

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Rulemaking Under Penal Code Section 5058

April 2000

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and 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. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN September 1, 2000.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

As a general matter, rulemaking by a state agency is governed by the Administrative Procedure Act. Penal Code Section 5058 provides special procedures for rulemaking by the Department of Corrections. The Law Revision Commission has studied the provisions of Section 5058 that govern pilot program regulations and emergency rulemaking, and recommends a number of minor improvements to those provisions. The recommended changes would do the following:

- (1) Define “pilot program” for the purposes of the special procedures governing pilot programs.
- (2) Make it clear that the special procedures for adopting a pilot program regulation also apply to the amendment or repeal of a pilot program regulation.
- (3) Limit readoption of an exempt pilot program regulation.
- (4) Require that the Department explain in writing why its operational needs require emergency rulemaking, where the Department proceeds with emergency rulemaking on the basis of its operational needs, rather than on the basis of an emergency.
- (5) Extend the period for review of an emergency regulation by the Office of Administrative Law, where the Department proceeds with emergency rulemaking on the basis of its operational needs, rather than on the basis of an emergency.
- (6) Make it clear that the procedures for emergency adoption of a regulation also apply to the emergency amendment or repeal of a regulation.

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.

RULEMAKING UNDER PENAL CODE SECTION 5058

1 As a general matter, rulemaking by a state agency is governed by the Adminis-
2 trative Procedure Act.¹ Penal Code Section 5058 provides special procedures for
3 rulemaking by the Department of Corrections (“Department”). In the course of
4 studying administrative rulemaking, the Law Revision Commission received
5 comments suggesting that there are problems with the provisions of Section 5058
6 that govern pilot program regulations and emergency rulemaking. The Commis-
7 sion has investigated these suggestions and recommends a number of minor
8 changes to improve rulemaking under Section 5058. These changes are described
9 below.

PILOT PROGRAMS

Existing Law

10 Under Section 5058, regulations implementing Department “pilot programs” are
11 exempt from most rulemaking procedures. The Department conducts a fiscal
12 impact analysis of a proposed regulation,² then submits the regulation to the Office
13 of Administrative Law (OAL) for filing with the Secretary of State and publication
14 in the California Code of Regulations. The regulation takes effect immediately.³
15

16 There are three limitations on the exemption:
17

- 18 (1) The director of the Department must certify that a regulation adopted
19 under the exemption relates to a “legislatively mandated or authorized
20 pilot program or a departmentally authorized pilot program.”
- 21 (2) A pilot program may not affect more than 10% of the inmate population
22 (measured by reference to the gender of the affected population, i.e.
23 10% of men if only men are affected, or women if only women are
24 affected, or both if both are affected).
- 25 (3) A regulation adopted under the exemption lapses by operation of law
26 two years after adoption.

Definition of “Pilot Program”

27 Existing law does not define “pilot program” for the purposes of Section 5058.
28 There does not appear to be any general definition of “pilot program” or any
29 similar term in any of the codes. This may make it difficult to determine whether a
30 particular program qualifies for the exemption. However, a survey of statutes
31

1. Gov’t Code §§ 11340-11359.

2. Penal Code Section 5058(c)(2) and (d)(1) require completion of an estimate of fiscal impact pursuant to “Section 6055, and following, of the State Administrative Manual dated July 1986.” The provisions of the State Administrative Manual governing fiscal analysis of regulations have been revised and renumbered since 1986. The proposed law corrects these references. See proposed amendment of Penal Code § 5058(c)(2), and proposed Penal Code § 5058.1(a)(5), *infra*.

3. Penal Code § 5058(d)(1).

1 establishing pilot programs reveals certain common characteristics: experimental
2 purpose and limited duration and scope.⁴ The proposed law includes a definition of
3 “pilot program” that is consistent with this general usage: “a program implemented
4 on a temporary and limited basis in order to test and evaluate the effectiveness of
5 the program, develop new techniques, or gather information.”⁵ In order to help
6 evaluate whether a particular program is a pilot program subject to the exemption,
7 the proposed law would require the Department to describe the program in writing
8 when adopting implementing regulations.⁶

9 **Readoption of a Pilot Program Regulation**

10 A regulation implementing a pilot program lapses by operation of law two years
11 after adoption.⁷ If the Department chooses to readopt a lapsed pilot program regu-
12 lation, it should do so under the regular rulemaking procedure. Otherwise, the
13 intent of the two-year limit on the duration of a regulation adopted would be
14 defeated. The proposed law would expressly preclude use of the exemption to
15 implement a pilot program that would have substantially the same effect as another
16 pilot program implemented under the exemption.⁸ Such a change would be
17 consistent in principle with existing limitations on the readoption of an emergency
18 regulation that has lapsed by operation of law.⁹

19 **Amendment or Repeal of Pilot Program Regulation**

20 Existing law does not state whether the pilot program exemption also applies to
21 the amendment or repeal of a pilot program regulation. The proposed law would
22 make clear that the exemption applies to the adoption, amendment, and repeal of a
23 pilot program regulation.¹⁰ This would give the Department necessary flexibility in
24 the administration of its pilot programs.

