13 regulations was delayed because the office identified problems and required agencies to correct them before approving the regulations. Agencies withdrew 5 of the 13 regulations after the office identified problems in the regulations. The agencies revised and resubmitted the regulations. Three of these 5 regulations were withdrawn twice before the office approved them.

The office initially disapproved 8 of the 13 regulations; agencies revised the regulations and resubmitted them to the office. The office disapproved 2 of the 8 regulations twice before finally

approving them. One of the 8 regulations initially disapproved was rewritten by the agency as an emergency regulation, resubmitted to the office, and approved.

Delays in the approval process occurred both at agencies, where regulations had to be revised, and at the office, where regulations had to be reviewed again. These delays may be detrimental in some instances. For example, the process for approving a regulation outlining specific criteria for identifying hazardous waste took over seven months. During the delay, the Department of Health Services could not use this regulation in its enforcement activities. According to a Department of Health Services' staff counsel, this regulation affects virtually all of the State's hazardous waste management programs. In this instance, the regulation was at the agency for revision for about five of the seven months.

In another instance, the process for approving a Contractors' State License Board regulation took over four months. This regulation pertained to procedures for homeowners to follow to avoid having contractors file liens on their homes. During the delay, the board could not implement this regulation to increase consumer protection. The board withdrew this regulation twice to correct problems that the office identified during two separate reviews. The regulation was at the agency for revision for almost two of the four months.

Additional Costs
Resulting From Delays

Delays in the approval of regulations also resulted in additional costs for agencies and the office. For example, we estimate that the Department of Health Services initially spent \$289,700 over seven years to develop the regulation that concerned the identification of hazardous waste. We estimate that the office spent \$4,650 to initially review the regulation once it was submitted. However, because the office disapproved the regulation and the regulation had to be revised by the Department of Health Services and resubmitted to the office, the Department of Health Services incurred an additional cost of \$18,600 revising the regulation, and the office incurred an additional cost of \$2,560 in reviewing the regulation a second time.

In addition, we estimate that the Contractors' State License Board spent \$3,105 to develop the regulation that concerned procedures for homeowners to follow to avoid liens on their homes; we estimate that the board spent \$52 to initially review the regulation.* Because the Contractors' State License Board twice withdrew the regulation to correct problems the office identified, the board incurred an additional cost of \$2,557, and the office incurred an additional cost of \$680 in its two additional reviews of the regulation.

*According to an office staff counsel, the office did not perform a comprehensive review initially because the rulemaking file was incomplete.

A regulation submitted by the Fish and Game Commission provides another example of additional costs resulting from multiple revisions and reviews. The regulation addressed wildlife management on private lands. The regulation was not approved until more than two months after the commission originally submitted it to the office. The commission withdrew the regulation twice to correct problems the office identified. We estimate that it initially cost \$6,891 for the Fish and Game Commission to develop this regulation and \$914 for the office to review it.* The Fish and Game Commission incurred additional costs of about \$2,961 in twice revising the regulation, and the office incurred additional costs of about \$308 for the two additional reviews.

The Department of Fish and Game's estimate of its total costs for developing and revising regulations during fiscal year 1983-84 provides an additional example of costs incurred when regulations must be revised before receiving approval. The department estimates that its initial costs for developing regulations were \$513,300. The department estimates it incurred additional costs of \$42,000 during fiscal year 1983-84 in revising and resubmitting regulations to correct problems that the office identified during its review.

*Both the Fish and Game Commission and the Department of Fish and Game incurred costs in developing the regulation. The Department of Fish and Game is responsible for developing regulations, while the Fish and Game Commission is the regulatory entity that reviews the Department of Fish and Game's policy, including its regulations.

Reasons for Delays

Regulations are sent back and forth between the office and agencies before they are finally approved because agencies do not always comply with standards specified in the Administrative Procedure Act when developing regulations. Additionally, the office does not provide specific instruction to agencies and does not have specific internal regulations for its own staff to follow in reviewing regulations.

Staff from the three agencies in our sample whose regulations were either initially disapproved or initially withdrawn told us that, in some instances, they agreed with the office's determination that the regulations did not comply with the standards of the act. Some staff members believed that revisions they were required to make sometimes resulted in improved or better defined regulations.

