



CALIFORNIA DEPARTMENT OF
State Hospitals

January 25, 2018

**Notice of Finding of Emergency / Statement of
Request for Re-Adoption**

Sexually Violent Predator (SVP) Evaluation Processes

California Code of Regulations
Title 9. Rehabilitative and Developmental Services
Division 1. Department of Mental Health
Chapter 16. State Hospital Operations
Article 7. Admissions
Sections 4020, 4020.1

Request for Re-adoption of Emergency Regulation:

The Department of State Hospitals (DSH) finds that an emergency continues to exist and that the emergency regulations (OAL Matter Number: 2017-0807-02), California Code of Regulations, title 9, sections 4020 and 4020.1, were originally approved by the Office of Administrative Law (OAL) and became effective August 17, 2017. Since the emergency regulations are set to expire on February 14, 2018, it is necessary to re-adopt the existing emergency regulations for an additional 90-day period in order to allow for DSH to finalize the permanent regulations and submit them to OAL pursuant to Government Code section 11346.1(h) in order to avoid serious harm to the public peace, health, safety, or general welfare.

DSH is facing current and existing legal challenges to the current Sexually Violent Predatory (SVP) evaluations update process, on the grounds that current guidance is unclear, potentially *ultravires*, and potentially does not abide by the Administrative Procedure Act. These policy and legal challenges are being raised in a variety of pending SVP civil commitment proceedings. The re-adoption of these regulations would continue to provide clarity and extinguish any legal doubts as to the validity of the Department's interpretation of the SVPA. It is critical, therefore, to re-adopt these emergency regulations in order to continue to provide guidance and clarification on Welfare and Institutions Code, section 6600 et. seq.

Compliance with Re-Adoption Criteria:

(1) Same or Substantially Equivalent:

Pursuant to Government Code section 11346.1(h), the text of a re-adopted regulation must be the “same or substantially equivalent” to the text of the original emergency regulation. The proposed language for the re-adopted emergency regulation text is substantially equivalent to the language of the original emergency regulation. The text of both regulations provide clarity and extinguish any legal doubts as to the validity of the Department’s interpretation of the SVPA. Minor technical modifications have been made to the text of the original emergency regulation to provide clarification.

(2) Substantial Progress Toward Adoption of Permanent Regulations:

As required for re-adoption of emergency regulations, DSH has made substantial progress and is proceeding with diligence to comply with Government Code section 11346.1, subdivision (e). (Cal. Code Regs., tit. 1, § 52, subd. (b)(1).) The following actions demonstrate DSH’s progress toward the adoption of permanent regulations.

Since the emergency regulations were enacted in August 17, 2017, DSH has engaged in the following:

- On November 20, 2017, DSH filed the 45-Day Notice for Proposed Rulemaking and Public Hearing.
- On December 8, 2017, the 45-Day public comment period began, the 45-Day Notice was published in the California Regulatory Notice Register.
- On December 28, 2017, DSH received one public comment letter.
- On January 2, 2018, DSH held a public hearing and received no oral or written comments.

A re-adoption of the emergency regulations will ensure that the Department is able to continue to provide proper evaluations for all pending matters while DSH continues to work to complete the regular rulemaking process for permanent regulations. A re-adoption of the emergency regulation will provide DSH with additional time to prepare the Final Statement of Reasons and compile the other final rulemaking documents to complete the rulemaking record for submittal to OAL.

As required for re-adoption of emergency regulations (Cal. Code Regs., tit.1, § 52, subd. (b)(2)), there has been no material change in emergency circumstances since the original emergency adoption of these regulations (OAL Matter Number: 2017-0807-02).

A copy of the text of the emergency regulations and the Finding of Emergency are enclosed. These documents are also available for review on DSH’s Internet web site at: <http://www.dsh.ca.gov/Publications/Regulations.aspx>

Public Comment:

Pursuant to Government Code section 11346.1, subdivision (a)(2) and California Code of Regulations, title 1, section 52, at least five working days prior to the submission of the proposed re-adoption to OAL, notice must be provided to every person who has filed a request for notice of regulatory action with DSH. After submission of the proposed re-adoption to OAL, any interested person will have five calendar days to submit related comments to OAL as set forth in Government Code section 11349.6. This re-adoption request and Finding of Emergency will be submitted to the Office of Administrative Law (OAL) on February 1, 2018. Also upon submission, OAL will have 10 calendar days within which to review and make a decision on the proposed re-adoption.

