

OFFICE OF ADMINISTRATIVE LAW

300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

ENDORSED FILED
IN THE OFFICE OF

2012 SEP -5 PM 1:18



DEBRA M. CORNEZ
Director

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: September 5, 2012

To: Eric Eleson

From: Chapter Two Compliance Unit

Subject: **2012 OAL DETERMINATION NO. 9 (S)**
(CTU2012-0803-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation recent amendments to California Code of Regulations, title 15, section 3377.2, titled "Criteria for Assignment of Close Custody"

On August 3, 2012, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether recent amendments to California Code of Regulations, title 15, section 3377.2, titled "Criteria for Assignment of Close Custody" constitute an underground regulation.

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).

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 [chapter 2 of division 1 of title 1 of the California Code of Regulations]:

(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.

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.

You allege the amendments to California Code of Regulations, title 15, section 3377.2 constitute an underground regulation. The amendments to section 3377.2 were submitted to OAL by the California Department of Corrections and Rehabilitation (CDCR) on June 6, 2012, as an emergency filing based upon operational necessity pursuant to Penal Code section 5058.3. The filing was deemed to be an emergency by the Legislature pursuant to Penal Code section 5058.3. The filing was reviewed by OAL attorneys for compliance with applicable law and it was approved pursuant to Government Code sections 11346.1 and 11349.6, and Penal Code section 5058.3. The regulations were filed with the Secretary of State on June 26, 2012 and became effective on July 1, 2012. The amendments you challenge, therefore, are properly adopted regulations.²

For the reason discussed above, we find that the rule challenged by your petition is not an underground regulation.³

² To permanently adopt the amendments, a Certificate of Compliance indicating that CDCR has complied with Government Code sections 11346.2 to 11347.3, inclusive, must be submitted to OAL no later than December 10, 2012, or the emergency language will be repealed by operation of law on the following day. Pursuant to Government Code section 11346.4, a notice of the proposed adoption, amendment or repeal of a regulation must be mailed to, among others, every person who has filed a request for notice of regulation actions. The notice is also required to identify the period during which the agency must accept comments.

As of August 30, 2012, the CDCR website shows that the notice was mailed on July 20, 2012, and the close of the comment period is September 17, 2012.

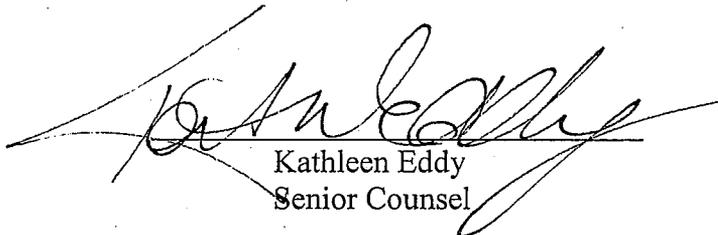
³ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (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.



Debra M. Cornez
Director



Kathleen Eddy
Senior Counsel

Copy: Matthew Cate
Tim Lockwood