

INITIAL STATEMENT OF REASONS:

The California Department of Corrections and Rehabilitation (CDCR) proposes to amend Sections 3000, 3173.2, 3287, 3410.1 and adopt 3410.2 of the California Code of Regulations (CCR), Title 15, Division 3, by implementing the use of passive canine search teams to search all individuals who come onto institutional grounds.

Recognizing the ongoing problem with drug use and trafficking within the institutions, CDCR must focus on undertaking a comprehensive approach to prevent the introduction of drugs and contraband into its institutions. Persons entering and exiting CDCR institutions sometimes employ extraordinary means to try and smuggle drugs and contraband into and out of prisons. These methods include secreting drugs and contraband in hidden pockets in clothing or in body cavities. Importing, trafficking, and drug use cause many problems in a prison setting, including an increase in assaults, power struggles within the inmate population, establishment of an underground economy, and staff corruption. Tragically, 29 inmate deaths attributed to illegal drug overdoses were reported from January 2012 to February 2014. Incidents involving drugs also result in overtime for writing reports, processing evidence, processing crime scenes, and searching among other things.

There were over 4000 documented incidents recorded in 2013 related to drugs in our prisons. Of these 4000 drug related incidents, there were 382 arrests of non-inmates attempting to introduce drugs into an institution. Of the 382 arrests there were 10 staff, 320 visitor, and 52 non-visitor arrests from January 2013 to December 2013.

In June 2013 the CDCR conducted blind baseline urine testing of 25 percent of the inmate population. The results confirmed nearly 23 percent of the inmates who voluntarily participated tested positive for one or more illicit drugs. Approximately 30 percent of inmates randomly selected to voluntarily test declined to do so even though there were no disciplinary actions taken against inmates testing positive.

Based on the 2013 drug related incidents and test results, the Department must do more to reduce the availability of and use of drugs in the prison system. Reducing the introduction of illegal drugs into prison facilities will decrease drug use and have an indirect effect of reducing violence, injuries, gang influence, lockdowns, and modified programs. Therefore, the Department seeks to move forward with the implementation of various drug interdiction strategies, which includes the use of passive canine units. "Passive" air scan canine searches coupled with other drug and contraband interdiction strategies such as increased sanctions will act as a deterrent to the introduction of illicit drugs.

Air scan is the terminology used to describe how a canine breathes or smells the air around a person or item. When the canine breathes through his/her nose they can detect the odor of specific substances and then alert or change behavior in response to the odor. A passive air scan search is conducted by allowing a canine to roam through an open area where people congregate and scan the air without directing the canine to target a specific item, person, or area. The handler, utilizing a 6' leash, follows the canine freely past individuals or through areas. If the canine discovers the target odor, he/she will "alert" the handler when in close proximity to whatever is giving off the target odor. A passive alert is typically the dog sitting or staring at the target odor. An active alert is typically scratching or pawing at the target odor.

A direct air scan search is conducted by identifying a specific person, place, or article of property and directing the canine to scan the air to determine if the target odor is present. If the canine discovers the target odor, he/she will alert the handler when in close proximity to whatever or whoever is giving off the target odor.

Staff are required to be polite, courteous, and respectful. Canine handlers will reassure individuals to be searched that the procedure is safe and the canine will be on a leash. Handlers will be trained to keep the canine from climbing, jumping, pawing, etc. and will not be allowed to touch the individuals, but inadvertent contact may occur by a dog nose, which will not be intentional and not encouraged.

Visitors must give consent for a search by a departmental canine. Visitors can refuse to consent to the search and if so, will be denied contact visiting, but may be given a non-contact visit if space is available. If the odor of illegal drugs is detected during the air scan of the visitor, denial of entrance into the institution or the approval of a non-contact visit will be in accordance with Department policy. A visitor found in possession of drugs and/or cell phones (via admission or emptying of his/her pockets, etc.) shall be referred to the Investigative Services Unit (ISU) for possible arrest. A visitor who receives negative results from the air scan will be permitted to resume his/her visitor processing.

