Study N-304 March 29, 2000

Memorandum 2000-28

Rulemaking Under Penal Code Section 5058 (Comments on Request for Public Comment)

OUTLINE OF MEMORANDUM

BACKGROUND

In the course of studying statutory exemptions to the rulemaking requirements of the Administrative Procedure Act, the Commission received comments suggesting that there are problems with Penal Code Section 5058. That section

establishes special procedures for rulemaking by the Department of Corrections. Specific concerns were raised about the provisions relating to regulations implementing pilot programs and the provisions relating to emergency rulemaking procedures. In December 1999, the Commission circulated a Request for Public Comment regarding *Rulemaking Under Penal Code Section 5058*, in order to gather additional information regarding these specific issues and any other issues relating to Section 5058. This memorandum considers the responses to the Request for Public Comment and discusses how the Commission might proceed with this matter. The text of Penal Code Section 5058, the comment letters that we have received, and other relevant materials are attached as an exhibit, as follows:

GENERAL RESPONSE

Overall, the response to the Request for Public Comment was lighter than expected. The staff had hoped that distribution of the Request for Public Comment to persons and organizations on the Department of Corrections' mailing list would result in a broader response than was received. Although we did receive many helpful comments, they were mostly from the same persons and organizations that have previously commented to the Commission on this topic: the Department of Corrections, Senator Polanco (chair of the Joint Legislative Committee on Prison Construction and Operations), and the Prison Law Office.

In general, the Department of Corrections is skeptical of the need for any changes to Penal Code Section 5058 and is concerned about the potential for costly and unnecessary litigation that might result if the section is amended. Senator Polanco and the Prison Law Office restate and provide new support for their view that reform of Section 5058 is needed. Mr. Amaral, currently an inmate in a

Department of Corrections facility, also expresses support for changes to Section 5058.

PILOT PROGRAM REGULATIONS

Defining "Pilot Program"

Under Section 5058(d)(1), a regulation implementing a Department of Corrections pilot program is exempt from most rulemaking procedures. The term "pilot program" is not defined. This may make it difficult to determine whether a regulation implementing a particular program would be subject to the exemption. In the Request for Public Comment, the Commission asked whether it would be helpful to define the term "pilot program" and offered a proposed definition:

> "Pilot program" means a program implemented on a temporary and limited basis in order to test and evaluate the effectiveness of the program, develop new techniques, or gather information.

The reaction to the proposed definition was generally favorable. Senator Polanco comments, at Exhibit p. 8:

> It would be helpful to define the term "pilot project." Frequently, when the Legislature enacts such a program, that term is specifically used in the enacting legislation. In those cases, the intention is clear. However, when programs are created that do not specifically use that term, there is too much room for interpretation. Thus, a consistent definition would provide clarity and uniformity.

The Prison Law Office writes: "In our opinion, this definition would provide better guidance for the Department of Corrections…." See Exhibit p. 12. Mr. Amaral also supports the proposal. See Exhibit p. 6.

The Department of Corrections "does not object in principle" to defining the term, but is concerned that ambiguities in the proposed definition could lead to costly, unnecessary litigation. See Exhibit p. 16. Of course, our proposed definition would be much less ambiguous than existing law, which does not define the term at all. Under existing law, the Department of Corrections could be involved in litigation over whether a pilot program implemented under this rulemaking exemption is actually a "pilot program," and the plaintiff would have unlimited scope to argue for whatever definition of the term best suits the plaintiff's case. A more specific definition would provide something of a safe harbor to the

Department of Corrections in cases where the pilot program falls squarely within the definition.

The staff is willing to consider any suggestions for how the proposed language might be made less ambiguous. Also, if the concern is that the definition will lead to increased litigation, it might be appropriate to add language establishing an evidentiary presumption based on the Director's certification that a program is a pilot program. For example, Section 5058(d)(1)(B) could be amended to read as follows:

> (B) The director certifies in writing that the regulations apply to a pilot program that qualifies for exemption under this subdivision. The certification establishes a rebuttable presumption affecting the burden of proof that the program is a pilot program that qualifies for exemption under this subdivision.

Readoption of a Pilot Program Regulation

A regulation relating to a pilot program lapses by operation of law two years after adoption. If the Department of Corrections chooses to readopt a lapsed pilot program regulation it should do so under the regular rulemaking procedure — the exemption for pilot program regulations should not apply. Otherwise, the two-year limit on the duration of a pilot program regulation could be circumvented. The Request for Public Comment notes that we do not know of any instance in which the Department of Corrections has readopted a lapsed pilot program regulation, but asks whether it would be helpful to add language eliminating the possibility. This could be done by amending subdivision (d)(1) as follows:

> 5058. (d) The following regulations are exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code under the conditions specified:
>
> (1) Regulations adopted by the director or the director's designee applying to any legislatively mandated or authorized pilot program or a departmentally authorized pilot program, provided that an estimate of fiscal impact is completed pursuant to Section 6055, and following, of the State Administrative Manual dated July 1986, and that the following conditions are met:
>
> …
>
> (D) The regulation is not the same in substance as a regulation previously adopted under this paragraph that has lapsed by operation of law.
>
> **Comment.** Subdivision (d)(1) of Section 5058 is amended to provide that the pilot program exemption does not apply to a

> regulation that is the same in substance as a regulation that was previously adopted as a pilot program regulation and has lapsed by operation of law. This ensures that the two-year time limit on the effectiveness of a pilot program regulation cannot be circumvented by readopting a lapsed regulation.

Both Senator Polanco and the Prison Law Office favor adding the proposed language. See Exhibit pp. 8, 12. However, the Prison Law Office acknowledges that it is unaware of any circumstance in which the Department of Corrections has actually readopted a lapsed pilot program regulation.

The Department of Corrections is concerned that the proposed language would lead to unnecessary litigation. See Exhibit p. 17:

> Unfortunately, the Department's mission and operation are not supported by every member of the public, and the Department sometimes finds itself facing examination in the litigation arena. To reduce the Department's exposure to unnecessary and useless litigation, statutory enactments should be necessary to remedy a potential or actual problem and should be unambiguous. This suggested limitation seems unnecessary since the Department has not readopted such lapsed regulations. Indeed the Request notes "The Commission is not aware of any instance where the Department has extended the duration of a pilot program regulation this way…." … Furthermore, if the Commission decides to propose this limitation, the vague phrase "same in substance" should be revised.

The phrase "same in substance" is meant to be somewhat open-ended. If the limitation only precludes adoption of a regulation that is *identical* to a lapsed pilot program regulation, then the Department of Corrections could circumvent the limitation by making superficial changes to a lapsed regulation that it wishes to readopt.

On the other hand, the proposed language might well be overbroad. For example, if the Department adopts a set of regulations to implement a pilot program, one of them providing a procedure for applying to participate in the program, would the Department then be precluded from using the same application procedure in implementing a later pilot program because that procedure is the "same in substance" as a regulation that had lapsed by operation of law? As the Department points out, someone who is opposed to the later pilot program might make such a claim in order to obstruct implementation of the

program. This could perhaps be addressed by focusing on the pilot program rather than the implementing regulation, thus:

> 5058. (d) The following regulations are exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code under the conditions specified:
>
> (1) Regulations adopted by the director or the director's designee applying to any legislatively mandated or authorized pilot program or a departmentally authorized pilot program, provided that an estimate of fiscal impact is completed pursuant to Section 6055, and following, of the State Administrative Manual dated July 1986, and that the following conditions are met:
>
> …
>
> (D) The pilot program being implemented is not the same in substance as a previous pilot program that was implemented by regulations adopted under this paragraph.
>
> **Comment.** Subdivision (d)(1) of Section 5058 is amended to provide that the pilot program exemption does not apply to regulations implementing a pilot program that is the same in substance as a previous pilot program that was implemented by regulations adopted that paragraph. This ensures that the two-year time limit on the effectiveness of a pilot program cannot be circumvented by adopting regulations a new pilot program that is the same in substance as the lapsed pilot program.

This still presents a difficult factual question — how similar can a pilot program be to an earlier lapsed pilot program and still fall within the exemption for pilot program regulations? Considering that the problem to be addressed by the proposed language is purely theoretical at this point, **the staff is inclined to drop the proposal.** If at some time in the future there is a demonstrated problem with readoption of lapsed pilot programs, the issue could be revisited.

Amendment of Pilot Program Regulation

The Department of Corrections also raises an issue not discussed in the Request for Public Comment — existing law does not clearly provide that the exemption for "adopting" a pilot program regulation also applies to the amendment or repeal of a pilot program regulation. See Exhibit pp. 16-17. **This could be clarified by amending subdivision (d)(1) as follows:**

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

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

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

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

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

~~The regulations shall become effective immediately upon filing with the Secretary of State and shall lapse by operation of law two years after the date of the director's certification unless formally 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~~.

