

**State of California
Office of Administrative Law**

In re:

**Department of Corrections and
Rehabilitation**

Regulatory Action:

Title 15, California Code of Regulations

Adopt sections: 3410.1

Amend sections: 3173.2

Repeal sections:

**NOTICE OF APPROVAL OF CERTIFICATE OF
COMPLIANCE**

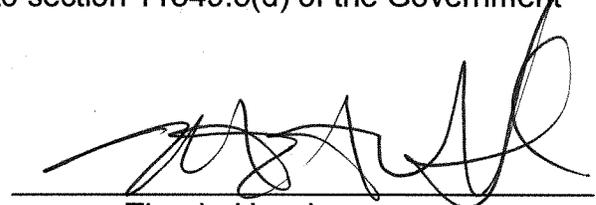
**Government Code Section 11349.1 and
11349.6(d)**

OAL File No. 2015-0304-01 C

This certification of compliance makes permanent sections 3410.1 and 3173.2 of title 15 of the California Code of Regulations to introduce electronic drug detectors as a tool for drug and contraband detection on the Department's institutional grounds.

OAL approves this regulatory action pursuant to section 11349.6(d) of the Government Code.

Date: 4/16/2015



**Thanh Huynh
Senior Attorney**

**For: DEBRA M. CORNEZ
Director**

**Original: Jeffrey Beard
Copy: Gail Long**

NOTICE PUBLICATION/REGULATIONS SUBMISSION**CERT**

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-2014-1007-06	REGULATORY ACTION NUMBER 2015-0304-01C	EMERGENCY NUMBER
For use by Office of Administrative Law (OAL) only			
NOTICE		REGULATIONS	

ENDORSED - FILEDin the office of the Secretary of State
of the State of California

APR 16 2015

3:59 PM

AGENCY WITH RULEMAKING AUTHORITY
California Department of Corrections and RehabilitationAGENCY FILE NUMBER (if any)
13-0239**A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)**

1. SUBJECT OF NOTICE		TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE	
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other		4. AGENCY CONTACT PERSON		TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn			NOTICE REGISTER NUMBER 2014, 422	PUBLICATION DATE 10/17/2014

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Electronic Drug Detection Equipment	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) 2014-0912-03E
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT 3410.1
	AMEND 3173.2
	REPEAL 15

3. TYPE OF FILING

<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input checked="" type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))		<input type="checkbox"/> Other (Specify)	

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input checked="" type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify)
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6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal
<input type="checkbox"/> Other (Specify)		

7. CONTACT PERSON

Gail Long	TELEPHONE NUMBER (916) 445-2276	FAX NUMBER (Optional) (916) 324-6075	E-MAIL ADDRESS (Optional) gail.long@cdcr.ca.gov
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8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE Diana Toche	DATE 2/27/2015
TYPED NAME AND TITLE OF SIGNATORY DIANA TOCHE, Undersecretary (A), Administration and Offender Services	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

APR 16 2015

Office of Administrative Law

TEXT OF ADOPTED REGULATIONS

In the following, all new language is indicated by underline and deleted text is indicated by ~~strikethrough~~.

Chapter 1. Rules and Regulations of Adult Operations and Programs

Subchapter 2. Inmate Resources

Article 7. Visiting

3173.2 Searches and Inspections.

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

Subsection 3173.2(c) is amended to read:

(c) Visitors shall be required to submit to contraband and/or metal detection device(s); and/or electronic drug detectors including, but not limited to, ION scanners and other available contraband and/or metal detecting device(s) technology, and a thorough search of all personal items, including inspection of a wheelchair, implant, prosthesis or assistive devices, prior to being allowed to visit with an inmate.

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

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 4573, 4573.5, 4576 and 5054, Penal Code.

Subchapter 5. Personnel

Article 2. Employees

New Subsection 3410.1 title is adopted to read:

3410.1 Search of Employees.

New subsection 3410.1 is adopted to read:

All persons who are employed by the department, employees of other government agencies, contract employees, contractors and their employees, and volunteers who come onto institutional grounds are subject to a search via the use of contraband and/or metal detection equipment and/or electronic drug detectors including, but not limited to, ION scanners and other available contraband and/or metal detecting device(s) technology.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 4573, 4573.5, 4576, and 5054, Penal Code.

FINAL STATEMENT OF REASONS:

The Initial Statement of Reasons is incorporated by reference.

UPDATES TO THE INITIAL STATEMENT OF REASONS

The Notice of Emergency Regulations was published in the California Regulatory Notice register on October 17, 2014, which began the public comment period. The Notice of Change to Regulations 14-09 was mailed out the same day and also posted on the Department's Internet and Intranet websites. The public hearing was held December 9, 2014.

During the 45-day public comment period thirty one comments were received. These comments are discussed below under the heading "*Summaries and Responses To Written Public Comments.*"

LOCAL MANDATE

This action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement of costs or savings pursuant to Government code Sections 17500-17630.

DETERMINATION

The Department has determined that no reasonable alternative considered would be more effective in carrying out the purpose for which this regulation is proposed; or would be as effective and less burdensome to affected private persons than the proposed action; 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 determined these proposed changes are the only regulations identified by the Department and no testimony or practical alternative has been offered that would alter the Department's decision.

INCORPORATED BY REFERENCE

No documents were incorporated by reference into this rulemaking action.

PUBLIC HEARING COMMENTS

Public hearing was held on December 9, 2014, at 9:00 a.m.

One individual, Commenter #24, commented at the public hearing.

SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS

COMMENTS #1

Comment 1A: Commenter states that with few exceptions, a large percentage of the visit time is taken up with processing because of the lack of staff for the number of visitors being processed, inefficient methods (in some facilities), visitors who don't know or don't follow the dress codes and take extra time to process, and rude, unhelpful staff. This additional regulation will absorb even more time that could be

spent with the loved one and create more frustration in the visitor check-in areas, which neither staff nor visitors need.

Response 1A: The Department recognizes the importance of visiting and understands the need to process visitors quickly and efficiently so as to not cause undue delay. The Electronic Drug Detection Equipment (EDDE) takes 8 to 10 seconds to perform a scan. Staff operating the EDDE have been trained to perform the testing in the most efficient manner possible without causing unnecessary delays. Individuals randomly selected for search will be directed to another area so as to not disrupt the normal pre-visiting procedures. The Department is currently using the EDDE in multiple institutions and has not noted an undue delay in processing.

Comment 1B: Commenter states that most of the contraband comes in through staff and also introduced ‘over the fence.’ Commenter heard of one case where Level one or minimum security work outside the fence, inmates were jumping the fence, going out to meet a contact, pick up contraband, and returning to the facility.

Response 1B: Although the above comment does address an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to GC Section 11346.9(a)(3), it is either insufficiently related to the specific action or actions proposed, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Comment 1C: Commenter asks if every single person that enters the prison for any reason is thoroughly scanned and searched, every single exit and entrance, what additional costs will be ensued, how many more scanners will be required, and will it keep contraband out of the yards. Perhaps the additional millions would be better spent to improve programs that would rehabilitate, teach, & educate inmates so they do not return to prison but become productive and contributing citizens.

Response 1C: All searches are random, not every person entering and exiting an institution will be scanned. Searches will be conducted within resources at random intervals. The Department is adopting a layered approach to Drug Interdiction using preventive methods as well as rehabilitative programs to achieve an overall environment free of drugs. **Also see the Economic Impact Assessment in the Initial Statement of Reasons.**

COMMENTER # 2

Comment 2A: Commenter offers new subsections (a) and (b) and suggest they be added to Subsection 3410.1 to include a search of all persons, personal property, and vehicle so there is no misunderstanding or disparity in treatment of staff and employees.

Response 2A: The Department will not incorporate the proposed text, but refers the commenter to Government Codes 11340.6 and 11340.7, which describes the process for requests to repeal or amend an existing regulation, or to adopt a new regulation.

COMMENTER #3

Comment 3A: Commenter quotes the Initial Statement of Reasons (ISOR) and says that CDCR fails to account for the total number of staff caught trafficking drugs (and other dangerous contraband) into California prisons, but were nicely walked off of prison grounds, politely asked to resign/retire (often with pensions and benefits unaffected), but never arrested (or prosecuted) and asks, how many staff members

were caught trafficking drugs etc. into California prisons in 2013.

Response 3A: See Response 1B.

