

California case law.⁹ Second, while the Petition refers to case law from other states, such law is not controlling as to the Department's determinations regarding rule-making actions. Third, the 2002 WCAB decision cited in the Petition is consistent with the *Gould* criteria.¹⁰ Finally, OAL conducted a review of the regulation and made a determination concerning the consistency of subdivision (a)(3)(B) with existing statutes, court decisions, or other provisions of law when it approved the regulation in 2003.¹¹

The Department has determined that the factors and criteria set forth in subdivision (a)(3)(B) of Rule 1300.71 are consistent with existing statutory and case law, and that legal developments since the approval of subdivision (a)(3)(B) do not require that the regulation be reexamined.

For the reasons set forth above, the Department has determined not to initiate a rulemaking action to amend or repeal the regulation as requested in the Petition.

Petitioner's interest in the Department's rulemaking process is appreciated.

**ACCEPTANCE OF PETITION
TO REVIEW ALLEGED
UNDERGROUND REGULATIONS**

OFFICE OF ADMINISTRATIVE LAW

**ACCEPTANCE OF PETITION TO REVIEW
ALLEGED UNDERGROUND REGULATIONS**

**(Pursuant to title 1, section 270, of the
California Code of Regulations)**

DEPARTMENT OF MENTAL HEALTH

Agency being challenged:

The Office of Administrative Law has accepted the following petition for consideration. Please send your comments to:

Kathleen Eddy, Senior Counsel
Office of Administrative Law
300 Capitol Mall, Ste. 1250
Sacramento, CA 95814

A copy of your comment must also be sent to the petitioner and the agency contact person.

Petitioner:

Michael St. Martin
446 Alta Road, Ste. 5300
San Diego, CA 92158

Agency contact:

Hon Chan, Senior Staff Counsel
Dept. of Mental Health
1600 9th Street, Ste. 151
Sacramento, CA 95814

Please note the following timelines:

Publication of Petition in Notice Register: May 1, 2009

Deadline for Public Comments: June 1, 2009

Deadline for Agency Response: June 15, 2009

Deadline for Petitioner Rebuttal: No later than 15 days after receipt of the agency's response

Deadline for OAL Decision: August 31, 2009

The attachments are not being printed for practical reasons or space considerations. However, if you would like to view the attachments please contact Margaret Molina at (916) 324-6044 or mmolina@oal.ca.gov.

**PETITION TO THE OFFICE OF
ADMINISTRATIVE LAW**

RE: **ALLEGED UNDERGROUND
REGULATION**

Department of Mental Health

Special Order No.: 239.02 "Contraband"

FROM: MICHAEL GEORGE ST.MARTIN,
Petitioner

DATE: February 17, 2009

This is a computer generated petition based on the optional OAL form supplying the information required by Title 1, California Code of Regulations, §280, for a petition challenging an alleged underground regulation.

1. Identifying Information: Petitioner

Your Name: MICHAEL GEORGE ST.MARTIN
CO-000414-3, RRU-10

Your Address: P.O. Box 5003, Coalinga, CA 93210

Your Telephone

Number: (559) 935-0493 or (559) 935-0638

Your E-Mail

(if you have one): michaelstmartin@hotmail.com

2. State Agency or Department being challenged:

**California Department of Mental Health
("DMH")**

3. Provide a complete description of the purported underground regulation. Attach a written

⁹ *Gould, supra*, 4 Ca1.App.4th 1059.

¹⁰ *Kunz, supra*, 67 Cal. Comp. Cas. 1588.

¹¹ Government Code section 11349.1, subdivision (a).

copy of it. If the purported underground regulation is found in an agency manual, identify the specific provision of the manual alleged to comprise the underground regulation. Please be as precise as possible.

Description of alleged Underground Regulation

Petitioner alleges the ENTIRE California Department of Mental Health ("DMH") Operation Manual is an Underground Regulation, as there is no evidence that any portion of the DMH Operation Manual has been promulgated pursuant to the Administrative Procedures Act.

By this action, Petitioner specifically alleges the section of the DMH Operation Manual known as **Special Order No.: 239.02 "Contraband"** is an underground regulation, as there is no evidence that this Special Order has been promulgated pursuant to the Administrative Procedures Act.

Department of Mental Health Special Orders are written Orders which are issued by the Deputy Director, Long Term Care Services, Department of Mental Health. Special Orders are mandatory and direct each State Hospital within the Department of Mental Health system to take specific actions. Because these mandated specific actions are required of all State Hospitals, they affect all persons in California detained at State Hospitals operated by the Department of Mental Health.