However, staff from all four agencies in our sample stated that specific written instruction from the office is needed to assure that regulations are written correctly the first time. Agency staff generally believed that the office needs to provide specific examples of what should be included in a rulemaking file to satisfy each of the six legal standards specified in the act. In addition, staff from three of the four agencies stated that the office should adopt internal regulations to govern the procedures that it uses in reviewing regulations.

The office does not currently have regulations to ensure consistency in its review of regulations. For example, the office currently has a policy of sending letters to agencies specifying the problems the office identified during its review within 24 hours after the regulation is disapproved or withdrawn. However, the office is not always consistent in sending letters within this period. For 7 of the 13 regulations for which approval was delayed, the office did not send the letters to agencies until as much as one month after the regulations had been initially disapproved or withdrawn. Until agencies received these letters, the agencies did not have the written information from the office to assist them in revising the regulations.

In two instances, agencies had already revised the regulations and resubmitted them to the office for a second review by the time they received the letters from the office specifying the problems that the office had identified with the regulations. In one of these instances, the office did not send the letter until 20 days after the agency withdrew the regulation; in the other instance, the office did not send the letter until 30 days after the agency withdrew the regulation. Although office attorneys notified the agencies by telephone of the problems they had identified, the agencies did not have the office's written information to assist them in revising the regulations before resubmitting them to the office. After the agencies resubmitted the regulations in these two instances, the office again identified problems and returned the regulations to the agencies for a second revision.

The Legislature amended the Administrative Procedure Act in 1982 to require the office to develop regulations that govern the procedures it uses in reviewing regulations; the office has begun developing these regulations. Such regulations would help to ensure that office attorneys follow consistent procedures.

The Office Has Not Completed
Reviews of Some Regulations
Adopted Before July 1, 1980

The office has not completed discretionary reviews that it initiated for regulations addressed in 382 Statements of Review Completion submitted by state agencies. In addition, the office has not made a final decision on 68 unresolved orders to show cause why regulations should not be repealed. As of June 1984, the office stopped initiating discretionary reviews of agencies' Statements of Review Completion, and it has not issued any orders to show cause since February 1983. Legislation that became effective January 1, 1985, requires the office to publish agencies' Statements of Review Completion in the California Administrative Notice Register and to consider the public comment it receives. The legislation also requires the office to make a final decision on certain unresolved orders to show cause by April 30, 1985. However, 5 of the 68 unresolved orders are not subject to the legislative deadline.

Incomplete Reviews

Following their review of regulations adopted before July 1, 1980, agencies must submit to the office Statements of Review Completion in which they identify regulations that should be retained and regulations that should be amended or repealed. Agencies must submit their proposals to amend or repeal regulations within six months after submitting their Statements of Review Completion. The office has six months in which to review and either approve or disapprove these proposed changes. In addition, within six months after receiving the Statements of Review Completion, the office can initiate its own discretionary review of the regulations addressed in the Statements of Review Completion and can issue to agencies orders to show cause why regulations should not be repealed.

Until June 1984, the office chose to exercise its authority to conduct discretionary reviews of regulations adopted before July 1, 1980, and it routinely notified agencies that it was initiating a review of the regulations addressed in the agencies' Statements of Review Completion. In June 1984, the director stopped this practice of initiating discretionary reviews. This decision applied to Statements of Review Completion that the office received after February 1984. According to the director, initiating and conducting discretionary reviews of regulations in all Statements of Review Completion created more work than the staff could handle; as a result, the office could not complete all reviews that it initiated.

According to the office, agencies submitted 532 Statements of Review Completion addressing 29,329 regulations from January 1981 through February 1984; the office sent letters to initiate reviews for all of them. However, the office reviewed and gave a final disposition to regulations addressed in only 150 Statements of Review Completion. The office did not complete reviews for the remaining 382 Statements of Review Completion. In addition, from February 1984 through December 31, 1984, the office received 54 Statements of Review Completion addressing 2,739 regulations. The office has not initiated discretionary reviews for these Statements of Review Completion.

Although the office is not currently initiating discretionary reviews of regulations identified in agencies' Statements of Review Completion, agencies must continue to submit to the office for review proposed amendments to and repeals of regulations adopted before July 1, 1980. The office is currently reviewing and either approving or disapproving the proposed changes.

