Study N-304 September 28, 1999

Memorandum 99-70

Administrative Rulemaking: Exemptions from Administrative Procedure Act

In May, 1999, the staff prepared a list of approximately 250 specific exemptions from the rulemaking requirements of the Administrative Procedure Act (APA). The list was circulated as part of a request for public comment on the listed exemptions. The stated purpose was to solicit input on whether any of the exemptions is "questionable as a matter of policy, or … obsolete or otherwise defective technically." The request for public comment was also published in the California Regulatory Notice Register. This memorandum, which supersedes Memorandum 99-52 and its first supplement, considers issues raised in public comment.

We received two letters suggesting that we study Penal Code Section 5058, which provides exemptions from the rulemaking process for certain regulations of the California Department of Corrections (CDC). That section is set out in the Exhibit at pp. 1-3. In particular, the commentators are concerned about the procedure for adoption of "emergency regulations" and the exemption from rulemaking requirements for regulations relating to "pilot programs." Those provisions were added fairly recently. See 1994 Cal. Stat. ch. 692. The issues raised by the commentators are discussed below. Relevant materials are attached in the Exhibit, as follows:

Exhibit pp.

1. Penal Code Section 5058 1
2. Donald Specter, Prison Law Office, August 11, 1999 4
3. Senator Richard G. Polanco, Joint Legislative Committee on Prison Construction and Operations, August 16, 1999 6
3. Gwynnae L. Byrd, of Joint Legislative Committee on Prison Construction and Operations, September 15, 1999 (portion of memorandum to Peggy McHenry, Department of Corrections) 15
4. Michael B. Neal, Department of Corrections, August 3, 1998 (letter to Senator Polanco) 17
5. Michael B. Neal, Department of Corrections, March 28, 1994 (letter to Assembly Member Epple) 18

Existing Law

Section 5058(e) authorizes CDC to adopt emergency regulations without the usual showing of emergency. Under the regular APA procedure, an agency must show that a proposed emergency regulation is "necessary for the immediate preservation of the public peace, health and safety or general welfare." See Gov't Code § 11346.1(b). OAL will not approve an emergency regulation if it finds that the regulation is not "necessary for the immediate preservation of the public peace, health and safety or general welfare." See Gov't Code § 11349.6(b). In order to adopt an emergency regulation under Section 5058(e), CDC only needs to certify that the "operational needs of the department require adoption of the regulations on an emergency basis." This certification does not appear to be subject to OAL review.

Section 5058(e) also contains a statement of legislative intent regarding the special emergency rulemaking procedure:

> It is the intent of the legislature, in authorizing the deviations in this subdivision from the requirements and procedures of Chapter 3.5 (commencing with Section [11340]) of part 1 of Division 3 of Title 2 of the Government Code, to authorize the department to expedite the exercise of its power to implement regulations as its unique operational circumstances require.

Commentator Concerns

Writing as chair of the Joint Legislative Committee on Prison Construction and Operations ("the Joint Committee"), Senator Richard G. Polanco expresses concern that the emergency regulation procedure "has been overused by the Director of Corrections, resulting in far too many regulations being hurriedly adopted by CDC before there is any opportunity for public comment." See Exhibit p. 6. Similar concerns were expressed by Donald Specter of the Prison Law Office, who believes that the procedure is used to adopt regulations in situations that are not "true emergencies," thereby precluding public comment and the regular review procedures for a considerable period of time. See Exhibit pp. 4-5.

CDC's use of the emergency regulation procedure to adopt regulations where there is no true emergency is not in itself a problem. The procedure expressly permits use of the emergency regulation procedure in cases where the need for

the regulation is urgent, but does not rise to the level of an emergency. This is consistent with CDC's intention in seeking enactment of Section 5058(e): "CDC will have an enhanced ability to quickly implement policies based upon urgent, though not emergency, operational needs." See Exhibit p. 18.

The real question is whether CDC has regularly used the emergency regulation procedure in cases where there is no true *urgency*, simply because the procedure is expedient. This would be a problem. A basic principle of the APA is that public notice and comment should precede the effective date of a proposed regulation. This provides the public with advance notice of the pending rule and a meaningful opportunity to comment on the rule. If an agency has a rule in place for several months before providing for notice and comment then no advance notice is provided and institutional inertia will decrease the effectiveness of public comment in influencing the final rule. This is to be avoided if possible, which is why emergency rulemaking is an extraordinary procedure reserved for circumstances where delay could cause serious harm.

In support of its contention that CDC has overused the procedure, the Joint Committee notes (see Exhibit p. 13, emphasis in original):

> When we gave the Director [the special emergency rulemaking power], the department promised that it would only be used in exceptional circumstances when there was a threat to public safety. Since then, that provision of the Penal Code has been used to justify almost every regulation adopted. *[In 1997], out of 12 regulations adopted, 10 were considered an emergency. In 1996, out of 15 regulations adopted, 11 were considered an emergency.*

More recent CDC rulemaking reveals a similar pattern. The staff searched Westlaw for recent changes to CDC's regulations (excluding editorial changes, changes without regulatory effect, readoption of previously adopted emergency regulations, or actions to make previously adopted emergency regulations permanent) and found the following:

- In 1988 there were six emergency rulemaking actions completed. See Notice Registers 98-1, 98-7, 98-9, 98-35, 98-46, & 98-49. There was one non-emergency rulemaking action completed. See Notice Register 98-50.

- To date, in 1999 there have been five emergency rulemaking actions completed. See Notice Registers 99-4, 99-6, 99-11, 99-26, 99-34 & 99-36. There were three non-emergency rulemaking actions completed. See Notice Registers 99-3, 99-5 & 99-13.

Combining the data for the period from 1996 to 1999 shows that the emergency procedure was used in 32 of the 42 rulemaking actions (about 76%). This does seem to be a high level of usage. However, it isn't out of the question that three quarters of CDC's rulemaking is in response to urgent operational needs or an actual emergency. As the Legislature recognized in their statement of intent, CDC faces unique operational circumstances.

One way of evaluating whether the procedure has been used in non-urgent circumstances would be to review the content of the emergency regulations to determine whether they address urgent topics. However, as non-experts in prison administration, the staff is reluctant to second-guess the CDC's judgment in this way.