Special Order No.: 239.02 states:

"Each Executive Director [of each State Hospital in California] shall establish directives, procedures, and report forms consistent with this Special Order."

"Consistent with this Special Order, each Executive Director shall either develop a list of items that are considered contraband, or a list of items that are considered allowable, . . ."

Special Order No.: 239.02 also requires the development of Directives [Administrative Directives] and procedures by each State Hospital to implement the mandates of the Special Order.

A true and correct copy of
Special Order No.: 239.02
is attached hereto as EXHIBIT A.

4. Provide a description of the agency actions you believe demonstrate that it has issued, used, enforced, or attempted to enforce the purported underground regulation.

Special Order No.: 239.02 is applied to all persons, no matter what their classification who are detained at each State Hospital in California by the Department of

Mental Health. Its existence and use are not in controversy.

As a result of **Special Order No.: 239.02**, each State Hospital has a Contraband Administrative Directive, along with a Contraband List and/or Allowables List, and various related procedures and directives.

Petitioner alleges that the DMH can not justify or legitimize the use of one **Special Order** or **Administrative Directive** which has not been legally promulgated pursuant to the Administrative Procedures Act by citing as its authority some other Rule, Regulation, Manual, Instructions, Administrative Directive, or Special Order, which itself is also an underground regulation which has not been legally promulgated pursuant to the Administrative Procedures Act.

It should be noted that the Office of Administrative Law found the Contraband Administrative Directive, **AD-818**, for Coalinga State Hospital to be an underground regulation in 2008 OAL Determination 23, on August 27, 2008. **AD-818** was one of those Administrative Directives developed and implemented pursuant to **Special Order No.: 239.02**.

The DMH has taken the firm position that none of its Manuals, Instructions, Administrative Directives, or Special Orders are regulations subject to the provisions of the APA.

Petitioner alleges that **Special Order No.: 239.02** is a regulation within the meaning of the APA.

5. State the legal basis for believing that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code that no express statutory exemption to the requirements of the APA is applicable.

SPECIAL ORDER NO.: 239.02 IS A REGULATION WITHIN THE MEANING OF THE APA

Prior to implementation, or revision thereof, the Department was required to adopt **Special Order No.: 239.02**, or any revision thereof, but failed to do so, and thus, pursuant to the law the current version now being utilized is invalid and an "Underground Regulation."

Though the Director may prescribe rules and regulations such as **Special Order No.: 239.02**, they must be promulgated and filed per Chapter 3.5 of art. 1 of Division 3 of Title 2 of the Administrative Procedures Act, government Code, section 11340 et seq. There is no evidence that DMH has ever promulgated any version of **Special Order No.: 239.02**.

Special Order No.: 239.02 is a regulation. Chapter 3.5, article 5, of the Administrative Procedure Act, Govt. Code sections 11346 et seq., governs adoption,

amendment and repeal of regulations by administrative agencies known as rulemaking. Govt. Code section 11342.600 provides that:

“[A regulation is] 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.”

Syngenta Crop Protection, Inc. v. Helliker (2d Dist. 2006) 138 Cal.App. 4th 1135, 1175–77, 42 Cal.Rptr.3d 191, 221–222, quotes *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th, 557, 59 Cal.Rptr.2d 186, which explains:

“[The APA] establishes ‘minimum procedural requirements’ for rulemaking. ([Govt. C.] § 11346(a).) The agency must provide notice of the proposed action (*Id.* §§ 11346.4, 11346.5), the complete text of the proposal (§ 11346.2(a)), and an initial statement of reasons for the proposal (§ 11346.2(b)), and a final statement of reasons (§ 11346.9(a)). The agency must provide a public hearing if an interested person timely requests a hearing (§ 11346.8(a)), provide an opportunity for interested persons to submit written comments if no hearing is held (*ibid.*), and respond in writing to comments in the final statement of reasons (§ 11346.9(a)(3)). The agency must submit the entire rulemaking file to the Office of Administrative Law (§§ 11347.3(c), 11342.550), which reviews the regulation for compliance with the law and other criteria and approves or disapproves the regulatory action. (§§ 11349.1, 11349.3 . . . ” (14 Cal. 4th 557, 59 Cal.Rptr.2d 186.)

“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.” (Govt. Code § 11340.5(a).)

“A substantial failure to comply with chapter 3.5 of the APA renders the regulation invalid. § 11350(a); *Tidewater Marine Western, Inc. v. Bradshaw*, *supra*, 14 Cal. 4th at 576, 59 Cal.Rptr.2d 186.)”