Comment 3B: Commenter quotes Subsection 3173.2(c) and states that a search of visitors is not discretionary, but mandatory ("shall be required to submit"). In fact, every visitor, every instance of entering prison grounds is intimately searched. Commenter states Subsection 3410.1 does not contain any mandatory language, but says such persons may only be subjected to a search, instead of the "shall be required to submit" and does not contain any language pertaining to "a thorough search of all personal items, including inspection of a wheelchair, implant, prosthesis or assistive devices," as does the language of section 3173.2(c). Commenter says please explain why section 3410.1 does not contain any mandatory language, and why no language as to "a thorough search of all personal items," etc.

Response 3B: Visitors have a constitution right to refuse a search; however, they will forfeit visiting for that day. See Title 15 CCR Section 3176(a)(3)(A).

Comment 3C: Commenter asks what number of persons other than visitors will be searched, under what circumstances, in what way they will be searched, and what authority exempts prison employees from searches.

Response 3C: The Department has begun by searching five percent of the people attempting to enter institutions. This number or percentage can fluctuate, but will increase as additional resources become available. The regulations do not exempt anyone from search. All staff and visitors are subject to the search.

Comment 3D: Commenter states if CDCR is serious about controlling trafficking, commenter suggests combining sections 3173.2(c) and 3410.1 to state that all visitors, employees, and volunteers are required to submit to searches prior to being allowed on prisons grounds for any reason.

Response 3D: See Response 3B.

COMMENTS #4

Comment 4A: Commenter states the ISOR does not indicate the types of substances that the baseline tests revealed (i.e. (sic) alcohol, marijuana, LSD, etc., amphetamines, etc.) nor the percentages, and fails to identify whether the amount of substances revealed by the baseline tests (including percentages of the sample group) were for substances that can be obtained/made in prison (e.g. alcohol/pruno, controlled medication like morphine sulfate [pain medication prescribed by CDCR physicians], which inmates who receive routinely "cheek" to give/sell to other inmates); and substances that are introduced by persons coming on to prison grounds.

Response 4A: See Response 1B.

COMMENTS #5

Comment 5A: Commenter opposes the proposed regulations that require mandatory scan on visitors to submit to an ION scanner search and discretionary scans on staff.

Response 5A: See Response 3B.

Comment 5B: Commenter states ION Scanners are highly unreliable and may register an alarm from residue left inside the scanner from previous scans of visitors, residue from currency, other contaminated objects, or substances being legally used and possessed.

Response 5B: The Department has no knowledge of EDDE being highly unreliable and has ensured training has been provided to EDDE operators that address clearing the machine between tests to eliminate the possibility of residue being left in the machine. The equipment currently in use is the Smith's Detection ION Scan 400B. It is a reliable and sensitive detector that can identify small amounts of residue of a variety of drugs with a false positive rate of less than one percent.

Comment 5C: Commenter states visitors who have a false positive often do not have recourse to prove their innocence and visitors sometimes being turned away based on a highly sensitive and flawed scanner after having made hours long drive to see the inmate can be devastating and may dissuade people from visiting.

Response 5C: The Department recognizes the importance of visiting and does not intend to turn visitors away that test positive. Language has been included to address options for non-contact visiting for those who test positive and do not want to submit to an unclothed body search.

Comment 5D: Commenter says the CDCR does not state explicitly what the result of a positive scan will be for visitor or staff and references Sections 3173.2(d)(2) and 3173.2(h).

Response 5D: See Response 5C.

Comment 5E: Commenter strongly recommends ION Scanners are not used to search visitors because of the high rate of false positive and if they are used, recommends CDCR create an adequate and prompt process for positive alert to be challenged. Commenter states an unclothed strip search should never be required based on a positive ION alert, and instead have the option of a pat-down search and if no contraband is found they should be allowed to visit the same day.

Response 5E: The Department has no knowledge of a high rate of false positives with the use of EDDE. The Department recognizes the importance of visiting and encourages visiting as a means of maintaining relationships, and has created a good component to interdict drugs from entering our institutions. Comment pertaining to unclothed body search is outside the scope of this regulation.

Comment 5F: Commenter refers to reports of prison guards being indicted for smuggling drugs to inmates and states that it is not persuasive that CDCR cites a higher number of visitor arrests who are only in contact with inmates in highly controlled and supervised visiting rooms, and the relaxed scrutiny of staff who have unsupervised access to incarcerated people and who could be responsible for a large percentage of drugs entering prisons. Commenter recommends that scanners not be used on visitors or be randomized for both visitors and staff. Commenter also recommends CDCR create a process to allow visitors to challenge an alert the same day, and never require an unclothed strip search based on a positive alert.

Response 5F: The CDCR will continue EDDE in order to stop the introduction of illegal drugs into our institutions. Unclothed body searches are outlined within existing regulations and are only used as necessary within those parameters.

COMMENTS #6

Comment 6A: Commenter objects to the proposed changes because of equipment cost to taxpayers for purchase, maintaining, and to purchase more, plus court/insurance tax.

Response 6A: See Response 1B.

Comment 6B: Commenter states the reports the Department gives to people that say voluntary, are false and that the Department should tell the truth in the hearing by stating “I want to violate inmates rights by taking away from them drug paraphernalia and distribution that is listed in the Title 15 rule book so that no one can be a square.” Commenter also states “get to it and grant to me administrative adjudication by state agencies “acquit me,” “releases me (sic).”

Response 6B: See Response 1B.

COMMENTS #7

Comment 7A: Commenter objects to the new language “are subject to” in Subsection 3410.1 and states text must read the same as Section 3173.2(c) “shall be required” because the general public must not be held to a higher standard than any government agency or its employees.

Response 7A: As stated in the ISOR, the Department proposes to amend Subsection 3410.1 to assist the Department’s efforts in minimizing/eliminating the introduction of dangerous contraband and drugs into the prisons and to provide a safer work environment for all employees, visitors and inmates. The Department does not agree with the Commenter that Subsection 3410.1 must read the same as Subsection 3173.2(c).

Comment 7B: Commenter states the language in Subsection 3410.1 must read: 'are required' and 'effort to eliminate'. The minimize must be void. The issue in the regulations is to STOP the introduction of illegal contraband and substance. Not a program to minimize the problem.

Response 7B: See Response 7A.

Comment 7C: Commenter states enhanced inspection of staff must be implemented and no exceptions, random drug testing must be adopted, and searches of staff required when entering institutional grounds. The CCPOA Union must not be allowed to stave off the implementation of new regulations.

Response 7C: See Response 3B.

COMMENTS #8

Comment 8A: Commenter disagrees with the revised regulations because EDDE can be manipulated by staff and the electronic drug test may not be accurate and could open the door for harassment and discrimination against visitors and family members.

Response 8A: CDCR is not aware of a method to manipulate the EDDE to test positive or negative. All employees are required to be alert, courteous, and professional in their dealings with inmates, employees, and members of the public.

Comment 8B: Commenter contends not enough information was provided because it may affect elderly people who have personal prescriptions due to illness and that inmates should be the ones tested on the

way out of visits. Commenter also disagrees with electrical drug testing for visitors because it is discriminatory.

Response 8B: See Response 1B.

COMMENTER #9

Comment 9A: Commenter states that because of the history of excessive false positives, the use of the technology should be banned until the science proves a high rate of detection efficacy and because a significant rate of false positives can be anticipated, CDCR lacks the necessary visiting room facilities for unclothed searches of visitors and staff as well as a lack of funding for the necessary number of staff to conduct the searches at either the employee or visitor point of entry.

Response 9A: CDCR is not aware of a history of excessive false positives with the use of EDDE. CDCR maintains the ability and resources to perform searches and inspections as necessary to maintain the safety and security of Department institutions. **Also see Response 5B.**

Comment 9B: Commenter names sources of cross contamination in which an individual who does not use drugs may have a positive test result and be subjected to unclothed searches in order to visit an inmate.

Response 9B: CDCR is aware of the possibility of cross contamination. To combat this, CDCR has provided facilities to wash the hands. In addition, each ION Scan must be performed twice. Two positive tests are required before CDCR designates the scan positive.

