

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

Bill Jones
SECRETARY OF STATE

In re:)	1999 OAL Determination No. 24
Request for Regulatory)	
Determination filed by)	[Docket No. 98-009]
MICHAEL J. THOMAS)	
regarding a rule that inmates)	October 21, 1999
may not receive printed)	
material downloaded from)	Determination Pursuant to
the Internet which is enclosed)	Government Code Section
in incoming inmate mail--per)	11340.5; Title 1, California
PELICAN BAY STATE PRISON)	Code of Regulations,
Memorandum dated May 6,)	Chapter 1, Article 3
1998 ¹)	
_____)	

Determination by: CHARLENE G. MATHIAS, Deputy Director

HERBERT F. BOLZ, Supervising Attorney
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law concludes that the prohibition contained in this memorandum from the warden of one state prison, though a "regulation," is not subject to the Administrative Procedure Act because of a special express APA exemption covering rules applying solely to one particular prison, if specified statutory conditions are met. However, if there were an uncodified statewide rule containing such a prohibition, such a rule would constitute a "regulation" issued in violation of the APA.

DECISION^{2,3,4}

The issue presented to the Office of Administrative Law (“OAL”) is whether the following rule is a “regulation” required to be adopted pursuant to the Administrative Procedure Act (“APA”):⁵ the rule that inmates may not receive printed material downloaded from the Internet which is enclosed in incoming inmate mail, as articulated in a Pelican Bay State Prison Memorandum dated May 6, 1998.

OAL concludes that this rule, though a “regulation,” is not subject to the APA because of a special express APA exemption covering rules applying solely to one particular prison, if specified statutory conditions are met. However, if there were an uncodified statewide rule containing such a prohibition, such a rule would constitute a “regulation” issued in violation of the APA.

REASONS FOR DECISION

I. BACKGROUND

Michael J. Thomas, an inmate at Pelican Bay State Prison, is Chairman of the Men’s Advisory Council, “A” Facility. On November 3, 1998, OAL accepted his request to determine whether the rule prohibiting inmates from receiving material downloaded from the Internet violated the APA. The Department submitted a response to the request on July 21, 1999. The record of this proceeding reveals the following undisputed facts, drawn primarily from the request, which included eight attachments.

- March 24, 1998: Mailroom staff at Pelican Bay sent a “Returned Mail Notification” to the requester. At the bottom of the one-page form, a paragraph states:

“You received mail from the above listed correspondent [FACTS (Families Against California’s Three Strikes)] which is not allowed for the reasons(s) checked above. The entire contents will be returned to the sender. Contents included: _____.”

In this blank, mail room staff entered the words “Printed Material from the internet.”⁶

In the middle of the form, staff checked the following box:
“UNAUTHORIZED MAIL (NOT ALLOWED). Newspapers, books, magazines from a private party (directly from a publisher or vendor only)”

- That same day, March 24, 1998, the requester wrote to the head of the mail room staff, protesting the decision to return the item of mail containing the FACTS Internet material. In this memo, Mr. Thomas stated in part:

“Please note that **all** material retrieved from the Internet is printed material. As are typed letters, church newsletters, prison newsletters, etc. That is the only way to receive such material. Three weeks ago I received 15 pages of Internet retrieved material from the Federal Bureau [sic] of the Interior. Five weeks ago I received over thirty pages of printed retrieved material from the Internet from the Department of Veterans Affairs. . . .

“There is no rule or regulation banning ‘Printed Material From the Internet.’ The material was *not* subversive, did *not* advocate the overthrow of any government, did *not* advocate violence, and was *not* a threat to the safety or security of this institution. It was not a ‘Newspaper, Book, or Magazine’ that needed to come from a vendor or require a book address label. Nor was it an ‘item that cannot searched without being destroyed, or correspondence from another incarcerated person, or a third party mailing.’ It was information on current ‘Three Strikes’ legislation and court cases from a family oriented organization.” [Emphasis added.]

This quoted memo was not answered.