A rulemaking action taken under this paragraph shall become effective immediately upon filing with the Secretary of State. A rulemaking action taken pursuant to this paragraph shall lapse by operation of law two years after the commencement of the pilot program it implements, unless it is formally promulgated 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.

Comment. Subdivision (d)(1) of Section 5058 is amended to make clear that the exemption for regulations implementing a pilot program applies to the adoption, amendment or repeal of such a regulation. The subdivision is also amended to make clear that the duration of a rulemaking action implementing a pilot program is two years from the date that the pilot program commenced, regardless of when the action is taken. Thus, a change to the regulations implementing a pilot program does not extend the two-year maximum duration of the program.

This approach is consistent with the approach taken in the Commission's omnibus rulemaking recommendation, to clarify that the rulemaking procedures apply to

amendment and repeal of a regulation, as well as adoption. See *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 459 (1999). A similar change may be necessary in the provisions governing emergency regulations, as discussed below.

EMERGENCY RULEMAKING PROCEDURE

The general approach of the Administrative Procedure Act is to provide for public notice and comment, and review by the Office of Administrative Law, before the effective date of a proposed regulation. If a regulation were to take effect before notice and comment, persons affected by the regulation would have no advance notice, institutional inertia might decrease the effectiveness of public comment in influencing the final rule, and the regulation imposed might be unnecessary, unauthorized, or inconsistent with other laws — problems that would be detected if the substance of the regulation were first reviewed by the Office of Administrative Law. However, an agency may adopt a regulation on an expedited basis, without prior public notice and comment where the regulation is "necessary for the immediate preservation of the public peace, health and safety or general welfare." Gov't Code § 11346.1(b). A decision to do so is subject to review by the Office of Administrative Law, which will block adoption of an emergency regulation that does not satisfy the statutory standard. Gov't Code § 11349.6(b). An emergency regulation lapses by operation of law after 120 days, unless the agency adopts it under the regular rulemaking procedure before that date. Gov't Code § 11346.1(e).

Under Section 5058, the Department of Corrections does not need to satisfy the "emergency" standard in order to adopt an emergency regulation. Instead, the Department of Corrections need only certify that "the operational needs of the department require adoption of the regulations on an emergency basis." Penal Code § 5058(e)(2). This certification is not subject to review by the Office of Administrative Law. This relaxed standard is intended to "authorize the department to expedite the exercise of its power to implement regulations as its unique operational circumstances require." Penal Code § 5058(e).

It has been asserted that the Department of Corrections overuses the emergency rulemaking procedure. The Request for Public Comment asked for comments on this assertion. It also presented two legislative alternatives that might help address any overuse of the procedure. Comments on these matters are discussed below.

Comments Asserting Proper Use

Although the Department of Corrections did not directly address the question of whether it had overused the emergency rulemaking procedure, it did comment on the need for a streamlined rulemaking procedure to address its unique operational circumstances. See Exhibit pp. 4-5, 18, n.2:

> [The Department of Corrections] is unique in that 33 prisons with roughly 162,000 inmates are operated 24 hours per day, 7 days per week. In addition, there are upwards of 90 parole offices out of which roughly 158,000 parolees are monitored. Managing and monitoring large numbers of persons, many of whom are dangerous, in such a dynamic system often requires prompt action. The operational necessity provision accommodates this need. Furthermore, historically each prison was allowed a relatively high degree of autonomy operationally; more recently there has been movement towards statewide consistency. Because the operational necessity provision allows a more rapid response to system-wide issues or problems, the development and implementation of numerous inconsistent policies is minimized. …Finally, the fact that the internal development of a regulation may take a period of time is not a reason to delay implementation of a necessary regulation in cases where the unique operational needs of the Department require rapid implementation.

The Department of Corrections also notes that it has only used the operational necessity justification for emergency rulemaking in about two-thirds of its rulemaking actions. This "demonstrates that the operational needs of the Department do not consistently require emergency implementation of regulations." See Exhibit p. 5. The implication is that the Department is properly distinguishing between cases where use of the emergency rulemaking is justified and those in which it is not justified — otherwise, it would use the emergency rulemaking procedure in all cases.

The Department also comments that there is little harm when it uses the emergency rulemaking procedure. See Exhibit p. 18:

> It is important to remember that the Department does not avoid the public notice and comment process when it files a regulation on an operational necessity basis. The public still has notice and the opportunity to comment. The frequency of the Department's accommodation of comments in regular rulemaking filings is no

> greater than the frequency of the Department's accommodation of comments in its operational necessity filings.
>
> It is important to balance the benefit and the harm to the public of forcing the department to wait longer to implement some of its regulations, and question whether the proposed solution reflects that balance. The benefit of earlier public notice and comment prior to implementation of regulations is a system that theoretically accommodates more public comments, although as stated above, the Department's accommodation of comments is no different in its regular rulemaking fillings than in its operational necessity filings. The harm to the public of waiting varies, depending on the problem being addressed; some problems in prisons should not be allowed to fester.

Comments Asserting Misuse

Senator Polanco believes that the Department of Corrections' use of the emergency rulemaking procedure on the basis of operational necessity has been unwarranted. See Exhibit p. 9:

> [The] Department of Corrections is quoted regarding the unique circumstances that prompt the necessity to use an emergency rulemaking process. The "unique circumstances" described do not correlate to most of the "emergency" regulations that have been promulgated under Penal Code Section 5058. For example, regulations that require all inmates to comply with specific grooming standards were promulgated under this section.
>
> While the … Department's reasons for wanting inmates to be properly groomed may be reasonable, the need to enact such regulations under this code section is not related to any emergency or security needs, nor to any other reasons quoted on page 4 of the Request. I am not familiar with any regulation that has been adopted that was, in fact, a true emergency in the Department of Corrections.

The Prison Law Office also believes that the Department of Corrections' use of the emergency rulemaking procedure has been unjustified. See Exhibit pp. 13-14. It provides two specific examples to support its view. These examples are discussed below. Mr. Amaral also believes that the emergency rulemaking procedure has been overused. See Exhibit p. 7.

Examples of Possible Misuse

The Prison Law Office cited two examples of possible misuse of the emergency rulemaking procedure (see Exhibit pp. 13-14):

> For example, on February 18, 1998, Title 15 California Code of Regulations, Section 3097 ("Inmate Restitution Fine and Direct Order Collections") was amended as an emergency regulation. The regulation was amended to, among other things, allow the CDC to deduct 10 percent from all prisoner wages and trust account deposits, to be applied to administrative costs. It is unclear why a rule that deprives a prisoner of an important property interest, and which had not been found necessary for years, needed to be implemented as an emergency regulation. Such a fundamental right should have been protected by at least a notice requirement and public comment period.
>
> In another action in February 1998, the CDC used emergency procedures to amend Title 15, California Code of Regulations, Sections 3044, 3220, 3220.1 and 3220.2. This amendment eliminated inmate weight lifting programs. In justifying its use of the emergency procedure, the CDC stated "these provisions were established to interpret and make specific Penal Code Section 5010." … However, the emergency nature of this action is dubious, considering that Penal Code Section 5010 was made effective November 30, 1994, more than three years and two months before the emergency regulation. The CDC did not appear to be in a hurry to interpret the law, so the regular rulemaking procedure should have been used.

The Department of Corrections was asked for comments on these specific examples, but indicated that it would not be able to provide an official response before the Commission's next meeting. The examples are discussed in more detail below:

Withholding for restitution purposes. The first example cited by the Prison Law Office is the 1998 amendment of Regulation Section 3097. That section governs the withholding of prisoner wages and trust account funds to pay restitution fines and orders. The regulation implements Penal Code Section 2085.5.

Prior to 1995, Penal Code Section 2085.5 provided for withholding of prisoner wages and trust account funds to pay "restitution fines" (fines assessed against defendant on conviction). In 1994, the section was amended to authorize withholding to pay "restitution orders" (amounts determined necessary to compensate victim of crime for economic losses resulting from crime) as well. The 1998 amendment of Regulation Section 3097, was apparently intended to implement the changes made in the 1994 amendment of Penal Code Section 2085.5. On its face, a delay of more than three years in implementing a statutory change does not suggest an urgent need for immediate adoption. It would appear that the Department of Corrections could have used the full rulemaking procedure.

