



CALIFORNIA DEPARTMENT OF
State Hospitals

**NOTICE OF PUBLIC HEARING TO CONSIDER ADOPTION OF
PROPOSED REGULATIONS FOR THE SEXUALLY VIOLENT PREDATOR
STANDARDIZED ASSESSMENT PROTOCOL**

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

The Department of State Hospitals (Department) will conduct a public hearing at the time and place noted below to consider adoption of the proposed regulations for the sexually violent predator standardized assessment protocol after considering all comments, objections, and recommendations regarding the above matter.

DATE: January 22, 2018

TIME: 2:00 p.m.

LOCATION: California Health and Human Services Agency
Department of State Hospitals
Conference Room 100
1600 9th Street
Sacramento, California 95814

At the hearing, any interested person or his or her representative may, orally or in writing, submit comments relevant to the proposed action described in the Informative Digest. The Department requests but does not require that a person who makes an oral comment at the hearing also prepare and submit a written copy of his or her testimony. Furthermore, the Department requests but does not require that all written and email statements on this item be filed at least 10 days prior to the hearing, so that Department staff have sufficient time to consider each comment. The Department encourages members of the public to bring any suggestions for modifications to the proposed regulatory action to staff's attention in advance of the hearing.

WRITTEN COMMENT PERIOD AND SUBMITTAL OF COMMENTS

Any interested person or his or her representative may present comments orally or in writing at the hearing and may provide comments by personal delivery, postal mail service, fax, or email submittal before the hearing as described in detail below. The public comment period for this regulatory action will begin on December 8, 2017. For

any written comment to be considered, comments not physically submitted at the hearing, must be received by the Department **no later than 5:00 pm, January 22, 2018**. The Department reserves the right to consider or not consider a late submission. For consideration, any written comments may be submitted as follows:

1. By email to DSH.Regulations@dsh.ca.gov. It is requested that all comments, particularly those emailed with attachments, contain the regulation package identifier **“SVP Assessment Protocol”** in the subject line to facilitate timely identification and review;
2. By fax transmission to (916) 651-3090;
3. By United States Postal Service to:

California Department of State Hospitals
Office of Regulations
1600 9th Street, Room 410
Sacramento, CA 95814; or
4. Hand-delivered to the address above.

AUTHORITY AND REFERENCE

These regulatory actions are proposed under the authority granted in California Welfare and Institutions Code sections 4005.1, 4027, and 4101. These actions are proposed to implement, interpret, and make specific Welfare and Institutions Code sections 6600, 6601, 6602, 6603, 6604.9, and 6605; *Albertson v. Superior Court* (2001) 25 Cal. 4th 796; *People v. Superior Court (Ghilotti)*, (2002) 27 Cal.4th 888; *People v. Hurtado* (2002) 28 Cal.4th 1179; *People v. Torres* (2001) 25 Cal.4th 680; and *People v. Turner* (2000) 78 Cal.App.4th 1131.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW PURSUANT TO GOVERNMENT CODE SECTION 11346.5(a)

Sections Affected: The Department proposes adoption of California Code of Regulations, title 9, sections 4011, 4012, 4013, 4014, and 4015.

Policy Statement Overview

The Bureau of State Audits recognized that the Department needed to provide evaluators more guidance in completing their evaluations. These proposed regulations will implement and clarify the statutory requirements for sexually violent predator (SVP) evaluations under the Sexually Violent Predator Act (SVPA). Furthermore, the regulatory action will provide consistency and ensure sufficient guidance to evaluators conducting forensic evaluations, such as what assessment instruments evaluators may use and what documents to consider for evaluations. The proposed regulations will also help ensure that evaluations are consistent in quality.

