

Memorandum 2000-67

Rulemaking Under Penal Code Section 5058 (Comments on Tentative Recommendation)

In general, rulemaking by state agencies is governed by the Administrative Procedure Act. See Gov't Code § 11340 *et seq.* However, Penal Code Section 5058 provides special procedures applicable to rulemaking by the Department of Corrections. As part of its general study of rulemaking procedures, the Commission investigated how Section 5058 might be improved. The Commission's conclusions were set out in the tentative recommendation relating to *Rulemaking Under Penal Code Section 5058*, which focuses on the streamlined procedures that apply to (1) regulations implementing pilot programs and (2) emergency regulations.

The Commission has received letters commenting on the tentative recommendation from the Department of Corrections and the Prison Law Office. These letters, which are attached as an exhibit, are discussed below. After considering the views expressed by the commentators, the Commission should decide whether to approve the tentative recommendation as its final recommendation (with any appropriate changes).

PILOT PROGRAM REGULATIONS

Under Section 5058, regulations implementing Department "pilot programs" are exempt from most rulemaking procedures. The Department conducts a fiscal impact analysis of a proposed regulation, then submits the regulation to the Office of Administrative Law (OAL) for filing with the Secretary of State and publication in the California Code of Regulations. The regulation takes effect immediately.

There are three limitations on the exemption:

- (1) The director of the Department must certify that a regulation adopted under the exemption relates to a "legislatively mandated or authorized pilot program or a departmentally authorized pilot program."

- (2) A pilot program may not affect more than 10% of the inmate population (measured by reference to the gender of the affected population, i.e. 10% of men if only men are affected, or women if only women are affected, or both if both are affected).
- (3) A regulation adopted under the exemption lapses by operation of law two years after adoption.

Definition of “Pilot Program”

Existing law does not define “pilot program” for the purposes of Section 5058. There does not appear to be any general definition of “pilot program” or any similar term in any of the codes. This may make it difficult to determine whether a particular program qualifies for the exemption. However, a survey of statutes establishing pilot programs reveals certain common characteristics: experimental purpose and limited duration and scope. Proposed Penal Code Section 5058.1(a) would define “pilot program,” consistent with this general usage:

For the purposes of this section, “pilot program” means a program implemented on a temporary and limited basis in order to test and evaluate the effectiveness of the program, develop new techniques, or gather information.

The Prison Law Office supports the proposed definition. See Exhibit p. 4.

The Department of Corrections does not object to the proposed definition, “except to the extent ambiguity in this definition provides an opportunity for useless litigation,” and so long as the definition includes pilot programs that arise from litigation (pilot programs “are especially helpful when the Department is engaged in settlement negotiations or developing a program in response to court orders in class action litigation.”). See Exhibit p. 1.

The proposed definition shouldn’t create a heightened risk of litigation. Its requirement that a pilot program be limited in duration and scope is consistent with existing law providing that a pilot program lapses by operation of law in two years and can only affect 10% of the inmate population. The requirement that the purpose of a pilot program be to “test and evaluate the effectiveness of the program, develop new techniques, or gather information” is clear and seems sensible.

As to the Department of Corrections’ concern that the definition include pilot programs that arise from litigation, there doesn’t appear to be anything in the definition that would exclude such programs. This could perhaps be clarified by adding language to the proposed Comment, as indicated below in underscore:

Subdivision (a) defines “pilot program” for the purposes of this section. While there is no general statutory definition of “pilot program,” a survey of statutes establishing pilot programs reveals certain common characteristics: experimental purpose and limited duration and scope. See, e.g., Bus. & Prof. Code § 3537.15 (limited implementation “to test validity and effectiveness” of program before full implementation); Fam. Code § 3032 (evaluation of program to be reported to Legislature). See also Third New International Dictionary 1716 (P. Gove ed., 1971) (“pilot” means “serving on a small scale ... in checking technique or cost preparatory to full scale activity”). Subdivision (a) is consistent with this common usage. Pilot programs may include programs initiated by the Department of Corrections in response to a court order or negotiated settlement directing the Department to establish the program.

The staff recommends that the Commission’s final recommendation include the proposed definition. The staff is unsure whether the additional Comment language would be helpful, and would like to receive input on the matter from interested persons.

Description of Pilot Program

In order to help evaluate whether a particular program is a pilot program subject to the exemption, the proposed law would require that the Department describe the program in writing when adopting implementing regulations: “The certification shall include a description of the pilot program and of the methods the department will use to evaluate the results of the pilot program.” Proposed Section 5058.1(a)(2).