Abolition of weight-lifting programs. The second example of possible overuse cited by the Prison Law Office is the 1998 amendment of Regulation Sections 3044, 3220, 3220.1, and the repeal of Section 3220.2. These changes generally abolished inmate recreational weight-lifting programs, as directed by Penal Code Section 5010. Section 5010 was enacted in 1994. It requires that the Department of Corrections adopt regulations limiting recreational weight-lifting by July 1, 1995. The required regulatory changes were not made until 1998. While the need to satisfy a legislative deadline could constitute an urgent operational need in some circumstances, here the regulations were not adopted until two and one half years after the deadline passed. Obviously, having missed a deadline creates a sense of urgency, but it is probably not good policy to defer public participation procedures simply because an agency has missed a deadline. Arguably, if the Department of Corrections took over two years to adopt the regulations, it could have use the full rulemaking procedure.

Conclusion

In evaluating these comments, the staff faces the same quandary that existed before receiving the comments — the commentary is compelling, but contradictory. On the one hand, the staff must give considerable weight to the views of the Department of Corrections. As the entity responsible for administration of prisons, it is most knowledgeable about the "unique operational circumstances" that it faces. The statement of legislative intent in Section 5058(e) clearly implies that the Department of Corrections should have broad discretion to address its operational needs through the emergency rulemaking process. On the other hand, whatever discretion the Legislature has granted, it can also take away. If the relevant legislative oversight committee now believes that the Department of Corrections has overstepped the boundaries of its discretion, then that view is also entitled to great weight. The views of prisoners and prisoner advocates on the matter must also be taken into account. Although prisoners are in something of an adverse relation to the Department of Corrections and therefore may be inclined to find fault with the Department of Corrections' actions, they clearly have a significant interest in Department of Corrections' rulemaking.

If all we had were these contradictory contentions, it would be difficult to determine whether the Department of Corrections had overused the emergency rulemaking procedure. However, we also have the examples provided by the Prison Law Office. These were cases where the Department of Corrections used the

emergency rulemaking procedure to adopt regulations two to three years after the need for the regulation became apparent (because of statutory changes). In these cases, there doesn't seem to have been an urgent need for immediate adoption of a regulation. In the absence of such urgency, circumvention of the ordinary protections of the Administrative Procedure Act doesn't seem justified. These examples may or may not be typical, but they do demonstrate that Department of Corrections has used the emergency rulemaking procedure in questionable circumstances.

If the Commission concludes that there has been overuse of the emergency rulemaking procedure, or that there is a significant potential for overuse in the future, it may be appropriate to revise Section 5058 along the lines discussed below. The proposed changes are fairly modest and may lead to a solution that is satisfactory to everyone.

PROPOSED LIMITATION ON USE OF EMERGENCY RULEMAKING PROCEDURE

One alternative proposed in the Request for Public Comment is to limit the availability of the emergency rulemaking procedure to cases where a regulation is urgently required to address "an unanticipated change in circumstances." This would preserve the basic policy of allowing use of the procedure in urgent situations, while precluding use of the procedure in cases where there is time for the regular rulemaking procedure to be used. This could be done by amending Section 5058(e)(2) as follows:

> 5058. (e)(2) No showing of emergency is necessary in order to adopt emergency regulations other than a written statement by the director or the director's designee, to be filed with the Office of Administrative Law, certifying that operational needs of the department require adoption of the regulations on an emergency basis <u>in order to address an unanticipated change in circumstances</u>.
>
> **Comment**. Subdivision (e) of Section 5058 is amended to limit adoption of emergency regulations on the basis of operational necessity to cases where a regulation is needed to address an unanticipated change in circumstances. This precludes use of the procedure in cases where the department has sufficient advance notice of the need for a regulation to use the regular rulemaking procedure. See Gov't Code §§ 11340-11359.

The reaction to this proposal was mixed. Both the Prison Law Office and Mr. Amaral support the proposed language. Senator Polanco and the Department of Corrections do not support the proposed language.

Support for Limitation

The Prison Law Office writes in support of the proposed language. See Exhibit p. 15:

> Such a limitation would prevent the CDC from avoiding the notice and public comment period before implementing changes not truly based on operational necessity, and it would ensure that the important interests are afforded the greatest protection from arbitrary CDC action. The requirement of an unanticipated change in circumstances furthers the goal of providing fast-track procedures only in cases of emergency.
>
> Another effect of limiting the scope of the emergency procedure will be that such a limitation addresses the current situation that arises when the CDC is found to have been implementing "underground rules"…. These are rules that were not adopted pursuant to the Administrative Procedure Act. Currently, if a court order is obtained to block enforcement of an underground rule, the CDC immediately adopts the same rule as an emergency rule under Penal Code Section 5058, thus blunting the force of the court order. If the scope of the emergency procedure is limited, such unseemly tactics will not be permitted.

The point made regarding underground regulations is an interesting one — should an agency be able to use the emergency rulemaking procedure to adopt a regulation that has been disapproved by the court as an invalid "underground regulation?" If the regulation has been disapproved on substantive grounds (e.g., the regulation is inconsistent with statutory law), then clearly the agency would not be able to readopt the regulation without making some change to address the substantive defect.

However, if a regulation is disapproved on the basis of the agency's failure to follow proper procedures in adopting it, then the regulation should be adopted under the required procedures. These procedures include the emergency rulemaking procedures. If the need for the regulation satisfies the statutory requirements for use of the emergency rulemaking procedure, then there does not seem to be any reason to preclude emergency adoption of the regulation. The fact that the regulation was judicially disapproved for failure to follow required procedures does not seem to bear on the question of whether the regulation is

urgently needed. What's more, it isn't clear that the proposed legislation would preclude emergency adoption of a disapproved regulation, as the Prison Law Office suggests. Judicial disapproval of an urgently needed "underground regulation" may well be considered an unforeseen change in circumstances.

Concerns About Limitation

A number of concerns were raised about the proposed language:

(1) The approach would not effectively limit use of the emergency rulemaking procedure. Senator Polanco does not support the proposed language because he believes that it would not effectively limit use of the emergency rulemaking procedure. See Exhibit p. 9:

> I do not support the first suggested amendment on page 5 of the Request, which would amend Section 5058(e)(2) to narrow the circumstances under which the procedure may be used. Given the history of the Department's consistent and unwarranted expansion of authorizing language, insertion of such narrowing language is ripe for similar unwarranted expansion. A more public process wherein the department has to justify use of this code section prior to implementation of an emergency regulation is appropriate.

If one accepts Senator Polanco's premise that the Department would interpret the limiting language expansively, then the language could well be ineffective as a limitation. This could perhaps be addressed by tightening the language, as discussed below.

(2) The proposed limitation would be inconsistent with the Department's need for flexibility in addressing its unique circumstances. The Department of Corrections believes that the limitation would hamper its operations. See Exhibit p. 18:

> The Department could not operate effectively with the suggested limitation, since the current operational necessity exception can be used for more than unanticipated changes in circumstances. For example, the Department may choose to exercise its discretion to change its operations even when the underlying facts or circumstances have not changed. In these instances, the Department should be able to choose whether or not more rapid implementation of the new and improved solution is preferable, which it may be, primarily because of safety and security concerns.

Of course, if immediate adoption of a regulation is necessary to address safety and security concerns, then the Department of Corrections should be able to adopt the

regulation on the basis of an actual "emergency," rather than on the basis of operational necessity. Furthermore, the Department of Corrections' comment implies that any substantive limit on its discretion to use the emergency rulemaking procedure where "preferable" would be a problem. However, a good argument can be made that the Department of Corrections should only use the emergency rulemaking procedure to address an *urgent* operational need. This is consistent with the Department's own description of the purpose of Section 5058: "CDC will have an enhanced ability to quickly implement policies based upon urgent, though not emergency, operational needs." See Exhibit p. 20. The proposed language is an attempt to limit the emergency rulemaking procedure to cases of urgency.

(3) There may be situations where a regulation is needed to address urgent operational needs despite the lack of any change in circumstances. As the Department of Corrections explains, at Exhibit p. 18:

> … the Department may identify a problem for which the development of a solution takes some time. An argument could be made that the proposed limitation would preclude the rapid implementation of such a solution, since the Department had known about the problem for a while.

In other words, if the Department of Corrections is unable to address a regulatory need for a considerable period of time, either because of the complexity of the problem or because of other time demands on the Department's staff, would the Department be barred from using the emergency rulemaking procedure to adopt the regulation because there is no longer an "unanticipated" change of circumstances? How much of a delay in reacting to a change of circumstances is reasonable before the need for the regulation should be considered "anticipated?" One approach to addressing this issue would be to create a bright line rule. For example: "A regulation shall not be considered necessary to address an unanticipated change in circumstances if the change in circumstances occurs six months or more before the adoption of the regulation." Such an approach is clear, but may be too inflexible. It would also be difficult to determine what the proper time period should be. The two to three year delay in the examples discussed above is probably too long, but six months may be too short.