25 **EMERGENCY RULEMAKING**

26 **Existing Law**

27 Under the Administrative Procedure Act, an agency may adopt a regulation on
28 an expedited basis, without prior public notice and comment, where the regulation
29 is shown to be “necessary for the immediate preservation of the public peace,

4. See, e.g., Bus. & Prof. Code § 3537.15 (limited implementation “to test the validity and effectiveness” of program before full implementation); Fam. Code § 3032 (findings as to measurable success 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”).

5. See proposed Penal Code § 5058.1(a) *infra*.

6. See proposed Penal Code § 5058.1(b)(2) *infra*.

7. Penal Code § 5058(d)(1).

8. See proposed Penal Code § 5058.1(b)(4) *infra*.

9. See, e.g., Penal Code § 5058(e)(3) (special emergency rulemaking procedure limited to original adoption and one readoption of emergency regulation).

10. See proposed Penal Code § 5058.1(b)-(d) *infra*.

1 health and safety or general welfare.”¹¹ A decision to do so is subject to review by
2 OAL, which will block adoption of the regulation if the showing of emergency is
3 insufficient.¹² An emergency regulation lapses by operation of law after 120 days,
4 unless the agency adopts it under the regular rulemaking procedure before that
5 date.¹³

6 Under Section 5058, the Department does not need to show the existence of an
7 emergency in order to adopt an emergency regulation. Instead, the Department
8 need only certify that “the operational needs of the department require adoption of
9 the regulation on an emergency basis.”¹⁴ The certification is not subject to sub-
10 stantive review by OAL.¹⁵ This relaxed emergency rulemaking procedure is
11 intended to “authorize the department to expedite the exercise of its power to
12 implement regulations as its unique operational circumstances require.”¹⁶

13 **Asserted Overuse of Emergency Rulemaking Procedure**

14 Section 5058 clearly authorizes the Department to use emergency rulemaking in
15 a broader set of circumstances than is generally permitted. By its own figures, the
16 Department uses emergency rulemaking, on the basis of operational necessity
17 rather than on the basis of emergency, in about two-thirds of its rulemaking activ-
18 ity.¹⁷ Some commentators believe that this constitutes overuse.¹⁸ This proposition
19 is difficult to evaluate, as it involves a policy judgment about which circumstances
20 fall within the “operational needs” of the Department for expedited rulemaking.
21 Critics of the Department’s use of emergency rulemaking point to cases where
22 emergency rulemaking has been used to adopt a regulation years after the need for
23 the regulation arose. In such cases, the need for expedited rulemaking procedures
24 is questionable.¹⁹

11. Gov’t Code § 11346.1(b).

12. Gov’t Code § 11349.6(b).

13. Gov’t Code § 11346.1(e).

14. Penal Code § 5058(e)(2).

15. However, OAL does review whether required procedures have been followed and whether the regulation satisfies the general standards stated in Government Code Section 11349.1. Gov’t Code § 11349.6(b).

16. Penal Code § 5058(e).

17. According to Department records, it used the emergency rulemaking procedure on the basis of operational necessity in 66% of its rulemaking actions for the period from 1997 to 1999. See letter from C.A. Terhune, Department of Corrections, to Brian Hebert (December 13, 1999) (attached to Memorandum 2000-28, on file with Commission).

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

19. For example, in February 1998 the Department used the emergency rulemaking procedure to amend Section 3097 of Title 15 of the California Code of Regulations, relating to withholding of prisoner wages and trust account funds to pay restitution fines and restitution orders. The amendment was in response to the 1994 amendment of Penal Code Section 2085.5. Thus, the emergency rulemaking took place four years

1 Ultimately, the Commission did not reach a conclusion as to whether the
2 Department's use of emergency rulemaking has exceeded the level of use intended
3 by the Legislature. Nonetheless, the Commission has identified a few minor
4 changes to Section 5058 that would improve the emergency rulemaking process
5 and should allay concerns about the frequency of its use by the Department. These
6 changes are described below.

