

**OFFICE OF ADMINISTRATIVE LAW**

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**ENDORSED FILED  
IN THE OFFICE OF****2009 MAR 17 PM 12:08**

**SUSAN LAPSLEY**  
Director

*Debra Bowen*  
DEBRA BOWEN  
SECRETARY OF STATE

Date: March 17, 2009

To: Askari Powers

From: Chapter Two Compliance Unit

Subject: **2009 OAL DETERMINATION NO. 4(S)**  
**(CTU 2009-0205-01)**  
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging California Code of Regulations, title 15, section 3375.4(a) as an underground regulation.

On February 5, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the California Code of Regulations, title 15, section 3375.4(a) is an underground regulation. This section states that a period shall be considered continuous for the calculation of favorable behavior points when an inmate's status is interrupted during that period through no fault of the inmate.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600<sup>1</sup>, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA). Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

The following definitions shall apply to the regulations contained in this chapter:

(a) "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, *but has not been adopted as a regulation and filed with the Secretary of State pursuant to*

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<sup>1</sup>A regulation is defined in section 11342.600 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.

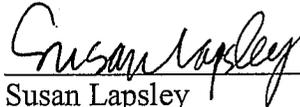
*the APA* and is not subject to an express statutory exemption from adoption pursuant to the APA. (Emphasis added)

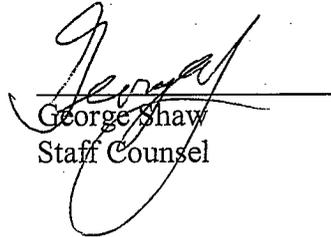
The section you challenge as an underground regulation, California Code of Regulations, title 15, section 3375.4(a), was duly adopted as a regulation pursuant to the APA and filed with the Secretary of State on October 22, 1990, in compliance with the APA. The challenged rule is not, therefore, an underground regulation.<sup>2</sup>

The petition also alleges that California Code of Regulations, title 15, section 3375.4(a) was not properly enforced as applied to you. OAL does not have the jurisdiction or authority to review and evaluate actions taken by other state agencies pursuant to a duly adopted regulation.

The issuance of this summary disposition letter does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code or to seek declaratory relief pursuant to section 11350 of the Government Code.

Date: March 17, 2009

  
Susan Lapsley  
Director

  
George Shaw  
Staff Counsel

Copy: Matthew Cate  
John McClure

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<sup>2</sup>A rule which is contained in a properly adopted regulation is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides:

- (f)(1) If facts presented in the petition or obtained by OAL during its review ... demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be used to conclude that a challenged rule is an underground regulation.
- (2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:
- (A) The challenged rule has been superseded.
  - (B) The challenged rule is contained in a California statute.
  - (C) *The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.*
  - (D) The challenged rule has expired by its own terms.