(3) The proposed law could lead to increased litigation. The Department of Corrections is concerned that the flexibility of the limiting language would lead to litigation. See Exhibit p. 19:

> … this proposed limitation is likely to generate litigation over whether a proposed regulation filed on an operational necessity basis meets the standard of addressing "an unanticipated change in circumstances" since this phrase is subject to a variety of interpretations. Such litigation may ostensibly be over the process, but in reality over substantive policy with which the plaintiff disagrees.

As discussed above, the limiting language could perhaps be made less ambiguous by specifying bright line rules. In addition to the rule elaborating what is meant by "unanticipated," it might be possible to draft rules defining "change in circumstances." For example:

> For the purpose of this paragraph, "change in circumstances" means any of the following:
> (A) A change in legal requirements, including a change in controlling statutes or the issuance of a court order.
> (B) A change in physical conditions.
> (C) A change in the Director's actual knowledge of legal requirements or physical conditions.

This approach might help reduce the potential for litigation, but creates a risk of under- or over-inclusiveness. If the Commission favors this approach, the staff will work with the interested parties to refine the language.

Another way to reduce the likelihood of unwarranted litigation, discussed earlier in the context of pilot program regulations, would be to create an evidentiary presumption that the certification is correct. Section 5058(e)(2) could be amended along the following lines:

> 5058. (e)(2) No showing of emergency is necessary in order to adopt emergency regulations other than a written statement by the director or the director's designee, to be filed with the Office of Administrative Law, certifying that operational needs of the department require adoption of the regulations on an emergency basis <u>in order to address an unanticipated change in circumstances</u>. <u>Certification creates a rebuttable presumption affecting the burden of proof that the facts stated in the certification are correct.</u>

However, such a presumption would probably be opposed by Senator Polanco, who maintains that the Department of Corrections is prone to unwarranted expansion of authorizing language.

Conclusion

The principal concerns regarding the proposed limitation relate to the flexibility of the proposed language. If the language were made more concrete, as discussed above, then the approach might be acceptable to Senator Polanco and the Department of Corrections. However, as Senator Polanco's comments imply, the limitation would probably be unnecessary if notice and comment were required before adopting an emergency regulation on the basis of operational necessity. That alternative is discussed below.

NOTICE AND COMMENT PRECEDING EMERGENCY RULEMAKING

One disadvantage of using the emergency rulemaking procedure is that it defers public notice and comment until after the regulation has gone into effect. A bill introduced in 1998 by the Joint Legislative Committee on Prison Construction and Operations would have addressed this by requiring the Department of Corrections to provide notice to the Committee 31 days before filing an emergency regulation. The Committee would then hold a public hearing on the proposed regulation. See SB 1450 (1998) (Polanco). The bill failed narrowly. One problem with the approach taken in the bill is that it would delay the adoption of an emergency regulation that is required immediately. That problem could be avoided by distinguishing between regulations adopted on the basis of operational necessity and regulations adopted after a showing of emergency. Advance notice and comment could be required in cases of operational necessity, but not required in cases of demonstrated emergency. This would result in a 4-tier procedural scheme tailored to varying degrees of urgency:

> *No urgency:* Where there is no special urgency, the regular rulemaking procedure would be followed. This would result in a delay of approximately three months to a year before the regulation becomes effective.
>
> *Operational necessity:* Where operational needs require expedited adoption of a regulation, the department could use the emergency rulemaking procedure supplemented by advance public notice and comment. This would result in a delay of 30-40 days before the regulation becomes effective.

Emergency: In an emergency, the department could use the regular emergency rulemaking procedure. This would result in a delay of up to 10 days before the regulation becomes effective.

Imminent Danger: Where, a regulation is required immediately in order to avoid serious injury, illness, or death, the department could follow the existing procedure for rulemaking in cases of "imminent danger." There would be no delay in the regulation becoming effective. See Penal Code Section 5058(d)(2).

The approach described above could be implemented by amending Section 5058(e) as follows:

5058. (e) Emergency regulations shall be adopted pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except that:

…

(2) No showing of emergency is necessary in order to adopt ~~emergency regulations other than a written statement by the director or the director's designee, to be filed with the Office of Administrative Law, certifying that operational needs of the department require adoption of the regulations on an emergency basis~~ an emergency regulation if the director or the director's designee does each of the following:

(A) Certifies, in a written statement filed with the Office of Administrative Law, that the operational needs of the department require the adoption, amendment, or repeal of the regulation on an emergency basis.

(B) Mails notice of the proposed emergency rulemaking to persons who have requested notice of the department's rulemaking activity, at least 30 days before filing the regulation with the Office of Administrative Law.

(C) Holds a public hearing regarding the proposed emergency rulemaking after mailing the notice required in subparagraph (B) but before filing the regulation with the Office of Administrative Law.

Comment. Subdivision (e) of Section 5058 is amended to make clear that the department may adopt an emergency regulation either by making a showing of emergency as required by Government Code Section 11346.1(b), or by certifying that the department's operational needs require use of the emergency rulemaking procedure. If the emergency regulation is adopted on the basis of a certification of operational necessity, rather than a showing of emergency, the department must provide for public notice and comment before filing the emergency regulation with the Office of Administrative Law. No advance public notice is required where

adopting a regulation to address a situation of imminent danger. See subdivision (d)(2).

The Request for Public Comment invited comment on the merits of that approach. Responses are discussed below.

Support for the Approach

The approach described above is supported by Senator Polanco, the Prison Law Office, and Mr. Amaral. Senator Polanco writes, at Exhibit p. 9:

> The 4-tiered approach … may best resolve this problem — it balances the Department's need for enacting such regulations with the public's right to be notified of such changes. In addition, it eliminates the confusion that currently exists between when a regulation is an operational necessity regulation and when it is a true emergency.

The Prison Law Office writes, at Exhibit p. 15:

> The four-tier scheme adequately protects both the prisoners' and the public's rights by ensuring that only in the most narrow circumstances will the notice and comment period be avoided prior to CDC adopting a regulation; those instances in which there is an imminent danger. Such a scheme takes into consideration the public interest in participating in the rulemaking process as it relates to prisons, while continuing to acknowledge the CDC's unique concerns in maintaining and operating those institutions.

Mr. Amaral believes that the proposal is "good for all parties involved…." See Exhibit p. 7.

Concern About Possible Duplication of Effort

The Department of Corrections is concerned that requiring public notice and comment before adopting an emergency regulation might result in duplication of effort. See Exhibit p. 19. Under the regular rulemaking procedure, an agency is required to mail notice of a proposed rulemaking action and summarize comments received during the public comment period. The Department estimates the cost of mailing some notices at $2,000. Where numerous comments are received from the public, the department spends "months" summarizing them. If notice and comment is required before adopting an emergency regulation on the basis of operational necessity, and the Department later decides to adopt the regulation on a permanent basis, the department would be faced with two mailings and would

perhaps be required to summarize two sets of comments (those received before adoption of the emergency regulation and those received during the process of adopting the emergency regulation on a permanent basis).

The Department is correct that the proposal would impose additional mailing costs. However, the two notices serve different purposes and therefore should not be wastefully duplicative.

The Department is also correct that the existing procedure for adopting a regulation on a permanent basis would probably require that the Department summarize *all* comments received regarding the proposed permanent regulation, even those received when the regulation was proposed for adoption as an emergency regulation. See Gov't Code § 11346.9(a)(3). For example, under the proposed law, the Department proposes an emergency regulation, and receives 100 written comments. It adopts the emergency regulation and then decides to adopt the regulation on a permanent basis. During the comment period that follows, it receives an additional 100 written comments. In it's "final statement of reasons," the Department must summarize "each objection or recommendation" made regarding the proposed regulation. This would probably include all 200 comments.

This might be inefficient in two ways: (1) The same comment might be submitted twice by the same person, once at the emergency rulemaking stage and again when the regulation is proposed for permanent adoption. (2) Comments that focus entirely on the propriety of using the emergency rulemaking procedure have little or no relevance when considering whether to adopt the regulation on a permanent basis.

