

# CALIFORNIA LAW REVISION COMMISSION

REQUEST FOR PUBLIC COMMENT

Rulemaking Under Penal Code Section 5058

December 1999

This request for public comment is being distributed so that interested persons can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature.

**RESPONSES TO THIS REQUEST SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN February 28, 2000.**

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
650-494-1335 FAX: 650-494-1827

1                    R U L E M A K I N G   U N D E R   P E N A L   C O D E   S E C T I O N   5 0 5 8

2        The Legislature has directed the California Law Revision Commission to study  
3 administrative law and recommend needed changes to that law.<sup>1</sup> As part of its study of  
4 administrative rulemaking, the Commission is soliciting public comments regarding  
5 Penal Code Section 5058 which provides special procedures for rulemaking by the  
6 California Department of Corrections.<sup>2</sup> A number of specific issues are discussed below.  
7 Section 5058 is attached as an exhibit.

8                    P I L O T   P R O G R A M S

9        **Existing Law**

10        Under Section 5058, regulations implementing Department of Corrections “pilot  
11 programs” are exempt from most rulemaking procedures.<sup>3</sup> The Department of  
12 Corrections simply conducts a fiscal impact analysis of the proposed regulation, then  
13 submits the regulation to the Office of Administrative Law for filing with the Secretary of  
14 State and publication in the California Code of Regulations. The regulation takes effect  
15 immediately, but lapses by operation of law two years later.

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

17                (1) The director of the Department of Corrections must certify that a  
18 regulation relates to a “legislatively mandated or authorized pilot program  
19 or a departmentally authorized pilot program.”

20                (2) A pilot program may not affect more than ten percent of the inmate  
21 population (measured by reference to the gender of the affected population,  
22 i.e. ten percent of men if only men are affected, or women if only women  
23 are affected, or both if both are affected).

24        **Defining “Pilot Program”**

25        The term “pilot program” is not defined. This may make it difficult to determine  
26 whether a particular program is subject to the exemption. *The Commission would like to*  
27 *receive comment on whether it would be helpful to define the term.* A proposed definition,  
28 consistent with general usage,<sup>4</sup> is set out below:

---

1. 1999 Cal. Stat. res. ch. 81.

2. As a general matter, state agency rulemaking is governed by the Administrative Procedure Act. See Gov’t Code §§ 11340-11359.

3. Penal Code § 5058(d)(1).

4. There appears to be no generic definition of “pilot program” or any similar term in any of the codes. However, a survey of existing pilot programs and pilot projects reveals certain common characteristics: experimental purpose and limited duration and scope. See, e.g., Bus. & Prof. Code § 3537.15; Fam. Code § 3032; Penal Code § 1202.41.

1 “Pilot program” means a program implemented on a temporary and  
2 limited basis in order to test and evaluate the effectiveness of the program,  
3 develop new techniques, or gather information.

4 **Readoption of a Pilot Program Regulation**

5 A regulation relating to a pilot program lapses by operation of law two years after  
6 adoption.<sup>5</sup> If the Department of Corrections chooses to readopt a lapsed pilot program  
7 regulation it should do so under the regular rulemaking procedure — the exemption for  
8 pilot program regulations should not apply. Otherwise, the two-year limit on the duration  
9 of a pilot program regulation could be circumvented simply by readopting the regulation.  
10 The Commission is not aware of any instance where the Department of Corrections has  
11 extended the duration of a pilot program regulation in this way, but Section 5058 could  
12 be amended to eliminate the possibility. Such a change would be consistent with existing  
13 limitations on the readoption of an emergency regulation that has lapsed by operation of  
14 law.<sup>6</sup> The change could be implemented by amending Section 5058(d)(1) as follows:

15 5058. (d) The following regulations are exempt from Chapter 3.5  
16 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the  
17 Government Code under the conditions specified:

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

24 (A) A pilot program affecting male inmates only shall affect no more than  
25 10 percent of the total state male inmate population; a pilot program  
26 affecting female inmates only shall affect no more than 10 percent of the  
27 total state female inmate population; and a pilot program affecting male and  
28 female inmates shall affect no more than 10 percent of the total state inmate  
29 population.

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

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

36 (D) The regulation is not the same in substance as a regulation previously  
37 adopted under this paragraph that has lapsed by operation of law.

---

5. Penal Code § 5058(d)(1).

6. See Gov't Code § 11346.1(h) (approval of director of Office of Administrative Law required to readopt lapsed emergency regulation); Penal Code § 5058(e)(3) (special emergency rulemaking procedure limited to original adoption and one readoption of emergency regulation).