- April 1, 1998: the requester filed a formal written grievance (on CDC Form 602 (12/87) “Inmate/Parolee Appeal Form), requesting prison authorities to take the following action:

“That the Pelican Bay Mail Room cease rejecting typed/ink jet/laser printed material received in personal correspondence. In particular such material retrieved from the Internet that is not *in and of itself a publication, newspaper, book or magazine that must come from a*

publisher or vendor. And, that the Mail Room Staff be properly trained in regulation interpretation to avoid any future such problems.”

- May 6, 1998: a memorandum is sent to “All Inmates,” from the Department of Corrections, Pelican Bay State Prison, titled “Internet E-mail and related Material,” signed by Warden Robert L. Ayers, Jr., and dated May 6, 1998. The memorandum reads in part:

“Recently, there has been an influx of incoming inmate mail containing internet related material. At this time, materials being downloaded from the internet and sent into the institution are considered *unauthorized* publications pursuant to the California Code of Regulations, Title 15, Section 3138(f)(1). *These publications and the mail in which they are enclosed will be disallowed and will not be accepted by the institutional Mailroom.*

“This subject has been referred to the California Department of Correction’s [sic] Legal Affairs Division to evaluate issues presented by allowing internet material into the institution. Following review by the Legal Affairs Division, our position will be reevaluated. Until that time, inmates should notify persons with whom they correspond to refrain from enclosing internet material in their letters.” [Emphasis added.]

This memo is the agency rule challenged in this determination proceeding.

- May 14, 1998: the first level reviewer denied the action sought in the grievance, attaching the May 6 memo, explaining that Pelican Bay State Prison “is disallowing internet material per California Code of Regulations, Title 15, section 3138(f)(1). Materials downloaded from the internet are considered unauthorized publications. . . .”
- June 9, 1998: the second level reviewer (the Warden’s level) denied the grievance. Noting that the relevant rules were found in Title 15, CCR, section 3000, 3006, 3136, 3138, as well as Penal Code sections 2600 and 2601, this decision stated in part:

“As indicated in the First Level response, the Internet publications are being denied per . . . section 3138. The appellant is directed to the last line of . . . section 3138(f)(1), which states in part, ‘Any exceptions must be authorized by the Institution Head.’ This vests the Warden of the prison with the

authority to make final determinations on what will or will not be allowed into the facility. In this case, the Warden has determined that Internet downloads will not be allowed. However, he has deferred final determination to the Office of Legal Affairs. Upon receipt of their determination, this policy will be reevaluated.”

Following denial of his grievance, Mr. Thomas filed a request for determination with OAL.

The requester argues first that:

“ . . . the Internet is *not* a publisher and therefore material downloaded from the Internet is not material coming from an unauthorized publisher. Would the Constitution of the United States be an unauthorized publication if my mother downloaded a copy of it from the Internet and sent it to me?”
[Emphasis in original.]

Second, the requester argues that material downloaded from the Internet is not “in and of itself a publication, newspaper, book or magazine that must come from a publisher or vendor.” The Internet, he argues, “has no vendor or publisher.”

Third, the requester argues that if section 3138(f) is read to prohibit inmates from receiving any material which is typed or printed on the grounds that such typed or printed material constitutes a “publication” within the meaning of subsection (f), that this interpretation would have the effect of forbidding

“the mailing of newsletters from the Department of Justice, Veterans Administration, or religious groups. Typed letters from home that are done on a personal computer, then ink jet/laser printed, would be disallowed. Bank statements, that are computer generated, are history under this type of illogical reasoning.”

Fourth, the requester argues in effect that subsection (f) has more than one interpretation because in several prior instances, he received mail containing material downloaded from the Internet, indicating that responsible CDC employees read the regulation as permitting receipt of such material by inmates.

The Department, though not responding directly to some of the requester’s arguments, states in part in its response to the request for determination:

“It is the CDC’s position that [Pelican Bay’s] procedure of disallowing incoming inmate mail containing material downloaded from the internet as unauthorized publications is not an underground regulation, therefore not a violation of the APA.