An alternative way of assessing whether the need for a regulation is urgent is to examine how much time passed between the time at which the department realized the need for a regulation and the time when the regulation was adopted. If the time was sufficient for adoption of a regulation under the normal procedure then it would be difficult to argue that the need for the regulation is urgent and use of the emergency procedure justified. For example, in response to a recent CDC emergency rulemaking the Joint Committee staff made the following comments (see Exhibit pp. 15-16):

> [Use of the emergency procedure] is unwarranted in this case. Specifically, last year, the Legislature passed Assembly Bill 1332, which was chaptered on September 22, 1998 (ch. 696 Stats. 1998). The bill became effective January 1, 1999. That bill required the Department of Corrections to adopt policies and enact regulations to implement the provisions of the bill, which relate to the collection of blood and saliva samples, and thumb and palm prints, from inmates, for the purpose of developing a data bank of DNA information about certain criminal offenders.
>
> Thus, the CDC has had close to one full year's notice that these regulations would be required. This is not a situation where CDC needed to immediately respond to an incident that just recently arose which created some emergency condition.
>
> …
>
> The Legislature, in enacting 5058(e), did not contemplate its use in a situation like this, where CDC had sufficient notice of the need to develop regulations in a certain area. To submit them to OAL under these circumstances is disingenuous and in direct contravention of the purpose of Section 5058(e).

This does seem to be an instance in which the full rulemaking procedure could have been used. As a counter example, CDC recently adopted an emergency regulation to implement changes in its policies regarding the use of deadly force. These changes were made in March 1999, in response to recommendations by the CDC Office of Internal Affairs in October 1998. It seems likely that in this case the regulations were adopted shortly after their formulation, and that the full rulemaking procedure would have delayed their enactment.

Recommendation

Although the staff is not well-qualified to judge whether CDC has overused the emergency rulemaking procedure, the Joint Committee's assertion that CDC has done so is entitled to considerable weight — because the Joint Committee is the legislative body charged with overseeing CDC's operations and because they have provided an example of a case where CDC used the emergency procedure despite having had a year's advance notice of the need for a regulation. The Joint Committee's view is also shared by the Prison Law Office. However, in order to fairly evaluate whether there is a problem, and if so, what should be done about it, we need more information. To that end, **the staff recommends that a request for public comment on the matter be prepared and circulated.** This would provide an opportunity for CDC and other interested groups to comment in detail on the issues raised in this memorandum. In addition to soliciting feedback on the general question of whether there is a problem with the use of Section 5058(e), the Commission should consider including drafts of possible alternative procedures in the request for public comment. This would help to focus the commentary on concrete proposals for improvement. Some possible alternative procedures are set out below.

Alternative Procedures

The staff sees three alternative procedures that might be included in a request for public comment:

(1) Refine the scope of the exception. One possible alternative would be to limit the circumstances in which CDC may adopt an emergency regulation on the basis of operational necessity. For example, the procedure might be limited to cases where a regulation is urgently required to address an unanticipated change in circumstances or to implement or comply with an urgency statute. This would preserve the basic policy of allowing use of the procedure in urgent situations,

while precluding use of the procedure in cases where there is time for the regular procedure to be used (as in the example cited by the Joint Committee above). This change could be made by amending Section 5058(e) as follows:

> 5058. …
> (e) …
> (2) No showing of emergency is necessary in order to adopt emergency regulations other than a written statement by the director or the director's designee, to be filed with the Office of Administrative Law, certifying that operational needs of the department require adoption of the regulations on an emergency basis in order to address an unanticipated change in circumstances or to implement or comply with an urgency statute.
> …
> **Comment**. Subdivision (e) of Section 5058 is amended to limit adoption of emergency regulations on the basis of operational necessity to cases where a regulation is urgently needed to address an unforeseen change in circumstances or to implement or comply with an urgency statute. This precludes use of the procedure in cases where the need for a regulation is known well in advance.

(2) Impose OAL review of operational necessity. Another possibility would be to subject CDC's certification of operational necessity to OAL review (similar to OAL's review of a statement of emergency under the APA's emergency procedure). This could be done by amending Section 5058(e) as follows:

> 5058. …
> (e) …
> (2) No showing of emergency is necessary in order to adopt emergency regulations other than a written statement by the director or the director's designee, to be filed with the Office of Administrative Law, certifying that operational needs of the department require adoption of the regulations on an emergency basis. The Office of Administrative Law shall not file the emergency regulation with the Secretary of State if it determines that the operational needs of the department do not require adoption of the regulation on an emergency basis.
> …
> **Comment**. Subdivision (e) of Section 5058 is amended to require review by the Office of Administrative Law (OAL) of whether the operational needs of the department require adoption of an emergency regulation. OAL performs a similar review of the need for emergency regulations adopted under Government Code Section 11346.1. See Gov't Code § 11349.6(b).

The problem with this approach is that OAL, as an expert in rulemaking law, seems ill-equipped to second-guess CDC's judgments about what is urgently needed to administer prisons. Considering the risks involved in delaying an urgently needed change in prison administration, it seems unwise to require OAL's validation before an emergency rule can take effect. This is perhaps why the Legislature decided not to impose OAL review when they added Section 5058(e) in 1994. It is also worth noting that OAL was closely involved in the drafting of Section 5058(e), suggesting that OAL concurred in the decision not to require OAL review.

(3) Provide an alternate forum for public participation. This was the approach taken in Senate Bill 1450, which was authored by Senator Polanco in 1998 but narrowly failed passage on the floor of the Assembly. See Exhibit pp. 7-12.

Senate Bill 1450 would have required that CDC notify the Joint Committee 31 days before filing an emergency regulation with OAL. The Joint Committee could then hold a public hearing regarding the proposed emergency regulation. Failure of the Joint Committee to hold a hearing would not prevent CDC from proceeding with adoption of the emergency regulation after the 31 day period has run. See Exhibit p. 11. This approach would preserve the present scope of CDC's discretion while providing an opportunity for public notice and comment before an emergency regulation takes effect.

The most significant problem with this approach is the 31-day delay it entails. Where there *is* a true emergency requiring an emergency regulation, forcing CDC to wait 31 days before adopting the regulation could cause serious problems. CDC raised a similar point in opposition to SB 1450 (noting that the notice period could cause delay of an emergency regulation). See Exhibit p. 17.

The problem of delay would be particularly acute where the need for a regulation is based on a situation of imminent danger. Section 5058(d)(2) provides for the immediate adoption of a regulation in situations of "imminent danger" to avoid "serious injury, illness, or death." A regulation adopted under the imminent danger procedure lapses by operation of law within 15 calendar days. If CDC were required to wait 31 days before filing an emergency regulation, then a 15-day imminent danger regulation would lapse before a follow-up emergency regulation could take effect, creating a gap in CDC's response to the dangerous situation.

