PETITION TO THE OFFICE OF ADMINISTRATIVE LAW

RE: **ALLEGED UNDERGROUND REGULATION**

FROM: MICHAEL GEORGE ST.MARTIN, Petitioner

DATE:

This is a computer generated petition based on the optional OAL form supplying the information required by Title 1, California Code of Regulations, §280, for a petition challenging an alleged underground regulation.

1. Identifying Information: **Petitioner**

Your Name: **MICHAEL GEORGE ST.MARTIN**
CO-000414-3, RRU-10

Your Address: **P.O. Box 5003, Coalinga, CA 93210**

Your Telephone Number: **(559) 935-3814 or (559) 934-1634**

Your E-Mail (if you have one): michaelst.martin@hotmail.com

2. State Agency or Department being challenged:

California Department of Mental Health ("DMH")

3. Provide a complete description of the purported underground regulation. Attach a written copy of it. If the purported underground regulation is found in an agency manual, identify the specific provision of the manual alleged to comprise the underground regulation. Please be as precise as possible.

Description of alleged Underground Regulation

The DMH issued the ***CLINICAL EVALUATOR HANDBOOK AND STANDARDIZED ASSESSMENT PROTOCOL*** (November 2008) (hereinafter ***"Protocol"***) without following the requirements of the Administrative Procedures Act. The DMH has revised this Protocol several times, most recently in November 2008. The covers of all editions, including the 2008 revision are identical except for the date and contain the following:

SEX OFFENDER COMMITMENT PROGRAM (SOCP)
WIC 6600 (SEXUALLY VIOLENT PREDATOR)

CLINICAL EVALUATOR HANDBOOK
AND
STANDARDIZED ASSESSMENT PROTOCOL
NOVEMBER 2008

California Department of Mental Health
Sacramento, California

The Protocol (2008) is a 40-page manual, with several additional pages of appendices. Welfare & Institutions Code section 6601(c) requires that persons are evaluated in accordance with a standardized assessment protocol. The Protocol being challenged by this petition is the "standardized assessment protocol" required by section 6601(c). The Protocol thus creates a mandatory instruction, criterion, or manual, which is a Standard of General Application utilized

for the entire class of persons subject to Civil Commitment under the SVPA Statute. Furthermore, the Protocol is replete with references to the Sexually Violent Predator Act and thus the Protocol implements, interprets, or makes specific the SVPA.

Petitioner alleges the entire Protocol is an underground regulation, as there is no evidence that any portion of this mandatory directive has been promulgated pursuant to the Administrative Procedures Act.

A true and correct copy of the
Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)
is attached hereto as EXHIBIT A.

THE CLINICAL EVALUATOR HANDBOOK AND STANDARDIZED ASSESSMENT PROTOCOL (2008)
IS A REGULATION WITHIN THE MEANING OF THE APA

Welfare & Institutions Code section 6601(c) requires the Director of the Department of Mental Health (DMH) to develop a standardized assessment protocol for evaluations of persons considered for commitment pursuant to the Sexually Violent Predator Act (SVPA):

> "(c) The State Department of Mental Health shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator . . . The Standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder."

Thus in 1996, the California Department of Mental Health was instructed by the California Legislature to develop and update a standardized assessment protocol. However, the Department has failed or refused to adopt, in substantive compliance with the Administrative Procedures Act, any version of their ***Clinical Evaluator Handbook and Standardized Assessment Protocol*** upon which Psychological Evaluations for persons considered for Civil Commitment must be based.

In fact, on August 15, 2008, the Office of Administrative Law issued 2008 OAL Determination No. 19 (OAL FILE # CTU 2008-0129-01), which declared the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2007)*** to be an underground regulation that must be promulgated pursuant to the Administrative Procedures Act.

The Department of Mental Health has simply revised the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2007)*** and reissued it as the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)*** without promulgating it pursuant to the Administrative Procedures Act.

The Department of Mental Health cannot reasonably claim any version of the ***Clinical Evaluator Handbook and Standardized Assessment Protocol*** is not subject to the

Administrative Procedures Act because ***OAL Determination No. 19*** has previously determined that the ***Protocol*** is subject to the APA, and the DMH did not challenge this determination in a court of law.

The Department of Mental Health has, from the date of its issue, thumbed its nose at the Governors ***EXECUTIVE ORDER S-2-03***, 11/17/2003, that required all State agencies to promulgate their regulations pursuant to the Administrative Procedures Act.