The Prison Law Office supports this requirement. See Exhibit p. 4.

The Department of Corrections “does not object” to the proposal. See Exhibit p. 1. **The staff recommends that the Commission’s final recommendation include the proposed description requirement.**

Readoption of a Pilot Program Regulation

A regulation implementing a pilot program lapses by operation of law two years after adoption. However, there appears to be nothing in the existing statute that precludes replacing a lapsed pilot program with a “new” pilot program that is identical with the first. Theoretically, this would allow perpetual extension of pilot programs, defeating the purpose of the two-year duration limit. The tentative recommendation would address this by requiring that a pilot program

implemented under Section 5058 “not have substantially the same effect as another pilot program implemented under [that] section.”

The Department of Corrections notes that the problem described above has never actually occurred. It then states that “statutory enactments should be necessary to remedy a potential or actual problem.” See Exhibit p. 2. Of course, the fact that a problem has not occurred in the past does not mean that it won’t occur in the future. There does seem to be a *potential* problem with the statute, which the proposed language would fix. As a purely technical matter, the staff is inclined to fix the problem, since we’re already proposing amendment of the section. However, considering the progress we’ve made in reaching a near consensus on reform of Section 5058, despite the somewhat polarized positions of the interested parties, we may wish to limit our recommendation to changes that are more clearly useful. **Although it is a close question, the staff favors dropping this change from the recommendation.**

Amendment or Repeal of Pilot Program Regulation

Existing law does not state whether the pilot program exemption applies to the *amendment or repeal* of a pilot program regulation. The proposed law would make clear that the exemption applies to the adoption, amendment, and repeal of a pilot program regulation. This would give the Department necessary flexibility in the administration of its pilot programs. These changes were made in response to a concern raised by the Department of Corrections.

The Department of Corrections appreciates the clarification but raises one concern about the drafting. See Exhibit p. 2. Proposed Section 5058.1(d) provides, in relevant part:

The adoption, amendment, or repeal of a regulation pursuant to this section lapses by operation of law two years after the commencement of the pilot program being implemented...

The staff’s intention in drafting this subdivision was to make clear that any type of regulatory change made to implement a pilot program pursuant to the pilot program exemption would be undone after two years. The Department of Corrections objects that the “lapse” of a “repeal” does not make sense because a repeal cannot lapse. Perhaps it would be clearer if the provision read as follows:

A regulation adopted pursuant to this section is repealed by operation of law, and the amendment or repeal of a regulation

pursuant to this section is reversed by operation of law, two years after the commencement of the pilot program being implemented...

The staff would like to receive input from interested parties as to whether the alternative language is better.

EMERGENCY RULEMAKING

Under the Administrative Procedure Act, an agency may adopt a regulation on an expedited basis, without prior public notice and comment, where the regulation is shown to be “necessary for the immediate preservation of the public peace, health and safety or general welfare.” A decision to do so is subject to review by OAL, which will block adoption of the regulation if the showing of emergency is insufficient. An emergency regulation lapses by operation of law after 120 days, unless the agency adopts it under the regular rulemaking procedure before that date. Gov’t Code § 11346.1.

Under Section 5058, the Department does not need to show the existence of an emergency in order to adopt an emergency regulation. Instead, the Department need only certify that “the operational needs of the department require adoption of the regulation on an emergency basis.” The certification is not subject to substantive review by OAL. This relaxed emergency rulemaking procedure is intended to “authorize the department to expedite the exercise of its power to implement regulations as its unique operational circumstances require.” Penal Code § 5058(e).

Asserted Overuse of Emergency Rulemaking Procedure

Section 5058 clearly authorizes the Department to use emergency rulemaking in a broader set of circumstances than is generally permitted. By its own figures, the Department uses emergency rulemaking, on the basis of operational necessity rather than on the basis of emergency, in about two-thirds of its rulemaking activity. Some commentators believe that this constitutes overuse. This proposition is difficult to evaluate, as it involves a policy judgment about which circumstances fall within the “operational needs” of the Department for expedited rulemaking. Critics of the Department’s use of emergency rulemaking point to cases where emergency rulemaking has been used to adopt a regulation years after the need for the regulation arose. In such cases, the need for expedited rulemaking procedures is questionable.