In addition to not completing reviews that it initiated for some Statements of Review Completion, the office has not made a final decision on the regulations addressed in 68 orders to show cause that it issued to state agencies. According to the director of the office, since January 1981, the office has issued 106 orders to show cause why 4,153 regulations should not be repealed. The office repealed the regulations addressed in 8 of these orders to show cause, repealed regulations and approved amendments to regulations addressed in 26

orders to show cause, and approved amendments to regulations addressed in 4 of these orders to show cause. Sixty-eight of these orders are still unresolved because the office has not completed its review and made a final decision on them. These unresolved orders pertain to regulations administered by 41 agencies. The office last issued an order to show cause in February 1983.

Reasons for Incomplete Reviews

The director of the office noted several reasons for not completing the discretionary reviews for the 382 Statements of Review Completion and for not making a final decision on the 68 unresolved orders to show cause. The director stated that staff of the office were not always assigned to discretionary reviews of regulations because no statutory deadline exists for completing a discretionary review. The director told us that she has instead assigned staff to review the regulations that must be reviewed and either approved or disapproved within a statutory time limit. These regulations include regulations or amendments to or repeals of regulations adopted after July 1, 1980, emergency regulations, and amendments to or repeals of regulations adopted before July 1, 1980. The director also stated that she believes some of the orders to show cause are no longer relevant: some agencies have taken subsequent regulatory actions that have had the effect of nullifying many of the issues addressed by the orders to show cause.

The director told us also that, in March 1984, the Office of Administrative Law supported proposed legislation (Senate Bill 1896) subject to amendments. This legislation was enacted to address the unresolved orders to show cause and provide direction to the office concerning the processing of Statements of Review Completion and orders to show cause.

Senate Bill 1896

Senate Bill 1896, which amended the Administrative Procedure Act effective January 1, 1985, requires the office to publish each agency's Statements of Review Completion in the California Administrative Notice Register to inform the public and to invite public comment. The amendment also requires that the office consider the written comments that it receives within 45 days of the time the Statement of Review Completion is published in the California Administrative Notice Register.

Additionally, the amendment requires the office to decide if regulations for which it issued orders to show cause and received responses from agencies before December 31, 1984, meet the standards of the act. All regulations for which the office does not make a decision by April 30, 1985, will be considered to be in compliance with standards of the act and will remain effective. In addition, the office is required to report to the Legislature by May 31, 1985, the number of regulations on which it failed to make a decision and the reasons why it did not make a decision.

This amendment also put a limit on the time the office has to make a decision on the regulations addressed in its future orders to show cause. Within 60 days of receiving an agency's response, the office must decide whether the regulations addressed in the order to show cause meet the standards of the Administrative Procedure Act. In making its decision, the office must review any written comments submitted to it by the public within 30 days of the publication of the orders to show cause in the California Administrative Notice Register. If the office fails to make a decision within 60 days of receipt of an agency's response, the regulations will be considered to meet the standards of the act and will remain effective.

In our review of the statistics for the 68 unresolved orders to show cause, we determined that the requirement that the office make a decision on unresolved orders by April 30, 1985, does not apply to 5 of the unresolved orders. Although the office issued these orders before December 31, 1984, the agencies had not responded to the orders as of December 31, 1984. Consequently, the office has no mandated deadline for resolving these 5 orders.

CONCLUSION

The Office of Administrative Law approved 92 of the 96 regulations we reviewed. Two of the regulations that the office disapproved were not resubmitted; in addition, two regulations that agencies withdrew were not resubmitted. Of

the 92 regulations that the office approved, 15 were approved only after agencies corrected and resubmitted the regulations. The office most often disapproved regulations or allowed agencies to withdraw regulations because agencies did not demonstrate that the regulations were necessary, did not write the regulation clearly, did not demonstrate the agencies' legal authority to adopt certain regulations, or did not submit to the office sufficient documentation to demonstrate compliance with procedural requirements of the Administrative Procedure Act.

