

State of California
Office of Administrative Law

In re:

California Department of Corrections
and Rehabilitation

Regulatory Action: Title 15
California Code of Regulations

Amend Section: 3349

Adopt Sections: 3349.1.1, 3349.1.2,
3349.1.3, 3349.1.4,
3349.2.1, 3349.2.2,
3349.2.3, 3349.2.4,
3349.3, 3349.3.1,
3349.3.2, 3349.3.3,
3349.3.4, 3349.3.5
3349.3.6, 3349.3.7,
3349.4.1, 3349.4.2,
3349.4.3, 3349.4.4,
3349.4.5, and
3349.4.6.

DECISION OF DISAPPROVAL OF
REGULATORY ACTION

Government Code Section 11349.3

OAL File No. 2010-0429-04 S

DECISION SUMMARY

On April 29, 2010, the California Department of Corrections and Rehabilitation ("Department") submitted to the Office of Administrative Law ("OAL") the proposed amendment of section 3349 and the proposed adoption of sections: 3349.1.1, 3349.1.2, 3349.1.3, 3349.1.4, 3349.2.1, 3349.2.2, 3349.2.3, 3349.2.4, 3349.3, 3349.3.1, 3349.3.2, 3349.3.3, 3349.3.4, 3349.3.5, 3349.3.6, 3349.3.7, 3349.4.1, 3349.4.2, 3349.4.3, 3349.4.4, 3349.4.5, and 3349.4.6 for inclusion into Article 7.5, Subchapter 4, Chapter 1, Division 3 of Title 15 of the California Code of Regulations ("CCR") regarding the lethal injection process for inmates condemned to death.

On June 8, 2010, OAL notified the Department that OAL disapproved the proposed amended and adopted regulations for failure to comply with specified standards and

procedures of the California Administrative Procedures Act ("APA"). The reasons for the disapproval are summarized below:

A. the proposed regulations fail to comply with the consistency standard of Government Code section 11349.1(a)(4);

B. the proposed regulations fail to comply with the clarity standard of Government Code section 11349.1(a)(3) and 1 CCR section 16(a);

C. the proposed regulations fail to comply with the necessity standard of Government Code section 11349.1(a)(1) and 1 CCR section 10(b);

D. the proposed regulations fail to comply with the standards for Authority and Reference Citations of Government Code section 11349.1(a)(2) and (5) and 1 CCR section 14(a) and (b), respectively; and

E. the agency failed to comply with APA procedural requirements regarding:

(1) the incorporation of documents by reference pursuant to Title 1 CCR Section 20;

(2) the contents of the Initial Statement of Reasons pursuant to Government Code section 11346.2(b)(3)(A);

(3) the contents of the Final Statement of Reasons pursuant to Government Code section 11346.9(a)(3); and

(4) the contents of the Statement of Mailing Notice pursuant to Government Code section 11346.4(a).

All APA issues must be resolved prior to OAL approval of any resubmission.

BACKGROUND

Capital punishment is authorized by California Constitution, Art. 1, Section 27, and Penal Code section 190. Penal Code section 3603 requires that capital punishment be carried out at San Quentin State Prison.

San Quentin State Prison ("San Quentin") developed Operation Procedure ("OP") 770 to govern the lethal injection process, including the use of three intravenously injected chemicals. In 2006, inmates challenged OP 770 on the grounds that its implementation constituted cruel and unusual punishment. In *Morales v. Tilton* (N.D. Cal. 2006) 465 F.Supp.2d 972, the court found that there was evidence that OP 770 did not function as intended and that plaintiffs had raised a question of fact as to whether, as implemented, OP 770 constituted cruel and unusual punishment. The court found that in six of 13 recent executions, poorly illuminated visual observations, as well as poorly recorded

breathing and electrocardiogram readings, suggested that inmates may not have been sufficiently unconscious before the second and third chemicals were administered. The *Morales* court made it clear that capital punishment, lethal injection, and the use of the three chemicals chosen by the Department did not, in and of themselves, violate constitutional prohibitions on cruel and unusual punishment. However, the court found that OP 770, and the way San Quentin implemented it, suffered from five deficiencies in the areas of: 1) screening of execution team members, 2) training, supervision, and oversight of execution teams, 3) record keeping, 4) mixing, preparing, and administering Sodium Thiopental by the execution team, and 5) poor lighting, overcrowded conditions, and the design of the lethal injection facility. The court ordered a thorough review of OP 770.

As a result, executions were halted and the Governor ordered a review of all aspects of the lethal injection process and its implementation. During this period, the U.S. Supreme Court found that Kentucky's use of these three chemicals did not constitute cruel and unusual punishment. *Base v. Rees* (2008) 128 S.Ct. 1520. Also in 2008, a state appellate court found that OP 770 should have been adopted pursuant to the APA, because it was a rule of general application and that the Penal Code section 5058(c)(1) single-prison exception to the APA did not apply. The court also rejected, as untimely, the argument that OP 770 was exempt from the APA under the internal management exception. *Morales v. CDCR* (2008) 168 Cal.App.4th 729.

This rulemaking action proposes to amend one section and add 22 sections to title 15 of the California Code of Regulations to establish the process for the execution of death sentences by lethal injection in California. The rulemaking also incorporates by reference five amended and twelve adopted forms used in the process.