Departmental employees consent to search is a condition of employment and employees cannot refuse a search, including searches by a canine. If the odor of drugs is detected, the individual will not be permitted to enter the institution and supervisory staff will be notified. If an individual is found in possession of drugs or contraband, they will not be permitted to enter the institution and shall be referred to ISU for possible arrest.

Contractors and their employees, members of the media, and volunteers will consent to a search as a condition of entering institutional settings. Failure to consent will result in denial of entry.

Prior to any search, the staff member in charge of the search will determine if all persons are going to be searched or if a random selection will be used to determine who will be searched. If a random selection is used, (e.g., every fifth person), this selection process will be determined prior to the start of any searches and documented on the search plan and not changed without approval of the staff member in charge of the search. Under no circumstances will profiling be practiced.

This rulemaking action will provide appropriate authority and direction for staff and canine handlers conducting searches on all persons entering or exiting institutional grounds.

CONSIDERATION OF ALTERNATIVES:

The Department has determined that no reasonable alternatives considered, or that has otherwise been identified and brought to the attention of the Department, would be more effective in carrying out the purpose for which this action is proposed, would be as effective and less burdensome to affected private persons than the action proposed, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Department has made an initial determination that no reasonable alternatives to the regulation have been identified or brought to the attention of the Department that would lessen any adverse impact on small business.

Currently, no reasonable alternatives have been brought to the attention of the Department that would alter the Department's initial determination.

SIGNIFICANT ADVERSE ECONOMIC IMPACT ON BUSINESS

The Department has made an initial determination that this action will not have a significant adverse economic impact on business because business is not affected by the internal management of prisons.

ECONOMIC IMPACT ASSESSMENT:

The Department is implementing passive canine searches to the extent allowed with existing resources and will expand the program when and if additional resources are provided.

Additionally, in accordance with Government Code Section 11346.3(b), the CDCR has made the following assessments regarding the proposed regulations:

Creation or Elimination of Jobs within the State of California

The Department has determined that the proposed regulations will have no impact on the creation of new or elimination of existing jobs or businesses within California because those jobs or businesses are not affected by the internal management of prisons.

Creation of New Businesses or Elimination of Existing Businesses within the State of California

The Department has determined that the proposed regulations will have no effect on the creation of new or elimination of existing businesses within the State of California because those businesses are not affected by the internal management of prisons.

Expansion of Business Currently Doing Businesses within the State of California

The Department has determined that the proposed regulations have no effect on the expansion of businesses currently doing business within the State of California because they are not affected by the internal management of prisons.

BENEFITS OF THE REGULATIONS

The proposed regulatory action will:

- Provide staff with additional tools to detect the presence of illegal substances and contraband providing an additional deterrent to the introduction of illegal substances to the inmate population.
- Eliminate the potential strife between inmates trying to profit from illegal activities. Thus, the need to modify inmate program as a result of disruptive behaviors is significantly reduced.
- Provide an environment free from illegal substances for inmates seeking/advocating recovery from addiction.
- Provide a safer environment for inmates, staff, visitors, contractors and their employees, and volunteers.

A safe environment promotes the Department's efforts in providing rehabilitative programs to the inmate population, as we work towards preparing individuals for release back into society.

REPORTS RELIED UPON

Information regarding COMPSTAT DAI Analysis – Drug Related Incidents 2013 (January 2013 through December 2013), DAI Urinalysis Baseline Testing COMPSTAT Analysis (July 9, 2013), Staff Arrest Statistics, Division of Adult Institutions, January 2013 through December 2013, Visitor Arrest Statistics, Division of Adult Institutions, January 2013 to December 2013, and Non-Visitor Arrest Statistics, Division of Adult Institutions, January 2013 to December 2013 can be viewed on the Department's website at http://www.cdcr.ca.gov/Regulations/Adult_Operations/Supplemental_Documents.html.