“As indicated by CCR section 3138, subsection (f)(1), publications from sources other than directly from a publisher or book store which does mail order business, with the exception of donations which are not otherwise prohibited, are not permitted. Material retrieved from the internet is generally typed/printed, may contain pictorial material, and is reproduced for use, thereby meeting the definition of publications. In addition, CCR section 3138, subsection (f)(1) provides that any exceptions must be authorized by the institution head. There is no information in the exhibits provided by the requester that indicates that an exception to CCR section 3138, subsection (f)(1) was granted to the requester by Warden Ayers.

“The requester states that he has previously received material retrieved from the internet. Although the requester may have previously received material retrieved from the internet, it is important to note that a CDC Warden may at any time institute a ‘local rule’ as a means of resolving an issue or problem of that particular institution. The large volume of internet related material incoming inmate mail necessitated Warden Ayers to institute a ‘local rule’ disallowing such material. Warden Ayers is within his rights to institute such a rule. . . .”

II. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE DEPARTMENT OF CORRECTIONS?

Government Code section 11000 states:

“As used in this title [Title 2. “Government of the State of California” (which title encompasses the APA)], ‘state agency’ includes every state office, officer, department, division, bureau, board, and commission.”

The APA narrows the definition of “state agency” from that in Section 11000 by specifically excluding “an agency in the judicial or legislative departments of the state government.”⁷ The Department is in neither the judicial nor legislative branch

of state government. There is no specific statutory exemption which would permit the Department to conduct rulemaking without complying with the APA at this time.

In addition, Penal Code section 5058, subdivision (a), declares in part that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]*. . . . [Emphasis added.]"

Clearly, the APA generally applies to the Department's quasi-legislative enactments. However, effective January 1, 1995,⁸ Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements in subdivisions (c)⁹ and (d), which will be discussed later.

III. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

The key provision of Government Code section 11342, subdivision (g), defines "regulation" as:

". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations" and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ["]regulation["] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual,

instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]”

In *Grier v. Kizer*,¹⁰ the California Court of Appeal upheld OAL's two-part test¹¹ as to whether a challenged agency rule is a “regulation” as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule satisfies both parts of the two-part test, OAL must conclude that it is a “regulation” and subject to the APA. In applying the two-part test, OAL is guided by the *Grier* court:

“ . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]”¹²

Three California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in “a statutory scheme which the Legislature has [already] established. . . .”¹³ But “to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . .”¹⁴

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations (“CCR”) provisions) cannot legally be “embellished upon” in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)¹⁵ held that a terse 24-word definition of “intermediate physician service” in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went “far beyond” the text of the duly adopted regulation.¹⁶ Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

“. . . the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* . . . [Emphasis added.]”¹⁷

A. DOES THE CHALLENGED RULE CONSTITUTE A “STANDARD OF GENERAL APPLICATION?”

For an agency rule or standard to be “of general application” within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.¹⁸

The challenged rule by its terms applies to all members of a class: that is, all inmates incarcerated in Pelican Bay State Prison. Since the rule applies to all members of a class, it is a standard of general application.

Having concluded that the challenged rule is a standard of general application, OAL must consider whether the challenged rule meets the second prong of the two-part test.

B. DOES THE CHALLENGED RULE IMPLEMENT, INTERPRET, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE DEPARTMENT OR GOVERN THE DEPARTMENT'S PROCEDURE?

We will first review pertinent statutes, beginning with the general provision concerning custody of inmates and continuing with two provisions concerning inmate rights that were cited by the Department in the grievance proceeding.

Penal Code section 5054 declares that

"The supervision, management and control of the State prisons, and the responsibility for the care, *custody, treatment*, training, *discipline* and employment of persons confined therein are vested in the director [of the Department of Corrections]" [Emphasis added.]

Penal Code section 2600 provides in part:

"A person sentenced to imprisonment in a state prison *may* during that period of confinement *be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests.*" [Emphasis added.]