DISCUSSION

Any regulation amended or adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA review. (Government Code sections 11340.5 and 11346.) OAL reviews regulatory actions for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret and make specific statutory law, and to ensure that required procedures are followed in order to provide meaningful public opportunity to comment on rules and regulations before they become effective.

A. CONSISTENCY.

OAL must review regulations for compliance with the consistency standard of the APA, in accordance with Government Code section 11349.1(a)(4). Section 11349(d) of the Government Code provides that "consistency" means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law. Government Code section 11342.2 further provides that whenever by express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

(1) Proposed section 3349.2.3(c)(1) and (d) conflict with Penal Code section 3605.

Proposed section 3349.2.3 governs the process and requirements for the selection of witnesses to the execution, among other provisions. Subsection (c)(1) provides as follows:

(c) Number of persons permitted in the witness viewing rooms.

(1) A maximum of 50 persons will be approved within the following designations:

- Members of the Victim(s)'s Immediate Family
- Official Witnesses: (at least 12 reputable citizens, to be selected by the Warden)
- Attorney General
- Governor's Office
- Inspector General
- San Quentin security staff
- News media witnesses
- Spiritual advisor (not to exceed 2)
- Inmate's family/friends (not to exceed 5).

Relevant to this discussion is the fact that the proposed regulation permits one representative from the Governor's Office, one representative from the Inspector General's Office, and members of the news media to witness the execution from the witness viewing rooms.

Penal Code section 3605 provides as follows:

3605. (a) The Warden of the state prison where the execution is to take place shall be present at the execution and shall, subject to any applicable requirement or definition set forth in subdivision (b), invite the presence of the Attorney General, the members of the immediate family of the victim or victims of the defendant, and at least 12 reputable citizens, to be selected by the Warden. The Warden shall, at the request of the defendant, permit those ministers of the

Gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with those peace officers or any other Department of Corrections employee as he or she may think expedient, to witness the execution. But no other persons than those specified in this section may be present at the execution [emphasis added], nor may any person under 18 years of age be allowed to witness the execution.

(b) (1) For purposes of an invitation required by subdivision (a) to members of the immediate family of the victim or victims of the defendant, the Warden of the state prison where the execution is to take place shall make the invitation only if a member of the immediate family of the victim or victims of the defendant so requests in writing. In the event that a written request is made, the Warden of the state prison where the execution is to take place shall automatically make the invitation 30 days prior to the date of an imminent execution or as close to this date as practicable.

(2) For purposes of this section, "immediate family" means those persons who are related by blood, adoption, or marriage, within the second degree of consanguinity or affinity.

(c) No physician or any other person invited pursuant to this section, whether or not employed by the Department of Corrections, shall be compelled to attend the execution, and any physician's attendance shall be voluntary. A physician's or any other person's refusal to attend the execution shall not be used in any disciplinary action or negative job performance citation.

Penal Code section 3605(a) specifically limits who may be present for the execution to the individuals and officials listed in section 3605. Representatives of the Governor's Office, Inspector General's office, and news media are not listed in section 3605 but are permitted to witness the execution pursuant to proposed section 3349.2.3(c)(1). As it is currently written, the proposed regulation is, therefore, inconsistent with the statute it purports to implement, interpret, or make more specific and violates Government Code sections 11349.1(a)(4) and 11342.2.

In addition, proposed section 3349.1.2(d) provides as follows:

The Offices of the Governor, the Inspector General and the Attorney General shall each be permitted one observer present in the Infusion Control Room of the Lethal Injection Facility during an execution in locations designated by the Warden. No other observers will be permitted.

OAL has determined that the Infusion Control Room is a different room from any of the witness viewing rooms but that it contains a window to the lethal injection room looking out over the gurney on which the condemned inmate lies. To the extent that subsection (d) permits additional execution witnesses, who are excluded by Penal Code section

3605, namely representatives from the offices of the Governor and Inspector General, subsection (d) conflicts with Penal Code section 3605.

If the Department intends that the Governor's Office and Inspector General's Office witnesses, who are listed in subsection (c)(1) as witnessing the execution from the witness viewing rooms, be the same individuals described in subsection (d) but that they actually witness the execution from the infusion control room, then the regulation does not clearly establish that. Rather, subsection (d) appears to provide for an additional Governor's Office witness and Inspector General's Office witness, in addition to those in the witness viewing rooms, who will witness the execution, albeit from the infusion control room. In any event, subsection (d) itself conflicts with Penal Code section 3605(a), because it authorizes individuals, excluded by the statute, to witness the execution.

The proposed regulation also permits members of the news media to witness the execution. Members of the news media are not listed as authorized witnesses in Penal Code section 3605. Penal Code section 3605(a), therefore, excludes them. The Department lists Penal Code section 3605 as a Reference citation for proposed section 3349.2.3. Pursuant to title 1 CCR section 14(d), OAL shall presume the constitutionality of the statutes cited by an agency as authority or reference absent an appellate court decision to the contrary. OAL was unable to locate an appellate court decision which determined that Penal Code section 3605 is unconstitutional as it applies to excluding members of the news media as witnesses to executions.

(2) Incorporated CDCR Form 2173 (01/09), 20-Day Pre-Execution Report is inconsistent with Penal Code Section 3700.5.