“A regulation subject to the APA thus 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.’ ([Former] Govt. Code § 11342(g) [now § 11342.601].) Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases . . . Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. ([Former] Govt. Code § 11343(a)(3), 11346.1(a) [now § 11340.9(I)].) Thus, if an agency prepares a policy manual that is no more than a summary, without commentary, of the agency’s prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations . . . A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes.”(Emphasis added.) (*Tidewater Marine Western, Inc. v. Bradshaw*, *supra*, 14 Cal. 4th at 571, 59 Cal.Rptr.2d 186.)”

Morning Star Co. v. State Bd. Of Equalization (2006), 38 Cal. 4th 324, 333–334, 42 Cal.Rptr.3d 47, 53–54, confirms the *Syngenta/Tidewater* analysis, especially that a regulation must be intended to apply generally, and that it must implement, interpret or make specific the law administered by the agency, or govern the agency’s procedure.

Special Order No.: 239.02 is a regulation. It is applied to all persons proposed or adjudicated to mentally ill or have a mental abnormality in California who are detained by Department of Mental Health. Its use is mandatory. Thus the mandate of **Special Order No.: 239.02** implements, enforces or otherwise makes specific various provisions of the Welfare and Institutions Code, the Health and Safety Code, and the Penal Code. Specifically, **Special Order No.: 239.02** attempts to implement, interpret and/or make specific almost every Health and Safety and Penal Code section that deals with controlled substances, and **Special Order No.: 239.02** is vague and overbroad in its attempt to implement, interpret and/or make specific provisions of Welfare and Institutions Code, sections 5325 and 5325.1.

**NO EXCEPTION EXCLUDES SPECIAL
ORDER NO.: 239.02
FROM THE APA PROCEDURES.**

Clearly inapplicable are the provisions of Govt. Code § 11340.9 excluding:

“(d) A regulation that relates only to the internal management of the state agency. . . .”

“(f) A regulation that embodies the only legally tenable interpretation of a provision of law. . . .”

“(I) A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.”

Armistead v. State Personnel Bd. (1978) 22 Cal.3d 198, 204–205, 149 Cal.Rptr. 1, 4 quoting from the First Report of the Senate Interim Committee on Administrative Regulations to the 1955 Legislature, documents the necessity for strict adherence to the APA. The court found this necessary so as to prevent state agencies from avoiding obedience to the APA by denominating rules as “‘policies,’ ‘interpretations,’ ‘instructions,’ ‘guides,’ ‘standards,’ or the like,” and by containing them “in internal organs of the agency such as manuals, memoranda, bulletins, or [directing them] to the public in the form of circulars or bulletins.”

Armistead underlined that “[R]ules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA” (emphasis added), thus provision of state personnel transactions manual governing withdrawal of resignation by state employee merited no weight as agency interpretation where such provision had not been duly promulgated and published.

The Special Order in question here fits the above description perfectly. It is referred to as “Special Order,” and is replete with mandatory words such as “shall” and “will” in regard to actions to be taken. It contains mandatory language thus making it much more than simple policies, interpretations, instructions, guides, standards, or the like. Instead, it is a forbidden underground regulation which has not been adopted pursuant to the Administrative Procedures Act.

The authority for issuing **Special Order No.: 239.02** is stated in that document as, “By order of the Deputy Director, Long Term Care Services.”

Petitioner alleges that no authority exists in statutory law, or in the Constitutions of California or the United States, which would grant the Deputy Director, Long Term Care Services, of the Department of Mental Health the autocratic authority to issue, utilize, enforce, or attempt to enforce any rule or regulation by denominating it a **Special Order**, unless it has first been promulgated pursuant to the Administrative Procedures Act.

Special Orders apply statewide to all DMH facilities. These **Special Orders** mandate what each facility **must** mandate in its own version of an **Administrative Directive**. Having each DMH facility issue its own mandated version of a **Special Order** under the label of an **Administrative Directive** is just the sort of “avoiding obedience to the APA” that is discussed in *Armistead v. State Personnel Bd.*

**SPECIAL ORDER NO.: 239.02
APPLIES GENERALLY
TO ALL PERSONS DETAINED BY THE
DEPARTMENT OF MENTAL HEALTH**

Modesto City Schools v. Education Audits Appeal Panel, (3d Dist. 2004) 123 Cal.App. 4th 1365, 1381, 20 Cal.Rptr.3d 831, 842, holds that to be deemed an underground regulation, which would be invalid because it was not adopted in substantial compliance with the procedures of the APA, the agency must intend it to apply generally rather than in a specific case, and the agency must adopt it to implement, interpret, or make specific the law enforced by the agency.

