

NOTICE PUBLICATION/REGULATIONS SUBMISSION

EMERGENCY

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-	REGULATORY ACTION NUMBER	EMERGENCY NUMBER 2017-0807-02E
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For use by Office of Administrative Law (OAL) only

2017 AUG - 7 P 2: 50
OFFICE OF ADMINISTRATIVE LAW

NOTICE

REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
Department of State Hospitals

AGENCY FILE NUMBER (if any)

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 <input type="checkbox"/> 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 Disapproved/Withdrawn		NOTICE REGISTER NUMBER	PUBLICATION DATE

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Emergency - Sexually Violent Predator Act (SVPA) Evaluations Processes	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) 2017-0714-01E
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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 4020 and 4020.1
	AMEND
TITLE(S) 9	REPEAL

3. TYPE OF FILING

<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input 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 Resubmittal of disapproved or withdrawn nonemergency filing (Gov.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 Resubmittal of disapproved or withdrawn emergency filing (Gov.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 checked="" 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 Amy Whiting,	TELEPHONE NUMBER (916) 651-3247	FAX NUMBER (Optional) (916) 651-3090	E-MAIL ADDRESS (Optional) Amy.Whiting@dsh.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 	DATE 8/7/2017
TYPED NAME AND TITLE OF SIGNATORY Pamela Ahlin, Director	

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EMERGENCY REGULATION ORDER

California Code of Regulations
Title 9. Rehabilitative and Developmental Services
Division 1. Department of Mental Health
Chapter 15. Assessment of Sexually Violent Predators

Adopt new sections 4020 and 4020.1, title 9, California Code of Regulations to read as follows:

[NOTE: The entire text of sections 4020 and 4020.0 is new language to be added to the California Code of Regulations]

§ 4020. Evaluations Definitions.

- (a) "Necessary" shall mean no more frequently than annually, with an exception if the original evaluation(s) will expire during the time of trial under the Sexually Violent Predator Act.
- (b) "Original evaluation" shall mean either:
- (1) Two concurring initial evaluations conducted pursuant to Welfare and Institutions Code section 6601, subdivision (d); or
 - (2) Two concurring independent evaluations conducted pursuant to Welfare and Institutions Code section 6601, subdivision (f).

NOTE: Authority cited: Sections 4005.1, 4027 and 4101, Welfare and Institutions Code. Reference: Sections 6601 and 6603, Welfare and Institutions Code; and *Albertson v. Superior Court* (2001) 25 Cal.4th 796.

§ 4020.1. Update Evaluations.

- (a) The Department of State Hospitals shall perform necessary update evaluations pursuant to Welfare and Institutions Code section 6603, subdivision (c)(1), on the original evaluations.

- (1) When update evaluations of the original evaluations are requested by the petitioner after a petition is filed, pursuant to Welfare and Institutions Code section 6603, subdivision (c)(1), and two independent evaluations have previously been assigned to address a difference of opinion post-petition, the two independent evaluations and the original evaluations may be updated.
- (b) The Department of State Hospitals shall only provide independent evaluations to resolve a difference of opinion one time during the Welfare and Institutions Code section 6603, subdivision (c)(1), post-petition evaluation phase.
- (c) Any time the Department of State Hospitals determines that an evaluation report contains an error, or when the Department of State Hospitals obtains or produces additional pertinent information, it shall authorize the currently assigned evaluators to prepare an addendum.
- (d) The Department of State Hospitals shall have the sole authority to designate evaluators for update evaluations and replacement evaluations for the petitioner.
 - (1) Only an evaluator designated by the Department of State Hospitals may testify on behalf of the Department of State Hospitals.
 - (2) The Department of State Hospitals shall replace an evaluator in accordance with Welfare and Institutions Code section 6603, subdivision (c)(2).
- (e) Only an evaluator designated by the Department of State Hospitals shall have access to a Department of State Hospitals patient's records for the purposes of

conducting an update or replacement evaluation absent a court order.

- (f) An evaluator who is no longer available to testify for the petitioner in court proceedings pursuant to Welfare and Institutions Code section 6603, subdivision (c)(2), may not be designated by the Department of State Hospitals to perform an update evaluation.
- (g) If an evaluator who is no longer available to testify for the petitioner in court proceedings pursuant to Welfare and Institutions Code section 6603, subdivision (c)(2), is called by a party to testify at trial, costs for the testimony shall be paid by the party calling the evaluator to testify.

NOTE: Authority cited: Sections 4005.1, 4027 and 4101, Welfare and Institutions Code. Reference: Sections 6601, 6603, 6604 and 6605, Welfare and Institutions Code.

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. Furthermore, the proposed regulations are necessary to avoid serious harm, since there are currently 449 patients still at the Department of State Hospitals who are in the process of their SVP civil commitment proceedings. 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, DSH has housed many patients for many years while they are pending trial under Welfare and Institutions Code, section 6602. In some, 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.

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 Procedures 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.

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 with the court to determine whether an individual should be adjudicated a Sexually Violent Predator under the SVPA. The law allows the department to update the evaluations performed before the petition was filed with the court, pending trial under the SVPA, when the petitioning party requests the updates. The law does not specify which evaluations should be updated.

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 when there are multiple post-petition evaluators and/or when there is a difference of opinion between concurrent evaluators.

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.

DSH invites interested persons to present statements or arguments with respect to alternatives to the proposed regulation amendment a during the written comment period.

AVAILABILITY OF FINDING OF EMERGENCY, TEXT OF PROPOSED EMERGENCY REGULATIONS, AND RULEMAKING FILE

The rulemaking file is available for inspection and copying at the Department of State Hospitals, Regulations Unit, 1600 9th Street, Room 410, Sacramento, CA 95814. As of the date this Notice is published, the rulemaking file consists of a copy of the exact language of the proposed emergency regulations and the Finding of Emergency. These documents may also be viewed and downloaded from DSH's Internet Web site at www.dsh.ca.gov.