A different approach would be to provide that the Department must certify that it has considered any comments it received regarding a proposed emergency regulation, before submitting the regulation to the Office of Administrative Law, but need not summarize such comments in the final statement of reasons if it later adopts the regulation on a permanent basis. This would ensure that the Department considers any comments *before* adopting the proposed emergency regulation, without unduly delaying the emergency rulemaking process or requiring that it consider the same comment later in the rulemaking process. This could be implemented by adding a new subparagraph (D) to the proposed law, as follows:

5058. (e) Emergency regulations shall be adopted pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except that:

…

(2) No showing of emergency is necessary in order to adopt ~~emergency regulations other than a written statement by the director or the director's designee, to be filed with the Office of Administrative Law, certifying that operational needs of the department require adoption of the regulations on an emergency basis~~ an emergency regulation if the director or the director's designee does each of the following:

…

(D) Before submitting the proposed emergency regulation to the Office of Administrative Law, certifies that the department considered all comments received regarding the proposed emergency regulation. Notwithstanding Section 11346.9 of the Government Code, these comments do not need to be summarized in a final statement of reasons.

Comment. Subdivision (e)(2)(D) provides that the department must consider any comments it receives regarding a proposed emergency regulation. These comments need not be summarized in a final statement of reasons if the department later adopts the emergency regulation on a permanent basis. See Gov't Code § 11346.9(a)(3) (summary of comments in final statement of reasons).

The staff recommends this approach. It would be similar to the streamlined procedure for consideration of comments the Commission proposed in another rulemaking recommendation. See *Administrative Rulemaking: Advisory Interpretations*, 28 Cal. L. Revision Comm'n Reports 657 (1998).

Conclusion

The 4-tier approach described above seems promising. It provides for public notice and comment before adopting an emergency regulation on the basis of operational necessity, thereby eliminating the principal harm that results from use of the emergency rulemaking procedure. The approach does impose some delay and cost, but these are fairly minimal (30-40 days delay and the cost of a notice mailing). The approach does not depend on ambiguous language and therefore does not provide any increased risk of litigation by those who oppose a proposed regulation. Instead, any opposition would be expressed in pre-adoption comment, which might help improve the regulation before it is adopted.

REQUIRE STATEMENT OF JUSTIFICATION

Senator Polanco has one concern about the 4-tier approach, which is worth discussing separately. Under existing law, all that is required for the Department of Corrections to use the emergency rulemaking procedure on the basis of operational necessity is a written statement certifying that the operational needs of the department require adoption of the regulation on an emergency basis. See Penal Code Section 5058(e)(2). Senator Polanco feels that something more should be required. See Exhibit p. 10:

> I would strongly suggest that any regulation that is proposed to be implemented outside the scope of the regular rulemaking process be justified with facts and rationale, in order to promote a more responsible use of this power.

This could be implemented by revising proposed subdivision (e)(2)(A) along the following lines:

> (2) No showing of emergency is necessary in order to adopt an emergency regulation if the director or the director's designee does each of the following:
>
> (A) Certifies, in a written statement filed with the Office of Administrative Law, that the operational needs of the department require the adoption, amendment, or repeal of the regulation on an emergency basis. The written statement shall include a statement of the underlying facts and the department's rationale for use of the emergency rulemaking procedure.

Requiring an explanation of a decision to proceed on the basis of operational necessity wouldn't impose much of an additional burden on the Department and it might help avoid controversy over whether use of the emergency rulemaking procedure is warranted. **This change would probably be a significant improvement, even if none of the other proposed changes are adopted.**

EMERGENCY AMENDMENT AND REPEAL OF REGULATIONS

As discussed above, existing law is somewhat unclear with regard to whether the pilot program exemption applies to the amendment or repeal of a regulation, as well as the adoption of a regulation. The same lack of clarity exists in the emergency rulemaking provisions of Section 5058. This technical problem could be corrected by amending Section 5058(e) as follows:

(e) ~~Emergency regulations shall be adopted~~ An emergency adoption, amendment, or repeal of a regulation shall be conducted pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except that:

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

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

~~(3) This subdivision shall apply only to the adoption and one readoption of any emergency regulation.~~

…

Comment. Subdivision (e) of Section 5058 is amended to make clear that the special emergency rulemaking procedures apply to the adoption, amendment or repeal of a regulation.

WHERE DO WE GO FROM HERE?

The Commission now has better information regarding the merits of the reforms proposed in the Request for Public Comment. However, the Commission still has conflicting information on the underlying question of whether there is any need to reform Section 5058. In light of this, how shall we proceed? There are at least three alternatives: (1) Distribute a tentative recommendation proposing any or all of the reforms described above. (2) Issue a final recommendation proposing any or all of the reforms described above. (3) Issue a report of the Commission's findings, without recommending any legislation. These alternatives are discussed below.

Distribute Tentative Recommendation

As is our usual practice, the Commission could distribute a tentative recommendation setting out proposed legislation and explaining the purpose of the recommended changes. If the Commission decides to do so, **the staff recommends that it include the following:**

(1) A definition of "pilot program," along the lines proposed in the Request for Public Comment. It may also be appropriate to add language establishing a presumption of the correctness of the director's certification that a program is a pilot program. The staff would also consider any suggestions from the Department of Corrections for limiting ambiguity in the definition.

(2) Language clarifying that the pilot program exemption and the special emergency rulemaking procedures apply to the amendment and repeal of a regulation, as well as the adoption of a regulation.

(3) Language implementing the 4-tier scheme for adopting regulations of increasing urgency. Before adopting an emergency regulation on the basis of operational necessity, the Department of Corrections would provide 30 days advance notice and hold a public hearing. The Department of Corrections should be required to certify that it has read and considered any comments received regarding an emergency regulation, but should not be required to summarize those comments in a final statement of reasons if it later adopts the emergency regulation on a permanent basis.

(4) Language requiring that the certification that operational needs of the department require use of the emergency rulemaking procedure include a statement of the facts and rationale underlying the certification.

Issue Final Recommendation

The Request for Public Comment served an information gathering purpose similar to that of a tentative recommendation and was distributed to a broader group of people and organizations than would normally receive a tentative recommendation on administrative rulemaking. Because of this, the Commission could conceivably skip distribution of a tentative recommendation process and instead issue a final recommendation. **However, the staff feels that this would be premature.** We may have enough information now to make a tentative recommendation, but the comments we've received to date have been on miscellaneous proposed reforms, not an integrated legislative proposal. Before the Commission makes a final recommendation on the matter, it probably would be wise to solicit comment on the recommended legislation as a whole.

Issue Report of Commission's Findings

Our study of Section 5058 has provided a forum for the exploration of the various criticisms of that section and its application. The issues have been aired and various possible improvements to the statute considered and refined. If the

Commission feels that it is not in a position to make any specific recommendations regarding reform of Section 5058, it could instead issue a report of its findings. The report could serve as a resource to Senator Polanco and his Committee in considering how to address their concerns about Section 5058. In particular, the 4-tier approach described in this memorandum may present a compromise position that would address the concerns raised by Senator Polanco and others without imposing too great an impediment to the operations of the Department of Corrections.

Respectfully submitted,

Brian Hebert
Staff Counsel

Exhibit

Penal Code § 5058. Administration of prisons and parole

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. 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.

(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, of the State Administrative Manual dated July 1986.

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

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

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

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

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

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

The regulations shall become effective immediately upon filing with the Secretary of State and shall lapse by operation of law two years after the date of the director's certification unless formally 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.

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

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

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

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

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

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

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

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

(3) This subdivision shall apply only to the adoption and one readoption of any emergency regulation.

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

STATE OF CALIFORNIA--YOUTH AND ADULT CORRECTIONAL AGENCY GRAY DAVIS, *Governor*

DEPARTMENT OF CORRECTIONS
1515 S Street, 95814
P.O. Box 942883
Sacramento, CA 94283-0001

December 13, 1999

Mr. Brian Hebert
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Mr. Hebert:

Thank you for the opportunity to comment during the Law Revision Commission's consideration of Penal Code Section 5058(e) (Operational Necessity) and Penal Code Section 5058(d) (Pilot Programs).

Under Penal Code Section 5058(e), the California Department of Corrections (Department) is authorized to implement regulations on an emergency basis after approval by the Office of Administrative Law (OAL) without a showing of an emergency. Instead, the law permits the Director to certify that the *operational needs* of the Department require adoption of the regulations on an emergency basis. The Legislature, in enacting this provision, authorized the Department "to expedite the exercise of its power to implement regulations as its unique operational circumstances require." (Penal Code Section 5058(e).) This Department is unique in that 33 prisons with roughly 162,000 inmates are operated 24 hours per day, 7 days per week. In addition, there are upwards of 90 parole offices out of which roughly 158,000 parolees are monitored. Managing and monitoring large numbers of persons, many of whom are dangerous, in such a dynamic system often requires prompt action. The operational necessity provision accommodates this need. Furthermore, historically each prison was allowed a relatively high degree of autonomy operationally; more recently there has been movement towards statewide consistency. Because the operational necessity provision allows a more rapid response to system-wide issues or problems, the development and implementation of numerous inconsistent policies is minimized.