Comment 9C: Commenter states none of the California penal institutions has sufficient facilities to deal with increased unclothed searches of visitors, which will be a direct consequence of false positive readings and none of the visiting rooms are allocates sufficient staff, both male and female, to allow additional unclothed searches of visitors. If only ten percent of 200 visitors (a low number based upon historical experience) present a false positive, and each of the visitors who test positive require a ten minute search plus five minutes to dress and undress, the examination time is 300 minutes, or five hours during the six hour daily visiting period. The implementation of this proposal effectively terminates visiting.

Response 9C: Also see Responses 1A and 9A.

Comment 9D: Commenter states technology has not improved in the last thirteen years and there is no doubt that the presence of contraband in a penal institution is the most significant cause of violence within an institution and the interdiction of contraband should be one of the highest priorities. However, just as CDCR rejected the use of Backscatter X-ray devices for visitors and staff because of the potential for abuse and questionable efficacy of the technology, the proposed use of ion spectrometry drug detection machines should be rejected by CDCR because the technology does not and cannot assure a high rate of accuracy concerning the actual presence upon the person of illegal contraband.

Response 9D: See Response 5B.

COMMENTER #10

Comment 10A: Commenter respectfully dissents to the new rules changes and states that CDCR already have many methods to search visitors and the regulations are already an intrusive burden. Commenter states that the new proposed regulations are draconian while being arbitrary in its semantics and these procedures are intended to deter visitors and potential visitors who would feel they are invasive, uncomfortable, and embarrassing. Commenter further states CDCR's inappropriate method of criminalizing and degrading visitors by subjecting them to EDDE discourages family and friends from visiting or entering prison grounds.

Response 10A: CDCR believes and data shows that current methods used for searching visitors, staff, and others are not sufficient to slow the tide of illegal substances entering our institutions and developed these regulations to apply to all persons and not just visitors. CDCR strives to continually improve methods used for searching visitors and impede illegal substances entering institutions. CDCR does not criminalize visitors, but seeks to protect the inmate population and the public from the harm that illegal drugs pose.

Comment 10B: Commenter says that CDCR's statistics of 382 arrests out of 375,000 visitors is a fraction that doesn't rationally warrant emergency action that is vague and obscure.

Response 10B: Penal Code Section 5058.3 gives the Department statutory authority to adopt, amend, or repeal regulations as an emergency if the operational needs of the Department so require. Illegal substances constitute an ongoing threat to the safety and security of institution staff, inmates and the public. The Department must step up its drug interdiction efforts.

Comment 10C: Commenter asks where the devices were acquired, have they been tested in research, and what happens if the devices detect non-legal substances as in tobacco, medical marijuana scent/residue, or prescription drugs that are illegal in prison. Even if it is only scents, but not the actual substance, this would be an invasion of the visitor's privacy for visitors who consume legal substances. The proposed regulations violate visitor rights and privacy, are vague, intrusive, and criminalize visitors.

Response 10C: The Department purchased the EDDE from Smith's Detection. These devices are programmed to alert to a number of illegal substances and do not alert to tobacco and certain prescription drugs. Visitors to our institutions must follow the regulations put in place by the Department in order to ensure that we are providing the best drug free environment possible for the inmate population.

COMMENTER # 11

Comment 11A: Commenter refers to the Informative Digest/Policy Statement Overview and states the CDCR already has many methods to search individuals who come onto institution grounds. Commenter states rigorous searching procedures, such as back ground checks before a visitor can be approved to visit, visitors and prisoners under constant surveillance in visiting rooms (cameras and staff planted in visiting room), being subject to further inspection if deemed "reasonable," and stiff legal penalties if found with illegal substances causes a burden on prisoners and those who visit. Most visitors and potential visitors are unwilling to undergo being criminalized and therefore will not visit. To further criminalize and degrade visitors with electronic drug detection equipment will further isolate prisoner from loved ones and negate rehabilitation.

Response 11A: See Response 10A.

Comment 11B: Commenter states that CDCR claims 382 arrests in 2013 of non-inmates attempting to introduce drugs into an institution. With 52 weekends a year, 36 prisons, approximately 200 visitors per

institution per weekend is approximately 375,000 visitors a year. 382 arrests out of 375,000 do not reasonably warrant such emergency new regulation action.

Response 11B: Penal Code Section 5058.3 gives the Department statutory authority to adopt, amend, or repeal regulations as an emergency if the operational needs of the Department so require. Illegal substances constitute an ongoing threat to the safety and security of institution staff, inmates and the public. The blind baseline urine testing data cited in the ISOR demonstrates that existing search practices are insufficient and the Department must do more to interdict illegal drugs entering our prisons.

Comment 11C: Commenter states the regulations are vague in its application and ask if the devices have been tested, do they invade privacy and safety rights, will more time be consumed processing visitors, and if these devices are 60 percent efficient. Commenter further asks what happens if visitors are identified who use substances that are deemed illegal or contraband in prison and are legal on the outside of prison (i.e. (sic) medical marijuana, prescription drugs, etc.) then what, more invasion of privacy, doctor patient confidentiality deemed irrelevant. All this does is violate visitors' rights and visitors will stop coming to visit due to this, and further isolate prisoners from family, friends, and community.

Response 11C: The Department has conducted verifications of the equipment and performs maintenance and inspection as dictated by the manufacturer. **Also see Responses 1A, 5B, and 10C.**

Comment 11D: Commenter states prisoners being isolated from their loved ones and loved ones who visit being criminalized does not create a safe environment in prison institutions, nor does it rehabilitate prisoners. Common sense and formal studies, including one by the CDCR, indicate that prisoners who establish and maintain ties with the outside world have an increased change of success on parole. Commenter respectfully dissent the proposed regulation.

Response 11D: See Response 1B.

COMMENTER #12

Comment 12A: Commenter states the only reference to ION Scanners is in Subsection 3173.2(c) and the only reference to electronic drug detection equipment is in Subsection 3173.2(c)(3)(H) and neither authorize the unclothed body search of a visitor after a positive EDDE test the first instance.

Response 12A: See Response 1B. Commenter references Subsection 3173.2(c)(3)(H), which are regulations for Canine Searches and not a part of this rulemaking file.

Comment 12B: Commenter states these regulations contain no procedures or safeguards for the use of the test and results, no requirement that visitors be randomly selected by a documented method, visitors be informed of the nature of the test, be given an opportunity to refuse the test, or that any procedures be followed in the event of a positive test. Commenter states the lack of any process, procedures, or guidelines in the regulations contradict the Department's official communication that such procedures would be established.

Response 12B: The process, procedures, and guidelines are stated in Subsection 3173.2, Searches and Inspections.

Comment 12C: Commenter references an editorial by Secretary Beard regarding ION testing and dog searches and states the regulations do not contain the safeguards as promised. Commenter also states the text needs to be amended to implement procedures and safeguards to ensure the manner in which the

scanner test is administered and positive results are used comports with due process.

Response 12C: As stated in the ISOR, the ION Mobility Spectrometry (ION Scanner) technology is a trace detecting device that measures the deflection of particles after they are exposed to an electric field. Samples are collected by wiping an object and then placing the EDDE swab into the machine. The results of the swipe are displayed within 8-10 seconds. The ION Scanner is a non-intrusive search tool for inmates, staff, and visitors, as well as for incoming mail and parcels. The Department is not aware of any additional safeguards necessary for the safe operation of the equipment. Additionally, there are no due process violations in place with the use of EDDE as described in the regulations.

Comment 12D: Commenter states the language in Subsection 3173.2(c), which authorizes searches of visitors by any and all forms of contraband detection technology and devices, permits unconstitutional searches.

Response 12D: Visitor searches may be refused. Police officers on the street may utilize reasonable suspicion to conduct a pat-search on a suspect they believe has committed, is committing, or is about to commit a crime as upheld in the Supreme Court Decision *Terry vs. Ohio* (1968) 392 U.S. 1, 88 S.Ct.1868. The Department further disagrees with commenter in that the correctional officers inside the institution are not going outside the law in utilizing reasonable suspicion as the standard to conduct a pat down search. The CDCR had a search standard of reasonable suspicion in the past. This standard has been accepted by the courts as the appropriate standard for searching of visitors to prisons, including an unclothed body search. (*Estes v. Rowland* (1993) 14 Cal.App.4th 508; *Daugherty v. Campbell* (6th Cir., 1991) 935 F. 2d. 780, cert. den. 502 U.S. 1060; *Hunter v. Auger* (8th Cir. 1982) 672 F.2d 668; *Blackburn v. Snow* (1st Cir. 1983) 771 F. 2d 556; *Thorne v. Jones* (5th Cir. 1985) 765 F.2d 1270 (cert. den. 475 U.S. 1016). Visitor unclothed body searches still require probable cause as noted in Title 15, Subsection 3176(a)(3)(A). The Department also would like to inform the commenter that unless a warrant is obtained from a magistrate, the visitor has the constitutional right to refuse a search.

