

OFFICE OF ADMINISTRATIVE LAW

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ENDORSED - FILED
in the office of the Secretary of State
of the State of California



NOV 13 2017

2:13pm

DEBRA M. CORNEZ
Director

Date: November 13, 2017

To: Rennie Norelli

From: Chapter Two Compliance Unit

Subject: **2017 OAL DETERMINATION NO. 4 (S)**
(CTU2017-0911-02)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation, Section 3490(a) of Title 15 of the California Code of Regulations promulgated by the California Department of Corrections and Rehabilitation

On September 11, 2017, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether Section 3490(a) of Title 15 of the California Code of Regulations, which was promulgated by the California Department of Corrections and Rehabilitation (CDCR), constitutes an underground regulation. The challenged rule is attached hereto as Exhibit A.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,¹ which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA). Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment.

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250 (a):

¹ "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

"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. [Emphasis added.]

Section 3490(a), as part of a new subchapter 5.5 in Title 15, was duly adopted by CDCR pursuant to Penal Code section 5058.3. It was submitted to OAL by the Secretary of CDCR as an emergency by operational necessity (OAL file number 2017-0324-01EON). It was approved by OAL and filed with the Secretary of State on April 13, 2017, and effective on April 13, 2017. The emergency regulation was thereafter readopted as an emergency by operational necessity by the Secretary of CDCR. It was approved by OAL and filed with the Secretary of State on September 19, 2017, and was effective on September 21, 2017 (OAL file number 2017-0831-01EON). A Certificate of Compliance must be transmitted to OAL by December 20, 2017, or the emergency regulations will be repealed by operation of law on the following day.

Therefore, Section 3490(a) of Title 15 was duly adopted pursuant to the APA. A rule that was duly adopted by a state agency pursuant to the APA and filed with the Secretary of State does not constitute an underground regulation.²

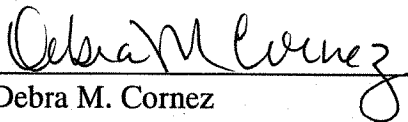
For the reasons discussed above, we find that the rule challenged by your petition is not an underground regulation.

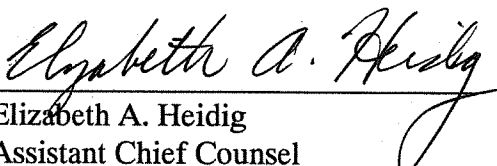
² The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

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

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

November 13, 2017


Debra M. Cornez
Director


Elizabeth A. Heidig
Assistant Chief Counsel

Original: Rennie Norelli
Copy: Scott Kernan, Secretary, CDCR
Timothy Lockwood, A.D., RPMB

Exhibit A

Chapter 1. Rules and Regulation of Adult Operations and Programs

New Subchapter 5.5. Title is adopted to read:

PAROLE CONSIDERATION.

New Article 1 is adopted to read:

Parole Consideration for Determinately-Sentenced Nonviolent Offenders.

New Section Title 3490. is adopted to read:

Definitions.

New Subsections 3490(a) through 3490(f) are adopted to read:

For the purposes of this article, the following definitions shall apply:

(a) A "Nonviolent Offender" is an inmate who is not any of the following:

(1) Condemned, incarcerated for a term of life without the possibility of parole, or incarcerated for a term of life with the possibility of parole;

(2) Serving a term of incarceration for a "violent felony;" or

(3) Convicted of a sexual offense that requires registration as a sex offender under Penal Code section 290.

(b) A "Nonviolent Offender" includes the following:

(1) An inmate who has completed a determinate term of incarceration for a violent felony and is currently serving a concurrent term for a nonviolent felony offense;

(2) An inmate who has completed a determinate or indeterminate term of incarceration and is currently serving a determinate term for a nonviolent in-prison offense.

(c) "Violent Felony" is a crime or enhancement as defined in Penal Code section 667.5, subdivision (c).

(d) "Primary Offense" means the single crime for which any sentencing court imposed the longest term of imprisonment, excluding all enhancements, alternative sentences, and consecutive sentences.

(e) "Full Term" means the actual number of years imposed by the sentencing court for the inmate's primary offense, not including any sentencing credits.

(f) A "Nonviolent Parole Eligible Date" is the date on which an inmate who qualifies as a nonviolent offender has served the full term of his or her primary offense, less pre-sentence credits applied by the sentencing court for time served under Penal Code section 2900.5 and any time spent in custody between sentencing and the date the inmate is received by the department.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b); and Sections 5058 and 1170.1, subdivision (c), Penal Code. Reference: Cal. Const., art. 1, sec. 32(a); *In re Reeves* (2005) 35 Cal.4th 765; *In re Tate* (2006) 135 Cal.App.4th 756; *Thompson v. Dept. of Corr.* (2001) 25 Cal.4th 117.

New Section 3491. Title is adopted to read:

Initial Eligibility Determination.

New Subsections 3491(a) through 3491(e) are adopted to read:

(a) By June 1, 2017, the department shall begin the initial eligibility determination for nonviolent offenders as defined in section 3490.