The problem of delay in the face of a true emergency can be avoided by creating two classes of emergency regulations. In cases of mere operational necessity, advance notice would be required. In situations of true emergency, advance notice would not be required. This would provide for advance public notice and an opportunity to comment in cases where delay is less critical, while preserving the fast track in cases where expedited adoption is essential.

Another objection raised by CDC, is that SB 1450 would have involved the Legislature in an executive process (see Exhibit p. 17):

> The regulatory process, as administered by OAL, is a strictly executive process. The Legislature may participate in the public comment segment of the permanent regulatory process, and may provide oversight of correctional policy during both budget hearings and other special hearings. However, the requirement proposed by SB 1450 would be an unacceptable first step down a slippery slope of legislative involvement in the regulatory process.

Of course, this problem could be avoided by requiring that CDC, rather than the Joint Committee, conduct the hearing. This probably makes sense as a practical matter, as it would allow commentators to address their concerns directly to CDC.

Thus, the approach taken in SB 1450 could be modified to address the issues raised by CDC while still preserving its basic policy of providing advance notice and opportunity to comment in cases of mere urgency (rather than true emergency). This could be implemented by amending Section 5058(e) as follows:

> 5058. …
>
> (e) …
>
> (2) ~~No showing of emergency is necessary in order to adopt emergency regulations other than a written statement by the director or the director's designee, to be filed with the Office of Administrative Law, certifying that operational needs of the department require adoption of the regulations on an emergency basis.~~
>
> If the director or the director's designee certifies in a written statement filed with the Office of Administrative Law that the operational needs of the department require the adoption, amendment, or repeal of a regulation on an emergency basis, the department is not required to make a finding of emergency pursuant to subdivision (b) of Section 11346.1 of the Government Code.

(3) If the department relies on a certification of operational needs under paragraph (2), the director shall mail notice of the proposed regulation to persons who have requested notice of the department's rulemaking activity. The notice shall be mailed at least 30 days before filing the regulation with the Office of Administrative Law. The department shall hold a public hearing regarding the proposed regulation after mailing the notice but before filing the regulation.

(4)…

Comment. Subdivision (e) of Section 5058 is amended to require that the department provide public notice and hold a public hearing before filing an emergency regulation based on its operational needs. The notice and hearing requirement does not apply where the department adopts an emergency regulation based on a finding of emergency pursuant to Government Code Section 11346.1(b).

PILOT PROGRAM EXEMPTION

Existing Law

Under Section 5058(d)(1), regulations implementing CDC "pilot programs" are exempt from most rulemaking procedures. CDC simply conducts a fiscal impact analysis of the proposed regulation, then submits the regulation to OAL for filing with the Secretary of State and publication in the California Code of Regulations. The regulation takes effect immediately, but lapses by operation of law two years later.

There are two significant limitations on the use of this exemption:

> (1) The director of CDC must certify that a regulation relates to a "legislatively mandated or authorized pilot program or a departmentally authorized pilot program." This implies that CDC has broad discretion to determine whether a program is a pilot program.
>
> (2) A pilot program may not affect more than ten percent of the inmate population (measured by reference to the gender of the affected population, i.e. ten percent of men if only men are affected, or women if only women are affected, or both if both are affected).

Defining "Pilot Program"

The Prison Law Office is concerned that CDC may use the pilot program exemption to adopt regulations relating to a program that is not actually intended as a "pilot program" (see Exhibit p. 5):

> Recently, this office obtained an order that the CDC develop policies and procedures for prisoners with disabilities. The CDC issued regulations and designated them as relating to a pilot program, thereby avoiding the public comment period. However, this was a pilot program only in the sense that it was new. It was not something designed to determine if a program would work and should be duplicated. The program governed all prisoners with disabilities. Under the statute a pilot program is defined as something that affects 10% or less of the total prison population. With the current population of approximately 155,000 prisoners, a pilot program affects a very large number of people.

Section 5058 does not define "pilot program." However, commonsense suggests that a "pilot program" is a short-term trial of a program to test its effectiveness or feasibility. This is consistent with the two-year limitation on the effect of a regulation adopted under the pilot program exemption.

It is implicit that a pilot program should be an experiment, although this is not expressly required. If CDC were to certify that a program is a pilot program even though it did not intend the program to serve as an experiment, it would probably be exceeding the boundaries of its discretion. However, the staff has no information showing that CDC has ever done this. The special program for disabled inmates cited by the Prison Law Office may well have been intended as experimental even if it was ordered by the court.

The other significant limitation on a pilot program is the ten percent cap on the scope of a program's effect. This ensures that any pilot program will only affect a small part of the total inmate population. However, as the Prison Law Office points out, a pilot program may affect an entire group (rather than a tenth of that group) if the group's members comprise no more than ten percent of the total population. This is only a problem if the Legislature intended that a pilot program should affect no more than ten percent of the group that it is ultimately intended to affect (e.g., only ten percent of disabled inmates if the program is intended to affect only disabled inmates) or if there is some good independent policy basis for imposing such a limitation.

A pilot program is expressly limited to a tenth of the affected group where the group at issue is determined by gender (e.g., only ten percent of women may be affected if the program is only intended to affect women). This suggests that the Legislature sees some merit in limiting a pilot program to a fraction of its intended target group, rather than to a fraction of the whole population.

However, the Legislature did not extend that express policy to other groups, implying that it did not intend that policy to apply to other groups. Nonetheless, the question remains whether there is a good independent argument for extending the policy to other identifiable groups.