Penal Code section 2601 provides in part:

"Subject only to the provisions of that section, *each person* described in Section 2600 *shall have the following civil rights:*

* * * *

"(c)(1) *To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office.*

Pursuant to this section, prison authorities may exclude any of the following matter:

(A) Obscene publications or writings, and mail containing information concerning where, how, or from whom this matter may be obtained.

(B) Any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence.

(C) Any matter concerning gambling or a lottery.

(2) Nothing in this section shall be construed as limiting the right of prison authorities to do the following:

(A) Open and inspect any and all packages received by an inmate.

(B) Establish reasonable restrictions as to the number of newspapers, magazines, and books that the inmate may have in his or her cell or elsewhere in the prison at one time.” [Emphasis added.]

Duly adopted departmental regulations provide as follows.

Title 15, CCR, section 3130 (“General [Mail] Policy”) provides:

“The department encourages correspondence between inmates and persons outside the correctional facilities. The sending and receiving of mail by inmates will be uninhibited except as provided for in this article [Article 4 “Mail”]. The privacy of correspondence between inmates and persons outside correctional facilities shall not be invaded except as may be necessary to prevent physical injury to persons and to maintain the security of correctional facilities and the community.” (Emphasis added.)

Title 15, CCR, section 3131 (“Plan of Operation”) provides:

“Each warden, superintendent and heads of correctional facilities [sic] shall prepare and maintain a plan of operations for the sending and receiving of mail for all inmates housed in the facility. This plan will require the director’s approval before implementation and before any revision is made to an approved plan. Procedures of the correctional facility shall conform to the policies, regulations and provisions of law made reference to and shall apply to all inmates of the facility. Correctional staff shall promptly inform each newly received inmate of all department regulations and local procedures governing inmate mail.”

Title 15, CCR, section 3138 (“General Mail Regulations”) provides in part:

“(a) All nonconfidential inmate mail is subject to being read . . . by designated employees of the facility before it is mailed for or delivered to an inmate.

The institutional head or designee may reject mail sent by or to an inmate as provided in section 3136 [authorizing rejection of mail (1) which constitutes or contains contraband, which includes material concerning explosives or weapons; or (2) which contains money; coded messages; maps of areas adjoining the prison; or (3) which constitutes obscene material].

* * * *

“(f) Publications

- (1) Publications are reproduced, handwritten, typed/printed, and/or pictorial materials including books, periodicals, newspapers, and pamphlets. Inmates may subscribe to newspapers, periodicals, and purchase softcover books. *All publications shall be sent directly from a publisher or book store which does mail order business*, with the exception of donations which are not otherwise prohibited. Any exceptions must be authorized by the institution head.
- (2) Publications must be addressed to an individual inmate except for donations to the institution as otherwise permitted by these regulations and local procedures.
- (3) A publication received through the U.S. mail from the publisher or book store shall be excluded for the reasons stated in Section 3006(c).
- (4) Nothing in this section shall be construed as limiting a facility's right to inspect nonconfidential material and to limit the number of publications an inmate may possess at one time.” [Emphasis added.]

Clearly, Title 15, CCR, section 3138 is a key provision. However, it does not expressly address the handling or acceptability of material downloaded from the Internet. It seems very likely that the Department did not envision having to deal with Internet material when it adopted section 3138 in 1995. Internet usage has increased phenomenally in the past two or three years. Thus, while section 3138 can be read to apply to Internet downloads, some matters are unclear or ambiguous.

For example, the regulation may be read as assuming that any publication that an inmate wishes to read may be obtained directly from the publisher or a mail order vendor: the regulation states that “[a]ll publications shall be sent directly from a

publisher or book store which does mail order business” [Emphasis added.] (If sent directly from a publisher or vendor, security concerns are greatly diminished, whereas books, etc. sent from private persons may contain contraband.) The Department, however, while concluding that material available from the Internet falls within the regulatory definition of “publication,” apparently does not consider an entity maintaining a website including downloadable material to be a “publisher” within the meaning of subsection 3138(f). For instance, it appears from the record that the organization FACTS maintains a website, and that this organization printed out an item found on its website and mailed it directly to Mr. Thomas. The Department nonetheless prohibited Mr. Thomas from receiving the downloaded item, even though it was mailed directly from FACTS, the entity which had “published” it on the Internet.