The approval process for 13 of the regulations in our sample took from 35 days to 11.6 months. Approval of these regulations was delayed because the regulations were either initially withdrawn by agencies or initially disapproved by the office. As a result of these delays, agencies and the office incurred additional costs; in addition, agencies could not promptly implement these regulations.

Finally, the office initiated but did not complete discretionary reviews of regulations addressed in 382 Statements of Review Completion. In addition, the office has not made a final decision on 68 unresolved orders to show cause why an agency's regulations should not be repealed. A recent amendment to the Administrative Procedure Act requires the office to make a decision on unresolved orders to show

cause. However, the amendment does not apply to 5 of the unresolved orders.

RECOMMENDATIONS

To expedite the approval of regulations, the Office of Administrative Law should take the following actions:

- Issue written instructions to agencies specifying what should be included in a rulemaking file to satisfy each of the six legal standards specified in the Administrative Procedure Act. The office should avoid violating Section 11347.5 of the Administrative Procedure Act, which prohibits state agencies from issuing instructions that are themselves regulations.

- Complete its development of regulations to govern its procedures for reviewing regulations that agencies submit. These regulations should include time limits that the the office must observe in issuing letters to agencies following the withdrawal or disapproval of regulations.

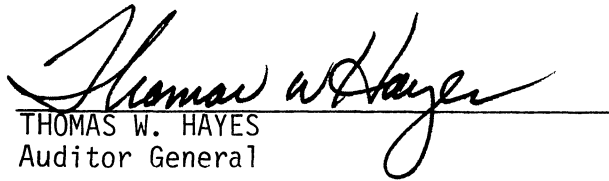
To resolve all incomplete reviews of regulations identified in Statements of Review Completion and unresolved orders to show cause and to improve the efficiency of handling future

Statements of Review Completion that agencies submit, the Office of Administrative Law should do the following:

- Establish a timetable for resolving the disposition of its incompletd discretionary reviews of 382 Statements of Review Completion. The office may want to consider completing reviews only of regulations that have generated significant public comment subsequent to their publication in the California Administrative Notice Register. The office might consider regulations that generated no public comment as conforming to the standards of the Administrative Procedure Act.
- Consider initiating reviews of future Statements of Review Completion only for regulations that receive significant public comment after being published in the California Administrative Notice Register.
- Reassess the relevance of the five orders to show cause that are not subject to the April 30, 1985, deadline in Senate Bill 1896, determine if the orders are justified, and resolve them by April 30, 1985.

We conducted this review under the authority vested in the Auditor General by Section 10500 et seq. of the California Government Code and according to generally accepted governmental auditing standards. We limited our review to those areas specified in the audit scope section of this report.

Respectfully submitted,


THOMAS W. HAYES
Auditor General

Date: February 4, 1985

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**OFFICE OF ADMINISTRATIVE LAW**

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January 30, 1985

Mr. Thomas W. Hayes
Auditor General
660 "J" Street, Suite 300
Sacramento, CA 95814

Dear Mr. Hayes:

The Office of Administrative Law has reviewed the Auditor General's Report, P-482 entitled "The State Could Expedite the Approval of Regulations." In that report you reached two general conclusions:

- I. Notwithstanding the fact that OAL completes its review of all regulations within statutorily mandated time frames, time delays and additional costs in the final implementation of regulations still occur when adopting agencies submit regulations to the office which do not initially meet the governing legal requirements of the Administrative Procedure Act.
- II. The office voluntarily began but has not completed a duplicate review of the 40,000 pre-1980 regulations that state agencies are mandated to complete a review of by 1986.

This office concurs in these conclusions.

You also recommend actions this office could take to address these areas of concern. Since we concur with your conclusions, the attached response of the Office of Administrative Law describes how this office will implement these recommendations.

Thank you for the opportunity of reviewing and commenting on this report.

Sincerely,

LINDA STOCKDALE BREWER
Director

LSB:mr
Attach.

Office of Administrative Law's Response to
Recommendations of the Auditor General's Report P-482

- I. That OAL issue written instructions to state agencies specifying what should be included in a regulation and its supporting documents to satisfy each of the legal standards in the Administrative Procedure Act.

