

**STATE OF CALIFORNIA**  
**OFFICE OF ADMINISTRATIVE LAW**

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**2007 OAL DETERMINATION No. 8**  
**(OAL FILE # CTU 07-0525-01)**

*John Bowen*  
DEPARTMENT OF CORRECTIONS  
AND REHABILITATION  
SAN QUENTIN STATE PRISON

**REQUESTED BY:** JIMMY VAN PELT

**AGENCY:** DEPARTMENT OF CORRECTIONS AND REHABILITATION AND SAN  
QUENTIN STATE PRISON

**CONCERNING:** ATTACHMENT 1 TO OPERATIONAL PROCEDURE IP #215 ISSUED  
BY SAN QUENTIN STATE PRISON

**DETERMINATION ISSUED PURSUANT TO GOVERNMENT CODE  
SECTION 11340.5**

**SCOPE OF REVIEW**

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule is an “underground regulation” as defined in Government Code section 11340.5<sup>1</sup> and section 250 of Title 1 of the California Code of Regulations, and must, therefore be adopted pursuant to the Administrative Procedure Act (APA). OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

**ISSUE**

The sole issue for OAL is whether Attachment 1, entitled Condemned Inmate Allowable Property, to Operational Procedure IP #215, issued by San Quentin State Prison constitutes an underground regulation pursuant to section 11340.5.

**DETERMINATION**

OAL determines that Attachment 1 to Operational Procedure IP #215 meets the definition of a regulation in section 11342.600 and would normally be required to be adopted as a regulation pursuant to the APA. The Attachment, however, pursuant to Penal Code

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<sup>1</sup> Unless specified otherwise code references are to the California Government Code.

section 5058, falls under an express exemption from the requirements of the APA and is not, therefore, an underground regulation.

### **FACTUAL BACKGROUND**

In May 2007, the petitioner submitted a petition to OAL alleging that the California Department of Corrections and Rehabilitation (CDCR) and San Quentin State Prison (SQSP) issued, used, enforced, or attempted to enforce an underground regulation as defined in section 250 of Title 1 of the California Code of Regulations, in violation of Government Code section 11340.5. The alleged underground regulation is contained in Attachment 1 to Operational Procedure IP #215,<sup>2</sup> issued by San Quentin State Prison.

Attachment 1 to IP #215, entitled “Condemned Inmate Allowable Property” (“Attachment 1”) is dated October 2, 2006. It is signed by the Facility Captain of Specialized Housing, the Associate Warden of Specialized Housing and the Warden of SQSP. It is a matrix which identifies all allowable property for a condemned inmate.

### **PETITIONERS’ ARGUMENT**

The petitioner argues that Attachment 1 is a regulation within the meaning of Government Code section 11342.600. He contends that Attachment 1 does not fall under any express statutory exemption from the APA, and must, therefore, be adopted as a regulation pursuant to the APA.

### **AGENCY RESPONSE**

CDCR did not submit a response to this petition.

### **UNDERGROUND REGULATIONS**

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA. It states, in part:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

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<sup>2</sup> The petition contained only a copy of Attachment 1 and did not contain a copy of IP #215, therefore, this determination is limited to an examination of Attachment 1.

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation. “Underground regulation” is defined in Cal. Code Regs., title 1, section 250 as follows:

“Underground regulation” means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

OAL is empowered to issue its determination as to whether or not an agency employs an underground regulation pursuant to section 11340.5 subdivision (b). An OAL determination that an agency is using an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to “due deference”<sup>3</sup> in any subsequent litigation of the issue.

### ANALYSIS

To determine that an agency is in violation of section 11340.5, it must be demonstrated that the alleged underground regulation actually is a regulation as defined by section 11342.600, that it has not been adopted pursuant to the APA, and that it is not subject to an express statutory exemption from the APA.

A regulation is defined in section 11342.600 as:

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

In *Tidewater Marine Western Inc. v. Victoria Bradshaw*, (1996)14 Cal.4<sup>th</sup> 557, 571, the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code § 11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code § 11342 subd. (g).)

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<sup>3</sup> *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244

The first element of a regulation is whether the rule applies generally. For an agency rule to be a “standard of general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order.<sup>4</sup>

Attachment 1, by its own terms, applies to all condemned prisoners at SQSP. This is a “class, kind or order.” The first element required by *Tidewater* is therefore met.

The second element is that the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure. Pursuant to Penal Code section 5003, CDCR

- ...has jurisdiction over the following prisons and institutions:
- (a) The California State Prison at San Quentin.
  - (b) ...

Attachment 1 was issued to implement, interpret, or make specific the Penal Code which is enforced or administered by CDCR and SQSP. The second element in *Tidewater* is therefore met.

The third step in the analysis is to determine whether an exemption from the requirements of the APA applies to the challenged rule. Pursuant to section 11346, the procedures established in the APA “shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.” A rule which meets the elements established in *Tidewater* but which is expressly exempt from the requirements of the APA is not an underground regulation.

Penal Code section 5058 establishes exemptions expressly for CDCR (emphasis added):

- (c) The following are deemed not to be "regulations" as defined in Section 11342.600 of the Government Code:
  - (1) Rules issued by the director applying solely to a particular prison or other correctional facility, provided...

The first of these exemptions is called the “local rule” exemption. It applies only when a rule is established for a single correctional institution. Attachment 1 was issued by SQSP personnel, and specifically applies only to condemned inmates at SQSP.

In *In re Garcia* (67 Cal.App.4<sup>th</sup> 841), the court discussed the nature of a “local rule”

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<sup>4</sup> *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556; see *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (a standard of general application applies to all members of any open class.)

dealing with correspondence between inmates at Richard J. Donovan Correctional Facility (Donovan):

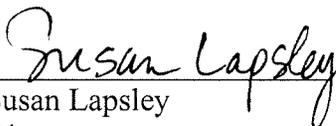
The Donovan inter-institutional correspondence policy applies solely to correspondence entering or leaving Donovan. It applies to Donovan inmates in all instances. Inmates housed at other institutions are controlled by that institution's correspondence policies. Inmates housed at other facilities are affected by Donovan rules only if they seek to correspond with Donovan inmates. However, their ability to correspond with any other individual is unaffected.

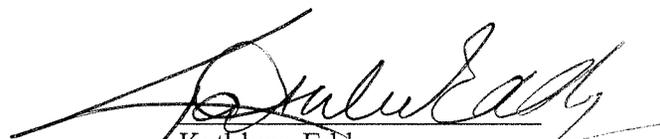
Similarly, Attachment 1 applies only to condemned inmates at SQSP. Similar inmates housed at other institutions are controlled by that other institution's property policies. Therefore, Attachment 1 is a "local rule" and is exempt from compliance with the APA.

### CONCLUSION

For these reasons, OAL concludes that Attachment 1 issued by San Quentin State Prison is a local rule and is not, therefore, an underground regulation.

Date: August 8, 2007

  
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