

State of California
DEPARTMENT OF STATE HOSPITALS

**Final Statement of Reasons for Rulemaking,
Including Summary of Comments and Department Response**

PUBLIC HEARING TO CONSIDER THE PROPOSED RULEMAKING FOR
ADOPTION OF SEXUALLY VIOLENT PREDATOR (SVP) EVALUATION PROCESSES

I. GENERAL

- A.** The Department of State Hospitals (DSH) released the Initial Statement of Reasons for Rulemaking (ISOR) for the proposed adoption of SVP Evaluation Processes on November 17, 2017. The ISOR, which is incorporated by reference herein, contains a description of the rationale for the proposed adoption of sections 4020 and 4020.1, title 9, California Code of Regulations (CCR). All documents associated with this rulemaking were made available to the public and are available on the DSH Internet Web site at: <http://www.dsh.ca.gov/Publications/Regulations.aspx>

On January 2, 2018, DSH conducted a public hearing to consider the proposed rulemaking for adoption of SVP Evaluation Processes, in accordance with the California Administrative Procedure Act, Government Code, title 2, division 3, part 1, chapter 3.5 (commencing with section 11340). After holding the public hearing, DSH considered all timely and relevant comments received.

After the January 2, 2018 public hearing, DSH proposed modifications to the originally proposed regulations to sections 4020 and 4020.1, title 9, CCR. The Department made modifications (with the changes clearly indicated) which are sufficiently related to the originally proposed text, available for a supplemental 15-day comment period through a "Notice of Public Availability of Modified Text." The notice and modified text were mailed on April 9, 2018 to all interested parties. The 15-day notice listed the DSH Internet Web site where interested parties could obtain the complete text of the modified regulations text, with the modifications clearly indicated. These documents were also published on the DSH Internet Web site. The 15-day notice and modified regulatory text are incorporated by reference herein. No comments were received during the 15-day public comment period.

B. MANDATES AND FISCAL IMPACTS TO LOCAL GOVERNMENTS AND SCHOOL DISTRICTS

The Department has determined that this regulatory action will not result in a mandate to any local agency or school district the costs of which are reimbursable by the state pursuant to Part 7 (commencing with section 17500), Division 4, Title 2 of the Government Code.

C. CONSIDERATION OF ALTERNATIVES

The Department has determined there are no reasonable alternatives considered by the Department that would be more effective in carrying out the purpose for which the regulatory action was proposed, or would be as effective and less burdensome to affected private persons, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law. The only other alternative is to take no action, which is not reasonable because the Department is mandated by statute to provide these evaluations and proceeding without regulations on this topic would lead to an interpretation of the statute which could lead to an absurd result (i.e. an endless pool of evaluation reports).

II. MODIFICATIONS MADE TO THE ORIGINAL PROPOSAL

A. MODIFICATIONS PROVIDED FOR IN THE 15-DAY COMMENT PERIOD

1. In Section 4020.1, subdivision (b) was eliminated and clarified in section 4020.1, subdivision (a)(1).
2. In Section 4020.1, subdivisions (a)(1) was added and (a)(2) was modified, to clarify when independent evaluators will be appointed for a difference of opinion.

B. NON-SUBSTANTIAL MODIFICATIONS

In the 45-day notice, “Effect on Small Business” statement, the Department made the statement that the regulations would not have any cost impact on small businesses because of the proposed regulations only affecting those individual patients who are terminally ill in the state hospitals, however, that was erroneous. There will be no cost impact on the small businesses, because the Department will continue its practice of contracting with independent evaluators pursuant to the Sexually Violent Predator Act, and the need for independent evaluators as specified in Act does not change with this regulation.

The Department had initially indicated that there would be a cost-savings anticipated of \$25,000. However, after the implementation of the emergency regulations, the Department has determined that there will be no cost savings to the Department and there will be no fiscal impact to the Department.