Copies of these documents will be available for review as part of the rulemaking file.

SPECIFIC PURPOSE AND RATIONALE FOR EACH SECTION, PER GOVERNMENT CODE 11346.2(B)(1):

Chapter 1. Rules and Regulations of Adult Operations and Programs

Article 1. Behavior

3000 Definitions.

Section 3000 is amended to add and alphabetically merge definitions associated with the new Canine Searches of All Individuals into existing definitions.

Canine is defined to offer a term used to describe a dog's function within the Department, commonly used breeds, and to make clear that a Department canine is designated a peace officer.

Canine Handler is defined to offer a term used for a peace officer trained to handle a canine and recognize the canine's alert signs.

Air Scan Search is defined to offer a term used when a canine is instructed to scan or "sniff" the air in an attempt to detect the odor of drugs, cellphones, and/or tobacco.

Positive Canine Alert is defined to offer a term that describes the behavior a canine exhibits when they detect the odor of drugs, cellphones, and/or tobacco.

3173.2 Searches and Inspections.

Subsections 3173.2(a) through 3173.2(b) are unchanged.

Subsection 3173.2(c) is amended to add passive canines as an additional method to search visitors for drugs or contraband. This is necessary to assist the Department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions.

New subsection 3173.2(c)(1) is adopted to establish that any individual is subject to canine search. It is important that members of the public, staff, and others who enter CDCR institutions are aware, through the Department's public and codified rules, that such searches will take place. This is necessary to assist the Department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions.

New subsection 3173.2(c)(2) is adopted to specify who is responsible for determining the random method of searches, and to ensure clarity that the method is determined and documented prior to the beginning of searches and shall not be altered. This is necessary to ensure profiling is not practiced and to assist in the department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions.

New subsection 3173.2(c)(2)(A) is adopted to establish that an announcement will be made informing visitors of the passive air scan search and the purpose of the search. This is necessary to ensure visitors are aware of the Department's use of canine detection dogs to search for illegal drugs.

New subsection 3173.2(c)(2)(B) is adopted to establish who will request consent for the search and inform visitors of their options to refuse, and the consequences. This is necessary to allow the visitor to exercise their right not to be searched and to ensure understanding that refusal to be searched will result in a denial of contact visiting.

New subsection 3173.2(c)(2)(C) is adopted to establish the behavior of the visitor towards the canine. This is necessary to ensure visitors do not attempt to pet, stroke, or otherwise distract the canine and to protect the visitor as well as the canine.

New subsection 3173.2(c)(2)(D) is adopted to establish the handler's instruction to the canine towards the visitor. This is necessary to ensure the canine does not intentionally come in contact with the visitor and to protect the visitor as well as the canine.

New subsection 3173.2(c)(2)(E) is adopted to establish how the handler responds to an excessively nervous visitor. This is necessary so visitors are as comfortable as possible with the presence of the canine and assist the Department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions and ensure.

New subsection 3173.2(c)(3) is adopted to establish the title of this section.

New subsection 3173.2(c)(3)(A) is adopted to establish the visitor's rights if there is no positive alert. This is necessary to ensure that the visiting process continues promptly after completion of an air scan that does not result in a positive alert.

New subsection 3173.2(c)(3)(B) is adopted to establish that if there is a canine alert, the visitor is required to submit to an unclothed body search before being allowed a contact visit that day. Prior to an unclothed body search, CDC Form 888 (Rev. 01/03), Notice of Request for Search, must be completed by staff and signed by the visitor giving authorizing for the search. If the visitor refuses to be searched or if drugs or contraband are found, CDC Form 887-B (Rev. 01/03), Notice of Visitor Warning/ Termination/ Suspicion/ Denial/ Revocation must be completed to specify the visiting violation and length of time of the denial. These forms are incorporated by reference into these regulations and copies are available to the public for review. This language is necessary to ensure visitors are aware of their rights and ensure proper forms are completed and proper procedures are followed by staff to assist in the Department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions.