If you wish to comment on the re-adoption of these emergency regulations, you must submit the comment directly to OAL within five calendar days of OAL's posting of the proposed re-adoption on their Internet [web site](#). You may submit comments on the proposed re-adoption to OAL at:

Office of Administrative Law
Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, California 95814
E-mail: staff@oal.ca.gov

When you submit a comment to OAL, you must also submit a copy of your comment simultaneously to DSH:

Department of State Hospitals
Attn: Amy Whiting
1600 9th Street, Rm 400
Sacramento, CA 95814
E-mail: DSH.Regulations@dsh.ca.gov

OAL will confirm that DSH has received the comment before considering it. Pursuant to California Code of Regulations, title 1, section 55(b)(1) through (4), the comment must state that it is about an emergency regulation currently under OAL review, and include the topic of the emergency.

Adoption of emergency regulations does not require response to submitted comments. Any response to comments from DSH will be submitted to OAL within eight calendar days following the date of submission of the proposed emergency regulation to OAL, unless specific exceptions are applicable.

Any questions regarding this proposed emergency regulatory action may be directed to DSH.Regulations@dsh.ca.gov or by calling Trini Balcazar, Regulations Coordinator at (916) 651-3222.

FINDING OF EMERGENCY

A. Department of State Hospital's (DSH) Finding of Emergency Regulatory Action Is Necessary

These regulations are being implemented on an emergency basis for the immediate preservation of the public peace, health and safety, or general welfare, within the meaning of Government Code, section 11346.1.

B. Description of Specific Facts Which Constitute the Emergency

The Necessity for the Proposed Regulations

DSH is proposing these emergency regulations because DSH is facing current and existing legal challenges to the current Sexually Violent Predator (SVP) evaluations update process, on the grounds that current guidance is unclear, potentially *ultravires*, and potentially does not abide by the Administrative Procedure Act. These policy and legal challenges are being raised in a variety of pending SVP civil commitment proceedings. The proposed regulations provide clarity and extinguish any legal doubts as to the validity of the Department's interpretation of the Sexually Violent Predator Act (SVPA). It is critical, therefore, to immediately promulgate these emergency regulations in order to provide guidance and clarification on Welfare and Institutions Code section 6600 et. seq.

The proposed regulations are necessary to avoid serious harm. There are currently 443 patients housed at the Department of State Hospitals who are pending their SVP civil commitment trial. The Department continues to get challenged on our policy as underground regulations, these challenges affect the Department's continued operations and the validity of the evaluations performed under the SVPA. As the validity of the evaluations continue to be challenged, this potentially affects the 443 patients whose cases are pending trial and affects the Department's responsibility in assuring public safety. This immediate action is reasonably expected to alleviate that serious harm.

The statute may appear to be clear on the process, however, the statute does not provide a time limit for a case filed under the SVPA to proceed to trial. Further, the statute did not anticipate that the cases pursued under Welfare and Institutions Code, section 6600 et. seq., to last for many years. Currently, there are 443 patient housed at DSH for many years while they are pending trial under SVPA. For some patients, cases have been pending for 10-15 years. As a result, individuals committed under Welfare and Institutions Code section 6602 have had a variety of evaluators assigned to their cases over multiple years providing update and replacement evaluations which has created confusion in the update evaluation process. The Legislature did not contemplate such a delay that would affect the due process of those pending trial. By challenging the evaluations, this could cause potential delays and jeopardizes the underlying case and the due process of the individual. Ensuring that the proper procedures are in place assures public safety under the SVPA.

As a result, DSH is implementing these emergency regulations to provide immediate and clear direction as to when an SVP evaluation can and should be updated, and the frequency for update requests to comply with *Albertson v. Superior Court* (2001) 25 Cal. 4th 796 (holding that

an evaluation is stale after one year). By these emergency regulations, DSH is also providing immediate clarification as to how many evaluators should be assigned when there is a difference of opinion between concurrently assigned evaluators providing update evaluations, and which evaluations may be updated for use in pending (and upcoming) SVP civil commitment proceedings.

Benefits of the Proposed Emergency Regulations

DSH has recently been challenged for promulgating policy regarding update evaluations as underground regulations in the Superior Court of California. As a result, DSH wants policy in place to ensure that the Department is able to provide the proper evaluations pursuant to and in compliance with statute and to ensure public safety.

Effect of the Proposed Emergency Regulations

- (1) These proposed regulations are consistent with statutory language and would provide clarity.
- (2) There are no federal regulations previously adopted or amended that prohibit the proposed regulations.
- (3) These regulations will provide uniform rules in all cases and will provide clarification to the update and evaluation process under the SVPA to the petitioners and defense counsel.