“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. . . . (*Tidewater Marine Western, Inc. v. Bradshaw*, *supra*, 14 Cal. 4th at 571, 59 Cal.Rptr.2d 186.)” (*Morning Star Co. V. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 55).

Kings Rehabilitation Center, Inc. V. Premo, (3rd Dist. 1999) 69 Cal.App. 4th 215, 217, 81 Cal.Rptr.2d 406, notes:

“The APA is partly designed to eliminate the use of ‘underground’ regulations; rules which only the government knows about. If a policy or procedure falls within the definition of a regulation within the meaning of the APA, the promulgating agency must comply with the procedures for formalizing such regulations, which include public notice and approval by the Office of Administrative Law (OAL). Failure to comply with the APA nullifies the rule. (Govt. Code § 11350(a); *Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 4”) (Emphasis added.)

Special Order No.: 239.02 is neither intended nor utilized to make specific determinations but is utilized generally when determining numerous rights of all persons detained by the Department of Mental Health. Thus, **Special Order No.: 239.02** is a regulation that must be promulgated as a regulation but otherwise is a null and void underground regulation.

6. Provide information demonstrating that the petition raises an issue of considerable public importance requiring prompt resolution.

Special Order No.: 239.02 is unconstitutionally vague and overbroad in its attempt to implement, interpret and/or make specific provisions of Welfare and Institutions Code, sections 5325 and 5325.1.

Special Order No.: 239.02 is at odds with the due process rights, conveyed by the California and United States Constitutions, to all persons detained by the DMH because it mandates actions that affect their liberty and property interests but has never been legally promulgated.

The state authorized enforcement by state employees of the numerous statutory and constitutional violations contained in each and every un-promulgated, underground,” Manual, Instructions, Administrative Directive, or Special Order has resulted in a great deal of litigation at great expense to the taxpayers of California. The OAL, pursuant to its regulatory duties, is in a position to bring these underground regulations into the oversight process, and has a duty to the taxpayers to do so.

Public comment and OAL oversight is needed in order to halt the “bureaucratic tyranny” warned of in *Tidewater* and *Morning Star*.

Morningstar reiterates, “[2] These requirements promote the APA’s goals of bureaucratic responsiveness and public engagement in agency rulemaking. ‘One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law’s requirements so that they can conform their conduct accordingly [citation]. The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. [Citation.]’ [132 P.3d 255] (*Tidewater, supra*, 14 Cal.4th at pp. 568–569, 59 Cal.Rptr.2d 186, 927 P.2d 296.)” (*Morning Star Co. V. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 53.)

7. (Optional) Please attach any additional relevant information that will assist OAL in evaluating your petition.

Notwithstanding numerous requests, grievances, complaints to the DMH, and even petitions submitted to the OAL, the Department of Mental Health has steadfastly refused and failed to follow the law as set forth in the Administrative Procedures Act and promulgate its guidelines, criteria, bulletins, manuals, instructions, orders, standards of general application, or other rules.

This type of obdurate opposition to correcting illegal and unconstitutional content in its Administrative Directives perfectly illustrates why the Legislature estab-

lished the procedures set forth in the Administrative Procedures Act. This clearly demonstrates the absolute need for oversight and public input to halt the type of bureaucratic tyranny exhibited by the Department of Mental Health by issuing, using, enforcing, or attempting to enforce this type of underground regulation.

CONCLUSION

The Department of Mental Health is not, and has not been, responsive to the public they serve. Nor has the DMH been responsible to the taxpayers who must pay the bills that result from the failure of the DMH to follow the law and serve the public who pays their salaries. The California Supreme Court directed attention to this problem by stating:

“Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. [Citation.]’ [132 P.3d 255] (*Tidewater, supra*, 14 Cal.4th at pp. 568–569, 59 Cal.Rptr.2d 186, 927 P.2d 296.)” (*Morning Star Co. v. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 53.)

Such bureaucratic tyranny has been a problem throughout the history of this country. Now, it must be stopped once again. The tyrannical bureaucrats in the Department of Mental Health must be directed to follow the law.

The DMH, part of the Executive Branch, lacks Constitutional authority to enact legislation. The Legislature has granted state agencies and departments quasi-legislative powers through the APA providing they follow specific promulgation procedures. However, until and unless the DMH does follow the provisions of the APA to properly promulgate **Special Order No.: 239.02**, it is an underground regulation which has been implemented in violation of the Separation of Powers Clause, Article III, Section 3, of the California Constitution.