Notwithstanding the fact that the Department of Mental Health knew and understood that prior to implementation, or revision thereof, the Department was required to adopt the ***Protocol***, or any revision thereof pursuant to the Administrative Procedures Act, the DMH nevertheless failed to do so, and thus, pursuant to the law the current ***Protocol*** being utilized is also invalid and an "Underground Regulation."

The November 2008 revision of the ***Protocol*** contains updates related to Proposition 83, also known as Jessica's Law; insignificant grammar and readability improvements; and, a few changes in the order of presentation of topics.

In reference to the statement, "WIC Section 6601(c) requires that a person referred from CDCR be evaluated in accordance with a standardized assessment protocol," which is contained in both the 2007 and 2008 versions of the ***Protocol***. The November 2008 revision of the ***Protocol***, at page 2, no longer contains the statement, "This clinical evaluator handbook is the centerpiece of that protocol."

Petitioner alleges that the Department of Mental Health cannot have it both ways: the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)*** is either the "standardized assessment protocol" required by WIC section 6601(c), or it is not. If the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)*** is the "standardized assessment protocol" required by WIC section 660(c), then its implementation or revision must be promulgated pursuant to the APA. If the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)*** is not the "standardized assessment protocol" required by WIC section 6601(c), then the Department of Mental Health is doing all of its clinical evaluations in violation of the Sexually Violent Predator Act, because these evaluations are being done without the required "standardized assessment protocol."

Clinical Evaluator Handbook and Standardized Assessment Protocol (2008) contains numerous language changes where the word "must" as used in the 2007 ***Protocol*** now reads "should" in the 2008 ***Protocol***. However, the word "should" is used in a manner that infers it is meant to be mandatory.

The section of the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)***, beginning at page 13, is now entitled "SUGGESTED CLINICAL EVALUATION PROTOCOL." The word "SUGGESTED" was added to this revision. Here, the DMH has attempted, through a word game slight-of-hand, to make this section appear to be not mandatory. However, the actual language of that section has few if any changes. It still contains mandatory language, e.g., "will," "shall," and "must."

The replacement of unquestionably mandatory words such as "shall," "will," "or must" with words such as "suggested," "encouraged," "recommended," "strongly recommended" or "should," when taken in the context used in the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)*** is simply a pretext by the DMH to avoid promulgating the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)*** as a regulation.

Any reasonable person who is employed by another, whether it be by direct employment or by contract, fully understands that when his employer issues any type of guideline, manual or verbal instruction, which contain directions on how to perform a specific job function, that the use of words like "suggested," "should," "encouraged," "recommended," or "strongly recommended" are meant to be mandatory. Any reasonable employee or contractor knows full well that to not do exactly as "suggested," "encouraged to," or "recommended that" by his or her boss will most likely result in discipline or termination.

In the case of the DMH Contract Evaluator Panel, doing exactly what is "suggested," "encouraged," "recommended," or "strongly recommended" is just what keeps them active on the panel. Some of these Panel Evaluators have earned well over one million dollars per year by doing exactly what the DMH "suggested," "encouraged," "recommended," or "strongly recommended."

A true and correct copy of the
Panel members and amount of pay (2007)
is attached hereto as EXHIBIT B.

Other Panel Evaluators have been removed for a failure to do exactly what was suggested, encouraged, recommended, or strongly recommended by the DMH. Thus in the context of the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)***, the words "should", "suggested," "encouraged," "recommended," or "strongly recommended" or are mandatory.

A true and correct copy of the
PARTIAL LIST OF SVP EVALUATOR PANEL MEMBERS WHO WERE DISCHARGED FOR ALLEGEDLY NOT FOLLOWING "GUIDELINES"
is attached hereto as EXHIBIT C.

Thus, even though those former evaluators on the attached list were discharged prior to the issuing of the 2008 ***Protocol***, the message has been clear to the remaining Panel evaluators from the very beginning: the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)***, and any verbal guidance received where "encouraged" by the Protocol to consult with the DMH, are meant to be mandatory, and those who do not follow the suggestions, recommendations, and encouragements contained therein are subject to dismissal.

Petitioner alleges that the revisions contained in the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)*** do not change the fact that it is a regulation within the meaning of the APA and must be promulgated.

Though the Director may prescribe rules and regulations such as the mandated protocol of section 6601(c), they must be promulgated and filed per Chapter 3.5 of art. 1 of Division 3 of Title 2 of the Administrative Procedures Act, government Code, section 11340 et seq. There is no evidence that DMH has promulgated the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)*** pursuant to the APA.

