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SUSAN LAPSLEY
 Director



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 SECRETARY OF STATE

2010 JUN 23 PM 2:49
 ENDORSED FILED
 IN THE OFFICE OF

Date: June 23, 2010
 To: Charles Griffin II
 From: Chapter Two Compliance Unit
 Subject: **2010 OAL DETERMINATION NO. 11 (S)**
(CTU2010-0506-02)
 (Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
 Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Operational Procedure (4) 222, titled "Single/Double Cell Criteria"

On May 6, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether Operational Procedure (4) 222, titled "Single/Double Cell Criteria" constitutes an underground regulation. The copy you provided is incomplete, however, it is clear that Operational Procedure (4) 222 was issued by Kern Valley State Prison. The date of the Operational Procedure is not included, nor is the signature page. The partial copy of Operational Procedure you provided is attached hereto as Exhibit A.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,¹ which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).² 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.

Generally, a rule which meets the definition of a "regulation" in Government Code section 11342.600 is required to be adopted pursuant to the APA. In some cases, however, the Legislature has chosen to establish exemptions from the requirements of the APA. Penal

¹ "Regulation" means 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.

² Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (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 the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

Code section 5058, subdivision (c), establishes exemptions expressly for the California Department of Corrections and Rehabilitation (CDCR):

(c) The following are deemed not to be "regulations" as defined in Section 11342.600 of the Government Code:

(1) Rules issued by the director applying solely to a particular prison or other correctional facility....

This exemption is called the "local rule" exemption. It applies only when a rule is established for a single correctional institution.

In *In re Garcia* (67 Cal.App.4th 841, 845), the court discussed the nature of a "local rule" adopted by the warden for the Richard J. Donovan Correctional Facility (Donovan) which dealt with correspondence between inmates at Donovan:

The Donovan inter-institutional correspondence policy applies solely to correspondence entering or leaving Donovan. It applies to Donovan inmates in all instances.

...
The Donovan policy is not a rule of general application. It applies solely to Donovan and, under Penal Code section 5058, subdivision (c)(1), is not subject to APA requirements.

Similarly, the rule challenged by your petition applies solely to the inmates of Kern Valley State Prison. Inmates housed at other institutions are governed by those other institutions' criteria for single and double celling. The rule you challenged was issued by Kern Valley State Prison and applies only to inmates at Kern Valley State Prison. Therefore, the rule is a "local rule" and is exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1). It is not an underground regulation.³

³ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) 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 issued 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.

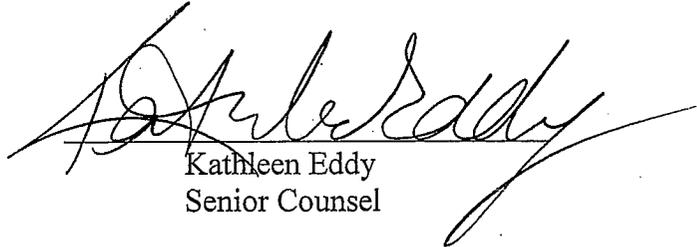
(E) **An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule.** (Emphasis added.)

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.



SUSAN LAPSLEY

Director



Kathleen Eddy

Senior Counsel

Copy: Matthew Cate
Tim Lockwood

Exhibit A



CALIFORNIA DEPARTMENT OF CORRECTIONS
Kern Valley State Prison

OPERATIONAL PROCEDURE (4)222
SINGLE/DOUBLE CELL CRITERIA

Operational Procedure 174- Operational Procedure 6.1.1.1	Single/Double Cell Criteria (4)222
PURPOSE/OBJECTIVE:	Establish the guidelines that require all inmates to double cell unless criteria or behavior patterns exist that indicate otherwise.
REFERENCES:	California Code of Regulations, Title 15, Section 3375.2 3375.1 Memorandum dated 4/25/00 by W. A. Duncan, Deputy Director, Institutions Division.
APPROVAL AND REVIEW:	The Warden must approve this procedure and all revisions prior to implementation. This procedure is to be reviewed annually by the Associate Warden of Housing.
RESPONSIBILITIES:	The Warden has the overall responsibilities for the administration of the procedure. It is the responsibility of the Associate Wardens/Housing to oversee and monitor the implementation of this procedure.
METHODS:	Inmates are required to double cell unless case factors exist that indicate single cell housing is necessary. The level of staff member to temporarily approve single cell assignment will be at the level of Correctional Sergeant or Correctional Counselor I. The approving authority shall be at the level of Correctional Lieutenant, Correctional Counselor II or above. The screening authority shall document his/her signature, printed name and title on a CDC form 1882. Single cell assignment shall be temporarily designated pending initial classification review. Determination of voluntary or involuntary housing assignment shall be made at the discretion of the designated staff in accordance with CDC

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Single/Double Cell Criteria
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established criteria. (NOTE: Per memorandum dated May 9, 2000 authored by D. Tristani, Deputy Director, Institutions Division, the CDC form 1882-A, General Population Double Cell Review has been discontinued.)

Inmates are not entitled to single cell assignment, housing location of choice or a cellmate of choice. Inmates must double cell unless staff determines that the inmate's case factors or security concerns warrant single cell assignment. The inmate is responsible for participating in the decision affecting his housing assignment, and is afforded the opportunity to express an opinion regarding housing. However, their agreement is not required.

Restrictions that may limit an inmate's placement are gang affiliation, health issues, social concerns, disciplinary behavior, nature of commitment offense, age, social factors, or prior in cell violence. Verification of such behavior shall require review by a Classification Committee to determine single cell status is warranted.

Upon determination that the inmate warrants single cell status, the "S" suffix shall be affixed to the inmate's custody designation. The determination for "S" suffix shall be documented as part of the classification action and re-evaluated during the inmate's required annual review.

ADMINISTRATIVE SEGREGATION

Unless approved for single cell assignment or other administrative concerns are identified, an inmate in ASU is required to double cell.

Approval of double cell assignment shall be based upon a review of Central Files, interviews with each inmate, and evaluation of security concerns. The staff member initiating the CDC form 1882-B shall complete Sections 1 and 2 and include the inmate's signature. The staff member performing this function shall also provide his/her name and signature as a Staff witness. If an inmate refuses to sign the agreement this shall be documented on the CDC form 1882-B.

The staff witness shall forward the CDC form 1882-B to a staff member at the level of Correctional Lieutenant, Correctional Counselor II or above. The approving authority shall be responsible for considering each inmate's case factors and deciding to approve or disapprove the proposed cell