Three alienists¹ are appointed to examine an inmate approximately 45 days prior to his execution regarding the inmate's sanity, consistent with Penal Code section 3700.5. The alienists must report their findings to the Warden within sufficient time for the Warden to complete his/her 20-day pre-execution report which is purportedly required by Penal Code section 3700.5. [But see section (4) below.] Proposed section 3349.3.1(d)(1) requires the alienists to include in their written reports to the Warden CDCR Form 2173 (01/09), 20-Day Pre-Execution Report.

Penal Code section 3700.5 provides:

It is the duty of the alienists so selected and appointed to examine such defendant and investigate his or her sanity, and to report their opinions and conclusions [emphasis added] thereon, in writing, to the Governor, to the Warden of the prison at which the execution is to take place...at least 20 days prior to the day appointed for the execution of the judgment of death upon the defendant.

The governing statute calls for the opinions and conclusions of the alienists to be reported in writing to the Warden and Governor. CDCR Form 2173 (01/09) 20-Day Pre-

¹ Alienists are physicians who treat mental disorders and who specialize in related legal matters.

Execution Report is a fill-in-the-blank form which precludes reporting, on the form, opinions and conclusions which are contrary to those that appear on the form. The form finds, among other things, that the inmate is calm and cooperative, does not evidence psychic or motoric agitation, and that his speech is normal and form of thought fully linear and coherent. Even if an alienist's contrary opinions and conclusions were stated in a separate accompanying psychiatric report, they would conflict with the required use and submission of this form. The form, and the required submission of the form to the Warden and Governor, are inconsistent with the duties of the alienist to report his/her opinions and conclusions in all cases where his/her opinions and conclusions are that the inmate is legally incompetent to undergo execution.

(3) Incorporated CDCR Form 2175 (01/09), 7-Day Pre-Execution Report is inconsistent with proposed section 3349.3.3(e).

Approximately 10 days prior to the execution, the three designated alienists must re-interview and re-evaluate the inmate, compare their current evaluations with their previous findings, and submit a CDCR Form 2175 (01/09), 7-Day Pre-Execution Report to the Warden. Section 3349.3.3(e) requires the alienists to report "their findings" to the Warden regarding "their current evaluations" in comparison with their previous findings and pertaining to "the inmate's" mental state.

Form CDCR Form 2175 (01/09), 7-Day Pre-Execution Report is a fill-in-the-blank form which precludes the reporting, on the form, of the alienists' findings or a comparison of their current evaluations with their previous findings if those findings are contrary to those that appear on the form. The form finds, among other things, that the inmate is polite and cooperative and evidences no impaired reality testing such as hallucinatory experiences or delusional beliefs. Even if an alienist's contrary findings were contained in a separate accompanying psychiatric report, it would conflict with the requirement to also use and submit this form. The form, and the required use and submission of the form to the Warden, are inconsistent with the duties of the alienists to report "their findings" in all cases where their findings are that "the inmate" is not considered mentally competent and does not meet the criteria for execution of his death sentence as scheduled.

(4) Proposed Section 3349.3.1(d)(1) is inconsistent with Penal Code Section 3700.5.

Penal Code section 3700.5 provides the designated alienists shall report their opinions and conclusions to the Governor and Warden regarding the inmate's sanity at least 20 days prior to the execution date. Proposed section 3349.3.1(d)(1) requires the alienists to interview and examine the inmate within sufficient time to evaluate the findings and give written reports, including the CDCR Form 2173 (01/09), 20-Day Pre-Execution Report, to the Warden within the Warden's 20-day report deadline. This subsection presumably authorizes the Warden to require that the alienists submit their reports to him/her sooner than the date that is 20 days before the execution which is allowed by the statute. To the extent that this proposed section shortens the ability of the alienist to

take up to the maximum period of up to 20 days prior to the execution date, it is, therefore, in conflict with Penal Code section 3700.5.

It should also be noted that to the extent that proposed sections 3349.3.1(d)(1) and 3349.3.1(a)(2) and the Department's description of section 3349.3.1 in the Initial Statement of Reasons are based on an assumption that Penal Code section 3700.5 requires the Warden to prepare and submit a 20-Day Pre-Execution Report to any state official or entity 20 days prior to the execution, the assumption is not correct.

(5) Proposed Section 3349.3(a)(1)(B) is inconsistent with CDCR Form 1801-B, Service of Execution Warrant, Warden's Initial Interview.

Section 3349.3(a)(1)(B) provides that: "The Warden shall: ... (B) Together with the Correctional Counselor II, Litigation Coordinator, and the Associate Warden, Specialized Housing Division, interview the inmate to be executed, serve the warrant of execution, and document the interview on a CDCR Form 1801-B (Rev. 01/09), Service of Execution Warrant-Warden's Initial Interview."

CDCR Form 1801-B (Rev. 01/09), Service of Execution Warrant-Warden's Initial Interview is inconsistent with proposed section 3349.3(a)(1)(B) because the regulation requires that the Warden perform the specified tasks and complete the Form 1801-B. Form 1801-B, however, allows for the Warden's designee to, presumably, interview the inmate, serve the warrant of execution, document the interview and sign the Form 1801-B.

B. CLARITY.

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Government Code section 11340(b).) Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Section 11349(c) of the Government Code defines "clarity" to mean "...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them." Title 1 CCR section 16 states in pertinent part that:

In examining a regulation for compliance with the 'clarity' requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exist:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or

(2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or

(3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or

(4) ...

(5) the regulation presents information in a format that is not readily understandable by persons "directly affected";...