The principle policy that would be served by limiting a pilot program to a fraction of the intended target group would be efficiency. If a pilot program requires tinkering or proves to be unworthy of continuation, then any inefficiency resulting from the experiment would be limited in its scope. Of course, the goal of minimizing the inefficiency of an experimental program is also served by the existing ten percent limit. It isn't clear that further limitation is necessary. Recall that the ten percent limit is a ceiling, not a floor — if a smaller pilot program makes sense operationally, CDC is free to implement a smaller program. Furthermore, requiring that a pilot program be limited to a tenth of the ultimate target group might result in inappropriately small trials where dealing with smaller groups. For the reasons discussed above, **the staff is skeptical about the wisdom of trying to further limit the scope of pilot projects**. However, if the Commission decides to do so, it could be done by amending Section 5058(d)(1)(A) as follows:

> 5058. …
>
> (A) ~~A pilot program affecting male inmates only shall affect no more than 10 percent of the total state male inmate population; a pilot program affecting female inmates only shall affect no more than 10 percent of the total state female inmate population; and a pilot program affecting male and female inmates shall affect no more than 10 percent of the total state inmate population.~~
>
> <u>A pilot program shall not affect more than 10 percent of the total state inmate population. A pilot program that is intended to affect an identifiable class of inmates shall not affect more than 10 percent of the inmates of that class. For the purposes of this paragraph, identifiable classes of inmates include male inmates, female inmates, and disabled inmates.</u>
>
> …
>
> **Comment**. Subdivision (d)(1)(A) of Section 5058 is amended to foreclose adoption of a regulation under that paragraph if it relates to a program that would affect more than ten percent of an identifiable class of inmates that is ultimately intended to be affected by that program. For example, a program intended to affect only disabled inmates would not be a pilot program for the purposes of subdivision (d)(1)(A) if it affects more than ten percent of disabled inmates.

Readoption

A regulation relating to a pilot program that is adopted pursuant to Section 5058(d)(1) lapses by operation of law two years after adoption. However, nothing in the statute prevents readoption of the same regulation after it has lapsed. The staff is not aware of any instance where CDC has readopted a lapsed pilot program regulation, but it might be worth adding a provision preventing such readoption. This could be done by amending Section 5058(d) as follows:

> 5058.…
> (d) …
> (1) The regulations shall become effective immediately upon filing with the Secretary of State and shall lapse by operation of law two years after the date of the director's certification unless formally adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. <u>This paragraph may not be used to adopt a regulation that is the same in substance as a regulation previously adopted under this paragraph.</u>
> …
> **Comment.** Subdivision (d)(1) of Section 5058 is amended to provide that the pilot program procedure cannot be used to adopt a regulation that was previously adopted as a pilot program regulation. This ensures that the two-year time limit on the effectiveness of a pilot program regulation cannot be circumvented by readopting a lapsed regulation.

This language should probably be included in any request for public comment that is circulated.

Amendment or Repeal of Pilot Program Regulation

In some cases CDC will need to amend or repeal a regulation relating to a pilot program. Section 5058 does not provide for this. The section should probably be amended to provide that the pilot program exemption applies to adoption, amendment, or repeal of a regulation relating to a pilot program. This could be done by amending Section 5058(d) as follows:

> 5058.…
> (d) The following ~~regulations~~ <u>regulatory actions</u> are exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code under the conditions specified:
> (1) ~~Regulations adopted~~ <u>Regulatory actions taken</u> by the director or the director's designee, applying to any legislatively

mandated or authorized pilot program or a departmentally authorized pilot program, provided that an estimate of fiscal impact is completed pursuant to Section 6055, and following, of the State Administrative Manual dated July 1986, and that the following conditions are met:

(A) A pilot program affecting male inmates only shall affect no more than 10 percent of the total state male inmate population; a pilot program affecting female inmates only shall affect no more than 10 percent of the total state female inmate population; and a pilot program affecting male and female inmates shall affect no more than 10 percent of the total state inmate population.

(B) The director certifies in writing that the ~~regulations~~ regulatory actions apply to a pilot program that qualifies for exemption under this subdivision.

(C) The certification and ~~regulations~~ regulatory actions are filed with the Office of Administrative Law and the ~~regulations~~ regulatory actions are made available to the public by publication pursuant to subparagraph (F) of paragraph (2) of subdivision (b) of Section 6 of Title 1 of the California Code of Regulations.

~~The regulations~~ A regulatory action taken pursuant to this paragraph shall become effective immediately upon filing with the Secretary of State ~~and~~. A regulatory action taken pursuant to this paragraph to implement a pilot program shall lapse by operation of law two years after the date ~~of the director's certification~~ that the director first certified a regulatory action relating to the pilot program, unless ~~formally adopted~~ the regulatory action is taken by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. For the purposes of this paragraph “regulatory action” means an action to adopt, amend, or repeal a regulation.

…

Comment. Subdivision (d) of Section 5058 is amended to provide that the exemption for adoption of regulations relating to a pilot program also applies to the amendment or repeal of a regulation required to implement, modify, or terminate a pilot program.

OTHER MISCELLANEOUS COMMENTS

We also received a few miscellaneous comments that require little or no Commission action. These are described below, but the staff does not intend to discuss them at the meeting unless someone raises an issue relating to them.

Some commentators pointed out APA exemptions that were inadvertently omitted from the list that was circulated for comment: Government Code

Sections 11357(b) (exemption for Department of Finance instructions regarding fiscal analysis of proposed regulation), 14615.1 (exemption for State Administrative Manual provisions), 19582.5 (authority for State personnel Board to designate precedent decisions, which are in turn exempt from the APA rulemaking requirements pursuant to Government Code § 11425.60). The omission of these provisions from the list will be noted in our final report.

One comment was received expressing support for an existing exemption: Public Contract Code Section 10302.5 (exemption for product specifications in public contracting). No action is required with respect to this exemption.

Respectfully submitted,

Brian Hebert
Staff Counsel

Exhibit

Penal Code § 5058. Administration of prisons and parole

5058. (a) The director may prescribe and amend rules and regulations for the administration of the prisons and for the administration of the parole of persons sentenced under Section 1170 except those persons who meet the criteria set forth in Section 2962. The rules and regulations shall be promulgated and filed pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except as otherwise provided in this section. All rules and regulations shall, to the extent practical, be stated in language that is easily understood by the general public.

For any rule or regulation filed as regular rulemaking as defined in paragraph (5) of subdivision (a) of Section 1 of Title 1 of the California Code of Regulations, copies of the rule or regulation shall be posted in conspicuous places throughout each institution and shall be mailed to all persons or organizations who request them no less than 20 days prior to its effective date.

(b) The director shall maintain, publish and make available to the general public, a compendium of the rules and regulations promulgated by the director or director's designee pursuant to this section.

(c) The following are deemed not to be "regulations" as defined in subdivision (b) of Section 11342 of the Government Code:

(1) Rules issued by the director or by the director's designee applying solely to a particular prison or other correctional facility, provided that the following conditions are met:

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public.

(2) Short-term criteria for the placement of inmates in a new prison or other correctional facility, or subunit thereof, during its first six months of operation, or in a prison or other correctional facility, or subunit thereof, planned for closing during its last six months of operation, provided that the criteria are made available to the public and that an estimate of fiscal impact is completed pursuant to Section 6055, and following, of the State Administrative Manual dated July 1986.