It is important to note that regulations adopted under the operational necessity provision are temporary. OAL approves them for a 160-day period, during which the Department must go through the public comment/response process required for OAL's permanent approval of regulations filed on an operational necessity basis. Inasmuch as a general purpose of the public comment process is to consider input from those persons affected by regulations, for some regulations, the Department receives upwards of 1,200 letters to which responses are made. As far as the frequency of accommodation of public comments, that is, making changes to

regulations, there is no real difference between regulations filed on an emergency basis and regulations filed on a regular basis. If accommodation of a comment is warranted, the comment is accommodated. As an example, the Department recently accommodated a comment of the Joint Committee on Prison Construction and Operations on its DNA regulations, filed on an operational necessity basis. As far as notice to persons affected by the regulations, in addition to posting at the institutions and parole offices, the Department mails the regulations and initial statement of reasons to every person who has requested notification -- approximately 6,600 copies. The fact that some people do not like the substance of a regulation does not lead to the conclusion that the process is defective. The process works.

Of the 32 regulatory filings (excluding final regulations packages) for 1997, 1998, and 1999, 21 (or 66 percent) have been filed on the basis of operational necessity. These figures demonstrate that the operational needs of the Department do not consistently require emergency implementation of regulations. Finally, the fact that the internal development of a regulation may take a period of time is not a reason to delay implementation of a necessary regulation in cases where the unique operational needs of the Department require rapid implementation.

Sincerely,

C. A. TERHUNE
Director
Department of Corrections

I.

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, ROOM D-1
PALO ALTO, CA. 94303-4739

Law Revision Commission
RECEIVED
FEB 14 2000
File:

JEFF AMARAL #J-78739
POST OFFICE BOX 600
TRACY, CA. 95378-0600

FEB. 9. 42K.

RE: RULEMAKING UNDER P.C. 5058

DEAR LAW REVISION COMMISSION:

I AM WRITING TO SUBMIT MY COMMENTS CONCERNING RULEMAKING UNDER PENAL CODE SEC. 5058, AS AN INMATE OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS I HAVE FIRST HAND KNOWLEDGE OF HOW P.C. 5058 IS MISUSED BY THE DEPARTMENT. A VERY GOOD EXAMPLE IS POINTED OUT IN THE REGULATION RELATING TO "PILOT PROGRAMS" THE DEPARTMENT USES THIS TERM FOR ALMOST ANY REGULATION THEY WISH TO ENFORCE. I FEEL IT WOULD BE VERY HELPFUL TO DEFINE THE TERM "PILOT PROGRAM" THE PROPOSED DEFINITION IS AN EXCELLANT IDEA AND SHOULD BECOME LAW.

II.

"EMERGENCY REGULATIONS"

AS AN INMATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS I HAVE PERSONALLY WITNESSED THE MISUSE AND ABUSE OF THE DEPARTMENTS POWER TO ENACT "EMERGENCY REGULATIONS" I AGREE WITH SENATOR RICHARD G. POLANCO WHEN HE SAYS THE DEPARTMENT OVERUSES THE EMERGENCY RULEMAKING PROCEDURE. CERTENLY SOMETHING NEEDS TO BE DONE TO STOP THE WIDESPREAD ABUSE OF POWER THE DEPARTMENT OF CORRECTIONS HAS, I FEEL THE LEGISLATURE SHOULD MINIMIZE THE POWER EXERCISED BY CDC.

THE LAW REVISION COMMISSION HAS SUGGESTED SOME POSSIBLE LEGISLATIVE ALTERNATIVES, I AGREE WITH THE FIRST (1) LIMITATION, BY MORE CLEARLY LIMITING THE CIRCUMSTANCES IN WHICH THE PROCEDURE IS USED. THIS IS THE MOST SENSIBLE SOLUTION BECAUSE IT WOULD REQUIRE THE DEPARTMENT TO LIMIT ITS USE OF P.C. 5058.

I AM ALSO IN AGREEMENT WITH #2 "REQUIRE PUBLIC NOTICE AND COMMENT" I FEEL THE LAW REVISIONS PROPOSED AMENDMENTS TO P.C. 5058 ARE GOOD FOR ALL PARTIES INVOLVED AND SHOULD BECOME LAW.

Respectfully,
J. Amaral

7

California Legislature

JOINT LEGISLATIVE COMMITTEE ON PRISON CONSTRUCTION AND OPERATIONS

SENATOR RICHARD G. POLANCO
CHAIRMAN

STATE CAPITOL
ROOM 400
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GWYNNAE BYRD
PRINCIPAL CONSULTANT

February 16, 2000

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: #N-304 – Request for Public Comment
Rulemaking under Penal Code Section 5058

Dear Commissioners:

I submit the following comments on the suggested changes to Penal Code Section 5058, as Chairman of the Joint Legislative Committee on Prison Construction and Operations:

1) It would be helpful to define the term "pilot project." Frequently, when the Legislature enacts such a program, that term is specifically used in the enacting legislation. In those cases, the intention is clear. However, when programs are created that do not specifically use that term, there is too much room for interpretation. Thus, a consistent definition would provide clarity and uniformity.

2) I agree with the proposed amendment to Section 5058 (d)(1), which would add a new (D) to limit the re-adoption of regulations that have lapsed by operation of law. (p.2 of Request for Public Comment; hereafter "Request")

- continued -

3) On page 4 of the Request, the Department of Corrections is quoted regarding the unique circumstances that prompt the necessity to use an emergency rulemaking process. The "unique circumstances" described do not correlate to most of the "emergency" regulations that have been promulgated under Penal Code Section 5058. For example, regulations that require all inmates to comply with specific grooming standards were promulgated under this section.

While the California Law Revision Commission Department's reasons for wanting inmates to be properly groomed may be reasonable, the need to enact such regulations under this code section is not related to any emergency or security needs, nor to any other reasons quoted on page 4 of the Request. I am not familiar with any regulation that has been adopted that was, in fact, a true emergency in the Department of Corrections. Thus, I would reiterate my support of the bill I introduced 2 years ago – SB 1450 (1998), or any variation thereof.

I do not support the first suggested amendment on page 5 of the Request, which would amend Section 5058(e)(2) to narrow the circumstances under which the procedure may be used. Given the history of the Department's consistent and unwarranted expansion of authorizing language, insertion of such narrowing language is ripe for similar unwarranted expansion. A more public process wherein the Department has to justify use of this code section prior to implementation of an emergency regulation is appropriate.

In that regard, the 4-tiered approach (suggested on p. 6 of the Request) may best resolve this problem – it balances the Department's need for enacting such regulations with the public's right to be notified of such changes. In addition, it eliminates the confusion that currently exists between when a regulation is an operational necessity and when it is a true emergency. However, the language proposed on page 7 of the Request is not sufficient to accomplish this result.

- continued -

Currently, all that is required is a "written statement" by the Director (see Sec. 5058(e)(2). The proposed language on page 7 of the Request does not impose any more stringent justification requirements. I would strongly suggest that any regulation that is proposed to be implemented outside the scope of the regular rulemaking process be justified with facts and rationale, in order to promote a more responsible use of this power.

Respectfully submitted,

RICHARD G. POLANCO
22nd Senatorial District

RGP:glb:dn

PRISON LAW OFFICE
General Delivery, San Quentin, California 94964-0001
Telephone: (415) 457-9144 • Fax (415) 457-9151

February 23, 2000

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303- 4739

Dear Law Revision Commission:

Thank you for the opportunity to comment on Rulemaking Under Penal Code Section 5058, and the proposed legislative changes. Enclosed please find our comments and suggestions.

Sincerely,

Keith Wattley

Defining "Pilot Program"

The Law Revision Commission requested comment on whether it would be helpful to define the term "pilot program" in Penal Code section 5058, in order to clarify the types of programs that are exempt from that section's provisions. You offered for consideration the following definition of the term: "'Pilot program' means a program implemented on a temporary and limited basis in order to test and evaluate the effectiveness of the program, develop new techniques, or gather information." Request for Public Comment, Page 2.

In our opinion, this definition would provide better guidance for the Department of Corrections in establishing programs of limited duration without following the formal rulemaking procedures outlined in Government Code section 11340, et. seq. (Administrative Procedure Act). It is our position that the proposed definition should be added to Penal Code section 5058, subdivision (d) (1).