The ***Protocol*** is a regulation. Chapter 3.5, article 5, of the Administrative Procedure Act, Govt. Code sections 11346 et seq., governs adoption, amendment and repeal of regulations by administrative agencies known as rulemaking. Govt. Code section 11342.600 provides that:

> "[A regulation is] every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret or make specific the law enforced or administered by it or to govern its procedure."

Syngenta Crop Protection, Inc. V. Helliker (2d Dist. 2006) 138 Cal.App. 4th 1135, 1175-77, 42 Cal.Rptr.3d 191, 221-222, quotes *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 59 Cal.Rptr.2d 186, which explains:

> "[The APA] establishes 'minimum procedural requirements' for rulemaking. ([Govt. C.] § 11346(a).) The agency must provide notice of the proposed action (Id. §§ 11346.4, 11346.5), the complete text of the proposal (§ 11346.2(a)), and an initial statement of reasons for the proposal (§ 11346.2(b)), and a final statement of reasons (§ 11346.9(a)). The agency must provide a public hearing if an interested person timely requests a hearing (§ 11346.8(a)), provide an opportunity for interested persons to submit written comments if no hearing is held (ibid.), and respond in writing to comments in the final statement of reasons (§ 11346.9(a)(3)). The agency must submit the entire rulemaking file to the Office of Administrative Law (§§ 11347.3(c), 11342.550), which reviews the regulation for compliance with the law and other criteria and approves or disapproves the regulatory action. (§§ 11349.1, 11349.3 . . . " (14 Cal. 4th 557, 59 Cal.Rptr.2d 186.)
>
> "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." (Govt. Code § 11340.5(a).)"
>
> "A substantial failure to comply with chapter 3.5 of the APA renders the regulation invalid. § 11350(a); *Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal. 4th at 576, 59 Cal.Rptr.2d 186.)"
>
> "A regulation subject to the APA thus has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided . . . Second, the rule must 'implement, interpret, or

make specific, the law enforced or administered by [the agency], or . . . govern [the agency's] procedure.' ([Former] Govt. Code § 11342(g) [now § 11342.601].) Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases . . . Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. ([Former] Govt Code § 11343(a)(3), 11346.1(a) [now § 11340.9(I)].) Thus, if an agency prepares a policy manual that is no more than a summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations . . . A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes."(Emphasis added.) (*Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal. 4th at 571, 59 Cal.Rptr.2d 186.)"

Morning Star Co. v. State Bd. Of Equalization (2006), 38 Cal. 4th 324, 333-334, 42 Cal.Rptr.3d 47, 53-54, confirms the Syngenta/Tidewater analysis, especially that a regulation must be intended to apply generally, and that it must implement, interpret or make specific the law administered by the agency, or govern the agency's procedure.

The *Protocol* is a regulation. It is applied to all persons proposed or adjudicated to be SVPs in California. It declares how this certain class of cases will be decided. Its use by all state evaluators is mandatory. They must prepare the reports which are utilized to support their professional opinions that the person examined is an SVP pursuant to the *Protocol*. Thus the mandate the ***Protocol*** implements, enforces or otherwise makes specific is the language of the Sexually Violent Predators Act (SVPA). The following excerpts from the *Protocol* mandate specific actions by either the DMH, its employees, or contractors that affect he taxpayers of California, and make clear that the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)*** is a regulation:

1. "Evaluator Panel," (page 2) "In the event that an Evaluator is sued for conduct within their scope of work under the contracts with the DMH, DMH will make a request that the State Attorney General's Office provide legal representation. "

> This mandates DMH employees to request the State Attorney General's Office to provide legal representation to contractors at taxpayer expense. Many of whom make in excess of a million dollars per year.

2. "Suggested Clinical Evaluation Protocol," pp. 13-33. In the title itself, the word "suggested" is added. As alleged *anti* by petitioner, this does not change the mandatory inference and intent of everything contained within this section. This section is replete with detailed mandatory instructions in every facet of the clinical evaluation.

> With the exception of a few additions, rearranging of order, and updating of references, the basic language and procedure being mandated remains mostly unchanged from the 2007 ***Protocol*** declared an underground regulation on August 15, 2008, in ***2008 OAL Determination No. 19*** (OAL FILE # CTU 2008-0129-01).

3. ***Protocol*** (page 36) "Since the person has been committed as an SVP by the court for 'appropriate treatment' (Welf. & Inst. Code § 6604), the department believes that a person must finish the program, including the completion of a period of outpatient supervision. Only under rather unusual circumstances would a patient being evaluated for SVP commitment extension be deemed unlikely to commit future sexually violent acts as a result of a mental disorder, if all five phases of treatment have not been completed. If this is the case, the evaluator is encouraged to consult with the department on their conclusion."