(3) Rules issued by the director or director's designee that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code.

(d) The following regulations are exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code under the conditions specified:

(1) Regulations adopted by the director or the director's designee applying to any legislatively mandated or authorized pilot program or a departmentally authorized pilot program, provided that an estimate of fiscal impact is completed pursuant to Section 6055, and following, of the State Administrative Manual dated July 1986, and that the following conditions are met:

(A) A pilot program affecting male inmates only shall affect no more than 10 percent of the total state male inmate population; a pilot program affecting female inmates only shall affect no more than 10 percent of the total state female inmate population; and a pilot program affecting male and female inmates shall affect no more than 10 percent of the total state inmate population.

(B) The director certifies in writing that the regulations apply to a pilot program that qualifies for exemption under this subdivision.

(C) The certification and regulations are filed with the Office of Administrative Law and the regulations are made available to the public by publication pursuant to subparagraph (F) of paragraph (2) of subdivision (b) of Section 6 of Title 1 of the California Code of Regulations.

The regulations shall become effective immediately upon filing with the Secretary of State and shall lapse by operation of law two years after the date of the director's certification unless formally adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(2) Action or actions, or policies implementing them, taken by the department and based upon a determination of imminent danger by the director or the director's designee that there is a compelling need for immediate action, and that unless that action is taken, serious injury, illness, or death is likely to result. The action or actions, or policies implementing them, may be taken provided that the following conditions shall subsequently be met:

(A) A written determination of imminent danger shall be issued describing the compelling need and why the specific action or actions must be taken to address the compelling need.

(B) The written determination of imminent danger shall be mailed within 10 working days to every person who has filed a request for notice of regulatory actions with the department and to the Chief Clerk of the Assembly and the Secretary of the Senate for referral to the appropriate policy committees.

Any policy in effect pursuant to a determination of imminent danger shall lapse by operation of law 15 calendar days after the date of the written determination of imminent danger unless an emergency regulation is filed with the Office of

Administrative Law pursuant to subdivision (e). This section shall in no way exempt the department from compliance with other provisions of law related to fiscal matters of the state.

(e) Emergency regulations shall be adopted pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except that:

(1) Notwithstanding subdivision (e) of Section 11346.1 of the Government Code, the initial effective period for emergency regulations shall be 160 days.

(2) No showing of emergency is necessary in order to adopt emergency regulations other than a written statement by the director or the director's designee, to be filed with the Office of Administrative Law, certifying that operational needs of the department require adoption of the regulations on an emergency basis.

(3) This subdivision shall apply only to the adoption and one readoption of any emergency regulation.

It is the intent of the Legislature, in authorizing the deviations in this subdivision from the requirements and procedures of Chapter 3.5 (commencing with Section 113340) of Part 1 of Division 3 of Title 2 of the Government Code, to authorize the department to expedite the exercise of its power to implement regulations as its unique operational circumstances require.

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August 11, 1999

Law Revision Commission
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AUG 16 1999

File:__________

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Re: Exemptions from APA

Dear Mr. Hebert:

I recently learned that the Commission is considering the issue of exemptions to the rulemaking requirements of the APA. I have reviewed your memorandum 99-52 stating that no comments were received and that the staff do not believe any further inquiry into this issue is necessary. I am writing to request that the Commission undertake an inquiry into exemptions from the APA, at least as it relates to the California Department of Corrections (CDC).

The CDC has several exemptions to the APA's rulemaking requirements. Under Penal Code §5058(c)-(e) the CDC is exempt from the APA (1) when the rules apply to a particular prison, (2) when the rules regulate a pilot program (exemption is limited to two years) and (3) for emergency regulations. In our opinion, the last two exemptions, for pilot programs and emergencies, are not warranted and have been abused. We urge the commission to study the manner in which the CDC has used these two exemptions.

The most egregious problems relate to the CDC's use of emergency regulations. Under this exemption, the CDC may enact regulations without public comment for up to 320 days without any showing of an emergency other than a written statement by the director or his designee. Pen. Code, §5058(e). Under this provision the CDC has adopted many regulations without any evidence that serious harm would result if the process was delayed for public comment. Recently, for example, the CDC planned to issue regulations that would have restricted the ability of families to send packages to their family members in prison, a practice that has been in existence for at least twenty years. The CDC decided not to issue the emergency regulations only after pressure from members of the Legislature. In other instances the CDC has adopted emergency regulations for placing prisoners into substance abuse programs, penalties for disciplinary infractions and procedures for processing court-ordered restitution payments. Although I do not know this for a fact, the slowness by which the CDC makes regulatory decisions leads me to believe that these regulations were under consideration for at least several months before they were issued.

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Besides the fact that these instances do not represent true emergencies, there is no effective method of challenging the Director's determination that it is an emergency. The statute is written in such a way as to make the Director's decision virtually immune from legal challenge. This has lead to the situation where the exception is swallowing the rule.

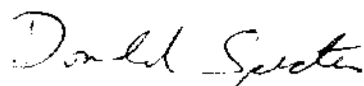
In addition, there is no requirement that any member of the public be notified that the CDC intends to issue emergency regulations. Thus, for example, by the time this office learns of the regulations, they already have been adopted. The public's interest in commenting on the wisdom and legality of the proposed regulations is thwarted for a considerable period of time.

The second problem, although less serious, is the use of pilot program regulations. Under §5058(d) these regulations remain in force for two years without public comment. Recently, this office obtained an order that the CDC develop policies and procedures for prisoners with disabilities. The CDC issued regulations and designated them as relating to a pilot program, thereby avoiding the public comment period. However, this was a pilot program only in the sense that it was new. It was not something designed to determine if a program would work and should be duplicated. The program governed all prisoners with disabilities. Under the statute a pilot program is defined as something that affects 10% or less of the total prison population. With the current population of approximately 155,000 prisoners, a pilot program affects very large number of people. At the very least, the definition of pilot program in §5058(d)(1)(A) should be revised.

In conclusion, we believe that the exemptions in Penal Code §5058 are contrary to the purposes of the APA and are not necessary to the proper functioning of the CDC. We therefore request that the Commission study this subject, at least with respect to the CDC.

Thank you for your attention to this matter. Please contact me if I can provide any further information.