The Finding of Emergency

DSH finds that the proposed regulatory amendment is necessary to address an emergency. An emergency is “a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.” (Gov. Code, § 11342.545.) DSH is facing current and existing legal challenges to the current SVP evaluations update process, on the grounds that current guidance is unclear, potentially *ultravires*, and potentially does not abide by the Administrative Procedure Act. These policy and legal challenges are being raised in a variety of pending SVP civil commitment proceedings. As a result, the Department wants to ensure that all parties of the SVPA commitment process are aware of the process and ensure that the department is able to provide proper evaluations for all pending matters. These regulations would provide clarity and extinguish any legal doubts as to the validity of the Department’s interpretation of the SVPA. It is critical, therefore, to immediately promulgate these emergency regulations in order to provide guidance and clarification on Welfare and Institutions Code, section 6600 et. seq. The District Attorney of Los Angeles filed an underground regulation challenge against the department’s policy on update evaluations and the department has been made aware that both the District Attorney and the Public Defender in Los Angeles County may challenge future policies of the department as underground regulations, unless it promulgates policy through the Administrative Procedure Act.

The proposed regulations will allow for an orderly and understandable process when it comes to updating the evaluations that are to be completed on individuals who are pending trial under the

SVPA. The proposed regulations are necessary to avoid serious harm. There are currently 443 patients housed at the Department of State Hospitals who are pending their SVP civil commitment trial. The Department continues to get challenged on our policy as underground regulations, these challenges affect the Department's continued operations and the validity of the evaluations performed under the SVPA. As the validity of the evaluations continue to be challenged, this potentially affects the 443 patients whose cases are pending trial and affects the Department's responsibility in assuring public safety. This immediate action is reasonably expected to alleviate that serious harm. The Legislature did not contemplate such a delay that would affect the due process of those pending trial. By challenging the evaluations, this could cause potential delays and jeopardizes the underlying case and the due process of the individual. Ensuring that the proper procedures are in place assures public safety under the SVPA.

C. Authority and Reference Citations

Authority: Welfare and Institutions Code sections 4005.1, 4027, and 4101.

References: Sections 6601, 6603, 6604, and 6605, Welfare and Institutions Code; and *Albertson v. Superior Court* (2001) 25 Cal.4th 796.

D. Informative Digest and Policy Statement Overview

Policy Statement

The objective of the proposed action is to implement, interpret, or make specific state policy regarding Welfare and Institutions Code, section 6600 et. seq. Specifically, the proposed regulations provide clarification to Welfare and Institutions Code, sections 6601 and 6603. The regulation would provide direction on when update evaluations may occur and which prior evaluations will be updated.

Existing Law

Currently, prisoners that potentially meet the requirements of being civilly committed under the SVPA are referred to DSH by the California Department of Corrections and Rehabilitation for full evaluations by the Department. If applicable, the appropriate county representative, per statute, files a petition based upon DSH's evaluations with the court to determine whether an individual should be adjudicated a Sexually Violent Predator under the SVPA. Once the petition is filed and the case is pending trial, the law allows the Department to update the evaluations performed before the petition was filed with the court, when the petitioning party requests the updates. The law does not provide a specific time period for a trial to occur and does not specify which evaluations should be updated when a trial is pending for several years or more.

E. Summary of Proposed New Regulations

Add Section 4020

This regulatory action would add Title 9, Division 1, Chapter 15, section 4020 to provide definitions of terminology that is used by current statutes and by the proposed regulations.

Add Section 4020.1

This regulatory action would add Title 9, Division 1, Chapter, 15, section 4020.1 to provide the update process designated by the Department, including how often evaluations may be updated, and which evaluations may be updated.

F. Technical, Theoretical, and Empirical Study or Report

None.

G. Determinations

Substantial Difference from Existing Comparable Federal Regulations or Statute: None.

Incompatibility with Existing Laws and Regulations: None.

Mandates on Local Agencies or School Districts: None.

Mandate Requires State Reimbursement Pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None.

Costs to Any Local Agency or School District that Requires Reimbursement Pursuant to Part 7, commencing with Section 17500, of Division 4 of the Government Code: DSH anticipates that there will be no fiscal impact in the current State Fiscal Year to Local Agencies.

Non-discretionary Costs or Savings Imposed on Local Agencies: None.

Costs or Savings to Any State Agency: DSH anticipates that there may be some cost savings to the state as this will allow the Department to be clear on what evaluations should be updated, potentially decreasing the amount of staff time to complete evaluations.

Costs or Savings in Federal Funding to the State: None.

Costs or Savings to Individuals or Businesses: DSH is not aware of any cost impacts that an individual or business would necessarily incur in reasonable compliance with the proposed action.

MATERIAL INCORPORATED BY REFERENCE

None.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), DSH has determined that no reasonable alternative, which it will consider or that will otherwise be identified and brought to its attention, will be more effective in carrying out the purpose for which this action is proposed or will be as effective and less burdensome to affect private persons than the proposed action described in this Notice.