Existing Law

Current laws provide for the Department to conduct the forensic evaluations as laid out in these proposed regulations. Pursuant to Welfare and Institutions Code sections 6601 and 6603, the Department has implied authority to adopt regulations on the evaluation process of an individual referred to the Department for determination of whether the individual is a sexually violent predator (SVP). Section 6601 charges the Department to develop and update a standardized assessment protocol for evaluators to use. This protocol shall evaluate for diagnosable mental disorders and factors contributing to an individual's risk of re-offense, such as criminal and psychosexual history; type, degree, and duration of sexual deviance; and severity of mental disorder. Section 6603 provides for updated evaluations on an individual, if necessary, and these evaluations would involve assessing the same criteria as with the initial SVP evaluation of that individual. These proposed regulations will implement, interpret, and make specific the assessment protocol involved in the Department's SVP evaluations – whether initial evaluations, update evaluations, annual evaluations, or any further evaluations – pursuant to Welfare and Institutions Code sections 6601, 6603, 6604.1, 6604.9, 6605, or 6608.

Further, these proposed regulations will implement, interpret, and make specific the holdings in the following cases.

- *Albertson v. Superior Court* (2001) 25 Cal.4th 796 – The court held that the district attorney is entitled, pursuant to Welfare and Institutions Code section 6603, to an updated SVP evaluation of an individual. These proposed regulations provide for the assessment protocol for those update evaluations.
- *People v. Superior Court (Ghilotti)* 27 Cal.4th 888 – The court laid out minimum factors an evaluator must consider in determining whether a SVP presents a substantial danger if unconditionally released to the community. These proposed regulations provide for the SVP assessment protocol, which includes an evaluation of the court's minimum factors.
- *People v. Torres* (2001) 25 Cal.4th 680 – The court held that to be determined to be a SVP, an individual's *prior* convictions need not be predatory. *People v. Hurtado* (2002) 28 Cal.4th 1179 – The court held that to be determined to be a SVP, if an individual is determined likely to engage in sexually violent criminal behavior, the potential *future* behavior must be predatory. These proposed regulations provide for the SVP assessment protocol, which includes an evaluation of whether future behavior, not prior criminal history, may be predatory.
- *People v. Turner* (2000) 78 Cal.App.4th 1131 – The court held that, pursuant Welfare and Institutions Code sections 6603 and 6604, a trier of fact must find unanimously whether an individual meets the SVP criteria or the district had not met his or her burden beyond a reasonable doubt that

the individual meets the SVP criteria. If the trier of fact unanimously finds that the district attorney did not meet his or her burden – that is, that the individual does not meet SVP criteria – these proposed regulations provide that an evaluator may still conduct an evaluation of that individual if (1) he or she accepts the trier of fact’s finding as true and (2) the facts have sufficiently changed such that the individual may now be dangerous and likely to reoffend.

These proposed regulations will not change current laws and only clarify the assessment protocol to conduct forensic evaluations of SVPs and potential SVPs. These proposed regulations also indicate the standard practice of the best practices in the field of psychology.

Evaluation of Inconsistency or Incompatibility with Existing State Regulations

The Department evaluated whether there were any other regulations in this area and has found that these are the only regulations concerning the assessment protocol in evaluating an individual to determine whether he or she is a SVP. While “evaluation” is defined in California Code of Regulations, title 9, section 4020, this section does not have provisions on the particular criteria to be evaluated in the SVP assessment. Similarly, while update evaluations are provided for in California Code of Regulations, title 9, section 4020.1, these provisions clarify the timing of the updates and do not address the evaluation criteria and process of the SVP assessment. Therefore, these proposed regulations are neither inconsistent nor incompatible with existing State regulations.

DISCLOSURES REGARDING THE PROPOSED REGULATIONS

The Department has made the following initial determinations:

1. Mandates on Local Agencies or School Districts: There will be no mandates imposed on local agencies or school districts.
2. Mandate Requires State Reimbursement Pursuant to Part 7 (commencing with section 17500) of Division 4 of the Government Code: None.
3. 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: None.
4. Non-discretionary Costs or Savings Imposed on Local Agencies: The Department anticipates there will be no fiscal impact in the current State Fiscal Year to Local Agencies.
5. Costs or Savings to State Agencies: The Department anticipates there will be no costs or savings to State agencies.