COMMENTS #13

Comment 13A: Commenter states canine searches are highly unreliable and when screening visitors for drug, cell phone, and tobacco smells it is possible that even a highly trained dog may respond to subtle, unintentional gestures by their handler, even as simple as pointing, nodding, turning their head, or gazing and give a positive alert, which will lead to visitors undergoing an invasive strip search or forego the contact visit and be allowed only a non-contact visit, if space is available during the next two visits.

Response 13A: Commenter references Canine Searches, which are not part of this regulatory action.

Comment 13B: Commenter states ION Scanners are unreliable tools known to lead to false positives and can produce a positive alert without the visitor actually being in possession of contraband because of contact with cash, chlorine baby wipes, prescription medications, lotion, perfume, consumption of poppy seed muffin, or from residue left on the scanner from a previous scan.

Response 13B: See Response 5B.

Comment 13C: Commenter states there are already a variety of searches for visitors and is concerned these proposed regulations will chill visitation because under the proposed regulations, one positive alert from either a dog or ION scanner will lead to an intrusive and potentially humiliating strip search, the visit being cancelled or put behind glass that will discourage visitors from visiting thereby, interfering, not

only with the well-being of incarcerated individuals, but also with their constitutional rights to legal counsel as well.

Response 13C: See Response 5E.

Comment 13D: Commenter states the regulations allowing prison staff to choose whether to canine search all visitors or only a random selection of visitors leaves room for potential abuse of applying the regulation that unfairly singles out certain individuals that may result in an invasive search or restriction of privileges that discourage visitors and isolates prisoners.

Response 13D: Commenter references to regulations for Canine Searches, which are not part of this regulatory action.

Comment 13E: Commenter states the regulations do not specify what alternatives might be available to someone who, for medical or other reasons, cannot undergo an ION Scanner search and not having alternatives will discourage some from visiting.

Response 13E: The Department is not aware of any medical condition that may be compromised by the use of EDDE.

Comment 13F: Commenter states these proposed regulations conflict with California prison law and policy promoting family visitation because they create a real risk of false positive readings, humiliating searches or loss of visits, and may also create a chilling effect on family visits. Commenter further states that these regulations are proposed with the intention of improving the lives of incarcerated individuals and it is important that they not do more harm via the reduction in visiting than the good they hope to accomplish by reducing the introduction of contraband to facilities.

Response 13F: See Responses 5B, 5E, and 5F.

Comment 13G: Commenter states that under these regulations, if a visitor gets three positive alerts, either from a dog, an ION Scanner, or a combination of both, the visitor is required to have undergone a strip search each of those times or be suspended from visiting for an entire year, even if no contraband was actually found. The regulations do not specify how this type of a suspension would apply to legal visitors who work with prisoners with pending legal proceedings.

Response 13G: The Department has not proposed any language that would deny or limit access to the assistance of legal counsel, but rather ensured that all persons are subjected to the same criteria to effectively eliminate accusations that those that are not searched are solely responsible for the introduction of contraband and drugs.

COMMENTS # 14

Comment 14A: Commenter states these searches are unwarranted, ineffective, and most important, too expensive given the limited benefit. This money would better be spent on rehabilitation.

Response 14A: See Response 1B.

Comment 14B: Commenter states the proposed regulations around canine searches remain targeted towards visitors and those incarcerated as opposed to staff or contractors. Staff and contractors have the most direct and least fettered access to prisoners yet, in the event of a "positive canine alert,"

they would only be subject to a pat-down, whereas visitors would be subject to strip-searches and if they decline, lose their visit and possibly their next two visits. Also, any visitor who refuses a strip-search following a "positive canine alert" and/or "positive Electronic Drug Detection Equipment alert" three times within a twelve-month period may be suspended from visiting all CDCR facilities for a year. Those incarcerated, similarly, cannot refuse a strip-search without being subject to disciplinary action and unspecified further searches, and urine testing.

Response 14B: Commenter references regulations for Canine Searches, which are not part of this regulatory action. Also, inmates may appeal any CDCR decision, action, condition, policy, or regulation that has a material adverse effect upon their welfare and for which there is no other prescribed method of departmental review/remedy available. **Also see Responses 3B, 5B, 5C, 5E, 5F, 9B, and 10A.**

Comment 14C: Commenter states no emergency exists to justify the emergency regulations approved by the OAL in October or current proposed regulations. Commenter quoted the ISOR and states that of the 4000 documented drug related incidents in California prisons, there were about 2.98 for each 100 people in custody and the CDCR already conducts pat-downs and other searches if they believe a person has contraband.

Response 14C: See Response 10B. Also, the baseline inmate urine testing data cited in the ISOR clearly establish that illegal drug use in California prisons is a problem. The Department must do more to interdict illegal drugs entering prisons.

Comment 14D: Commenter states electronic drug detectors are unreliable.

Response 14D: See Response 5B.

Comment 14E: Commenter states dogs are unreliable.

Response 14E: Commenter references regulations for Canine Searches, which are not part of this regulatory action.

Commenter 14F: Commenter asks what it means when CDCR says that the money to enforce these new regulations will come from existing resources. Scanners cost in the tens of thousands. According to the Glendale Police Department the initial cost to purchase and train a dog alone can cost \$20,000. How is it that CDCR can find money or resources to implement the new search regulations, without being able to use existing resources dedicated for rehabilitation funding? Commenter states the CDCR should cancel these searches.

Response 14F: See Response 1B.

COMMENTER # 15:

Comment 15A: Commenter writes to express opposition to the proposed drug testing policy that would use ION Scanner technology. Research indicates that these scanners are unreliable, often identifying false positives, and limited in their ability to detect diverse forms of drugs.

Response 15A: See Response 5B.

COMMENTER #16:

Comment 16A: Commenter states it seems CDCR is about to approve insulting and probably unconstitutional searches for drugs of visitors (and inmates) for the prison system, CDCR must realize that it is nearly impossible for prisoners to obtain drugs unless they are smuggled in by guards, other staff, or contracted help (who are often not searched at all).

Response 16A: These regulations apply to all persons entering prison grounds. All applicable laws shall be followed.

Comment 16B: Commenter states the Constitution requires probable cause (or a warrant) for any searches of person or home and the justification for these new rules as some sort of "emergency" involving a few cases inside prisons, which are vaguely related to drugs, is not too convincing. Commenter urges CDCR to abandon these new rules.

Response 16B: See Response 10B.

COMMENTER #17

Comment 17A: Commenter states that no emergency exists to justify the emergency regulations approved by the OAL in October or the currently proposed regulations. Under existing regulations, California Code of Regulations, Title 15, Section 3173.2, CDCR staff may already conduct pat-downs and other unspecified searches if they have reason to believe a person is attempting to carry in contraband.

Response 17A: See Response 10B.

Comment 17B: Commenter states the proposed regulations around canine searches remain targeted towards visitors and those incarcerated as opposed to staff or contractors who typically enter institutional premises without so much as passing through a metal detector, have the most direct and least fettered access to prisoners, and only subject to a pat-down in the event of a "positive canine alert, whereas those visiting loved ones would be subject to strip-searches.

Response 17B: Commenter references Canine Searches regulations in their comment, which are not part of this regulatory action.

Comment 17C: Commenter states that electronic drug detectors are unreliable and it is time to turn around the treatment of prisoners and their support people, time to raise the respect quotient, and time to put practices in place that act to return convicted persons to society as useful participants.

Response 17C: The Department has no knowledge of EDDE being highly unreliable and has mandated that only staff trained and certified to operate EDDE will be authorized to operate any EDDE. **Also see Responses 5B and 8A.**

COMMENTER #18

Comment 18A: Commenter is concerned about the regulations authorizing the use of electronic drug detectors and canines to conduct indiscriminate searches of those visiting or entering CDCR's facilities as visitation has long been proven to be essential to lowering recidivism and should be promoted by CDCR. Commenter also states that the invasive regulations will be sure to discourage visitation.