In addition to the modifications described above, additional modifications correcting grammar, and making changes in numbering and formatting, to improve clarity. These changes are non-substantive changes made to the regulatory text because they more accurately reflect the numbering of sections, correct spelling, and correct grammar, but do not materially alter the requirements, conditions, rights, or responsibilities of the originally proposed text.

III. SUMMARY OF COMMENTS AND AGENCY RESPONSE

Written comments were received during the 45-day comment period in response to the January 2, 2018 public hearing notice. No written and oral comments were presented at the hearing. Listed below is the organization and individual that provided comments during the 45-day comment period, a summary of those comments and the Department's response:

Commenter	Affiliation
Jeff Lowry	San Bernardino County Public Defender's Office

1. Comment: The proposed regulation section 4020.1, subdivision (b), providing that the Department conduct only a one-time independent evaluation to resolve a difference of opinion changes Welfare and Institutions Code section 6601, subdivision (c)(1) and section 6603, subdivision (f).

Agency Response: Thank you for your comment. The Department is not trying to change the statute, but this comment points out that the proposed regulation text was unclear. As a result, the Department has modified the text of section 4020.1, subdivision (b).

2. Comment: The commenter provides that the "rulemaking power of an administrative agency does not permit the agency to exceed the scope of authority conferred on the agency by the Legislature."

Agency Response: Thank you for your comment. The Department is not trying to change the statute, but this comment points out that the proposed regulation text was unclear. As a result, the Department has modified the text of section 4020.1, subdivision (b).

3. Comment: The commenter provides that "Government Code section 11342.2 provides the general standard of review for determining the validity of administrative regulations ... no regulation adopted is valid or effective unless [1] consistent and not in conflict with the statute and [2] reasonably necessary to effectuate the purpose of the statute. The proposed regulation is in direct conflict with the SVP statute."

Agency Response: Thank you for your comment. The regulation is not in direct conflict with the SVP statute, however this comment points out that the proposed regulation was unclear. As a result, the Department has modified the text of section 4020.1, subdivision (b).

4. Comment: The commenter also shared concern about the definition of "original evaluators" and there being a "high likelihood there would be a built in split when updates are performed" if the DA can potentially ask for initial updates on four different reports.

Agency Response: Thank you for your comment. The definition of “original evaluations” in the proposed regulations only includes two reports in any given case. The Department does not find that the proposed regulations conflict with the statute and the proposed regulation clarifies the definition of original evaluation.

5. Comment: The commenter provides that the proposed “regulation ‘resurrects’ evaluators who are no longer on the case. Once a split occurs to the concurrence of the two independents ... that enable the district attorney to file the petition, that testify at the probable cause hearing that forms the basis of a finding of probable cause.”

Agency Response: Thank you for your comment. The definition of “original evaluations” in the proposed regulations only includes the two independent evaluations when conducted pursuant to Welfare and Institutions Code section 6601, subdivision (f). The Department does not find that the proposed regulations conflict with the statute and the proposed regulation clarifies the definition of original evaluation.

6. Comment: The commenter provides that the term “original” is defined in Welfare and Institutions Code section 6603, subdivision (c)(1) “only in regards to replacement evaluations”, “does not provide for updates of original evaluators” and “[u]pdating the most recent evaluations ... comports with the SVP statutory procedure.”

Agency Response: Thank you for your comment. However, the Department does not find that the proposed regulations conflict with the statute and the proposed regulation clarifies the definition of original evaluation.

7. Comment: The commenter provides that the “remedy is straightforward” and “[w]hen a petition is filed because of a split and the district attorney later asks for updates, DSH should have the two concurring independent evaluators perform the updates. If they then split, DSH appoints two more independents to perform evaluations.” If the case is delayed further and the DA requests further updates, the commenter believes only the last two evaluations performed should be allowed to be updates.

Agency Response: Thank you for your comment. The Department has considered this interpretation; but finds it inconsistent with the statute. The Department does not find that the proposed regulation conflicts with the statute and the proposed regulation clarifies the statute.