As discussed below, OAL determined that a number of the proposed regulatory provisions did not satisfy the "clarity" standard.

(1) Proposed Section 3349.3.1(d)(1).

Proposed section 3349.3.1(d)(1) requires that:

The Alienists shall provide the following: (1) Interview and examine the inmate within sufficient time to evaluate the findings and give written reports, to include the CDCR Form 2173 (01/09), 20-Day Pre-Execution Report, which is incorporated by reference, to the Warden within the Warden's 20-day report deadline.

Penal Code section 3700.5 provides in part: "It is the duty of the alienists so selected and appointed to examine such defendant and investigate his or her sanity, and to report their opinions and conclusions thereon, in writing, to the Governor, to the Warden of the prison at which the execution is to take place...at least 20 days prior to the day appointed for the execution of the judgment of death upon the defendant."

It is unclear from the text of proposed section 3349.3.1(d)(1) and from the Department's description of this section in the Initial Statement of Reasons whether this section is limiting the duty of the alienists to submit their reports to submission of their reports only to the Warden. The reports must also be submitted to the Governor, and it may not be readily understood by the alienists directly affected by this section that this additional reporting requirement exists.

(2) Proposed Section 3349.1.2(e)(6).

Proposed section 3349.1.2(e)(6) provides:

(e) Criteria for Lethal Injection Team membership. Each team member shall be selected based on their qualifications and expertise to effectively carry out the

duties in one of the specialized functions. The following criteria shall be utilized in the selection of all Lethal Injection Team members:

...

(6) Annual permanent employee performance evaluations that meet or exceed expected standards.

This subsection is unclear as to how many meet-or-exceed performance evaluations an employee must have in order to be selected for Lethal Injection Team membership. The subsection could be interpreted as requiring any plural number, such as two. Therefore, a twenty-five year employee could have two evaluations which meet or exceed expected standards and 23 that do not and be qualified to serve on the Lethal Injection Team. At the other extreme, the section could be interpreted as requiring that all of an employee's performance evaluations must meet or exceed expected standards. In that event, an exemplary 25-year employee, whose most recent 24 performance evaluations meet or exceed expected standards, would be unqualified to serve on the lethal injection team on the basis of a single poor evaluation 24 years ago.

(3) Proposed Section 3349.2.3(j)(3).

Proposed section 3349.2.3(j)(3) provides:

(j) Selection and accommodations of media not selected to witness the execution.

...

(3) Requests must be made to the Assistant Secretary, Office of Public and Employee Communications via the process outlined in the media advisory.

It is unclear in this subsection what the "media advisory" is. It is not a document incorporated by reference or included in the rulemaking file, and OAL could not locate the term in an existing Title 15 regulation. OAL was able to locate three execution-related media advisories on the Department's website for executions scheduled for February 23, 1996, December 13, 2005, and January 17, 2006. The reference to the "media advisory" is unclear because the contents of the document, in terms of the rules governing news media entities and the requirements for access to execution proceedings at San Quentin State Prison, can apparently change over time. See also the discussion of the "media advisory" below under "PROCEDURAL REQUIREMENTS OF THE APA."

(4) Proposed Section 3349.3(a)(1)(B), (c)(1), (e)(1) & (f)(2) and CDCR Form 1801-B, (Rev. 01/09), Service of Execution Warrant, Warden's Initial Interview.

Collectively, these sections provide that the Warden, Associate Warden of the Specialized Housing Division, Condemned Unit Correctional Counselor II, and Litigation

Coordinator shall, together, interview the inmate, serve the warrant of execution, and document the interview on CDCR Form 1801-B, (Rev. 01/09), Service of Execution Warrant, Warden's Initial Interview.

It is unclear how each official will carry out each of the duties assigned by these subsections and how each will document the interview using the Form 1801-B and which, if any of the four, is ultimately responsible for one or more of these duties. The description of proposed section 3349.3 in the Initial Statement of Reasons is limited to the following sentence:

Section 3349.3 is adopted to establish the events that occur upon receipt of an execution order. Additionally, this section identifies the responsibilities of specific staff, including the Warden, Chief Deputy Warden, Associate Warden, Specialized Housing Division, Team Leader, Condemned Unit Correctional Counselor II, Litigation Coordinator, Warden's Administrative Assistant, Public Information Officer, and Visiting Lieutenant, upon receipt of an execution order.

It is unclear whether four CDCR Form 1801-Bs will be completed, one by each of the four officials, and what the significance would be, if any, in the event the contents of the completed forms differed. If the Department's intent is that only one Form 1801-B shall be completed by the Warden or his/her designee, it is unclear how the other three officials will document the interview on the CDCR Form 1801-B. Form 1801-B only provides signature lines for the Warden or his/her designee and one witness.

It should be noted that subsections (a)(1)(B) and (c)(1) of proposed section 3349.3 refer to the Correctional Counselor II, while subsections (e)(1) and (f)(1) refer to the Condemned Unit Correctional Counselor II. See also section 3349.2.2(c). It should also be noted that sections 3349.3(g)(2), 3349.3.1(a)(2)(C) and (f)(1), 3349.3.3(g), and 3349.3.4(d) introduce the term Condemned Row Correctional Counselor II. It is unclear whether all references to Correctional Counselor II are to the same Department position.

(5) Proposed Section 3349.3.2.

Proposed subsection (a) of this section provides:

(a) Sanity Review Request.