7 **Statement of Rationale for Emergency Rulemaking**

8 If the Department bases its use of emergency rulemaking on its operational
9 needs, rather than on the existence of an actual "emergency," the proposed law
10 would require that the Department explain, in writing, its operational need to use
11 emergency rulemaking.²⁰ Such an explanation would help answer public concerns
12 regarding the propriety of a decision to use emergency rulemaking. In addition,
13 requiring a written justification of an agency decision often improves the quality of
14 agency decisionmaking, as the agency is forced to anticipate and consider likely
15 arguments against its intended action.

16 The explanation would not be required if the Department proceeds on the basis
17 of an actual emergency, pursuant to the regular emergency rulemaking proce-
18 dure,²¹ or if the Department acts in response to "imminent danger."²²

19 **Extended Review by the Office of Administrative Law**

20 Under existing law, OAL reviews proposed emergency regulations to ensure that
21 the rulemaking agency has followed required procedures and that the regulation
22 satisfies applicable statutory standards (including necessity, consistency with
23 governing law, authority to adopt the regulation, and clarity).²³ The period for this
24 review is very short. The Office of Administrative Law has only 10 calendar days
25 to complete its review,²⁴ and accepts public comments for only the first five
26 calendar days of that period.²⁵ Considering that about two-thirds of the
27 Department's regulations are first adopted as emergency regulations, most of the
28 Department's regulations are subject to only minimal review before they become
29 effective.

30 The Commission recommends that the period for review of an emergency regu-
31 lation adopted on the basis of the Department's operational needs be extended
32 from 10 to 20 days. The period for public comment to OAL regarding such a

after the need for amendment of the regulation arose. See letter from Keith Wattlely, Prison Law Office, to Commission (February 23, 2000) (attached to Memorandum 2000-28, on file with Commission).

20. See proposed Penal Code § 5058.3(a)(2) *infra*.

21. Gov't Code § 11346.1(b)-(h).

22. See proposed Penal Code § 5058.2 *infra*.

23. Gov't Code § 11349.6(b).

24. *Id.*

25. 1 Cal. Code Regs. § 55.

1 regulation would be extended from five to 10 days.²⁶ This would result in only a
2 modest delay in implementing such regulations, but would double the time
3 available for their review.

4 There would be no extension of the review period if the Department proceeds on
5 the basis of an actual emergency, pursuant to the regular emergency rulemaking
6 procedure,²⁷ or if the Department acts in response to “imminent danger.”²⁸

7 **Emergency Amendment or Repeal**

8 Existing law is unclear with regard to whether the special emergency rulemaking
9 procedure applies to the amendment or repeal of a regulation, as well as the
10 adoption of a regulation. The proposed law would make clear that the procedure
11 also applies to the emergency amendment or repeal of a regulation.²⁹ This is
12 consistent with the change proposed for the provisions governing pilot program
13 regulations and with the Commission’s general recommendation on administrative
14 rulemaking.³⁰

26. See proposed Penal Code § 5058.3(a)(3) *infra*.

27. Gov’t Code § 11346.1(b)-(h).

28. See *supra* note 22.

29. See proposed Penal Code § 5058.3(a) *infra*.

30. See *Administrative Rulemaking*, 29 Cal. L. Revision Comm’n Reports 459, 470-71 (1999); AB 1822 (Wayne).

PROPOSED LEGISLATION

Penal Code § 5058 (amended). Administration of prisons and parole

SECTION 1. Section 5058 of the Penal Code is amended to read:

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 and Sections 5058.1 to 5058.3, inclusive. 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 and Sections 5058.1 to 5058.3, inclusive.

(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~~, Sections 6650 to 6670, inclusive, of the State Administrative Manual dated July 1986.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 ~~(3) This subdivision shall apply only to the adoption and one re-adoption of any~~
15 ~~emergency regulation.~~

16 ~~It is the intent of the Legislature, in authorizing the deviations in this subdivision~~
17 ~~from the requirements and procedures of Chapter 3.5 (commencing with Section~~
18 ~~113340) of Part 1 of Division 3 of Title 2 of the Government Code, to authorize~~
19 ~~the department to expedite the exercise of its power to implement regulations as its~~
20 ~~unique operational circumstances require.~~

21 **Comment.** Section 5058 is amended to facilitate revision and reorganization of pilot program
22 and emergency rulemaking provisions. Subdivisions (a) and (b) are revised to refer to the new
23 sections.