Similarly, it is significant that section 3138 has been interpreted in several different ways by prison staff: (1) to permit receipt of downloaded material and (2) to prohibit receipt of downloaded material. While section 3138 can be reasonably read to cover Internet downloads, we conclude that a blanket prohibition of Internet downloads is only one of several reasonable interpretations of this regulation. Warden Ayers, in his May 8, 1998 memorandum resolved interpretive uncertainties as to the meaning of this regulation and its application to Pelican Bay. Thus, we conclude that the challenged rule implements, interprets, and makes specific section 3138.

We appreciate the candid statement of the Department, in its response to the request for determination, that “some clarification to [Title 15 California Code of Regulations] section 3138, subsection (f)(1) [General Mail Regulations/Publications] may be necessary, and [CDC] is exploring the possibility of amending this subsection to clear up any misconceptions that may be caused by the current language.” We agree that clarification would likely be helpful.

In addition, we conclude that the challenged rule implements, interprets, and makes specific Penal Code sections 5054, 2600, and 2601,¹⁹ as well as Title 15, CCR, sections 3130 and 3131.²⁰

III. DOES THE CHALLENGED RULE FOUND TO BE A “REGULATION” FALL WITHIN ANY RECOGNIZED EXEMPTION FROM APA REQUIREMENTS?

Generally, all “regulations” issued by state agencies are required to be adopted

pursuant to the APA, unless expressly exempted by statute.²¹ In *United Systems of Arkansas v. Stamison* (1998),²² the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA.

According to the *Stamison* Court:

“When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language. (See, e.g., Gov. Code, section 16487 [‘The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.’]; Gov. Code, section 18211 [‘Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act’]; Labor Code, section 1185 [orders of Industrial Welfare Commission ‘expressly exempted’ from the APA].) [Emphasis added.]”²³

Express statutory APA exemptions may be divided into two categories: special and general.²⁴ *Special* express statutory exemptions typically: (1) apply only to a portion of one agency’s “regulations” and (2) are found in that agency’s enabling act. *General* express statutory exemptions typically: (1) apply across the board to all state agencies and (2) are found in the APA. An example of a *special* express exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example of an *general* express exemption is Government Code section 11342, subdivision (g), part of which exempts “internal management” regulations of all state agencies from the APA.

A. DOES THE CHALLENGED RULE FALL WITHIN ANY *SPECIAL* EXPRESS APA EXEMPTION?

Penal Code section 5058, subdivision (c), states, in part, that:

“(c) The following are deemed *not* to be ‘regulations’ as defined in subdivision (b) [now subdivision (g)] 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. [Emphasis added.]”

This statutory language indicates that the Legislature intends for *local* prison rules to be exempt from APA adoption procedures, provided certain conditions are met.

In determining whether a purported “local rule” of the Department of Corrections falls within the scope of the statutory local rule exception, OAL determines whether the rule, though officially designated as addressing a matter of solely local concern, in reality addresses an issue of statewide importance.

Being labeled a “local rule” by the issuing agency is not dispositive. Whether a state agency rule is subject to the APA (in other words, is a “regulation” within the meaning of the APA and not expressly exempt) does not depend solely on the official designation of the agency action. According to the California Court of Appeal: “[i]f the action is *not only of local concern, but of statewide importance*, it qualifies as a regulation despite the fact it is called ‘resolutions,’ ‘guidelines,’ ‘rulings’ and the like.” (Emphasis added.)²⁵

We conclude that the challenged rule represents an individual warden’s response to particular circumstances present at Pelican Bay State Prison, and is limited in its application to that one facility. Nowhere in the record of this request is there any indication that the challenged rule has any effect or significance outside of Pelican Bay State Prison. There is no indication in the record that this rule is an invalid restatement of an invalidly issued statewide rule,²⁶ and no indication that the challenged rule applies to other prisons. Thus, OAL concludes that the challenged rule is a “local” rule applying solely to one particular prison and, if the two

statutory conditions have been satisfied,²⁷ falls within the scope of the express specific statutory exemption found in Penal Code section 5058.