1 standard is intended to “authorize the department to expedite the exercise of its power to  
2 implement regulations as its unique operational circumstances require.”<sup>12</sup>

### 3 **Proper Scope of Emergency Rulemaking**

4 The general approach of the Administrative Procedure Act is to provide public notice  
5 and comment before the effective date of a proposed regulation. If a regulation were to  
6 take effect before notice and comment, persons affected by the regulation would have no  
7 advance notice<sup>13</sup> and institutional inertia might decrease the effectiveness of public  
8 comment in influencing the final rule. Emergency rulemaking does not provide for  
9 advance public notice and comment.<sup>14</sup> Although undesirable, this is necessary. The  
10 purpose of the emergency regulation procedure is to allow immediate adoption of a  
11 regulation in cases where delay could risk harm to the public. It has been suggested that  
12 the Department of Corrections has overused the emergency rulemaking procedure, by  
13 using it in cases where it could have used the regular rulemaking procedure.<sup>15</sup>

14 In practice, the Department of Corrections uses the emergency rulemaking procedure to  
15 conduct about two-thirds of its rulemaking activity.<sup>16</sup> However, it is not clear that this  
16 constitutes overuse — Section 5058 authorizes broader than ordinary use of the  
17 emergency rulemaking procedure by the Department of Corrections. This is reflected in  
18 the relaxed statutory standard (operational necessity rather than emergency), the absence  
19 of review by the Office of Administrative Law, and the express recognition of the  
20 Department of Corrections’ “unique operational circumstances.” These circumstances are  
21 described by the Department of Corrections:

22 [The Department of Corrections] is unique in that 33 prisons with roughly  
23 162,000 inmates are operated 24 hours per day, 7 days per week. In  
24 addition, there are upwards of 90 parole offices out of which roughly  
25 158,000 parolees are monitored. Managing and monitoring large numbers  
26 of persons, many of whom are dangerous, in such a dynamic system often  
27 requires prompt action. The operational necessity provision accommodates  
28 this need. Furthermore, historically each prison was allowed a relatively

---

12. Penal Code § 5058(e).

13. Advance notice permits interested persons to adjust their affairs to a pending rule change.

14. Although emergency rulemaking does not provide for *advance* public notice, the Department of Corrections typically provides for public notice and comment immediately after an emergency regulation takes effect, as it begins the process of adopting the regulation on a permanent basis. Furthermore, the Department of Corrections maintains that it gives the same weight to a public comment regarding an emergency regulation that it does to a comment regarding a regulation adopted under the regular rulemaking procedure — “if accommodation of a comment is warranted, the comment is accommodated.” See letter from C. A. Terhune, Director of the Department of Corrections, to the California Law Revision Commission (December 13, 1999), on file with the Law Revision Commission).

15. See, e.g., letter from Senator Richard G. Polanco, Chair of Joint Legislative Committee on Prison Construction and Operations, to the California Law Revision Commission (August 16, 1999) (attached to Memorandum 99-70, on file with the Law Revision Commission).

16. According to Department of Corrections records, it used the emergency rulemaking procedure in 66% of its rulemaking actions for the period from 1997 to 1999.

1 high degree of autonomy operationally; more recently there has been  
2 movement towards statewide consistency. Because the operational  
3 necessity provision allows a more rapid response to system-wide issues or  
4 problems, the development and implementation of numerous inconsistent  
5 policies is minimized.<sup>17</sup>

6 *The Commission would like to receive comments on the Department of Corrections' use of the*  
7 *emergency rulemaking procedure.*

#### 8 **Possible Legislative Alternatives**

9 If the Department of Corrections has overused the emergency rulemaking procedure,  
10 this could be addressed in at least two ways: (1) by more clearly limiting the  
11 circumstances in which the procedure may be used, or (2) by providing advance public  
12 notice and comment in some circumstances. These two approaches are discussed below.  
13 *The Commission would like to receive comments on these alternatives as well as any*  
14 *other suggestions for improving Section 5058(e).*

15 (1) *Scope limitation.* The emergency rulemaking procedure could be limited to cases  
16 where a regulation is urgently required to address an unanticipated change in  
17 circumstances. This would preserve the basic policy of allowing use of the procedure in  
18 urgent situations, while precluding use of the procedure in cases where there is time for  
19 the regular rulemaking procedure to be used. This could be done by amending Section  
20 5058(e)(2) as follows:

21 5058. (e)(2) No showing of emergency is necessary in order to adopt  
22 emergency regulations other than a written statement by the director or the  
23 director's designee, to be filed with the Office of Administrative Law,  
24 certifying that operational needs of the department require adoption of the  
25 regulations on an emergency basis in order to address an unanticipated  
26 change in circumstances.

27 **Comment.** Subdivision (e) of Section 5058 is amended to limit adoption  
28 of emergency regulations on the basis of operational necessity to cases  
29 where a regulation is needed to address an unanticipated change in  
30 circumstances. This precludes use of the procedure in cases where the  
31 department has sufficient advance notice of the need for a regulation to use  
32 the regular rulemaking procedure. See Gov't Code §§ 11340-11359.