RESPONSE:

First, I should point out that OAL has and continues to provide extensive training to state agency personnel on how to comply with the APA requirements. While participating agency personnel have stated that they benefit from such training, our experience has shown that due to a high turnover rate of personnel assigned as agency regulatory contact persons, the benefit derived is short-lived. Therefore, we concur with and will implement your recommendation that this office provide state agencies with written instructions. This action will be taken as soon as practical after this office has adopted regulations. Anticipated date of availability of such written instructions is mid-summer 1985.

- II. That OAL complete the process of adopting regulations to govern the procedures it uses in reviewing regulations submitted to it.

RESPONSE:

OAL, with the assistance of various state agencies, has developed draft regulations and conducted the requisite public hearing on these regulations on January 16, 1985. It should be noted that prior to holding this formal public hearing, OAL held four workshops with state agencies. These agencies were encouraged to make recommendations regarding the areas of OAL procedures they believed to be most in need of specificity and definition. The draft regulations proposed for discussion at the January 16 public hearing incorporated many of the agency concerns. (That may explain why only five (5) persons testified at the hearing.)

Final adoption and implementation of regulations is targeted for May 1985.

- III. That the office should resolve the disposition of those Statements of Review Completion for which the office has initiated but not completed reviews. Further, the office should consider initiating reviews of Statements of Review Completion only for regulations that receive significant public comments subsequent to their publication in the California Administrative Notice Register. Finally, the office should resolve all unresolved orders to show cause by April 30, 1985.

RESPONSE:

This Office examined the procedures it previously used when voluntarily initiating a duplicate review of regulations agencies had already reviewed, and determined that it should not again review all 40,000 pre-1980 regulations. Our analysis resulted in the internal policy change you allude to in your report regarding how reviews are initiated. Therefore, prospectively, we will fully implement your recommendation that this Office limit its voluntary reviews on pre-1980 regulations to those which are identified by the public as a significant cause of concern. We believe this approach to be fiscally prudent as well as in full compliance with both the letter and spirit of the APA. Implementation of this recommendation will assure that the Office's resources are focused on practical problems with pre-1980 regulations rather than theoretical ones. Implementation will occur as follows:

- (a) Effective January 1, 1985, the Office will publish Statements of Review Completion submitted by each agency in the California Administrative Notice Register. These Statements evidence the agency's intent to retain, amend or repeal their regulations that existed in July 1980. The Office will not voluntarily conduct an independent review of regulations covered by a published Statement unless:
 - (1) OAL receives significant public comments within 45 days of publication, or,
 - (2) OAL is directed to conduct such a review by the legislature in accordance with Government Code Section 11349.7(m).
- (b) The Office will systematically terminate the reviews it voluntarily initiated prior to June 1984, consistent with the procedures outlined in Subsection (a). In all cases where adequate public notice was provided and no significant public comment was received, the "review" will be terminated without further analysis. Where adequate public notice was not provided, the Office will publish the Statement and review only those that meet one of the above described conditions.

This same procedure will also be followed in terminating the 68 pending cases where the Office had, prior to March 1983, issued an Order to Show Cause why specified regulations should not be repealed. In any case where regulations covered by these Orders have been identified by the public as of significant concern, the Office will make a final determination of their legality by April 30, 1985. Further, since you raised the question of the

status of the five orders to show cause that are still outstanding but which are technically not covered by the provisions of SB 1896, I should note that this Office will treat them as though they are covered and will close them out in the same manner as the 68 Orders to Show Cause that are covered by SB 1896.

FOOTNOTE TO RESPONSE:

Although this Office concurs in the above recommendations, we wish to note that we question whether the general conclusion that OAL approves most regulations can be accurately drawn from the relatively small sampling of regulations the Auditor General's Office examined. A more accurate conclusion might be that OAL eventually approved most of the 96 regulations covered by the report. Ninety-six might be too small a sampling upon which to base a general conclusion when one considers that for the period covering July 1, 1984 through December 31, 1984, of the 2,290 regulations reviewed by the Office, 1,156 were approved, 1,122 were disapproved, and 702 were withdrawn.

cc: Members of the Legislature
Office of the Governor
Office of the Lieutenant Governor
State Controller
Legislative Analyst
Assembly Office of Research
Senate Office of Research
Assembly Majority/Minority Consultants
Senate Majority/Minority Consultants
Capitol Press Corps