Response 18A: The Department is conducting searches at random to ensure a safe and drug free environment. **Also see Response 5C.**

Comment 18B: Commenter states that while keeping contraband out of facilities and ensuring a safe environment are necessary, so is visitation, but believes that the tens of thousands of dollars to purchase scanners could be spent on strategies that are more reliable and don't dehumanize visitors.

Response 18B: See the Economic Impact Assessment in the Initial Statement Of Reasons and Response 1B.

COMMENTS #19:

Comment 19A: Commenter references Subsection 3173.2(c) and states evidence shows that these devices are highly unreliable and were abandoned when tried by the Bureau of Prisons. Commenter knows that the devices are already being used in spite of the fact that the public comment period has not yet closed and the Department has had no time to digest the input. Commenter also knows that when the machines were demonstrated for the Inmate Family Council at Solano they produced a false positive. Commenter believes it would be a grave mistake to institute these scanners and the regulations should be stopped.

Response 19A: The Department is using the technology within the guidelines of law and these emergency regulations were implemented per Government Code 11346.1(d). The Department was present at the Inmate Family Council at Solano and disagrees that any tests provided false positive readings. **Also see Response 5B.**

Comment 19B: Commenter states these regulations will subject people who have positive results to invasive strip searches, and multiple positive results from the scanner can result in permanent loss of visits that amounts to treating visitors as if they were criminals themselves. Moreover, it attempts to fix a problem with a solution that is worse than the disease.

Response 19B: See Responses 3B, 5C, 5E, and 10A.

Comment 19C: Commenter does not believe staff has been routinely searched before entering a facility and it has been their experience the vast majority of drug contraband is brought in by staff, although the data used makes it appear to be primarily a visitor violation. Commenter states if staff found to have positive results can be searched through a pat down instead of a strip search, visitors should be afforded the same dignity. Pat searches would certainly capture the majority of contraband with much less invasive results.

Response 19C: See Response 3B. Visitors have a constitutional right to refuse a search. Staff must submit as a condition of employment.

COMMENTS #20

Comment 20A: Commenter states the CDCR is constantly saying there isn't enough money for rehabilitation or education programs that would benefit inmates especially in solitary confinement. Commenter asks how can \$30,000 per scanner be justified.

Response 20A: See Response 1C.

Comment 20B: Commenter asks what the exact cost is for training search dogs and personnel.

Response 20B: Commenter references regulations for Canine Searches, which are not part of this regulatory action.

Comment 20C: Commenter asks what is being done to track contraband coming in through guards and other staff and contractors and why they are not subject to strip searches too.

Response 20C: All persons entering institutions are subject to search with the use of EDDE. Staff and other civilians attempting to smuggle illegal drugs or contraband into the institutions are referred for criminal prosecution and are given administrative penalties within the authority of the Department. **Also see Response to 3B.**

Comment 20D: Commenter states the CDCR says it wants to promote family bonds and closeness, yet strip searches are in total contradiction to this.

Response 20D: The Department disagrees with the commenter and does recognize the importance of family in the rehabilitation of an offender. As stated in the ISOR, there were over 4000 documented incidents recorded in 2013 related to drugs in our prisons. The presence of illegal drugs in institutions reinforces the strength of prison based gangs, leads to inmate-on-inmate violence due to drug dependency, and increases the possibility of inmate-on-staff attacks because of the reduced inhibition effects of some drugs. Based on the 2013 test results, the Department must do more to reduce the availability of and use of drugs in the prison system. Therefore, the Department seeks to move forward with the implementation of various drug interdiction strategies, which includes the utilization of ION Scanners. An unclothed body search is a security procedure that involves visual inspection of a person's body with all of their clothing removed and a thorough inspection of the person's clothing for the purpose of detecting contraband. This procedure may be conducted with the visitor's consent when there is a reasonable suspicion that the visitor is carrying contraband and when no less intrusive means are available to conduct the search. The Department's efforts in minimizing/eliminating the introduction of dangerous contraband and drugs into the prisons are paramount in providing a safer work environment for all employees, visitors, and inmates.

Comment 20E: Commenter asks if Secretary Beard was talking about increasing contraband surveillance in his June 2012 confirmation hearing, what the rationale is behind making these "emergency" regulations now.

Response 20E: See Response 10B.

Comment 20F: Commenter asks how can CDCR justify the expense and program with the appalling false-positive rate and unreliability of ION Scanners and dog alerts.

Response 20F: The Department has no knowledge of a high rate of false positives with the use of EDDE. **See Response 5B.**

Comment 20G: Commenter asks what safeguards will prevent an innocent bystander from being tagged by a canine air search and how can "air" be scanned individually.

Response 20G: Commenter references regulations for Canine Searches, which are not part of this regulatory action.

Comment 20H: Commenter asks how CDCR can assure a perfect system and what safeguards are there to ensure redress if a visitor has been falsely accused.

Response 20H: The Department will operate within the regulations and has adopted language to assure that only two separate scans that both reveal positive results for illegal substances are considered a positive alert that will result in the request to search a visitor. Visitors who believe they have been falsely accused may author correspondence to the appointing authority to address their concerns.

Comment 20I: Commenter doesn't believe there are no reasonable alternatives, especially when correctional officers are known to bring in contraband and plant it as evidence from time to time.

Response 20I: See Response 1B.

Comment 20J: Commenter asks where the money coming from for these expensive amendments to regulations.

Response 20J: See Response 1C.

Comment 20K: Commenter asks how you can say this provides a safer environment for visitors when it adds to stress and potential for false positives if searches are on a random basis.

Response 20K: The removal of drugs from our institutions will provide for a safer and more productive visiting experience. Also see Response 5B.

Comment 20L: Commenter states there is no positive effect for public health and safety if illegal drugs are being brought in by staff that is not being caught.

Response 20L: See Response 1B.

Comment 20M: Commenter refers to Subsection 3173.2(c)(1)(E) and states any visitor would be nervous and most likely excessively so. You cannot reassure a visitor or family member that the procedure is safe when there is a risk of a false positive.

Response 20M: See Response 1B.

COMMENTER #21

Comment 21A: Commenter states the usage of ION scanners and drug dogs deeply intrudes upon our privacy as civilians and also violate the US Constitution 4th Amendment rights to privacy. Commenter has concerns that unclothed body searches can cause unnecessary trauma as an unclothed body search and has the potential to trigger Post Traumatic Stress Disorder (PTSD) in sexual victims. Commenter asks how the Department is going to handle causing a sexually abused victim further trauma by requiring visitors who have produced a positive ION drug scan. If a visitor produced a positive drug scan and refuses an unclothed body scan, they will not be allowed to visit until they submit to an unclothed body search; however, the visitor may feel violated to submit to this type of search due to past sexual abuse, not because they have any drugs or contraband on them.

Response 21A: See **Response to Comment 1B**. Commenter also references regulations for Canine Searches, which are not part of this regulatory action. Visitors have a constitutional right to refuse a search.

Comment 21B: Commenter states the ION Scanner is known to produce false positives and increases the risk of the visitor being subjected to unclothed body search. Commenter states in the past those type of body searches were conducted with a reasonable suspicion of trafficking contraband into the facility and because this new procedure will increase the number of visitors having to participate in unnecessary unclothed body searches, the Department should consider having social workers staffed to handle trauma that visitors may incur as well as children being traumatized because their parent or guardian was subjected to an unclothed body search.

Response 21B: The Department disagrees with the commenter. Smith's Detections IONSCAN 400B is a reliable, highly sensitive detector that can accurately identify very small (trace) amounts of residue from a wide variety of narcotics. Using the proven Ion Mobility Spectrometry (IMS) technology, the IONSCAN 400B has a very low false alarm rate of less than one percent. Visitors may decline a body search following a positive EDDE scan. **Also see Response 5B.**

Comment 21C: Commenter states visitors who do not have the means to travel great distances and do not get a chance to visit very often may be discouraged to visit due to the belief of being forced to disrobe in front of staff, which is extremely intimidating, confusion on the procedure and their rights, fear of false positives, threat of strip searches and trauma to self and children. Knowing they either must (disrobe), or lose visiting is a horrendous decision, especially for those who are modest, suffer from low self-esteem, and are not comfortable with their bodies.

Response 21C: See **Responses 1B and 5B**. Visitors have a constitutional right to refuse a search.