Sincerely,



Donald Specter

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California Legislature

JOINT LEGISLATIVE COMMITTEE ON PRISON CONSTRUCTION AND OPERATIONS

SENATOR RICHARD G. POLANCO
CHAIRMAN

STATE CAPITOL
ROOM 400
SACRAMENTO, CA 95814
(916) 324-6175
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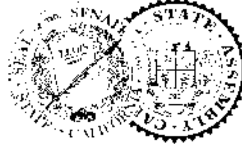
GWYNNAE BYRD
PRINCIPAL CONSULTANT



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August 16, 1999

Brian Hebert
Law Revision Commission
3455 – 5th Avenue, Rm. I-214
Sacramento, CA 95817

Dear Mr. Hebert:

I understand that the Law Revision Commission is reviewing the procedures for regulations to be approved through the Office of Administrative Law. As part of that review, I understand that you are looking at those departments that currently enjoy exemptions from certain portions of the OAL process.

I would like to specifically request that you review Section 5058 (d) and (e) of the Penal Code, which authorizes the Department of Corrections (CDC) to adopt emergency regulations under certain circumstances and authorizes other certain regulations of CDC to be exempt from the provisions related to OAL.

Specifically, my concern is that subdivision (e) of that section has been overused by the Director of Corrections, resulting in far too many regulations being hurriedly adopted by CDC before there is an opportunity for public comment. I attempted to address this problem in legislation last year, with my SB 1450. I am enclosing a copy of the bill and of the "bullet point" statement that was prepared by my staff for SB 1450. As you can see from the statement, the statistics do not bode well for CDC's overuse of their privilege to declare regulations an emergency.

Please do not hesitate to either call me or my staff about this request. You may reach Gwynnae Byrd, my principal consultant, at 324-6175. Thank you for your prompt attention to this request.

Sincerely,

Richard Polanco

RICHARD G. POLANCO
22nd Senatorial District

GLB:dn

Enclosures (2)

AMENDED IN ASSEMBLY JULY 21, 1998

AMENDED IN ASSEMBLY JUNE 18, 1998

AMENDED IN SENATE APRIL 13, 1998

AMENDED IN SENATE MARCH 25, 1998

SENATE BILL No. 1450

Introduced by Senator Polanco
(Coauthors: Assembly Members Migden and Washington)

January 29, 1998

An act to amend Section 5058 of the Penal Code, relating to prisons.

LEGISLATIVE COUNSEL'S DIGEST

SB 1450, as amended, Polanco. Prisons: administration.

Existing law authorizes the Director of Corrections to prescribe and amend rules and regulations for the administration of the prisons. Existing law also requires, with specified exceptions, that those rules and regulations be promulgated and filed with the Office of Administrative Law (OAL).

This bill would require the director to report to the Joint Committee on Prison Construction and Operations, 31 days prior to filing with the OAL, regarding regulations proposed to be adopted under a specified provision that applies to emergency regulations, and would require the committee to hold a public hearing on the proposed regulations within 30 days of that notice. The bill would authorize the department to proceed with the filing of the proposed regulations with the

95

OAL 31 days after notice was given to the committee, regardless of whether the committee held public hearings on those regulations.

This bill would also make technical, nonsubstantive changes.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 5058 of the Penal Code is
2 amended to read:
3 5058. (a) The director may prescribe and amend
4 rules and regulations for the administration of the prisons
5 and for the administration of the parole of persons
6 sentenced under Section 1170 except those persons who
7 meet the criteria set forth in Section 2962. The rules and
8 regulations shall be promulgated and filed pursuant to
9 Chapter 3.5 (commencing with Section 11340) of Part 1
10 of Division 3 of Title 2 of the Government Code, except
11 as otherwise provided in this section. All rules and
12 regulations shall, to the extent practical, be stated in
13 language that is easily understood by the general public.
14 For any rule or regulation filed as regular rulemaking
15 as defined in paragraph (5) of subdivision (a) of Section
16 1 of Title 1 of the California Code of Regulations, copies
17 of the rule or regulation shall be posted in conspicuous
18 places throughout each institution and shall be mailed to
19 all persons or organizations who request them no less than
20 20 days prior to its effective date.
21 (b) The director shall maintain, publish and make
22 available to the general public, a compendium of ~~the~~ rules
23 and regulations promulgated by the director or director's
24 designee pursuant to this section.
25 (c) The following are deemed not to be "regulations"
26 as defined in subdivision (g) of Section 11342 of the
27 Government Code:
28 (1) Rules issued by the director or by the director's
29 designee applying solely to a particular prison or other

1 correctional facility, provided that the following
2 conditions are met:
3 (A) All rules that apply to prisons or other correctional
4 facilities throughout the state are adopted by the director
5 pursuant to Chapter 3.5 (commencing with Section
6 11340) of Part 1 of Division 3 of Title 2 of the Government
7 Code.
8 (B) All rules except those that are excluded from
9 disclosure to the public pursuant to subdivision (f) of
10 Section 6254 of the Government Code are made available
11 to all inmates confined in the particular prison or other
12 correctional facility to which the rules apply and to all
13 members of the general public.
14 (2) Short-term criteria for the placement of inmates in
15 a new prison or other correctional facility, or subunit
16 thereof, during its first six months of operation, or in a
17 prison or other correctional facility, or subunit thereof,
18 planned for closing during its last six months of operation,
19 provided that the criteria are made available to the public
20 and that an estimate of fiscal impact is completed
21 pursuant to Section 6055, and following, of the State
22 Administrative Manual dated July 1986.
23 (3) Rules issued by the director or director's designee
24 that are excluded from disclosure to the public pursuant
25 to subdivision (f) of Section 6254 of the Government
26 Code.
27 (d) The following regulations are exempt from
28 Chapter 3.5 (commencing with Section 11340) of Part 1
29 of Division 3 of Title 2 of the Government Code under the
30 conditions specified:
31 (1) Regulations adopted by the director or the
32 director's designee applying to any legislatively
33 mandated or authorized pilot program or a
34 departmentally authorized pilot program, provided that
35 an estimate of fiscal impact is completed pursuant to
36 Section 6055, and following, of the State Administrative
37 Manual dated July 1986, and that the following conditions
38 are met:
39 (A) A pilot program affecting male inmates only shall
40 affect no more than 10 percent of the total state male