Ultimately, the Commission did not reach a conclusion as to whether the Department's use of emergency rulemaking has exceeded the level of use intended by the Legislature. Nonetheless, the tentative recommendation does include a few minor improvements to Section 5058 that should help allay concerns about the frequency of emergency rulemaking by the Department of Corrections. These changes are discussed below.

Statement of Rationale for Emergency Rulemaking

If the Department of Corrections bases its use of emergency rulemaking on its operational needs, rather than on the existence of an actual "emergency," proposed Penal Code Section 5058.3(a)(2) would require that the Department explain its operational need to use emergency rulemaking:

The written [certification of operational necessity] shall include a description of the underlying facts and an explanation of the operational need to use the emergency rulemaking procedure.

Such an explanation would help answer public concerns regarding the propriety of a decision to use emergency rulemaking. In addition, requiring a written justification of an agency decision often improves the quality of agency decisionmaking, as the agency is forced to anticipate and consider likely arguments against its intended action. The explanation would not be subject to substantive review by OAL.

The explanation would not be required if the Department proceeds on the basis of an actual emergency, pursuant to the regular emergency rulemaking procedure, or if the Department acts in response to "imminent danger."

The Prison Law Office supports the proposed change. See Exhibit p. 5.

The Department of Corrections "does not object" to the proposed change. See Exhibit p. 3. **The staff recommends that the Commission's final recommendation include the proposed explanation requirement.**

Extended Review by the Office of Administrative Law

Under existing law, OAL reviews proposed emergency regulations to ensure that the rulemaking agency has followed required procedures and that the regulation satisfies applicable statutory standards (including necessity, consistency with governing law, authority to adopt the regulation, and clarity). See Gov't Code § 11349.6. The period for this review is very short. The Office of Administrative Law has only 10 calendar days to complete its review, and

accepts public comments for only the first five calendar days of that period. Considering that about two-thirds of the Department's regulations are first adopted as emergency regulations, most of the Department's regulations are subject to only minimal review before they become effective.

The tentative recommendation provides that the period for review of an emergency regulation adopted on the basis of the Department's operational needs would be extended from 10 to 20 calendar days. The period for public comment to OAL regarding such a regulation would be extended from five to 10 calendar days. This would result in only a modest delay in implementing such regulations, but would double the time available for their review. See proposed Penal Code § 5058.2(a)(3).

There would be no extension of the review period if the Department proceeds on the basis of an actual emergency, pursuant to the regular emergency rulemaking procedure, or if the Department acts in response to "imminent danger."

The Prison Law Office supports the proposed extension of OAL review. See Exhibit p. 4.

The Department of Corrections is "wary of actions that slow down its ability to respond rapidly to problems in its prisons and parole regions." See Exhibit p. 3. The staff respects the Department of Corrections' need to respond promptly in administering its programs. However, the proposed extension of time for OAL review would only apply when the Department is using the emergency rulemaking procedure based on its "operational needs." If the need for expedited rulemaking is based on an emergency or on imminent danger, the extended comment period would not apply. The staff believes that the benefit of more deliberate OAL review, and a more meaningful opportunity for public comment, would justify the slight additional delay in cases of operational necessity. **The staff recommends that the Commission's final recommendation include the proposed extension of the review period.**

Emergency Amendment or Repeal

Existing law is unclear with regard to whether the special emergency rulemaking procedure applies to the amendment or repeal of a regulation, as well as the adoption of a regulation. The proposed law would make clear that the procedure also applies to the emergency amendment or repeal of a regulation. This is consistent with the change proposed for the provisions governing pilot

program regulations and with the Commission's general recommendation on administrative rulemaking (implemented in AB 1822 (Wayne), awaiting signature by the Governor).

The Prison Law Office supports the proposed change. See Exhibit p. 4.

The Department of Corrections is concerned about one aspect of the change. Under existing law, an emergency regulation adopted by the Department is effective for 160 days, rather than the 120 days provided in the Administrative Procedure Act. In making clear that the emergency rulemaking procedures apply to adoption, amendment, and repeal of a regulation, such language was also added to the provision governing an emergency regulation's effective period. Thus, proposed Penal Code § 5058.3(a)(1) provides (emphasis added):

Notwithstanding subdivision (e) of Section 11346.1 of the Government Code, the initial effective period for an emergency *adoption, amendment, or repeal* of a regulation shall be 160 days. This effective period can only be extended once, by an additional 160 days.