(1) Attorneys may submit in writing for the Warden's review, any current information that they believe may have a bearing on evaluating the sanity of an inmate with a scheduled execution date. This information will be accepted within 30 days and up to 7 days prior to the scheduled execution.

(2) Information submitted more than 30 days will be accepted for consideration by the panel of Alienists. The panel of Alienists shall consider this information in preparation of the 20-day pre-execution sanity report. [Emphasis added.]

The regulation indicates that inmate's attorneys may submit sanity-related information prior to 30 days before an execution and it will be accepted for consideration by the alienists. The regulation further provides that such information may be submitted later than 30 days, and up to seven days, before an execution for the Warden's review. A commenter requested that the regulation be amended to allow inmate attorneys to submit sanity-related information to the alienists as long as the alienists' duties continue. (Alienists' duties continue up to seven days prior to an execution pursuant to section 3349.3.3(e)(2).) The Department responded to the commenter as follows:

Any information made available by the inmate's counsel at any time will be furnished to the alienists so long as their duties continue. The alienists will be provided with the most current information. In addition, the Department will consider any information that the inmate's attorney feels is pertinent to the assessment of the inmate's sanity past the designated seven-day submission timetable. [Response to Commenter #944.]

Notwithstanding the Department's response to the commenter, the regulation specifies that information submitted [by inmates' attorneys] more than 30 days [prior to the scheduled execution] will be accepted for consideration by the alienists. It is reasonable to assume that the regulation does not contain superfluous language and that the statement in subsection (a)(2): "Information submitted more than 30 days [prior to the scheduled execution] will be accepted for consideration by the panel of Alienists" means that inmates' attorneys must submit any such information more than 30 days prior to the scheduled execution in order for it to be accepted for consideration by the panel of Alienists, and that information submitted later than 30-days-prior to the scheduled execution will not be accepted for such consideration. For the same reason, it is reasonable to assume that the statement in subsection (a)(1): "This information [information bearing on the inmate's sanity and submitted in writing for the Warden's review] will be accepted within 30 days and up to 7 days prior to the scheduled execution" means that inmates' attorneys must submit any such information to the Warden between 30 and up to 7 days prior to the scheduled execution, and that any such information submitted more than 30 or less than 7 days prior to the scheduled execution will not be reviewed by the Warden.

Proposed subsection (a)(1) and (2) is, therefore, unclear because the language of the regulation conflicts with the Department's description of the effect of the regulation. See 1 CCR section 16(a)(2).

(6) Proposed Sections 3349.1.1(v) and 3349.3(f)(5)(A)&(B).

Proposed section 3349.3(f)(5)(A)&(B) require that the Litigation Coordinator construct "a" Master Execution File containing five specified documents and "any other pertinent" information, and that "This" Master Execution File is to be kept in the Litigation Coordinator's office, unless the execution is stayed, in which case the file is to be closed and filed in the Warden's Office complex.

It is unclear whether the reference to "a" Master Execution File and to "[t]his" Master Execution File in section 3349.3(f)(5), which is kept in the Litigation Coordinator's office, is referring to the same Master Execution File defined in proposed section 3349.1.1(v). Section 3349.1.1(v) defines Master Execution File as the permanent record of "all" documents related to an execution, not just five specified documents and any other "pertinent" information, and which is maintained in the Warden's Office complex. Section 3349.2.2(a) also discusses the Master Execution File, which is maintained in the Warden's Office complex and which serves as a permanent record of all documents related to an execution.

(7) Proposed Section 3349.1.2(a)(4)(B).

This subsection provides:

If necessary, the Warden may contract with medical personnel to be members of the Lethal Injection Team, or to serve as the physician attending the execution. The attending physician shall monitor an electronic device(s) showing the inmate's vital signs and determine when the inmate has expired.

This subsection caused confusion among commenters as to whether the presence of a physician at an execution was required or was a matter of the Warden's discretion. The agency's response to, for example, commenter #7888, did not lessen the confusion.

The proposed regulations state that the Warden may contract with medical personnel when "necessary." (§ 3349.1.2 (a)(4)(B).) "Necessary" means an indispensable item. (See Merriam-Webster's Dictionary (5th ed. 1994) p. 491.) Therefore, when taken in context with the following language in the paragraph, the Warden may contract with medical personnel to be members of the Lethal Injection Team or to serve as the attending physician at an execution if the Warden, in his or her discretion, feels it is indispensable to the execution.

The regulation is unclear because it merges provisions concerning the duties of physicians at an execution into a subsection which deals with the potential need to contract for the services of a physician when necessary, presumably due to the unavailability or willingness of an employee physician to serve in this capacity. The second sentence of section 3349.1.2(a)(4)(B) could be removed from this subsection and integrated within a section which more specifically deals with the duties of physicians at executions, such as in section 3349.4.5(g)(7).

(8) Proposed sections 3349.4.1(c)(2) and 3349.4.3(a), and CDCR Form 2176 (01/09) Lethal Injection Chain of Custody-San Quentin State Prison.

Proposed section 3349.4.1(c)(2) requires the Team Administrator to verify the Lethal Injection Chemicals and quantity of these chemicals and saline and to complete the

CDCR Form 2176. CDCR Form 2176 is unclear because it does not provide a means for verifying the quantity of the saline.

In addition, proposed section 3349.4.3(a) requires that:

(a) The Team Administrator in the company of the Team Leader shall:

...