Comment 21D: Commenter states it is punitive that visitors that produce two positive scans and choose not to do a strip search will be forced to have two non-contact visits before they can resume visiting and recommends that the next day the visitor should have an opportunity to be retested with the ION Scanner instead of no contact visits. A woman may not want to submit to an unclothed body search if she is menstruating.

Response 21D: See **Response 1B**. Visitors have a constitutional right to refuse a search.

Comment 21E: Commenter states if the Department is really serious about eliminating all contraband from the facility then the same rules that apply for visitors should apply to staff and asks why staff get to keep their Constitutional Rights when the same Constitutional Rights to privacy are taken from visitors. Commenter states that visitors, volunteers, and employees should be treated equally when it comes to security.

Response 21E: See **Response 3B**. Visitors have a constitutional right to refuse a search.

Comment 21F: Commenter states that keeping a paper log of staff testing positive on an ION scan seems unfair when visitors are recorded in the Strategic Offender Management System (SOMS) and staff should also be recorded electronically in such a way that cannot be altered by staff.

Response 21F: The Department disagrees with the commenter. Institutions do not utilize the SOMS to track EDDE test results of inmates, visitors, staff, employees of other government agencies, contract

employees, contractors and their employees, volunteers, packages, mail, vehicles, Department property, and personal property.

Comment 21G: Commenter states if the Department is serious about preventing contraband from entering the facility, all staff should have to go through a metal detector, have their belongings scanned by an x-ray machine like at courthouses and the state capitol, and be subjected to unclothed body searches as visitors. Commenter states by only making visitors go through these procedures, the Department is not effectively screening everyone entering the prison, which is an unfair policy, double standards, stereotyping inmate families, and turning a blind eye to the possibilities of staff bringing in contraband in ice chests and lunch boxes that go unchecked. Visitors may fear staff will not be tested and positive results ignored or not recorded. Commenter also asks if staff will be disciplined when caught with contraband.

Response 21G: See **Response 3B**. Visitors have a constitutional right to refuse a search.

Comment 21H: Commenters states that lifers going before the Board have commissioners viewing SOMS on their computers that may show a positive (possible false) test for the family member they have listed in their parole plans and hurt their chances of parole when there was no reason to deny parole.

Response 21H: See **Responses 1B and 21F**.

Comment 21I: Commenter states visiting processing take a while and this new ION scanner policy will significantly slow down visiting and could lead to the possibility many will not get into to visit due to the hold up in visiting processing. Commenter states many visitors travel great distances and have financial hardships and it would be unfair to them to travel all that way, spent money they did not have, and were unable to get into visiting or had their visit cut short due to the delay visiting processing.

Response 21I: See **Response 1A**.

COMMENTER 22:

Comment 22A: Commenter was told that this EDDE will be used to search persons entering prison institutions because of "ongoing problem with drug use and trafficking within the institutions;" however, these regulations are not a "comprehensive approach to prevent the introduction of drugs and contraband into the institutions," but rather are only meant as a deterrent for visitors because prison guards, other prison staff, and prison contractors will not have to submit to these measures.

Response 22A: Per Subsections 3173.2(c) and 3410.1 all persons who come onto institutions grounds are subject to being searched. **Also see Responses 1C, 3B, 5C, and 10A.**

Comment 22B: Commenter does not believe that EDDE is worth the hefty cost as much research demonstrates this equipment is not intended for this scale or purpose and frequently gives false positives that will unjustly deny people the right to visit their loved ones. Commenter states that if the goal is to address the problems with drug use, they would much rather see this money channeled into rehabilitation and reentry services and searching prison guards and staff rather than visitors. Commenter states if your ultimate goal is actually to prevent drugs and other contraband from entering into prisons, these regulations should apply to all persons entering prisons, not just visitors. Such intermittent use and enforcement indicates that your goal is not to make prisons safer, but to target and restrict visitors and to negatively restrict and violate incarcerated people's access to their support systems.

Response 22B: The Department has no knowledge of a high rate of false positives with the use of EDDE. Also see Responses 3B, 5B, and 10A.

Comment 22C: Commenter asks CDCR to change the regulations to eliminate the section that would suspend visits for a year for a person who refuses a strip search following a "positive canine alert" and/or "positive Electronic Drug Detection Equipment alert" three times within a twelve-month period. Commenter states that being threatened with a strip search and then denied a visit that day is punishment enough.

Response 22C: Commenter references regulations for Canine Searches, which are not part of this regulatory action. Also see Responses 3B, 5B, 5C, 5E, 5F, 9B, and 10A.

COMMENTER # 23

Comment 23A: Commenter travels, uses rental cars and hotel rooms, and is concerned ion scanners put them self in danger of losing visits based on what previous strangers have done and the fact that something beyond my control could negatively affect me or my loved one is appalling. Commenter believes a strip search is very intrusive and would prefer a blood or urine test to test for illegal substances. Commenter understands there is a drug problem in prison, but thinks ion scanners that are set so sensitive it sets off gold will only cause more problems and inevitably reduce the family support that inmates have that helps reduce their risk of recidivism. A family network has shown to be a strong basis for rehabilitation and this is just one more step to alienate the families.

Response 23A: Unclothed body searches are only conducted after consent is obtained and EDDE has confirmed that two separate scans have resulted in the presence of drugs. The Department cannot perform blood and or urine testing of visitors for multiple reasons some of which are: Drug smugglers do not always use drugs themselves, blood and or urine testing cannot be performed immediately prior to visitation, and blood and urine testing costs are high and not budgeted for CDCR by the State of California. Also see Responses 5B, 5C, and 10A.

Comment 23B: Commenter asks if ion scanners are implemented, that all audits and findings be publicly reported so everyone can see who is testing positive, staff and visitors, per visiting day, and it needs to be broken down per institution, per visiting day, to show trends that could be attributed to faulty machinery, how many test positive after hand washing test negative, how many strip searches occur with positive findings, how many people deny strip searches, and when faulty machinery is found all visitors and inmates' records negatively affected should be purged.

Response 23B: See Response 20D. Also, the parameters of disclosure of records held by public agencies are not within the parameters of this regulation.

Comment 23C: Commenter states that on many occasions commenter encountered staff that had no idea what was allowed to be brought in per Title 15 and is concerned if they don't know a page and a half of approved items, then how can they know proper procedure for ion scanners. Commenter doesn't have much trust in the system when staff that never worked visiting is often called to cover and process visitors and asks what the procedure is for staff members who get 8 hour training then don't use the information for months then all of the sudden cover for a day, and if only regular visiting staff be responsible for the process.

Response 23C: The Department has mandated that only trained and certified staff operate EDDE.

Comment 23D: Commenter states that if this process can be used against visitors, it should be fool proof and the results should not held against them until the kinks are worked out and the data is collected and verified.

Response 23D: The Department is working to continually improve our own procedures and processes. Also see Responses 1B and 5B.

COMMENTS # 24 (also speaker)

Comment 24A: Commenter states that requiring all persons entering CDCR institutions to submit to searches by EDDE devices to stem the introduction of drugs and contraband into the institutions will not solve the problems associated with drug use in prisons and in fact, may worsen conditions and harm inmates' chances at reentry because the use of ION Scanners may adversely impact visitors, discouraging them from seeing their incarcerated loved ones, and the decrease in family and community visits will likely harm prisoners as such visits have been shown to improve institutional behavior and lower recidivism.

Response 24A: See Response 1B.

Comment 24B: Commenter states existing regulations already require all individuals entering CDCR facilities to submit to inspection and is concerned because EDDE devices, like ION Scanners, return false positive alerts which will result in visitors having to choose either to consent to invasive searches or lose their ability to visit their loved ones, may dissuade people from visiting their incarcerated family members which may hinder prisoners' reentry process, lead to increased recidivism, and are vague and may lead to arbitrary electronic drug detector searches of persons entering institution grounds.

Response 24B: See Responses 5B, 5C, and 10A.

Comment 24C: Commenter states ION Scanners are unreliable and because the devices are oversensitive, they can trigger false positive alerts for individuals who have touched a variety of common innocuous substances, are limited in their ability to detect certain drugs, most effectively detect powdered or liquid forms of drugs, and are less likely to detect larger forms of drugs, such as pills and larger particles like marijuana, and may falsely identify visitors who are not carrying drugs and may fail to identify others who are attempting to smuggle in drugs.