This language is unchanged except for one word from the 2007 ***Protocol*** declared an underground regulation on August 15, 2008, in ***2008 OAL Determination No. 19*** (OAL FILE # CTU 2008-0129-01). The word "required," in the last sentence, was changed to "encouraged." As used in the context of the ***Protocol***, the word "encouraged" is meant to be mandatory.

This is a mandated determination that the person meets the SVPA criteria if he has not completed all five phases of treatment – a determination that is for the jury to decide. This mandated determination is in direct conflict with the controlling statute's requirement that, "The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." (Welf & Inst. Code § 6604.) Such a mandate also violates the guarantee of Due Process Under the Laws of both the California and Untied States Constitutions.

Throughout the ***Protocol***, the words "Must" and "Required" are used repeatedly. When used in the language of the Protocol they create a mandatory instruction, criterion, or manual, which is a standard of general application utilized for the entire class of persons subject to civil commitment under the SVPA. Furthermore, the ***Protocol*** is replete with references to the SVPA, thus the ***Protocol*** implements, interprets, or makes specific the SVPA. Therefore the Protocol is a regulation, and one which has not been adopted in compliance with the APA.

4. Provide a description of the agency actions you believe demonstrate that it has issued, used, enforced, or attempted to enforce the purported underground regulation.

WIC §6601(c) mandated DMH to develop and update the ***Clinical Evaluator Handbook and Standardized Assessment Protocol***. Over the years, the DMH published and released several revisions of this handbook. WIC §6601(c) infers its use is mandatory when conducting SVP evaluations. The current version is used statewide by all State Evaluators when conducting SVP evaluations. Its existence and use are not in controversy.

The DMH has taken the firm position that the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)*** is not a regulation subject to the provisions of the APA.

Petitioner alleges that the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)*** is a regulation within the meaning of the APA.

5. State the legal basis for believing that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code that no express statutory exemption to the requirements of the APA is applicable.

NO EXCEPTION EXCLUDES THE *PROTOCOL* FROM THE APA PROCEDURES.

> Clearly inapplicable are the provisions of Govt. Code § 11340.9 excluding:
> "(d) A regulation that relates only to the internal management of the state agency . . . "
> "(f) A regulation that embodies the only legally tenable interpretation of a provision of law . . . "
> "(I) A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state."

Armistead v. State Personnel Bd. (1978) 22 Cal.3d 198, 204-205, 149 Cal.Rptr. 1, 4 quoting from the *First Report of the Senate Interim Committee on Administrative Regulations to the 1955 Legislature*, documents the necessity for strict adherence to the APA. The court found this necessary so as to prevent state agencies from avoiding obedience to the APA by denominating rules as "'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the like," and by containing them "in internal organs of the agency such as manuals, memoranda, bulletins, or [directing them] to the public in the form of circulars or bulletins."

Armistead underlined that "[R]ules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA" (emphasis added), thus provision of state personnel transactions manual governing withdrawal of resignation by state employee merited no weight as agency interpretation where such provision had not been duly promulgated and published.

The ***Protocol*** in question here fits the above description perfectly. It is called a "SUGGESTED CLINICAL EVALUATION PROTOCOL." but it contains mandatory language making it much more than a simple "SUGGESTED CLINICAL EVALUATION PROTOCOL." Instead, it is a forbidden underground regulation without its adoption pursuant to the Administrative Procedures Act.

THE *PROTOCOL* APPLIES GENERALLY THROUGHOUT THE STATE

Modesto City Schools v. Education Audits Appeal Panel, (3d Dist. 2004) 123 Cal.App. 4th 1365, 1381, 20 Cal.Rptr.3d 831, 842, holds that to be deemed an underground regulation, which would be invalid because it was not adopted in substantial compliance with the procedures of the APA, the agency must intend it to apply generally rather than in a specific case, and the agency must adopt it to implement, interpret, or make specific the law enforced by the agency.

Kings Rehabilitation Center, Inc. V. Premo, (3rd Dist. 1999) 69 Cal.App. 4th 215, 217, 81 Cal.Rptr.2d 406, notes:

> "The APA is partly designed to eliminate the use of 'underground' regulations; rules which only the government knows about. If a policy or procedure falls within the

definition of a regulation within the meaning of the APA, the promulgating agency must comply with the procedures for formalizing such regulations, which include public notice and approval by the Office of Administrative Law (OAL). Failure to comply with the APA nullifies the rule. (Govt Code § 11350(a); *Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 4") (Emphasis added.)