(2) Transfer custody of the Lethal Injection Chemicals to two members of the Infusion Sub-Team.

(3) Ensure accountability of the Lethal Injection Chemicals and saline.

(A) A minimum of two staff members shall verify all Lethal Injection Chemicals and saline at the time of transfer and sign the CDCR Form 2176 (01/09), Lethal Injection Chain of Custody-San Quentin State Prison.

(B) The original CDCR Form 2176 shall be signed by the Team Leader and remain with the Lethal Injection Chemicals.

Again, CDCR Form 2176 does not allow for verification of the saline which makes section 3349.4.3(a)(3)(A) unclear in terms of how it would be implemented. Moreover, the section is unclear as to who the two staff members are who will verify the chemicals and saline at the time of transfer. Given that the Team Leader is required to sign the CDCR Form 2176, pursuant to subsection (a)(3)(B), and because the Team Administrator in the company of the Team Leader is charged with performing all the tasks listed in subsections (a)(1) through (a)(3), the section could be interpreted as meaning that the Team Administrator and Team Leader are these two staff members. The section could also be interpreted as meaning that the two staff members in subsection (a)(3)(A) are the two members of the Infusion Sub-Team mentioned in subsection (a)(2). Or the section could be interpreted as meaning that any two staff members, whether they are transferring or receiving the quantities of chemicals and saline, may verify the chemicals and saline.

It should also be noted that the use of the term "Evidence" throughout CDCR Form 2176 is unclear in this context.

(9) Proposed Section 3349.4.6(I)(1).

Proposed section 3349.4.6(I)(1) requires that the Team Administrator assess the Lethal Injection Team members for the need for "post trauma." It is unclear what the Team Administrator must assess the need for without any additional information, such as the need for post-trauma psychological treatment or counseling, or the need for post-trauma employment leave.

(10) Proposed Section 3349.4.4(e)(2).

Proposed section 3349.4.4(e)(2) states that the Warden's administrative assistant shall: "assign a correctional officer to escort inmate witnesses and invited the inmate's attorney to their designated witness area." This subsection caused confusion among comments as to whether it meant that legal counsel for an inmate was automatically considered invited as a witness to the execution and not counted among the five permitted inmate family/friend witnesses.

(11) Proposed Section 3349.3.4(c)(6).

Proposed section 3349.3.4(c)(6) provides that: "For attorney/client confidential visits, the inmate shall be removed from the conference room and shall proceed with the attorney to visit in designated visiting area under constant visual observation by the special visiting team. It is unclear who is assigned to the "special visiting team." It is not a term that is defined in proposed section 3349.1.1 or any other place in Article 7.5.

C. NECESSITY.

OAL must review regulations for compliance with the necessity standard of the APA, in accordance with Government Code section 11349.1(a)(1). Section 11349(a) provides that "necessity" means that the record of the rulemaking proceeding demonstrates by substantial evidence the need for the regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. Necessity is explained primarily in the agency's Initial Statement of Reasons ("ISR"). Section 11346.2(b)(1) requires that the ISR include a statement of the specific purpose of each adoption and the rationale for the determination by the agency that each adoption is reasonably necessary to carry out the purpose for which it is proposed. Title 1 CCR section 10(b) requires that the rulemaking record include a statement of the specific purpose of each adoption, amendment, or repeal and information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.

Except for amended section 3349 and the definitions of terms in section 3349.1.1, the ISR for this rulemaking begins by explaining the purpose and necessity of the subsections of the next four adopted sections. Beginning at section 3349.2.2, however, the ISR lapses into a section by section description of the content of each section and only occasionally hints at the reasons why the Department chose to write the regulations the way it did.

This decision provides examples of failures by the Department to meet the necessity standard.

(1) Proposed section 3349.2.3.

Neither the ISR nor any of the agency's responses to comments explains why 10 days was selected as the filing period for news media requests to witness an execution or what the purpose or necessity is of the requirement that all witnesses view an execution orientation video.

(2) Proposed section 3349.3.

Proposed section 3349.3, for example, is a three-page listing of the responsibilities of various officials in connection with an execution, but the ISR explanation of the purpose and necessity of this section is limited to:

Section 3349.3 is adopted to establish the events that occur upon receipt of an execution order. Additionally, this section identifies the responsibilities of specific staff, including the Warden, Chief Deputy Warden, Associate Warden, Specialized Housing Division, Team Leader, Condemned Unit Correctional Counselor II, Litigation Coordinator, Warden's Administrative Assistant, Public Information Officer, and Visiting Lieutenant, upon receipt of an execution order.

Regarding section 3349.3, for example, there is no rationale for why the four individuals selected for conducting the initial inmate interview were chosen. There is no rationale given for why 10 days was selected as the time period the inmate is given to decide on a method of execution.

(3) Proposed section 3349.3.4(e).

Subsection 3349.3.4(e) as proposed, provides:

(e) Religious accommodations.

(1) State employed Chaplains selected by the inmate shall be allowed to perform their spiritual functions at the inmate's cell front on either second or third watch.

(2) Non-state employed Spiritual Advisors may visit the inmate utilizing the visitor process outlined in this article.