Response 24C: See Responses 5B and 10C.

Comment 24D: Commenter states the proposed regulations would likely dissuade family members and community members from visiting individuals in prison because ION Scanners pose a real threat of false positive alerts which can result in escalated searches and even loss of visiting privileges. Commenter also states the visiting population is largely made up of low income people of color who travel long distances to see their loved ones behind bars and because the expense of visiting and other barriers, such as invasive and inaccurate searches, will likely result in a decrease in visits.

Response 24D: See Responses 5B, 5C, and 9A.

Comment 24E: Commenter suggests that instead of spending resources on faulty ION Scanners and subjecting visitors to invasive EDDE scans, CDCR should approach drug and alcohol use and/or misuse as the public health problem that it is and invest additional resources on expanding treatment capacity. Commenter states that increasing the provision of treatment, rehabilitative programs, and services will go

further to reduce the amount of drugs entering CDCR facilities and alleviate the problems associated with drug-related activities in prisons than investing in faulty detection equipment.

Response 24E: See Responses 1B and 5B.

Comment 24F: Commenter states the proposed regulations are unclear and leave too much discretion to correctional officers, do not provide officers with instructions for which visitors or staff members should be subject to electronic drug detectors versus metal detectors, nor outline the procedures for how ION Scanners or other EDDE devices should be used and without a clear process, there is no way to guarantee they will not be used arbitrarily or in a punitive manner. Commenter also states these policies do nothing to prevent officers from punishing prisoners by singling out their family and community visitors for EDDE searches, which often leads to people of color being searched at disproportionate rates and ultimately does not make institutions safer. Commenter requests CDCR explore effective alternatives that reduce the amount of drugs in prison, rather than EDDE devices.

Response 24F: See Responses 8A and 9A.

COMMENTER #25

Comment 25A: Commenter requests CDCR change the way the proposed regulations for canine searches remain targeted towards visitors and those incarcerated, as opposed to staff or contractors as staff and contractors typically enter institutional premises without passing through a metal detector, have the most direct and least fettered access to prisoners, and in the event of a "positive canine alert," they would only be subject to a pat-down, whereas those visiting loved ones would be subject to strip-searches at the penalty of losing their visit and possibly their next two visits should they decline the strip-search.

Response 25A: Commenter references regulations for Canine Searches, which are not part of this regulatory action.

Comment 25B: Commenter states any visitor who refuses a strip-search following a "positive canine alert" and/or "positive Electronic Drug Detection Equipment alert" three times within a twelve-month period may be suspended from visiting all CDCR facilities for a year. Those incarcerated, similarly, cannot refuse a strip-search without being subject to disciplinary action and without being subject to unspecified further searches and urine testing.

Response 25B: Commenter also references regulations for Canine Searches, which are not part of this regulatory action. **Also see Responses 3B, 5B 5C, 5E 5F, 9B, and 10A.**

COMMENTER # 26

Comment 26A: Commenter objects to the introduction of ion scanners into visiting processing in California prisons and asks what the emergency is that promotes the use of ION Scanners and drug dogs into the visiting processing rooms.

Response 26A: See Response 10B. Also, the baseline inmate urinalysis testing data cited in the ISOR establishes the prevalence of drug use by inmates in prison. The Department must do more to interdict illegal drugs entering prisons.

Comment 26B: Commenter states that the Department noted the number of visitors intercepted attempting to transport contraband inside the prison is a minuscule percentage of the visitors who enter

and leave prison any given visiting day and has failed to address that numerous employees, including custodial staff, have been apprehended and in many cases criminally prosecuted for smuggling drugs and contraband.

Response 26B: See Responses 3B and 10A.

Comment 26C: Commenter states the use of ion scanners to randomly select individuals from all those seeking to enter prisons are flawed in that the various cohorts are not treated with equal scrutiny. Commenter further states these new emergency measurers clearly target visitors who already are under close observation including restrictions on clothing worn, items allowed on their person, and exposure to a metal detector. During a pre-roll out demonstration one custodial officer at a California State Prison stated visitors would be 'targeted' for scanning.

Response 26C: The regulations require the random searching of persons entering the institutions of the Department. There is no regulatory process that allows for the targeting of any person, in the absence of probable cause or reasonable suspicion.

Comment 26D: Commenter states the Department has not made any attempt to inform visitors of their rights, when one may refuse, leave, or appeal the process.

Response 26D: The Department is required by regulation to obtain consent from a visitor prior to performing a search of their person. Visitors' rights are contained in the Title 15, Division 3.

Comment 26E: Commenter states that no information has been given in English, Spanish, or otherwise in regard to which drugs are being tested, what visitors can do to protect themselves when they are taking prescribed controlled medications, or any appeals process available.

Response 26E: The Department will not disclose the specific drugs tested to safeguard against possible attempts to circumvent detection of illegal substances. The EDDE regulations address prescription medications and how to contest a positive alert possibly caused by a legal prescription medication. **Also see Subsection 3173.2(c)(4)(B).**

Comment 26F: Commenter states that given civilian visitors are already examined before entrance, their contact with prisoners is limited and always under surveillance, it strains the bounds of creditability to insist this is the primary path for introduction of contraband. Staff, custodial, civilian, and volunteers have greater access and less restricted to both prisoners and their living environments.

Response 26F: See Responses 3B and 10A.

Comment 26G: Commenter states the regulations state "all visitors." Subjecting minors to any scanning or proposed strip search deeply intrudes upon the rights of minors and likely will result in litigation.

Response 26G: Minors are subject to the same regulations as adults except as stated in Sections 3173 and 3173.1. Sadly, adult visitors have been known to utilize children and infants in their attempts to smuggle illegal drugs into prison.

Comment 26H: Commenter states that should a visitor suffer a positive reaction by the ION analyzer the options available are limited and they must submit to an unclothed body search, forfeit visiting privileges, and may have extended penalties including loss of visiting privileges for up to a year, and permanent

record in SOMS; however, staff upon receiving a positive result, suffer no such consequences, have only to suffer a pat down, are kept by paper record, and, may continue on their normal routine if no obvious contraband is found. Commenter asks why visitors are subjected to the indignity of an unclothed search, when staff who have not proven more trustworthy than the general public, are given only a cursory check by fellow employees.

Response 26H: See Responses 3B, 5C, and 21F. Also, staff cannot refuse a search following a positive EDDE scan.

COMMENTS #27

Comment 27A: Commenter states that under these new rules visitors are to be subjected to indiscriminate searches for contraband by dogs and electronic devices and may be required to endure a humiliating strip search in the event of a positive canine alert while staff or contractors merely have to go through a pat down.

Response 27A: Commenter also references regulations for Canine Searches, which are not part of this regulatory action.

Comment 27B: Commenter states that it is specified that ION scanners will be used on a “random” selection basis. Visitors passing through the usual metal detector will “randomly” be asked to press a button upon entering. If a green light results, they will proceed without incident. If a person tests positive the first time and a red light is triggered, he or she will be allowed the opportunity to go wash hands and come back for a second test scan. Commenter asks who “randomly” selects the visitors who have to press the button, on what basis are the allegedly “random” selections made, what would trigger a red light.

Response 27B: Drug Interdiction strategies utilizing ION Scanners will be conducted on random days, at random times, and in random areas. The Department currently uses an Adams Electronics, Inc., Random Selection-Spot Checker (Randomizer), which is a battery powered electronic random check selector, which allows an unbiased random process of selecting a visitor, staff, employees of other government agencies, contract employee, contractors and their employees, or volunteers. If there is a drug interdiction operation being conducted at the same time and area a visitor, staff, employees of other government agencies, contract employees, contractors and their employees, or volunteers enter the secured perimeter, the subject will be required to push the large red button on the Randomizer. If the Randomizer turns red, the subject would proceed to the EDDE search location.

Comment 27C: Commenter asks how you would inspect an implant that is inserted inside the body. Commenter has titanium implants in both hips that trigger the alarm and for years would show the cards from my doctors, be wanded, and allowed to pass through the metal detector once officers understood why I would set off. Commenter now has to go into a room with a guard and pull pants down so officers can see the scars. Commenter asks why a visitor should be subjected to such humiliation, fear of losing one’s visit, and be in danger of losing all visiting privileges because of hips set off an alarm. Commenter states you can’t inspect implants short of surgery and asks if there is a danger of being branded as a “repeat offender.”