Readoption of a Pilot Program Regulation

The Commission noted that under Penal Code section 5058, subdivision (d) (1), a pilot program lapses by operation of law two years after adoption. Request for Public Comment, Page 2. The Commission asked whether there were any instances in which the California Department of Corrections (CDC) has extended the duration of a pilot program beyond its initial two years without doing so through the regular rulemaking procedure required by the Administrative Procedure Act.

We are unaware of any instance in which CDC has readopted a pilot program regulation following the lapse of that regulation by operation of law after two years. A review of the pilot program regulations adopted by the CDC in the last few years failed to reveal any such readoptions.

While the CDC has not, at least in the recent past, readopted a pilot program without following regular rulemaking procedures, there is no guarantee that this will not happen in the future. In order to eliminate the possibility that the CDC could circumvent the regular procedure by enacting another, identical, pilot program regulation after lapse by operation of law, the Commission proposes adding a subdivision (D) to section 5058 (d) (1), which would provide: "The regulation is not the same in substance as a regulation previously adopted under this paragraph that has lapsed by operation of law." Request for Public Opinion, Page 2. . We agree that this addition would prevent such action.

Proper Scope of Emergency Rulemaking

The Commission requested comments on the CDC's use of the emergency rulemaking procedure in Penal Code section 5058 (e). As the Commission noted in its Request for Public Comment, "the Department of Corrections uses the emergency rulemaking procedure to conduct about two-thirds of its rulemaking activity." Request for Public Comment, Page 4. A brief review of some of the provisions in Title 15, California Code of Regulations, Division 3, Chapter One, confirms that the CDC has used this procedure at a very high rate.

Among the rules in the first three subchapters of Chapter One, the CDC used the emergency procedure 193 times to either enact a new regulation or amend a regulation. This includes 48 instances in which the new or amended regulation was re-filed as an emergency regulation after its initial period of enactment ended. While most of these re-filings resulted from expiration of the statutory time period for filing a Certificate of Compliance with the Office of Administrative Law (OAL), 18 re-filings were of regulations that had been disapproved by the OAL (reason unknown). Expanding this review to include the five remaining subchapters of Chapter One would yield even more examples of the overuse of this procedure.

As the Revision Commission wrote in the Request for Public Comment, Penal Code section 5058 authorizes broader than ordinary use of the emergency rulemaking procedure by the Department of Corrections. Request for Public Comment, Page 4. Under section 5058, the CDC need only justify use of the emergency procedures by claiming an operational necessity, rather than an actual emergency. The CDC has abused even that broader authority in adopting such numerous and varied regulations. The CDC would be hard-pressed to explain how the adoption of some of these regulations on an "emergency" basis is justified by operational necessity.

For example, on February 18, 1998, Title 15, California Code of Regulations, section 3097 ("Inmate Restitution Fine and Direct Order Collections") was amended as an emergency regulation. The regulation was amended to, among other things, allow the CDC to deduct 10 percent from all prisoner wages and trust account deposits, to be applied to administrative costs. It is unclear why a rule that deprives a prisoner of an important property interest, and which had not been found necessary for years, needed to be implemented as an emergency regulation. Such a fundamental right should have been protected by at least a notice requirement and public comment period.

In another action in February, 1998, the CDC used emergency procedures to amend Title 15, California Code of Regulations, sections 3044, 3220, 3220.1 and 3220.2. This amendment eliminated inmate weight lifting programs. In justifying its use of the emergency procedure, the CDC stated "these provisions were established to interpret and make specific Penal Code Section 5010." (CDC Notice of Change to Director's Rules, Number 97/17, January 2, 1998, Initial Statement of Reasons, Page 1.) However, the emergency nature of this action is dubious, considering that Penal Code section 5010 was made effective November 30, 1994, more than three years and two months before the emergency regulation. The CDC did not appear to be in a

hurry to interpret the law, so the regular rulemaking procedure should have been used.

These regulations are a small subset of the unjustified emergency rule changes made by the CDC .[1] Because of the continued overuse and abuse of the emergency rulemaking procedure, we recommend that Penal Code section 5058 (e) be amended in order to reign in the use of this procedure by providing greater restrictions on its use.

Possible Legislative Alternatives

The Commission proposed the following alternatives to the current emergency rulemaking provisions:

1. limiting the scope of emergency rulemaking so that it covers only instances where regulations must be adopted on an emergency basis in order to address an unanticipated change in circumstances, and

2. requiring that the need for public notice and comment be determined by applying a four-tier scheme. The four proposed tiers are:

    a) **No Urgency**, in which case the regular rulemaking procedures would be followed and there would be a delay of from three months to a year before the regulation becomes effective;

    b) **Operational Necessity**, in which the current emergency rulemaking procedure would be followed, in addition to a shortened advance public notice and comment period, resulting in a delay of 30-40 days before the regulation becomes effective;

    c) **Emergency**, in which the current emergency rulemaking procedure would be followed, resulting in a delay of no more than 10 days before the regulation becomes effective; and

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[1] Other questionable emergency regulation adoptions or amendments include: section 3000 (Definitions), amended 19 times; section 3024 (Business Dealings by Inmates), amended twice, including one re-filing; section 3043.3 (Loss of Behavior or Worktime Credit), amended five times, including one re-filing; section 3043.5 (Credit Earning Special Assignments), amended seven times, including three re-filings (two after OAL disapproval); section 3050 (Regular Meals), amended once; section 3063 (Tattoos), amended three times, including two re-filings; section 3104 (Inmate Handicraft Sales), amended twice, including one re-filing; section 3109 (Business Dealings), amended twice, including one re-filing; section 3182 (Minimum Visiting Days and Hours), amended three times, including two re-filings (one after OAL disapproval); and section 3220.4 (Movies/Videos for Inmate Viewing).

d) **Imminent Danger**, in which the regulation becomes effective immediately, but lapses by operation of law 15 calendar days after the date of the written determination of imminent danger unless an emergency regulation is filed.[2]

We agree that it is necessary to limit the scope of the emergency rulemaking procedure to cases in which a regulation is urgently required to address an unanticipated change in circumstances. Such a limitation would prevent the CDC from avoiding the notice and public comment period before implementing changes not truly based on operational necessity, and it would ensure that important interests are afforded the greatest protection from arbitrary CDC action. The requirement of an unanticipated change in circumstances furthers the goal of providing fast-track procedures only in cases of emergency.

Another effect of limiting the scope of the emergency procedure will be that such a limitation addresses the current situation that arises when the CDC is found to have been implementing "underground rules," such as many of those found in the Department [of Corrections] Operations Manual (DOM). These are rules that were not adopted pursuant to the Administrative Procedure Act. Currently, if a court order is obtained to block enforcement of an underground rule, the CDC immediately adopts the same rule as an emergency rule under Penal Code section 5058, thus blunting the force of the court order. If the scope of the emergency procedure is limited, such unseemly tactics will not be permitted.

The four-tier scheme adequately protects both the prisoners' and the public's rights by ensuring that only in the most narrow circumstances will the notice and public comment period be avoided prior to CDC adopting a regulation; those instances in which there is an imminent danger. Such a scheme takes into consideration the public interest in participating in the rulemaking process as it relates to prisons, while continuing to acknowledge the CDC's unique concerns in maintaining and operating those institutions.

The California Law Revision Commission should be commended for the effort and thoughtfulness that obviously went into addressing these very important issues. The Commission's dedication to the fair administration of justice is very much appreciated. Thank you again for the opportunity to comment on these proposed legislative changes.

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[2] See Penal Code section 5058 (d) (2).

DEPARTMENT OF CORRECTIONS
1515 S Street, 95814
P.O. Box 942883
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FEB 2 8 2000

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Via: Facsimile (650) 494-1827

Re: Request for Public Comment, Rulemaking Under Penal Code Section 5058
Legal Log No. 99-2013A

Dear Commission Members:

Thank you for the opportunity to respond to the California Law Revision Commission's Request for Public Comment on Rulemaking Under Penal Code Section 5058.

Pilot Programs

The California Law Revision Commission ("Commission") has asked for public comment on two issues related to pilot programs: first, whether a statutory definition of the term pilot program should be enacted, and second, whether a statutory limitation precluding the re-adoption of a pilot program should be enacted.

The proposed definition is:

> "Pilot program" means a program implemented on a temporary and limited basis in order to test and evaluate the effectiveness of the program, develop new techniques, or gather information. (Request for Public Comment, p. 2, lns. 1-3).

The California Department of Corrections (Department) does not object in principle to the enactment of a definition for this term. The Department does note, however, that certain ambiguities in this definition may lead to costly, unnecessary litigation.