The explanation of the purpose and necessity of this subsection in the ISR consists of the following sentence: "This section also includes procedures governing visitation around the time of an execution, and procedures that relate to religious accommodations." In response to public comments regarding the distinction between state-employed and non-state-employed spiritual advisors vis-à-vis cell-front performance of their duties, the Department stated:

The proposed regulations provide for the inmate to consult with a spiritual advisor of his or her choosing. (Sections 3349.3.1(e); 3349.3.3(a)(2), (f); 3349.3.4 (e)(1)-

(3); 3349.4.2 (b)(1)-(3).) So long as the inmate follows pre-approval requirements and in accordance with provisions of law and the Department regulations, the inmate can utilize a spiritual advisor not provided for or employed by the state. (Sections 3210(d); 3349.3.4(e)(2)-(3); 3349.4.2(b)(1)-(2).) Accommodation: None.

There is no statement of the purpose or necessity for the distinction between state-employed chaplains and non-state-employed spiritual advisors with respect to cell-front visits.

D. AUTHORITY CITATION.

Pursuant to Government Code section 11349(b), "Authority" means the provision of law which permits or obligates a state agency to adopt a regulation. Proposed section 3349.1.1 contains the definitions of 36 terms used in Article 7.5, Administration of Death Penalty. The Department lists Penal Code section 3602 as an Authority Citation for proposed section 3349.1.1. Penal Code section 3602 specifies that condemned female inmates not be transported to San Quentin State Prison sooner than three days prior to execution and that, in the event of commutation of sentence, a female inmate must be returned to the Central California Women's Facility. Nothing in Penal Code section 3602 specifically permits or obligates the Department to adopt the definitions contained in proposed section 3349.1.1, and none of those definitions mention women or are specific to the execution of female inmates.

E. REFERENCE CITATIONS.

Pursuant to Government Code section 11349(e), "Reference" means the statute, court decision, or other provision of law which the state agency implements, interprets, or makes specific by adopting a regulation.

For each adopted section in this rulemaking, other than for proposed sections 3349.1.1, 3349.2.4, and 3349.3.7, the Department lists as Reference citations nearly all Penal Code sections which address the imposition, re-imposition, suspension, or prison designated to carry out a death sentence. This is the case whether or not the regulation for which a Penal Code section is listed as a Reference citation addresses the subject matter of the statute.

For example, Penal Code section 3605 provides for the examination of a condemned female inmate suspected to be pregnant. Penal Code section 3606 provides for the suspension of execution of a death sentence of an inmate found to be pregnant. These sections are provided as Reference citations for nearly all proposed regulations. Similarly, the Penal Code statutes which address the suspicion, investigation, and treatment of insanity prior to execution of an inmate (sections 3700.5 through 3704.5) are listed as Reference citations for proposed sections: 3349.1.2 through 3349.1.4, 3349.2.1, 3349.2.3, 3349.3.5, 3349.3.6, and 3349.4.1 through 3349.4.6 but those Penal

Code sections are not implemented, interpreted, or made more specific by those regulations.

Penal Code sections 1193, 1217 and 1227 concern court procedures not implemented, interpreted, or made specific by these regulations, but they are listed as Reference citations for nearly all adopted sections.

On the other hand, Penal Code section 190, which requires that first degree murder shall be punished by death and California Constitution, Article 1, Sections 17 and 27, which, respectively, prohibit cruel and unusual punishment and establish the constitutionality of the death penalty, are not listed as Reference Citations for any of the adopted sections.

F. PROCEDURAL REQUIREMENTS OF THE APA.

(1) Regulatory Provisions Contained in Referenced Documents Must Comply with Title 1 CCR Section 20.

Title 1 CCR section 20 requires that documents incorporated by reference in regulations be, among other things: 1) available upon request or reasonably available to the affected public from a commonly known source, 2) identified in the Informative Digest by title and date, and 3) identified by title and date in the regulation text.

(a) The "Media Advisory."

Although not specifically incorporated by reference, in proposed section 3349.2.3(j)(3), the Department makes reference to the "media advisory." OAL was able to locate three media advisories, relevant to inmate executions, on the Department's website. The media advisories contain regulatory provisions which specify the procedures governing, and the limitations placed upon, the news media in its access to coverage of inmate executions. The media advisory specifies the number of representatives per firm, the number of allowable television camera operators, still photographers, audio engineers, satellite or microwave vehicles, television support personnel, and radio broadcast support personnel permitted at the prison, as well as the date for submission of requests to witness the execution and/or to be admitted to the Media Center Building and how to make requests.

(b) The "Lethal Injection Facility Activity Log."

Although not specifically incorporated by reference, the "Lethal Injection Facility Activity Log" must be used following any use of force pursuant to proposed section 3349.4.5(b)(5). OAL could not locate this document on the Department's website or in Title 15 and did not find it among the 23 attachments to OP 770. To the extent that the "Lethal Injection Facility Activity Log" contains regulatory provisions and is not merely a non-substantive blank log sheet, it must comply with the provisions of Title 1 CCR section 20 as outlined above.

(2) The Initial Statement of Reasons Must Contain a Description of Reasonable Alternatives to the Regulation and the Agency's Reasons for Rejecting Those Alternatives as Required by Government Code Section 11346.2(b)(3)(A).

Government Code section 11346.2(b)(3)(A) requires that the Initial Statement of Reasons (ISR) include: "A description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives." The ISR in this rulemaking action states that "the CDCR considered alternatives to the existing three-chemical process, including a one-chemical process." The ISR fails to include a description of the alternatives and a statement of the Department's reasons for rejecting any reasonable alternatives considered.