Response 27C: EDDE does not detect titanium and will not alarm to the presence of internal titanium plates. The Department does not see an impact from these regulations to commenters visiting status or experience.

Comment 27D: Commenter objects to the proposed revisions of the visiting rules and asks why visitors are singled out and why employees and contractors are above suspicion as they certainly have much more contact with the inmates than the visitors do. Commenter also asks why the assumption clearly being made is that electronic devices and dogs make no mistakes when they are notoriously unreliable.

Response 27D: See Responses 3B, 5B, and 10A. Also, the Department is not aware of any evidence proving EDDE to be unreliable. Staff cannot refuse a search following a positive EDDE scan.

COMMENTER # 28

Comment 28A: Commenter opposes the proposed amendments and states that it is unacceptable that visitors be turned away or subjected to invasive and humiliating searches simply because an ION Scanner, shown to be highly unreliable, registers an alarm. Commenter urges CDCR to reconsider your current course and find a more appropriate evidence-based approach to keeping our prisons safe and free of contraband than ION Scanners.

Response 28A: See Responses 5B, 5C, and 5E.

COMMENTER # 29:

Comment 29A: Commenter states fifty-three (53) days is an insufficient comment period for the men and women incarcerated on death row in California's prison, and their families and friends.

Response 29A: Pursuant to Government Code (GC) 11346.4, at least 45 days prior to the hearing and close of the public comment period on the regulations, the notice was filed with and approved by OAL, and mailed to all interested parties on CDCR's mailing list for regulations notices. Additionally, the Notice was published in the California Regulatory Notice Register in compliance with GC 11346.4(a)(5). The proposed regulations have been publically noticed in compliance of the APA. In addition, in compliance with Penal Code 5058, the regulations were posted in CDCR's prison institutions and this posting was certified by CDCR staff.

Comment 29B: Commenter's chief concern is that the proposed regulations, if applied to court appointed and retained counsel, will result in invasive and illegal searches, including strip searches, and pose a substantial risk of burdening and interfering with the attorney-client relationship particularly in capital cases, and further pose a significant risk of denying, burdening, and infringing on inmates constitutional right to the effective assistance of counsel and their right of access to the courts.

Response 29B: See Responses 5C and 13G.

Comment 29C: Commenter states the proposed regulations lack clarity and are vague because they fail to define the term "visitor." Commenter also states it is unclear whether the CDCR intends to apply the new search measures to court-appointed and retained counsel who are not "visitors" in the common usage of that term in that they occupy a professional standing as officers of the courts who must work with their clients in prison settings. Commenter also states the regulations also lack clarity and are vague as to how the CDCR intends to further search counsel and their possessions in the event of a positive result from an EDDE screening. It is commenter's view that if the CDCR intends to use the same follow-up search measures identified for metal detection set out in Subsection 3173.2(d) including intrusive pat-down and strip searching court appointed and retained counsel, then the regulations must clearly say so.

Response 29C: The Department has regulations pertaining to the processing of attorneys for attorney visits. Per the California Code of Regulations, Title 15, Subsection 3178(h), Unclothed Searches of Visitors, states the following, "Upon arrival at the institution/facility, the approved attorney shall be processed into the institution/facility in the same manner and under the same restrictions as regular visitors." **Also see Response 13G.**

Comment 29D: Commenter has reviewed the documents and data relied upon by the CDCR, including the Visitor Arrest Statistics, Division of Adult Institutions, January 2013 to December 2013 report, and because no evidence has been provided that court appointed and retained counsel have been in any way responsible for bringing contraband drugs into California's prisons, the proposed regulations requiring enhanced drug screening of counsel, including invasive body searches, have not been shown to be necessary.

Response 29D: See Response 13G.

Comment 29E: Commenter is concerned that, unlike metal detectors, ION scanners do not indicate the current presence of contraband and merely detect the presence of certain trace chemicals on an item that may or may not contain contraband at the time the item is tested that may result in a "false positive."

Response 29E: See Responses 5B, 9A, and 21B.

Comment 29F: Commenter states that although the proposed regulations do not clearly articulate a consequence of a positive EDDE result, the current metal detector regulations and pending Canine Search regulations indicate that the CDCR intends to provide counsel a choice when false positive results occur, to either submit to an invasive body search or be denied the opportunity to meet and confer with clients based on an ION Scanner or EDDE screening (See CDCR Proposed Regulation, Canine Searches, NCR 14-10.), which will undoubtedly add additional delays and costs to the already over-taxed post-conviction defense delivery system, especially with regard to death penalty cases.

Response 29F: See Responses 5B, 5C, 9A, 10A, 10B, and 13G.

Comment 29G: Commenter states that the CDCR has failed to accurately take into account and describe the potential costs of the proposed regulations and the regulations will prevent Office of the State Public Defender from meeting its mission of providing constitutionally mandated appellate counsel for death row inmates. Commenter, referencing the ISOR, also states the CDCR has incorrectly concluded that the proposed regulation will not have an adverse impact directly affecting small businesses when court appointed and retained counsel who travel to various prisons refuse to submit to unclothed strip searches after an EDDE screening procedure yields a false positive result, will be denied access to his or her client. Such costs will be borne either by the appointing court or by private business.

Response 29G: See Response 1B.

COMMENTER # 30

Comment 30A: Commenter requests the proposed regulations are not adopted because they are vague and cannot ensure the reasons for the regulations, deterring and detecting drug trafficking are met. Commenter states that because of the use of "but not limited to," "other." "And/or" suggests that the proposed regulations can be enforced or avoided altogether depending on the enforcing officer's discretion and if there is more than one device and or detector, the officer can choose which device since not all are required. This creates an opportunity for abuse and means there will be a human element and the searches will not be "completely random."

Response 30A: See Responses 8A, 90A, 10A, and 10B.

Comment 30B: Commenter states that by not enumerating the other technology the public will not know whether the other technology is reliable. Commenter also states because ION scanners are already considered unreliable, the vagueness of the regulations and the randomness of the searches will not guarantee results as those who are trafficking drugs might not be randomly selected for the additional screening, and those who are selected might not be caught trafficking drugs.

Response 30B: CDCR strives to improve methods used to combat the introduction of illegal substances entering the institutions. The Department is not aware of other technology that is fiscally responsible for use in our institutions at this time, but undoubtedly there are other technological advancements that exist in the arena of drug identification that may become available to the Department in the future. We cannot enumerate what we are not yet aware of. **See Responses 5B, 9A, 10A, and 10B.**

Comment 30C: Commenter referencing the ISOR states the current methods being used are effective in catching those who traffic drugs and the proposed regulations include an additional method that is not needed.

Response 30C: The CDCR has determined that the regulations are needed as part of an effective drug and contraband interdiction strategy. Current search methods are not sufficient as evidenced by the baseline inmate urinalysis testing data cited in the ISOR. **Also see Responses 10A and 10B.**

Comment 30D: Commenter contends American Muslims would not be able to subject themselves to a strip search if the test resulted in a false positive, as it would violate their sincerely held religious beliefs.

Response 30D: See Responses 1B and 5B.

COMMENTER #31

Commenter 31A: Commenter is appalled that CDCR is trying to enforce these adverse actions against visitors in an attempt to discourage visiting loved ones and does not choose to be subjected to this treatment. Commenter states it is difficult enough to be subjected to unnecessary & inappropriate behavior that is lodged against us as visitors attempting to visit our loved ones.

Response 31A: See Response 1B:

Commenter 31B: Commenter is concerned CDCR would subject visitors to a strip search which would entail a humiliating body cavity search with a mirror as well as spreading my cheeks apart and coughing to insure that I'm not carrying or transporting any contraband, but the same rule of thumb does not apply to employees and contractors who are just subjected to a pat down and search of their belongings and this is a double standard.

Response 31B: See Response 3B. Visitors may refuse a body search following a positive EDDE scan. Staff cannot.

Comment 31C: Commenter states many visitors are allergic to dogs as well as have a fear of dogs and dogs can sense fear. Commenter states if canines have to be utilized, use small animals, i.e., (sic) Labrador retrievers which are non-threatening dogs & other dogs of a similar nature.

Response 31C: Commenter references regulations for Canine Searches, which are not part of this regulatory action. **Also see Response 1B.**