6. Costs or Savings in Federal Funding to the State: None.
7. Significant, Statewide Adverse Economic Impact Directly Affecting Business: There will not be a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.
8. Cost Impacts on Representative Private Person or Businesses: The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
9. Effect on Small Businesses, pursuant to California Code of Regulations, title 1, section 4, subdivisions (a) & (b): There will be no cost impact on small businesses because SVP evaluations are conducted only by State staff or State contractors. As a result, these proposed regulations affect only State positions already existing and will not impact private businesses.
10. Housing Costs: In accordance with Government Code section 11346.5, subdivision (a)(12), the Department has made the initial determination that the proposed regulatory action will not have a significant effect on housing costs. These proposed regulations do not impact housing since they affect only inmates in California Department of Corrections and Rehabilitation custody or individuals committed to the Department and in Department custody.

RESULTS OF THE ECONOMIC IMPACT ANALYSIS

These proposed regulations are intended to allow the Department to set forth the policy of the Department under the SVPA.

Creation or Elimination of Jobs within the State of California

The Department has made an initial determination that the proposed regulations would not create or eliminate jobs within the State of California.

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

The Department has made an initial determination that the proposed regulations would not create new businesses or eliminate existing businesses. The Department already hires and/ or contracts evaluators for evaluation services and other services in providing the proper evaluations under the SVPA.

Expansion of Businesses Currently Doing Business within the State of California

The Department has made an initial determination that the proposed regulations would not create the expansion of businesses currently doing business within the State of California. The Department already hires and/ or contracts evaluators for evaluation services and other services in providing the proper evaluations under the SVPA.

Anticipated Benefits Under the Regulations

One benefit of these proposed regulations is the transparency of the evaluations process. Providing a uniform, streamlined SVP evaluations process ensures that there is equity and fairness in the treatment of SVPs and potential SVPs. These proposed regulations will standardize the expectations of the courts, counsel, potential patients, and the evaluators themselves regarding the SVP evaluations.

Further, these proposed regulations may benefit the health and welfare of California residents by ensuring that potential SVPs are evaluated equally, fairly, and uniformly, resulting in the potential civil commitment of only those patients who meet the SVP criteria, treating and rehabilitating SVPs who are suitable and appropriate for treatment, and keeping the public safe from potentially dangerous SVPs – in congruence with the spirit of the SVPA which is to keep the public safe and to provide treatment to SVPs who will benefit from it. These proposed regulations may also benefit worker safety by ensuring that only those patients who meet the SVP criteria, as evaluated using these proposed regulations, are treated by hospital staff, resulting in appropriate treatment and workload. Lastly, these proposed regulations may benefit the State's environment by streamlining the evaluation process, reducing carbon footprint, waste, use of resources, and energy costs.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Department must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed, 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.

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

AGENCY CONTACT PERSONS

Inquiries concerning the substance of the proposed regulatory action may be directed to the agency representatives: Domingo Aguilar, Forensic Services Division, Program Chief, by telephone at (916) 651-0984 or Dr. James Rokop, Forensic Services Division, Chief Psychologist, by telephone at (916) 651-5285.

AVAILABILITY OF DOCUMENTS

The Department staff has compiled a record for this rulemaking action which includes all the information upon which the proposal is based, including an Initial Statement of Reasons (ISOR) for the proposed regulatory action and the proposed text (the "express terms") of the regulation. Copies of the proposed regulation text and the ISOR, which

includes a summary of the economic and fiscal impacts of the proposal, may be accessed on the Department's web site listed below or may be obtained from the agency representative to whom non-substantive inquiries concerning the proposed administrative action may be directed: Amy Whiting, Manager, Regulations Unit, by telephone at (916) 654-2748.

HEARING PROCEDURES

The public hearing will be conducted in accordance with the California Administrative Procedure Act, Government Code, title 2, division 3, part 1, chapter 3.5 (commencing with § 11340). After holding the public hearing, and considering all timely and relevant comments received, the Department may adopt the proposed regulations substantially as described in this notice. If the Department makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Department adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of the contact person at the address indicated above. The Department will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, Final Statement of Reasons (FSOR) shall be available and copies may be requested from the agency contact persons in this notice or may be accessed on the Department's Internet web site listed below.

INTERNET ACCESS

This notice, the ISOR, the proposed regulation text, and all subsequent regulatory documents, including the FSOR, when completed, are available on the Department's web site for this rulemaking at <http://www.dsh.ca.gov/Publications/Regulations.aspx>.