1 inmate population; a pilot program affecting female
2 inmates only shall affect no more than 10 percent of the
3 total state female inmate population; and a pilot program
4 affecting male and female inmates shall affect no more
5 than 10 percent of the total state inmate population.
6 (B) The director certifies in writing that the
7 regulations apply to a pilot program that qualifies for
8 exemption under this subdivision.
9 (C) The certification and regulations are filed with the
10 Office of Administrative Law and the regulations are
11 made available to the public by publication pursuant to
12 subparagraph (F) of paragraph (2) of subdivision (b) of
13 Section 6 of Title 1 of the California Code of Regulations.
14 The regulations shall become effective immediately
15 upon filing with the Secretary of State and shall lapse by
16 operation of law two years after the date of the director's
17 certification unless formally adopted by the director
18 pursuant to Chapter 3.5 (commencing with Section
19 11340) of Part 1 of Division 3 of Title 2 of the Government
20 Code.
21 (2) Action or actions, or policies implementing them,
22 taken by the department and based upon a
23 determination of imminent danger by the director or the
24 director's designee that there is a compelling need for
25 immediate action, and that unless that action is taken,
26 serious injury, illness, or death is likely to result. The
27 action or actions, or policies implementing them, may be
28 taken provided that the following conditions shall
29 subsequently be met:
30 (A) A written determination of imminent danger shall
31 be issued describing the compelling need and why the
32 specific action or actions must be taken to address the
33 compelling need.
34 (B) The written determination of imminent danger
35 shall be mailed within 10 working days to every person
36 who has filed a request for notice of regulatory actions
37 with the department and to the Chief Clerk of the
38 Assembly and the Secretary of the Senate for referral to
39 the appropriate policy committees.

1 Any policy in effect pursuant to a determination of
2 imminent danger shall lapse by operation of law 15
3 calendar days after the date of the written determination
4 of imminent danger unless an emergency regulation is
5 filed with the Office of Administrative Law pursuant to
6 subdivision (e). This section shall in no way exempt the
7 department from compliance with other provisions of
8 law related to fiscal matters of the state.
9 (e) Emergency regulations shall be adopted pursuant
10 to Chapter 3.5 (commencing with Section 11340) of Part
11 1 of Division 3 of Title 2 of the Government Code, except
12 that:
13 (1) Notwithstanding subdivision (e) of Section 11346.1
14 of the Government Code, the initial effective period for
15 emergency regulations shall be 160 days.
16 (2) No showing of emergency is necessary in order to
17 adopt emergency regulations other than a written
18 statement by the director or the director's designee, to be
19 filed with the Office of Administrative Law, certifying
20 that operational needs of the department require
21 adoption of the regulations on an emergency basis.
22 (3) This subdivision shall apply only to the adoption
23 and one readoption of any emergency regulation.
24 (f) The director shall notify the Joint Committee on
25 Prison Construction and Operations regarding
26 regulations proposed to be adopted under subdivision (e)
27 31 days prior to filing with the Office of Administrative
28 Law, and the committee shall hold a public hearing on
29 proposed regulations within 30 days of that notice. The
30 department may proceed with the filing of regulations
31 with the office of Administrative Law 31 days after the
32 date of notice to the committee, regardless of whether a
33 public hearing was held by the committee.
34 (g) It is the intent of the Legislature, in authorizing
35 the deviations in this subdivision from the requirements
36 and procedures of Chapter 3.5 (commencing with
37 Section 11340) of Part 1 of Division 3 of Title 2 of the
38 Government Code, to authorize the department to
39 expedite the exercise of its power to implement

1 regulations as its unique operational circumstances
2 require.

O

<u>SB 1450 STATEMENT</u>

- SB 1450 provides legislative oversight to a process that has gotten out of control. A few years ago, the Legislature gave the Director of CDC the power to declare the need to adopt any regulations as an emergency without going through the normal channels. "No showing of an emergency is necessary" other than "a written statement by the director certifying that the operational needs of the department require adoption of the regulations on an emergency basis" (Penal Code Sec. 5058 (e)). The Department refers to these regulations as having "operational necessity."

- When we gave the Director that authority, the department promised that it would only be used in exceptional circumstances when there was a threat to public safety. Since then, that provision of the Penal Code has been used to justify almost every regulation adopted. <u>Last year, out of 12 regulations adopted, 10 were considered an emergency. In 1996, out of 15 regulations adopted, 11 were considered an emergency. So far this year, half of the regulations adopted were considered an emergency.</u>

- The most recent controversial one was the grooming standards, which we are now spending millions of dollars to defend in court, and which prompted a recent protest in front of the State Capitol.

- This bill would simply require the department to notify the Joint Committee on Prison Construction and Operations regarding any regulation that is proposed to be adopted out of "operational necessity" before filing

that regulation with the Office of Administrative Law so that the committee may hold a hearing to review the regulation in a public forum before the regulation is implemented.

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California Legislature

JOINT LEGISLATIVE COMMITTEE ON
PRISON CONSTRUCTION AND OPERATIONS

SENATOR RICHARD G. POLANCO
CHAIRMAN

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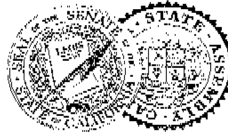


MEMORANDUM

Date: September 15, 1999

To: Peggy McHenry, Chief, Regulations & Policy Branch

From: Gwynnae L. Byrd, Principal Consultant,
Joint Legislative Committee on Prison Construction & Operations

Re: **Regulatory Action Number 99-0910-01E**

I'm submitting these comments pursuant to Section 55 of Title 1 of the California Code of Regulations.

1) To submit these proposed regulations under the discretionary "operational necessity" provisions of Section 5058(e) of the Penal Code makes a mockery of the privilege that the Legislature granted to the California Department of Corrections (CDC) a few years ago to make emergency regulations. When the Legislature granted the Director that authority, the department ensured that it would only be used in exceptional circumstances when there was a threat to public safety. Since then, that provision of the Penal Code has been used to justify almost every regulation adopted. In 1997, out of 12 regulations adopted, 10 were considered an emergency. In 1996, out of 15 regulations adopted, 11 were considered an emergency. This year, more often than not, that section has been invoked in promulgating regulations, including these.
It is unwarranted in this case. Specifically, last year, the Legislature passed Assembly Bill 1332, which was chaptered on September 22, 1998 (Ch. 696, Stats. 1998). The bill became effective January 1, 1999. That bill required the Department of Corrections to adopt policies and enact regulations to implement the provisions of the bill, which relate to the collection of blood and saliva samples, and thumb and palm prints, from inmates, for the purpose of developing a data bank of DNA information about certain criminal offenders.