The Department of Corrections states (See Exhibit pp. 2-3):

Although the Department appreciates the addition of the term "amendment" to clarify its authority to amend emergency regulations within the 160-day time frame and/or extended period, there is no need to set a time limit on a repealed regulation.

The staff believes that the Department of Corrections' concern is misplaced. Existing law already imposes a time limit on the effectiveness of an emergency repeal — if an emergency repeal is not made permanent within 120 days, it is reversed by operation of law and the repealed provision takes effect once again. Gov't Code § 11346.1(f). Proposed Section 5058.3(a)(1) only affects the length of the existing time limitation. It does not create a new time limit. **The staff recommends that the Commission's final recommendation include the proposed language making clear that the emergency rulemaking procedure applies to adoption, amendment, or repeal of a regulation.**

Director or Director's Designee

In some provisions, Section 5058 states the authority of the "director" of the Department of Corrections. In other provisions, the authority is granted to the "director or the director's designee." The staff was unsure whether these inconsistencies were intentional. The tentative recommendation specifically

asked for guidance on the question. We received no comments on this issue. In order to avoid disturbing any intentional distinctions, **the staff recommends that the statute's existing language be used, as it is in the tentative recommendation.**

CONCLUSION

The staff is pleased that the tentative recommendation is mostly acceptable to the interested parties, and recommends that the Commission approve it as its final recommendation, subject to any changes the Commission decides are necessary.

Respectfully submitted,

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Staff Counsel

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Law Revision Commission
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June 22, 2000

California Law Revision Commission
4000 Middlefield Road, Room D-1
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Re: TENTATIVE RECOMMENDATION ON RULEMAKING UNDER
PENAL CODE SECTION 5058

Commission Members:

Thank you for the opportunity to comment on your Tentative Recommendation on Rulemaking Under Penal Code section 5058. The Tentative Recommendation (TR) suggests a number of modifications to the Department of Corrections' (Department) rulemaking authority. At the request of Director C.A. Terhune, I offer the following comments.

Pilot Programs

A proposed definition of the term "pilot program" is:

... a program implemented on a temporary and limited basis in order to test and evaluate the effectiveness of the program, develop new techniques, or gather information. (TR, 9:37-39.)

The Department has used the pilot program regulations on several occasions. This type of regulation is especially helpful when the Department is engaged in settlement negotiations or developing a program in response to court orders in class action litigation.

The Department does not object to the enactment of a definition for this term, except to the extent ambiguity in this definition provides an opportunity for useless litigation, and so long as the definition covers these litigation-related programs.

In addition to the current requirement that the Director certify that pilot program regulations qualify for an exemption under Penal Code section 5058, the TR recommends that the certification shall include a description of the pilot program and of the methods the Department will use to evaluate the results of the pilot program. The Department does not object to these additional requirements.

The TR recommends an additional criterion for pilot program regulations: "The pilot program would not have substantially the same effect as another pilot program implemented under this section." (TR, 10:14-15.) This suggested limitation seems unnecessary since the department has not readopted pilot program regulations which have lapsed. Indeed, the Commission noted as much: "The Commission is not aware of any instance where the Department has extended the duration of a pilot program regulation this way. . . ." Request for Public Comment, Rulemaking Under Penal Code section 5058, December 1999, 2:10-11. Statutory enactments should be necessary to remedy a potential or actual problem.

The last substantive proposal to modify Penal Code section 5058 regarding pilot programs is a modification of an existing limitation which currently reads:

The regulations shall become effective 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. (Pen. Code, § 5058(d)(1)(C), second sentence.)

The modified version, as proposed, reads:

The adoption, amendment, or repeal of a regulation pursuant to this section becomes effective immediately upon filing with the Secretary of State. The adoption, amendment, or repeal of a regulation pursuant to this section lapses by operation of law two years after the commencement of the pilot program being implemented, unless the adoption, amendment, or repeal of the regulation is promulgated 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. (TR, 10:18-24.)

Although the word "repeal" makes sense in the first sentence above, it creates confusion in the second sentence. A repealed regulation cannot lapse. If the intent is to limit pilot programs to a two year limit, it is necessary only to limit the adoption and amendment of a regulation. Notwithstanding this drafting detail, I appreciate the proposal to the extent it clearly states that the Department has the authority to modify or repeal pilot program regulations. The Department does not object to the other proposed modification, counting the two years from the commencement of the pilot program instead of from the date of the Director's certification.