In this latter respect, an argument can be made under both the proposed definition and the current statute that the Department is unable to amend pilot program regulations. Such a limitation could hinder the Department in its ability to settle major litigation cooperatively with opposing parties. In class action lawsuits, the courts typically give the parties an opportunity to attempt settlement, and effectively take the case off of the court's calendar for a period of time. The resulting settlement negotiations involve the development of programs by the Department with significant input from plaintiffs' counsel. Pilot program regulations can be used for

programs developed in response to these class action lawsuits. During the implementation of the trial program, visits to many of the 33 prisons are made to evaluate the program's effectiveness, followed by "meet and confer" conferences between plaintiffs' counsel and the Department. As a result of these conferences, changes are negotiated, developed, refined, and implemented at the prisons. If the changes are significant, the operation of the amended program may conflict with the pilot program regulations; therefore, absent a court order[1] that the various versions of the developing program be implemented, or absent clear statutory authority for amendments, the Department could arguably be operating in violation of its pilot program regulations. Therefore, it is the Department's suggestion that clear statutory authority be enacted to permit the amendment of pilot program regulations developed in response to lawsuits. The Department does not oppose retaining the overall time limit of two years.

The second suggestion related to pilot programs in the Request For Public Comment ("Request") is a limitation precluding the readoption of lapsed pilot program regulations. The proposed limitation for public comment is underlined below:

> 5058(d) The following regulations are exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code under the conditions specified: (A) - (C)... (D) The regulation is not the same in substance as a regulation previously adopted under this paragraph that has lapsed by operation of law.

Unfortunately, the Department's mission and operation are not supported by every member of the public, and the Department sometimes finds itself facing examination in the litigation arena. To reduce the Department's exposure to unnecessary and useless litigation, statutory enactments should be necessary to remedy a potential or actual problem and should be unambiguous. This suggested limitation seems unnecessary since the Department has not readopted such lapsed regulations. Indeed, the Request notes "The Commission is not aware of any instance where the Department has extended the duration of a pilot program regulation this way...." (Request, p. 2, lns 10-11.) Furthermore, if the Commission decides to propose this limitation, the vague phrase "same in substance" should be revised.

Operational Necessity Regulations

The Commission has two suggestions for public comment related to regulations filed by the Department on an emergency basis based upon operational necessity; first, that the Department's use of operational necessity be limited to regulations addressing "an unanticipated change in circumstances," and second, that an additional public notice and comment be accommodated prior to implementation of these regulations. Penal Code section 5058(e) states, in pertinent part:

[1] It is the Department's position that compliance with a federal court order to implement a program cannot be delayed pending adoption of regulations which otherwise may be required by Government Code section 11342(g).

> It is the intent of the Legislature, in authorizing the deviations in this subdivision from the requirements and procedures of Chapter 3.5 (commencing with section 11340) of part 1 of Division 3 of Title 2 of the Government Code, to authorize the Department to expedite the exercise of its power to implement the regulations *as its unique operational circumstances require*. (Emphasis added.)

The Department has previously described its unique operational circumstances[2] to the Commission. The proposed change effectively redefines the Department's unique operational circumstances to only responding to unanticipated changes in circumstances. The Department could not operate effectively with the suggested limitation, since the current operational necessity exception can be used for more than unanticipated changes in circumstances. For example, the Department may choose to exercise its discretion to change its operations even when the underlying facts or circumstances have not changed. In these instances, the Department should be able to choose whether or not more rapid implementation of the new and improved solution is preferable, which it may be, primarily because of safety and security concerns. As another example, the Department may identify a problem for which the development of a solution takes some time. An argument could be made that the proposed limitation would preclude the rapid implementation of such a solution, since the Department had known about the problem for a while.

It is important to remember that the Department does not avoid the public notice and comment process when it files a regulation on an operational necessity basis. The public still has notice and the opportunity to comment. The frequency of the Department's accommodation of comments in regular rulemaking filings is no greater than the frequency of the Department's accommodation of comments in its operational necessity filings.

It is important to balance the benefit and the harm to the public of forcing the Department to wait longer to implement some of its regulations, and question whether the proposed solution reflects that balance. The benefit of earlier public notice and comment prior to implementation of regulations is a system that theoretically accommodates more public comments, although as stated above, the Department's accommodation of comments is no different in its regular rulemaking filings than in its operational necessity filings. The harm to the public of waiting varies, depending on the problem being addressed; some problems in prisons should not be allowed to fester.

[2] In a letter dated December 13, 1999, to the Law Revision Commission, I stated: "[The Department of Corrections] is unique in that 33 prisons with roughly 162,000 inmates are operated 24 hours per day, 7 days per week. In addition, there are upwards of 90 parole offices out of which roughly 158,000 parolees are monitored. Managing and monitoring large numbers of persons, many of whom are dangerous, in such a dynamic system often requires prompt action. The operational necessity provision accommodates this need. Furthermore, historically each prison was allowed a relatively high degree of autonomy operationally; more recently there has been movement towards statewide consistency. Because the operational necessity provision allows a more rapid response to system-wide issues or problems, the development and implementation of inconsistent policies is minimized.... Finally, the fact that the internal development of a regulation may take a period of time is not a reason to delay implementation of a necessary regulation in cases where the unique operational needs of the Department require rapid implementation."

Finally, this proposed limitation is likely to generate litigation over whether a proposed regulation filed on an operational necessity basis meets the standard of addressing "an unanticipated change circumstance" since this phrase is subject to a variety of interpretations. Such litigation may ostensibly be over the process, but in reality over substantive policy with which the plaintiff disagrees.

The proposal of advance public notice and comment may result in duplication of staff efforts and expense. It is not clear whether the proposal obligates the Department to summarize and respond to two sets of comments. Government Code Section 11346.9(a)(3) obligates agencies to include in their final statement of reasons:

> A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change....

The Department receives comments from thousands of people for some of its regulatory proposals; for these projects, months are expended summarizing and responding to comments. If summary and explanation were to be required for the comments received during the proposed 30- to 40-day advance notice period, considerable staff efforts would be required. If two notices would be required, I think it prudent to consider the expense of approximately $2,000 in costs alone for some notices.

Again, thank you for the opportunity for the Department to participate in this process.

Sincerely,

C. A. TERHUNE
Director
Department of Corrections

STATE OF CALIFORNIA—YOUTH AND ADULT CORRECTIONAL AGENCY PETE WILSON, Governor

DEPARTMENT OF CORRECTIONS
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March 28, 1994

The Honorable Bob Epple, Chairman
Assembly Committee on Public Safety
1021 O Street, Suite A-198
Sacramento, CA 95814

Attn: Dick Iglehart, Chief Counsel

Dear Mr. Epple:

This letter is to ask your support for AB 3563 (Aguiar), relating to specific exemptions to the Administrative Procedures Act (APA) for the California Department of Corrections (CDC).

This measure would, very simply, establish a regulation adoption process for CDC which will reduce the time needed to place new regulations into effect for emergency situations or urgent policy changes, or to initiate temporary or pilot programs, while still providing for public input, including inmates and parolees, into the process. At the present time, the APA does not provide for rapid changes in non-emergency regulations, nor for pilot or temporary programs of any kind.

Since CDC's needs to implement regulations for temporary or pilot programs and urgent policy changes generally do not meet the APA definition of emergency regulations, its discretion to operate the prison and parolee systems and act in advance to diffuse potentially dangerous situations is severely hampered. This legislation will provide CDC with the following:

- CDC will be able to immediately react to emergency situations affecting the public health or safety, thereby protecting the lives of inmates and staff.
- CDC will have an enhanced ability to quickly implement policies based upon urgent, though not emergency, operational needs.
- CDC will be able to initiate pilot projects in a fraction of the time that is presently required.

- CDC's responsibility to issue notices of its regulatory actions to the public will be more clearly specified.
- CDC will be explicitly exempted from APA requirement regarding confidential and security-related procedures, local rules, and rules for short-term (up to six month) placement criteria when departmental correctional facilities are activated or deactivated.
- CDC will be authorized to adopt regulations relating to the parole of specified indeterminately sentenced inmates.

CDC worked for over one year with the Office of Administrative Law (OAL) to write legislation that would satisfy OAL's concerns while at the same time providing CDC with the necessary flexibility to better manage our prison and parolee population.

Thank you for your consideration of our position. If you have any questions, please call me at 445-4737 or Tony Loftin, Regulation Management, at 327-4276.

Sincerely,

MICHAEL B. NEAL
Assistant Director (A)
Legislative Liaison

cc: Assemblyman Aguiar
Natasha Fooman, Assembly Republican Caucus
Geoff Long, Assembly Ways and Means
Ed Berends, Assembly Minority Ways and Means
Youth and Adult Correctional Agency