Thus, the CDC has had close to one full year's notice that these regulations would be required. This is not a situation where CDC needed to immediately respond to an incident that just recently arose which created some emergency condition.
In addition, CDC has known that it needed to develop these regulations because their failure to do so has been the subject of on-going litigation for 2 years (Alfaro v. Maddock). On July 9, 1997, the court issued a preliminary injunction enjoining CDC from seizing and testing blood and saliva from inmates due to the failure of CDC to properly issue regulations to implement the statute. Coincidentally, there is a hearing on this issue tomorrow.
The Legislature, in enacting 5058(e), did not contemplate its use in a situation like this, where CDC had sufficient notice of the need to develop regulations in a certain area. To submit them to OAL under these circumstances is disingenous and in direct contravention of the purpose of Section 5058(e).

2) Section 296(a), which was enacted by AB 1332, specifies the persons who are subject to the seizure and testing authorized under the law. Those persons are those who have been convicted of specific crimes that are enumerated in the statute. In addition, the statute requires all persons with a life term or who is condemned, and all probationers and parolees, to be subject to the seizure and testing provisions, regardless of when the offense was committed.
However, the proposed regulations state that all inmates who have been found guilty of those enumerated offenses, or whose records indicate a prior conviction for such an offense, shall be subject to these provisions (Sec, 3025 (a)). This requirement seriously widens the scope of persons who would be subject to this seizure and testing of specimens. Administrative agencies are not authorized to broaden the scope of their legislative mandate.

3) The seizure, analysis and dissemination of sensitive genetic information implicate important constitutional rights of those who are subject to this statute, and potentially their family members. The proposed regulations do not address, nor do they clarify for consistency and uniformity of application, the necessary procedures to implement the statute. While the department of Justice is charged with administration of the statute, the Department of Corrections is responsible for developing procedures that address how specimens are collected and handled prior to forwarding them to DOJ.
That is, the regulations should provide detailed and specific procedures to facilitate collection, storage, analysis, and dissemination of the samples and genetic information obtained therefrom. For example:

- There are no procedures regarding the collection of blood and saliva samples to prevent contamination, either upon collection

STATE OF CALIFORNIA--YOUTH AND ADULT CORRECTIONAL AGENCY PETE WILSON, *Governor*

DEPARTMENT OF CORRECTIONS
1515 S Street, 95814
P.O. Box 942883
Sacramento, CA 94283-0001

August 3, 1998

The Honorable Richard Polanco
Senate Majority Leader
State Capitol, Room 313
Sacramento, CA 95814

Dear Senator Polanco:

The California Department of Corrections (CDC) is opposed to Senate Bill 1450 relating to the state regulatory process.

Existing law authorizes the Director of CDC to temporarily promulgate regulations based on an operational necessity. This deviation from the emergency regulation process utilized by other state agencies is reflective of the need to implement new policies in correctional facilities on an expedited basis either due to the need for immediate action or the need for uniform implementation of policies.

This bill would require CDC to provide advance notice to the Joint Committee on Prison Construction and Operations 30 days prior to filing these regulations with the Office of Administrative Law (OAL), and for the committee to hold a hearing. As the finalization of policy to be reflected in the regulations may be ongoing up until the date of filing of the regulations with OAL, preparing for a hearing may delay this filing and the eventual implementation of these regulations.

The regulatory process, as administered by OAL, is a strictly executive process. The Legislature may participate in the public comment segment of the permanent regulatory process, and may provide oversight of correctional policy during both budget hearings and other special hearings. However, the requirement proposed by SB 1450 would be an unacceptable first step down a slippery slope of legislative involvement in the regulatory process.

For these reasons we are opposed to SB 1450. If you have any questions, please contact me at 445-4737.

MICHAEL B. NEAL
Assistant Director
Legislative Liaison

cc: Assembly Republican Caucus
Assembly Public Safety Committee
Senate Republican Caucus
Office of Senate Floor Analyses
Youth and Adult Correctional Agency

STATE OF CALIFORNIA—YOUTH AND ADULT CORRECTIONAL AGENCY PETE WILSON, Governor

DEPARTMENT OF CORRECTIONS
P.O. Box 942883
Sacramento, CA 94283-0001

March 28, 1994

The Honorable Bob Epple, Chairman
Assembly Committee on Public Safety
1021 O Street, Suite A-198
Sacramento, CA 95814

Attn: Dick Iglehart, Chief Counsel

Dear Mr. Epple:

This letter is to ask your support for AB 3563 (Aguiar), relating to specific exemptions to the Administrative Procedures Act (APA) for the California Department of Corrections (CDC).

This measure would, very simply, establish a regulation adoption process for CDC which will reduce the time needed to place new regulations into effect for emergency situations or urgent policy changes, or to initiate temporary or pilot programs, while still providing for public input, including inmates and parolees, into the process. At the present time, the APA does not provide for rapid changes in non-emergency regulations, nor for pilot or temporary programs of any kind.

Since CDC's needs to implement regulations for temporary or pilot programs and urgent policy changes generally do not meet the APA definition of emergency regulations, its discretion to operate the prison and parolee systems and act in advance to diffuse potentially dangerous situations is severely hampered. This legislation will provide CDC with the following:

- CDC will be able to immediately react to emergency situations affecting the public health or safety, thereby protecting the lives of inmates and staff.
- CDC will have an enhanced ability to quickly implement policies based upon urgent, though not emergency, operational needs.
- CDC will be able to initiate pilot projects in a fraction of the time that is presently required.

- CDC's responsibility to issue notices of its regulatory actions to the public will be more clearly specified.

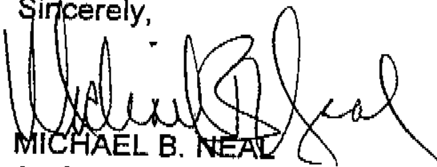
- CDC will be explicitly exempted from APA requirement regarding confidential and security-related procedures, local rules, and rules for short-term (up to six month) placement criteria when departmental correctional facilities are activated or deactivated.

- CDC will be authorized to adopt regulations relating to the parole of specified indeterminately sentenced inmates.

CDC worked for over one year with the Office of Administrative Law (OAL) to write legislation that would satisfy OAL's concerns while at the same time providing CDC with the necessary flexibility to better manage our prison and parolee population.

Thank you for your consideration of our position. If you have any questions, please call me at 445-4737 or Tony Loftin, Regulation Management, at 327-4276.

Sincerely,



MICHAEL B. NEAL
Assistant Director (A)
Legislative Liaison

cc: Assemblyman Aguiar
Natasha Fooman, Assembly Republican Caucus
Geoff Long, Assembly Ways and Means
Ed Berends, Assembly Minority Ways and Means
Youth and Adult Correctional Agency