Emergency Rulemaking on the Basis of Operational Necessity

Currently, the statute provides that the initial period for emergency regulations shall be 160 days, with a one-time extension of 160 days. (Pen. Code, §§ 5058(e)(1) and (3).) Proposed is an expansion of the actions subject to the 160-day limitation and extension. In addition to emergency regulations, amendment and repeal of emergency regulations would also be subject to these time limitations. (T.R. 11:37-40.) Although the Department appreciates the addition of the

term "amendment" to clarify its authority to amend emergency regulations within the 160-day time frame and/or extended period, there is no need to set a time limit on a repealed regulation would also be subject to these time limitations.

The Department does not object to the proposed requirement that the certification by the Director or designee "shall include a description of the underlying facts and an explanation of the operational need to use the emergency rulemaking procedure." (TR, 12:4-6.)

The most substantive proposals for modifying the operational necessity regulations are: the lengthening of time for review by the Office of Administrative Law (OAL) from ten calendar days to 20 calendar days; the mandate that OAL accept and consider public comments for the first ten calendar days; and the mandate that OAL provide copies of any comments received to the Department. (TR, 12:7-13.) The Department is wary of actions that slow down its ability to respond rapidly to problems in its prisons and parole regions. However, the Department does not object to the clear mandates that OAL accept and review comments and provide copies to the Department. In fact, I understand this to be OAL's current practice.

Again, thank you for the opportunity to participate in this process.

Sincerely,

John Sugiyama, Asst. Chief Counsel

JOHN SUGIYAMA
Deputy Director
Legal Affairs Division

cc: C.A. Terhune



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August 29, 2000

Law Revision Commission
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File: _____

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Re: Rulemaking Under Penal Code Section 5058

Dear Mr. Hebert:

Below you will find my comments to the Commission's *Tentative Recommendation on Rulemaking Under Penal Code Section 5058*.

Pilot Programs

As I commented in my February 23, 2000, letter to the Commission, our office is in favor of the recommendation that the term "pilot program" be defined in the manner suggested. We also support the recommendations respecting the readoption of a pilot program regulation and the amendment or repeal of a pilot program regulation.

Emergency Rulemaking

We support the recommendation for an extended OAL review and public comment period for proposed emergency regulations. As indicated by the Commission, on page 5 of the *Tentative Recommendation*, this would cause only a modest delay in implementing emergency regulations based on operational necessity, while doubling the review time. We are also in support of making clear that the emergency rulemaking procedure also applies to the emergency amendment or repeal of a regulation.

The Commission proposes to require the California Department of Corrections (CDC) to provide a written explanation of its operational need to use emergency rulemaking. This is a departure from the recommendation found in the Commission's original request for public comment on these matters. The original proposal involved a four-tier scheme for the CDC to follow whenever it enacts or amends a regulation.¹ For the reasons set forth in my February 23, 2000, letter to the Commission, we are in support of the four-tier scheme. However, if that

¹ Request for Public Comment, Rulemaking Under Penal Code Section 5058, December 1999, page 6.

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scheme will not be recommended, we hope to ensure that the proposal sufficiently limits the CDC's discretion so as to prevent overuse and abuse of the emergency rulemaking provisions.

The present procedure used by the CDC in enacting emergency regulations based on operational necessity already requires a statement that operational needs require such action. The proposed change should include language demonstrating the legislature's intention that the CDC provide a full explanation of the operational need in every case in which use of the emergency procedures are based on operational need. Such language would prevent the CDC from using boilerplate statements to explain the operational necessity.

Presently, the CDC uses virtually meaningless language to explain its use of the emergency rulemaking procedures. For example, in its Notice of Change to Director's Rules, Sections 3000, 3377.1, and 3377.2, Number 00/04, dated March 27, 2000, the CDC states, on page 2, "The operational needs of the Department require the proposed [regulations] be adopted on any emergency basis pursuant to PC Section 5058 (e)." Similarly, Notice of Change to Director's Rules, Section 3605, Number 00/07, dated May 18, 2000, provides, under Initial Statement of Reasons, "Emergency regulations are necessary because the parole assessment is imperative to the enhancement and protection of public safety by providing effective supervision of each parolee." These explanations both fail to set forth the specific reason the CDC is using the emergency procedures of section 5058, rather than the procedures normally required by the Administrative Procedure Act.² Any proposed change to section 5058 must ensure that specific reasons are required.

Thank you for your consideration of these matters.

Sincerely,



Keith Wattley

² For more examples, see the emergency regulations referred to in my February 23, 2000, letter to the Commission, on page 3.