To allow the DMH to continue to utilize a controversial Administrative Directive, such as **Special Order No.: 239.02**, would be to allow the sort of unfettered power in the Executive Branch that is a step toward a totalitarian concentration of power in the executive; a power to be exercised with inadequate legislative standard, and capable of avoiding judicial review, particularly when done through sleight-of-hand tactics designed to avoid review, has been prohibited from the earliest times. See *Hayburn’s Case*, (1792) 2 U.S. (Dall.) 408, 1 L.Ed. 436, and its progeny.

Throughout the negotiation and complaint process prior to filing this petition, the Department of Mental Health has consistently cited “safety and security of the institution” as the justification for implementing the

rules and regulations that Petitioner alleges are underground rules.

Petitioner takes the position that the justification for using underground rules and regulations is not relevant to the question presented in this Petition. The questions before the OAL are: (1) Is **Special Order No.: 239.02** a regulation within the meaning of the Administrative Procedures Act; and, (2) Did the Department of Mental Health promulgate **Special Order No.: 239.02** pursuant to the Administrative Procedures Act.

Petitioner submits that **Special Order No.: 239.02** is a regulation within the meaning of the Administrative Procedures Act, and that the Department of Mental Health has not promulgated **Special Order No.: 239.02** pursuant to the Administrative Procedures Act, and it is therefore an underground regulation that must be declared null and void.

Based on the foregoing, it is clear that there is a need for public participation in the regulatory process which directs the attention of agency policymakers within the Department of Mental Health to the public they serve, and to ensure that those persons or entities whom a regulation will affect have a voice in its creation.

8. Certifications:

I certify that I have submitted a copy of this petition and all attachments to:

Stephen W. Mayberg, Ph.D., Director
California Department of Mental Health
1600 9th St., Suite 151
Sacramento, CA 95814
(916) 654-2413/(916) 654-2309

I certify that all the above information is true and correct to the best of my knowledge.

/s/

February 17, 2009

MICHAEL GEORGE ST. MARTIN
PETITIONER

Date

SUMMARY OF REGULATORY ACTIONS

REGULATIONS FILED WITH SECRETARY OF STATE

This Summary of Regulatory Actions lists regulations filed with the Secretary of State on the dates indicated. Copies of the regulations may be obtained by contacting the agency or from the Secretary of State,

Archives, 1020 O Street, Sacramento, CA 95814, (916) 653-7715. Please have the agency name and the date filed (see below) when making a request.

File# 2009-0312-01

CALIFORNIA ENERGY COMMISSION

Alternative & Renewable Fuel & Vehicle Technology Program

This rulemaking action implements the Alternative and Renewable Fuel and Vehicle Technology Program established by AB 118, Chapter 750 of 2007, and AB 109, Chapter 313 of 2008. The rulemaking describes program proposals that will receive preferences in the awarding of program funds. It establishes program sustainability goals and criteria which will be used to evaluate applications. It establishes certain funding restrictions on activities already required by law. It describes the purpose and requirements for the Investment Plan that must be created by the Commission in consultation with an Advisory Body. And it describes how the Advisory Body will be created as well as its duties and operations.

Title 20

California Code of Regulations

ADOPT: 3100, 3101, 3101.5, 3102, 3103, 3104, 3105, 3106, 3107, 3108

Filed 04/22/2009

Effective 04/22/2009

Agency Contact: Aleecia Macias (916) 654-4526

File# 2009-0316-01

CORRECTIONS STANDARDS AUTHORITY

Minimum Standards for Local Detention Facilities

This regulatory action would update and otherwise amend existing regulations on the minimum standards for local detention facilities.

Title 15

California Code of Regulations

AMEND: 1004, 1006, 1007, 1008, 1012, 1013, 1018, 1027, 1028, 1029, 1032, 1040, 1044, 1045, 1046, 1055, 1056, 1059, 1063, 1066, 1082, 1101, 1105, 1144, 1151, 1161, 1209, 1217, 1230, 1241, 1243, 1245, 1247, 1262, 1272

Filed 04/20/2009

Effective 05/20/2009

Agency Contact: Allison Ganter (916) 323-8617

File# 2009-0402-04

DEPARTMENT OF HEALTH CARE SERVICES

Out-of-State Hospital Inpatient Services Reimbursement

This rulemaking amends Title 22 section 51543 to comply with a judgment issued pursuant to a stipulation by the San Francisco Superior Court in April of 2004. The current text of the California Code of Regulations,