24 Subdivision (c)(2) is amended to correct an obsolete reference to the State Administrative
25 Manual.

26 Former subdivision (d)(1) is superseded by Section 5058.1 (pilot program regulations). Former
27 subdivision (d)(2) is continued in Section 5058.2 (imminent danger) without substantive change.

28 Former subdivision (e) is superseded by Section 5058.3 (emergency rulemaking).

29 ☞ **Note.** Section 5058 governs the rulemaking authority and responsibilities of the director of the
30 Department of Corrections. In some provisions, this authority and responsibility is also extended
31 to the director's designee. **The Commission would like to receive input on whether the**
32 **omission of the "director's designee" from some provisions was an intentional restriction of**
33 **the powers of a director's designee, or was inadvertent.** See Penal Code § 5058(a)-(b),
34 (c)(1)(A), (d)(1)(B)-(C).

35 **Penal Code § 5058.1 (added). Pilot program regulations**

36 SEC. 2. Section 5058.1 is added to the Penal Code, to read:

37 5058.1. (a) For the purposes of this section, "pilot program" means a program
38 implemented on a temporary and limited basis in order to test and evaluate the
39 effectiveness of the program, develop new techniques, or gather information.

40 (b) The adoption, amendment, or repeal of a regulation by the director or the
41 director's designee, to implement a legislatively mandated or authorized pilot
42 program or a departmentally authorized pilot program, is exempt from Chapter 3.5
43 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the
44 Government Code, if the following conditions are met:

1 (1) A pilot program affecting male inmates affects no more than 10 percent of
2 the total state male inmate population; a pilot program affecting female inmates
3 affects no more than 10 percent of the total state female inmate population; and a
4 pilot program affecting male and female inmates affects no more than 10 percent
5 of the total state inmate population.

6 (2) The director certifies in writing that the regulations apply to a pilot program
7 that qualifies for exemption under this section. The certification shall include a
8 description of the pilot program and of the methods the department will use to
9 evaluate the results of the pilot program.

10 (3) The certification and regulations are filed with the Office of Administrative
11 Law and the regulations are made available to the public by publication pursuant
12 to subparagraph (F) of paragraph (3) of subdivision (b) of Section 6 of Title 1 of
13 the California Code of Regulations.

14 (4) The pilot program would not have substantially the same effect as another
15 pilot program implemented under this section.

16 (5) An estimate of fiscal impact is completed pursuant to Sections 6650 to 6670,
17 inclusive, of the State Administrative Manual.

18 (c) The adoption, amendment, or repeal of a regulation pursuant to this section
19 becomes effective immediately upon filing with the Secretary of State.

20 (d) The adoption, amendment, or repeal of a regulation pursuant to this section
21 lapses by operation of law two years after the commencement of the pilot program
22 being implemented, unless the adoption, amendment, or repeal of the regulation is
23 promulgated by the director pursuant to Chapter 3.5 (commencing with Section
24 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

25 **Comment.** Section 5058.1 continues former subdivision Section 5058(d)(1), without
26 substantive change, except as described below:

27 Subdivision (a) defines “pilot program” for the purposes of this section. While there is no
28 general statutory definition of “pilot program,” a survey of statutes establishing pilot programs
29 reveals certain common characteristics: experimental purpose and limited duration and scope.
30 See, e.g., Bus. & Prof. Code § 3537.15 (limited implementation “to test validity and
31 effectiveness” of program before full implementation); Fam. Code § 3032 (evaluation of program
32 to be reported to Legislature). See also Third New International Dictionary 1716 (P. Gove ed.,
33 1971) (“pilot” means “serving on a small scale ... in checking technique or cost preparatory to
34 full scale activity”). Subdivision (a) is consistent with this common usage.

35 Subdivisions (b)-(d) provide that the exemption for regulations implementing a pilot program
36 applies to amendment and repeal of a regulation, and not just adoption.

37 Subdivision (b)(1) requires that the certification that a regulation relates to a pilot program
38 include a description of the pilot program and of the method by which the results of the pilot
39 program will be evaluated.

40 Subdivision (b)(3) corrects an erroneous reference to Section 6(b)(3)(F) of Title 1 of the
41 California Code of Regulations.

42 Subdivision (b)(4) prohibits adoption of a pilot program that would have the same effect as
43 another pilot program implemented under this section. This ensures that the two-year time limit
44 on the effectiveness of regulations implementing a pilot program under this subdivision cannot be
45 circumvented by readopting a pilot program, or by adopting a “new” pilot program that has the
46 same effect as another pilot program adopted under this section.

