

**OFFICE OF ADMINISTRATIVE LAW**

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

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2009 SEP -8 PM 2:07



**SUSAN LAPSLEY**  
Director

*Debra Bowen*  
DEBRA BOWEN  
SECRETARY OF STATE

Date: September 8, 2009

To: Cory Hoch

From: Chapter Two Compliance Unit

Subject: **2009 OAL DETERMINATION NO. 20 (S)**  
**(CTU2009-0708-01)**  
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Sexual Violent Predator Guidelines issued by the Los Angeles County Sheriff's Department

On July 8, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether "141 'F' Pod Sexual Violent Predator Guidelines," (Guidelines) issued by the Los Angeles County Sheriff's Department (LASD), constitutes an underground regulation. You did not attach a copy of these guidelines, but you did attach copies of the "Sexual Violent Predators, Module 131, 'A' Pod Inmates Guidelines and the "Civil Commitments—Sexual Violent Predator Inmate Guidelines," both of which are also issued by the LASD. You allege in your petition that the Guidelines are "being illegally and/or unconstitutionally enforced." You also allege that the Guidelines "have not been properly promulgated in accordance with the Administrative Procedures Act."

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

California Code of Regulations, title 1, section 260 permits any interested person to submit a petition to OAL alleging that a state agency has issued, used, enforced, or attempted to enforce an underground regulation and seeking a determination from OAL pursuant to Section 11340.5 of the Government Code. Government Code section 11340.5 prohibits the following:

<sup>1</sup> Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

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

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 this chapter [the APA]. [Emphasis added.]

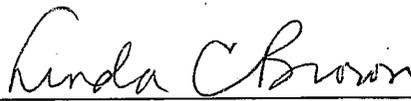
Government Code section 11342.600 defines "regulation" as:

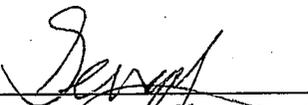
"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard *adopted by any state agency* to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.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

The APA applies only to state agencies. The Los Angeles County Sheriff's Department is not a state agency; therefore, its rules cannot be underground regulations pursuant to the APA.

For the reasons discussed above, we find that the rule challenged by your petition is not an underground regulation.<sup>2</sup>

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

  
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for SUSAN LAPSLEY  
Director

  
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George Shaw  
Staff Counsel

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<sup>2</sup>The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

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