New subsection 3173.2(c)(3)(C) is adopted to establish the consequences if a visitor is found in possession of drugs and/or cell phone and are referred to the institutions Investigative Services Unit (ISU). This is necessary as a preventative measure to protect staff, visitors, and inmates and assist the Department's efforts in minimizing/eliminating the introduction of contraband and drugs and maintaining a healthy visiting environment in its institutions.

New subsection 3173.2(c)(3)(D) is adopted to establish that any confiscated substance or contraband will be handled as evidence. This is necessary to ensure the chain of custody and that evidence processing is completed for potential referral for criminal prosecution.

New subsection 3173.2(c)(3)(E) is adopted to establish who will determine what action will be taken if contraband is found by the canine handler. This is necessary to ensure appropriate supervision of canine handlers and consistency with departmental expectations.

New subsection 3173.2(c)(3)(F) is adopted to establish the requirements if there is a positive alert and no drugs or contraband are found, or if drug paraphernalia is discovered. The Department's intent is not punitive in nature, it is meant as a preventative measure to protect the public by allowing custody staff to search a visitor who they reasonably suspect may introduce drugs or contraband into the facility. This is necessary to assist the Department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions.

New subsection 3173.2(c)(3)(G) is adopted to establish the consequences for refusal to submit to an unclothed body search. This is necessary to assist the Department's efforts in minimizing/eliminating the

introduction of contraband and drugs into the institutions while providing some access to visiting if possible.

New subsection 3173.2(c)(3)(H) is adopted to establish the consequences of refusing to submit to an unclothed body search after three positive alerts. This is necessary ensure visitors are aware of the consequences of positive alerts and to assist the Department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions.

New subsection 3173.2(c)(3)(I) is adopted to establish forms for consent or refusal for an unclothed body search that must be completed. This is necessary to ensure everyone is aware of their rights prior to an unclothed by search and the consequences of refusing a search or if drugs or contraband are found.

New subsection 3173.2(c)(4) is adopted to establish the title of this section.

New subsection 3173.2(c)(4)(A) is adopted to establish that canines may alert to a visitor who takes prescription medications This is necessary as canines detect all types of drugs to assist the Department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions.

New subsection 3173.2(c)(4)(B) is adopted to establish the responsibility of the visitor if they claim the alert is to prescribed medications. This is necessary to ensure the visitor does not lose their rights to a contact visit and assist in the Department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions while providing access to visiting if possible.

New subsection 3173.2(c)(4)(C) is adopted to establish that if there is a positive scan, with proper documentation of prescribed medication, a regular visit may be authorized. This is necessary to ensure the visitor may not lose their right to visit and assist in the Department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions.

New subsection 3173.2(c)(4)(D) is adopted to establish the type of authorized visit if documentation of prescribed medication is not readily available. This is necessary to assist the Department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions.

New subsection 3173.2(c)(5) is adopted to establish that only Department personnel shall search visitors. This is necessary to ensure that only departmentally trained drug detection staff and certified passive search canines are used in the search of persons.

New subsection 3173.2(c)(6) is adopted to establish the title of this section.

New subsection 3173.2(c)(6)(A) is adopted to establish the process when visitors are found in possession of drugs or contraband and referred to the institutions ISU. The ISU is a group specifically trained in investigations who will detain the suspect while other CDCR staff continues to process visitors for their scheduled visits. This is necessary to inform visitors of the consequences of being found in possession and to assist the Department in its efforts to provide a safe environment for inmates, visitors, and staff and its efforts to prevent the introduction of drugs or contraband into the institution.

New subsection 3173.2(c)(6)(B) is adopted to establish the process after the pre-booking has been completed. This is necessary to ensure staff and arrestee(s) are aware of the procedures if an arrest is made and that the process is conducted promptly.