33 (2) *Require public notice and comment.* The disadvantage of using the emergency  
34 rulemaking procedure is that it defers public notice and comment until after the regulation  
35 has gone into effect. A bill introduced in 1998 by the Joint Legislative Committee on  
36 Prison Construction and Operations would have addressed this by requiring the  
37 Department of Corrections to provide notice to the Committee 31 days before filing an

---

17. See letter from C. A. Terhune, *supra* note 13.

1 emergency regulation. The Committee would then hold a public hearing on the proposed  
2 regulation.<sup>18</sup> One problem with that approach is that it would delay the adoption of an  
3 emergency regulation that is required immediately. That problem could perhaps be  
4 avoided by distinguishing between regulations adopted on the basis of operational  
5 necessity and regulations adopted after a showing of emergency. Advance notice and  
6 comment could be required in cases of operational necessity, but not required in cases of  
7 demonstrated emergency. This would result in a 4-tier procedural scheme tailored to  
8 varying degrees of urgency:

9       **No urgency:** Where there is no special urgency, the regular rulemaking  
10 procedure would be followed. This would result in a delay of approximately  
11 three months to a year before the regulation becomes effective.

12       **Operational necessity:** Where operational needs require expedited  
13 adoption of a regulation, the department could use the emergency  
14 rulemaking procedure supplemented by advance public notice and  
15 comment. This would result in a delay of 30-40 days before the regulation  
16 becomes effective.<sup>19</sup>

17       **Emergency:** In an emergency, the department could use the regular  
18 emergency rulemaking procedure. This would result in a delay of up to 10  
19 days before the regulation becomes effective.<sup>20</sup>

20       **Imminent Danger:** Where, a regulation is required immediately in order to  
21 avoid serious injury, illness, or death, the department could follow the  
22 existing procedure for rulemaking in cases of “imminent danger.” There  
23 would be no delay in the regulation becoming effective.<sup>21</sup>

24       The approach described above could be implemented by amending Section 5058(e) as  
25 follows:

26       5058. (e) Emergency regulations shall be adopted pursuant to Chapter 3.5  
27 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the  
28 Government Code, except that:

29       (2) ~~No showing of emergency is necessary in order to adopt emergency~~  
30 ~~regulations other than a written statement by the director or the director's~~  
31 ~~designee, to be filed with the Office of Administrative Law, certifying that~~

---

18. See SB 1450 (1998) (Polanco).

19. The delay would involve 30 days for public comment followed by a period of up to 10 days for review of the proposed regulation by the Office of Administrative Law. See Gov’t Code § 11346.9(b) (OAL review of proposed emergency regulation).

20. The delay results from the review of an emergency regulation by the Office of Administrative Law. *Id.*

21. Penal Code § 5058(d)(2).

1 ~~operational needs of the department require adoption of the regulations on~~  
2 ~~an emergency basis~~ an emergency regulation if the director or the director's  
3 designee does each of the following:

4 (i) Certifies, in a written statement filed with the Office of Administrative  
5 Law, that the operational needs of the department require the adoption,  
6 amendment, or repeal of the regulation on an emergency basis.

7 (ii) Mails notice of the proposed emergency rulemaking to persons who  
8 have requested notice of the department's rulemaking activity, at least 30  
9 days before filing the regulation with the Office of Administrative Law.

10 (iii) Holds a public hearing regarding the proposed emergency  
11 rulemaking after mailing the notice required in subparagraph (ii) but before  
12 filing the regulation with the Office of Administrative Law.

13 (4)...

14 **Comment.** Subdivision (e) of Section 5058 is amended to clarify that the  
15 department may adopt an emergency regulation either by making a showing  
16 of emergency as required by Government Code Section 11346.1(b), or by  
17 certifying that the department's operational needs require use of the  
18 emergency rulemaking procedure. If the emergency regulation is adopted  
19 on the basis of a certification of operational necessity, rather than a showing  
20 of emergency, the department must provide for public notice and comment  
21 before filing the emergency regulation with the Office of Administrative  
22 Law. No advance public notice is required where adopting a regulation to  
23 address a situation of imminent danger. See subdivision (d)(2).



EXHIBIT

1 **Penal Code § 5058. Administration of prisons and parole**

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

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

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

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

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

22 (A) All rules that apply to prisons or other correctional facilities throughout the state are  
23 adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part  
24 1 of Division 3 of Title 2 of the Government Code.

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

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

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

37 (d) The following regulations are exempt from Chapter 3.5 (commencing with Section  
38 11340) of Part 1 of Division 3 of Title 2 of the Government Code under the conditions  
39 specified:

1 (1) Regulations adopted by the director or the director's designee applying to any  
2 legislatively mandated or authorized pilot program or a departmentally authorized pilot  
3 program, provided that an estimate of fiscal impact is completed pursuant to Section  
4 6055, and following, of the State Administrative Manual dated July 1986, and that the  
5 following conditions are met:

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

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

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

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

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

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

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

35 Any policy in effect pursuant to a determination of imminent danger shall lapse by  
36 operation of law 15 calendar days after the date of the written determination of imminent  
37 danger unless an emergency regulation is filed with the Office of Administrative Law  
38 pursuant to subdivision (e). This section shall in no way exempt the department from  
39 compliance with other provisions of law related to fiscal matters of the state.

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

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

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

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

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

---