CONCLUSION

For the reasons set forth above, OAL finds that the challenged rule is not subject to the APA because of a special express APA exception for rules applying solely to one prison, if specified statutory conditions are met.

DATE: October 21, 1999


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ENDNOTES

1. This request for determination was filed by Michael J. Thomas, J-59866, A7-130, Pelican Bay State Prison, P. O. 7500, Crescent City, CA 95532-7500. The agency's response was submitted by Kenneth L. Huez, for Meg Halloran, Deputy Director (A), Legal Affairs Division, Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001. (916) 485-0495.
2. This determination may be cited as "**1999 OAL Determination No. 24.**"

Pursuant to Title 1, CCR, section 127, this determination becomes effective on the 30th day after filing with the Secretary of State, which filing occurred on the date shown on the first page of this determination.

Government Code section 11340.5, subdivision (d), provides that:

"Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published [in the California Regulatory Notice Register]."

Determinations are ordinarily published in the Notice Register within two weeks of the date of filing with the Secretary of State.

3. If an unmodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.
4. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121 (a), provides:

"*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA.

[Emphasis added.]”

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that unmodified agency rule which constituted a “regulation” under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was “*invalid*”). We note that a 1996 California Supreme Court case stated that it “disapproved” of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to “the two-part test of the Office of Administrative Law,” citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

5. According to Government Code section 11370:

“Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the *Administrative Procedure Act*.” [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 (“Administrative Regulations and Rulemaking”) of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

6. CDC practice is apparently to *not* capitalize the word “Internet.”
7. Government Code section 11342, subdivision (a).
8. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) institutional, e.g., “local rules,” see **1992 OAL Determination No. 2** (Department of Corrections, March 2, 1992, Docket No. 90-011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.
9. Penal Code section 5058, subdivision (c), codified case law and OAL determinations regarding the local rule exception.
10. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it “disapproved” of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th

296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to “the two-part test of the Office of Administrative Law,” citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

11. The *Grier* Court stated:

“The OAL’s analysis set forth a two-part test: ‘First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency’s procedure?’ (1987 OAL Determination No. 10, . . . slip op’n., at p. 8.) [*Grier*, disapproved on other grounds in *Tidewater*].”

OAL’s wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in California Regulatory Notice Register 96, No. 8-Z, February 23, 1996, p. 292.

12. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001,1010, 74 Cal.Rptr.2d 407, 412, review denied.
13. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.
14. *Id.*
15. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
16. *Id.*
17. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.
18. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

19. In the decision concerning the grievance filed by Mr. Thomas, the Department cited Penal Code sections 2600 and 2601 as being part of the “rules governing denial of these publications.” We conclude from this statement that the Department views the challenged rule as interpreting, implementing, and making specific these two Penal Code sections.
20. For example, the challenged rule carves out an exception to the section 3130 policy that the sending of mail be “uninhibited.” Some material, it appears, is available solely on the Internet. Inmates are not permitted to use computers. If inmates are also prohibited in all cases from receiving Internet downloads, then their access to this material has been inhibited.

Also, section 3131 mandates wardens to issue a plan of operations for the sending and receiving of mail. Clearly, Warden Ayers’ memo prohibiting receipt of Internet downloads implements section 3131 by specifying how a certain type of incoming mail will be dealt with.

21. Government Code section 11346.
22. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.
23. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.
24. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself).
25. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
26. OAL has found that such restatements fail to qualify as true “local rules.”
27. We assume, for instance, that the challenged rule was made available “to all members of the general public.” Penal Code section 5058, subdivision (c)(1)(B).