New subsection 3173.2(c)(6)(C) is adopted to establish who makes the decision of an arrest, citation, or referral to the District Attorney's (DA) for visitors in possession of drugs or contraband. This is necessary to ensure consistency and to ensure prompt referral to the local DA office for prosecution is completed as requested by the DA.

New subsection 3173.2(c)(6)(D) is adopted to establish the procedure when a visitor is arrested or receives a citation while on institution grounds. In addition, CDCR 837-A (Rev. 07/05), Crime/Incident Report, Part A - Cover Sheet, is used to document the crime/incident and will be forwarded along with other reports to the DA's office. This information is necessary to ensure the DA has documentation of the arrest and the reasons for the arrest. Form 837-A is already established in regulations therefore, no copy is being made available to the public.

Subsections 3173.2(d) through 3173.2(i)(2) are unchanged.

Subchapter 2. Inmate Resources

Article 2. Security

3287 Cell, Property, and Body Inspections.

Subsections 3287(a) through 3287(c) are unchanged.

New subsection 3287(c)(1) is adopted to establish that inmates shall be subject to a passive air scan. This is necessary to check an inmate for the possession of drugs in an effort to prevent the use of drugs or contraband in the institution.

New subsection 3287(c)(2) is adopted establish that an announcement will be made informing inmates of the passive air scan and the purpose of the search. This is necessary to ensure inmates are aware of the Department's use of canine detection dogs to search for illegal drugs.

New subsection 3287(c)(2)(A) is adopted to establish the behavior of the canine towards the inmate. This is necessary to ensure the canine does not intentionally come in contact with the visitor and to protect the visitor as well as the canine.

New subsection 3287(c)(2)(B) is adopted to establish how the handler responds to an excessively nervous inmate. This is necessary so the inmate feels as comfortable as possible during the search and to assist the Department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions.

New subsection 3287(c)(3) is adopted to establish the process when there is a positive canine alert to an inmate. This is necessary to determine the reason for the positive canine alert and to prevent the use of drugs or contraband in the institution.

New subsection 3287(c)(3)(A) is adopted to establish that any confiscated substance or contraband will be handled as evidence. This is necessary to ensure the chain of custody and that evidence processing is completed for potential referral for criminal prosecution.

New subsection 3287(c)(3)(B) is adopted to establish who will determine what action will be taken if contraband is found by the canine handler. This is necessary to ensure appropriate supervision of canine handlers and consistency with departmental expectations.

Subchapter 5. Personnel

Article 2. Employees.

3410. Intoxicants and drugs.

Subsection 3410.1 title is amended to add persons who are subject to search.

Subsection 3410.1(a) is amended to include what are subject to be searched by passive canine. This is necessary to ensure all employees are aware of what will be searched and the type of search to assist in the Department's efforts in minimizing/eliminating the introduction of contraband into the prisons.

New subsection 3410.1(b) is adopted to establish that all persons consent to be searched when entering institutional grounds. This is necessary so they know by coming onto the grounds of any department facility they consent to be searched to assist the Department's efforts in minimizing/eliminating the introduction of contraband into the prisons.

New subsection 3410.2 title is adopted to establish the type of search and who will be searched.

New subsection 3410.2(a) is adopted to establish all employees are subject to be searched, how they will be searched and the purpose of the search. This is necessary to ensure all individuals are aware of the search regulations to assist the Department's efforts in minimizing/eliminating the introduction of contraband into the prisons.

New Subsection 3410.2(b) is adopted to establish direct searches of all employees and who will be responsible for determining the random method of searches and to ensure clarity that the method is determined and documented prior to the beginning to searches and shall not be altered. This is necessary to ensure that profiling is not practiced. Random searches insure that all employees have an equal chance of being selected for a search. Such searches assist in the department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions.