(3) The Final Statement of Reasons Must Contain a Summary of Each Comment and Explanation of How the Proposed Action Has Been Changed or the Reasons for Making No Change Pursuant to Government Code Section 11346.9(a)(3).

(a) CDCR failed to respond to the following comment.

Commenter #3, along with hundreds of others, commented on proposed section 3349.3.4(e) regarding the disparate treatment of spiritual advisors in terms of the ability of state-employed chaplains to perform spiritual functions at the inmate's cell front while non-state-employed spiritual advisors must use the visitor process outlined in this article, which involves visiting in the main visiting room. See section 3349.3(i). The Department's response to the comment was:

The proposed regulations provide for the inmate to consult with a spiritual advisor of his or her choosing. (Sections 3349.3.1(e); 3349.3.3(a)(2), (f); 3349.3.4 (e)(1)-(3); 3349.4.2 (b)(1)-(3).) So long as the inmate follows pre-approval requirements and in accordance with provisions of law and the Department regulations, the inmate can utilize a spiritual advisor not provided for or employed by the state. (Sections 3210(d); 3349.3.4(e)(2)-(3); 3349.4.2(b)(1)-(2).) Accommodation: None.

The response fails to indicate a change to the regulation or explain the reasons for no change concerning non-state-employed spiritual advisors and cell-front visiting.

(b) OAL could not identify a summary or response for the following comments.

Commenter #35, and numerous others, stated that the Department added approximately 500 pages of material to the rulemaking file on or about June 15, 2009.

Commenter #757 commented on the need for provisions to be added to the regulations which specified what will be done in the event of something unforeseen occurring just prior to the scheduled execution in relation to the inmate's health or if a witness notices

during the lethal injection procedure that the inmate is evidencing consciousness. The commenter stated that the regulations must include criteria the Warden must use in deciding when to terminate an execution.

Commenter #948, State of California, Prison Health Care Services, commented that:

The regulation must clearly state that current CPHCS clinical staff, PCP, Nursing and Pharmacy staff cannot participate in any aspect of the execution [including] medical evaluations, purchasing drugs, securing the drugs, starting IVs, determining consciousness of inmate, monitoring heart activity, determining death, and disposal of execution drugs...it is a clear conflict for our staff's medical ethics.

(c) The Department's response to many comments does not comply with Government Code section 11347.1.

As a result of the 15-day revised-text Notice, Commenter #R10172, among many others, commented as follows:

The modified regulations are not supported by an adequate record. The CDCR relies upon the Press Democrat Article about Dr. Jay Chapman, but fails to describe reasonable alternatives contained therein and the reasons for rejecting them. In materials released January 4, 2010, the CDCR indicated for the first time that one of the materials reviewed and considered was a 2007 article from the Santa Rosa Democrat. The article is about Dr. Jay Chapman, the person who first suggested a three drug execution procedure. According to the article, the original creator of the three-drug lethal injection formula has suggested ways to reform the process, including keeping up with changing drugs and science and proper training of lethal injection team members. Given that Dr. Chapman suggests, there are other alternatives, continued use of the paralytic drug is unreasonable, unnecessary and unduly burdensome to the rights of the public and the individuals being executed. Dr. Chapman suggests the proposed procedure is inhumane. The lethal injection procedures' creators think it is a failed experiment any way it is implemented. CDCR seems to have ignored the part of the article where Dr. Chapman suggests changing the procedures as science advances. CDCR continues to use the three-drug protocol despite the very growing evidence that it is an unsafe and potentially tortuous form of execution.

The Department responded to the comment as follows:

The majority of this comment is directed toward the Department's statement of necessity set forth in the ISOR, rather than to the Notice of Modifications to Text of Proposed Regulations. Therefore, pursuant to Government Code section 11346.8 (c), the Department will not respond to those portions of this comment. The remainder of the comment concerns the listing of three documents in the

Notice of Modifications to Text of Proposed Regulations that were included in the rulemaking file but inadvertently omitted from the ISOR. Because the omission of those documents was inadvertent, the Department had already addressed in the ISOR the alternatives it considered and its reasons for adopting the proposed three-chemical protocol. Accommodation: None.

Government Code section 11347.1(a) and (d) provide as follows:

(a) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action shall make the document available as required by this section.

(d) Written comments on the document or information received by the agency during the availability period shall be summarized and responded to in the final statement of reasons as provided in Section 11346.9.

Pursuant to section 11347.1(d), the Department must respond to comments that are based on the relied-upon document added to the rulemaking file subsequent to publication of the notice.

(4) The Statement of Mailing Notice Must Certify That Notice of the Proposed Action Was Mailed at Least 45 Days Prior to the Public Hearing and Close of the Public Comment Period.

The Statement of Mailing Notice in the rulemaking file states that the Notice was mailed on May 1, 2010. The Statement must be corrected to indicate the correct date, including the year, on which Notice was mailed.

CONCLUSION

For the foregoing reasons, OAL disapproves the above-referenced rulemaking action. Pursuant to Government Code section 11349.4(a), the Department may resubmit revised regulations within 120 days of the Department's receipt of this Decision of Disapproval. If the Department makes other than non-substantial or solely grammatical changes in revising the regulations, the Department shall make all changes which are sufficiently related to the original text available for at least 15 days for public comment pursuant to Government Code section 11346.8(c).

Date: June 8, 2010



SUSAN LAPSLEY
Director

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