47 Subdivision (b)(5) corrects an obsolete reference to the State Administrative Manual.

1 Subdivision (d) makes clear that the duration of a rulemaking action implementing a pilot
2 program is two years from the date that the pilot program commenced, regardless of when the
3 rulemaking action is taken. Thus, a change to the regulations implementing a pilot program does
4 not extend the two-year maximum duration of the program.

5 **Penal Code § 5058.2 (added). Imminent danger**

6 SEC. 3. Section 5058.2 is added to the Penal Code, to read:

7 5058.2. (a) Chapter 3.5 (commencing with Section 11340) of Part 1 of Division
8 3 of Title 2 of the Government Code does not apply to a department action or
9 policy implementing an action, that is based on a determination by the director or
10 the director's designee that there is a compelling need for immediate action, and
11 that unless the action is taken, serious injury, illness, or death is likely to result.
12 The action, or the policy implementing the action, may be taken provided that the
13 following conditions shall subsequently be met:

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

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

21 (b) Any policy in effect pursuant to a determination of imminent danger shall
22 lapse by operation of law 15 calendar days after the date of the written
23 determination of imminent danger unless an emergency regulation is filed with the
24 Office of Administrative Law pursuant to Section 5058.3. This section shall in no
25 way exempt the department from compliance with other provisions of law related
26 to fiscal matters of the state.

27 **Comment.** Section 5058.2 continues former Section 5058(d)(2) without substantive change.
28 The first sentence of subdivision (a) has been revised to eliminate a superfluous and
29 ungrammatical reference to "imminent danger." The cross-reference in subdivision (b) has been
30 revised to reflect the reorganization of provisions formerly in Section 5058.

31 **Penal Code § 5058.3 (added). Emergency rulemaking**

32 SEC. 4. Section 5058.3 is added to the Penal Code, to read:

33 5058.3. (a) Emergency adoption, amendment, or repeal of a regulation by the
34 director or the director's designee shall be conducted pursuant to Chapter 3.5
35 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the
36 Government Code, except that:

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

41 (2) Notwithstanding subdivision (b) of Section 11346.1 of the Government
42 Code, no showing of emergency is necessary in order to adopt, amend, or repeal

1 an emergency regulation if the director or the director's designee instead certifies,
2 in a written statement filed with the Office of Administrative Law, that operational
3 needs of the department require adoption, amendment, or repeal of the regulation
4 on an emergency basis. The written statement shall include a description of the
5 underlying facts and an explanation of the operational need to use the emergency
6 rulemaking procedure.

7 (3) Notwithstanding subdivision (b) of Section 11349.6 of the Government
8 Code, the adoption, amendment, or repeal of a regulation pursuant to paragraph (2)
9 shall be reviewed by the Office of Administrative Law within 20 calendar days
10 after its submission to the Office of Administrative Law. In conducting its review,
11 the Office of Administrative Law shall accept and consider public comments for
12 the first 10 calendar days of the review period. Copies of any comments received
13 by the Office of Administrative Law shall be provided to the department.

14 (b) It is the intent of the Legislature, in authorizing the deviations in this section
15 from the requirements and procedures of Chapter 3.5 (commencing with Section
16 113340) of Part 1 of Division 3 of Title 2 of the Government Code, to authorize
17 the department to expedite the exercise of its power to implement regulations as its
18 unique operational circumstances require.

19 **Comment.** Section 5058.3 continues former Section 5058(e), without substantive change,
20 except as described below:

21 The introductory clause of subdivision (a) provides that the special emergency rulemaking
22 procedure applies to amendment and repeal of a regulation, and not just adoption.

23 Subdivision (a)(2) requires a written explanation of the need for emergency rulemaking where
24 the Department proceeds with emergency rulemaking on the basis of operational necessity, rather
25 than on the basis of emergency. The written explanation is not required if the agency follows the
26 general emergency rulemaking procedure and makes a showing of emergency pursuant to
27 Government Code Section 11346.1(b).

28 Subdivision (a)(3) extends the period for review of an emergency regulation by the Office of
29 Administrative Law, where the Department proceeds with emergency rulemaking on the basis of
30 operational necessity pursuant to subdivision (e)(2), rather than on the basis of emergency. The
31 review period is not extended if the Department follows the general emergency rulemaking
32 procedure and makes a showing of emergency pursuant to Government Code Section 11346.1(b).
33 Cf. Gov't Code § 11349.6(b) (review period for emergency rulemaking in general).