New subsection 3410.2(b)(1) is adopted establish that employees will be made informed of the passive air scan search and the purpose of the search. This is necessary to ensure employees are aware of the Department's use of canine detection dogs to search for illegal drugs.

New subsection 3410.2(b)(2) is adopted to establish who will inform employees what the canines have been trained to do. This is necessary to ensure that persons being searched have an understanding of the process and the specialized training for canine units.

New subsection 3410.2(b)(3) is adopted to establish the behavior of the employees towards the canine. This is necessary to ensure employees do not attempt to pet, stroke, or otherwise distract the canine. The safety of staff and canine units is protected by such notice.

New subsection 3410.2(b)(4) is adopted to establish the handler's instruction to the canine towards the individual being scanned. This is necessary to ensure that the canine does not intentionally contact the person to protect the individual as well as the canine.

New subsection 3410.2(b)(5) is adopted to establish how the handler responds to an excessively nervous employee. This is necessary so employees are as comfortable as possible with the presence of the canine and assist the Department's efforts in minimizing/eliminating the introduction of contraband and drugs into the institutions.

New subsection 3140.2(c) is adopted to establish canine passive air scan searches. This is necessary to utilize canines to assist in the Department's efforts in minimizing/eliminating the introduction of contraband into the prisons.

New subsection 3410.2(c)(1) is adopted to establish where air scan searches of individuals may be conducted. This is necessary so the canine can move freely through areas occupied by employees to assist in the Department's efforts in minimizing/eliminating the introduction of contraband in the institutions.

New subsection 3410.2(c)(2) is adopted to establish that reasonable suspicion may initiate a passive air scan. This is necessary because there may be circumstances when an individual is selected for a search outside the random search protocol because reasonable suspicion exists. Reasonable suspicion is defined as a search based on articulable facts, circumstances, and rational inferences that a person has committed, is committing, or is about to commit a crime.

New subsection 3410.2(d) is adopted to establish Positive Canine Alert.

New subsection 3410.2(d)(1) is adopted to establish who is notified when a canine alerts to an air scan search and that the individual and any item of that individual is subject to search. This is necessary as a preventative measure to ensure drugs or contraband are not taken inside the institution.

New subsection 3410.2(d)(2) is adopted to establish who to contact when an exigent investigation may be needed prior to a search. This is necessary to prevent the loss of critical information or evidence that a departmental employee, employee of other government agency, contract employee, contractor or their employee, or volunteer is involved in potential criminal activity.

New subsection 3410.2(d)(3) is adopted to establish the process when employees are found in possession of drugs or cell phones and referred to the ISU. This is necessary to inform employees of the consequences of being found in possession and to assist the Department in its efforts to provide a safe environment for inmates, visitors, and staff and its efforts to prevent the introduction of drugs or contraband into the institution.

New subsection 3410.2(d)(4) is adopted to establish who can and who cannot refuse to be searched and the consequences. This is necessary as a preventative measure to ensure drugs or contraband are not taken inside the institution.

New subsection 3410.2(d)(5) is adopted to establish that outside law enforcement shall not be involved in the searching of employees. This is necessary to ensure that only departmentally trained and certified passive search canines are used in the search.

New subsection 3410.2(d)(6) is adopted to establish that if an arrest is initiated, persons arrested along with drugs and contraband are turned over to the ISU. This is necessary to assist the Department's efforts in minimizing/eliminating the introduction of contraband into the prisons.

New subsection 3410.2(d)(6)(A) is adopted to establish procedures after the pre-booking process. This is necessary to ensure individual are aware of the procedures if an arrest is made and ensure that the process is conducted promptly.

New subsection 3410.2(d)(6)(B) is adopted to establish who will determine the action to be taken if the individual is found in possession of drugs or contraband. This is necessary to ensure that individuals are aware who makes decisions.

New subsection 3410.2(d)(6)(C) is adopted to establish that if an arrest or a citation is issued, what form and documents will be forwarded to the DA's office. This is necessary for clarity.