The ***Protocol*** is neither intended nor utilized to make specific determinations but is utilized generally throughout the state when performing all SVP evaluations. Thus, the ***Protocol*** is a regulation that must be promulgated as a regulation but otherwise is a null and void underground regulation.

6. Provide information demonstrating that the petition raises an issue of considerable public importance requiring prompt resolution.

The Legislature passed the Administrative Procedures Act with the intent that all State Agencies would follow that law. The Governor issued ***EXECUTIVE ORDER S-2-03***, 11/17/2003, ordering all State agencies to promulgate their regulations pursuant to the Administrative Procedures Act. The Department of Mental Health became aware on August 15, 2008, following ***2008 OAL Determination No. 19*** declaring the previous edition of the ***Protocol*** to be an underground regulation, and that the ***Protocol*** and any future revisions must be promulgated. Yet the DMH refused and failed to do so, instead issuing the November 2008 revision without making any attempt to promulgate. The irony of this is the DMH is using the ***Protocol*** to involuntarily commitment citizens of California because they might commit a crime in the future. The reality is that the Administration of the DMH is actually committing crimes in the present by refusing and failing to follow existing laws. This is a classic example of the bureaucratic tyranny warned of in *Tidewater* and *Morning Star*..

Morning Star reiterates, "[2] These requirements promote the APA's goals of bureaucratic responsiveness and public engagement in agency rulemaking. 'One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law's requirements so that they can conform their conduct accordingly [citation]. The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. [Citation.]' [132 P.3d 255] (*Tidewater, supra*, 14 Cal.4th at pp. 568-569, 59 Cal.Rptr.2d 186, 927 P.2d 296.)" (*Morning Star Co. v. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 53.)

An entire class of citizens face a potential life term of incarceration based on evaluations performed under the mandate of this alleged underground regulation. Every citizen has an interest based upon the fundamental American principles of justice and freedom to have every law, rule, regulation, policy, procedure, guideline, criterion, bulletin, manual, instruction, order, or standard used in any procedure which could aid to deprive any citizen of his liberty to be legally promulgated prior to its implementation.

Many psychologists are complaining that the ***Protocol***, particularly in the section beginning at page 19, "**B. Does the inmate have a diagnosed mental disorder that predisposes the person to the commission of criminal sexual acts? (Yes/No)**," contains misstatements regarding proper use of the *Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition-Text Revision (DSM-IV-TR)*. They claim this section contains a major flaw in reasoning. That, among other things, it states that the *DSM-IV TR* diagnosis can be used to determine volitional impairment and serious difficulty controlling behavior. That wherever contained in the ***Protocol***, the term "volitional" is improperly used.

Ethical psychologists claim the ***Protocol***, as written, contains numerous passages that are poorly written, resulting in professional and ethical concerns. This conflict between the language of the ***Protocol*** and the very profession required to follow the mandates of the ***Protocol*** illustrates the need for promulgation of the ***Protocol***, and the need for input from members of the Psychological Community during the promulgation process.

CONCLUSION

Clearly, both those who may receive a life-time commitment following psychological evaluations performed pursuant to the ***Clinical Evaluator Handbook and Standardized Assessment Protocol (2008)***, and members of the psychological profession believe the Protocol meets neither the mandate of the SVPA nor professional and ethical standards of the psychological and psychiatric communities. Thus, public participation in the regulatory process is needed to halt the bureaucratic tyranny of the Department of Mental Health.

"Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. [Citation.]' [132 P.3d 255] (*Tidewater, supra*, 14 Cal.4th at pp. 568-569, 59 Cal.Rptr.2d 186, 927 P.2d 296.)" (*Morning Star Co. v. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 53.)

The DMH, part of the Executive Branch, lacks Constitutional authority to enact legislation. The Legislature has granted state agencies and departments quasi-legislative powers through the APA providing they follow specific promulgation procedures. However, until and unless the DMH does follow the provisions of the APA to properly promulgate The ***Clinical Evaluator Handbook and Standardized Assessment Protocol***, it is an underground regulation which has been implemented in violation of the Separation of Powers Clause, Article III, Section 3, of the California Constitution.

To allow the DMH to continue to utilize such a controversial handbook, such as the ***Protocol***, would be to allow the sort of unfettered power in the Executive Branch that is a step toward a totalitarian concentration of power in the executive; a power to be exercised with inadequate legislative standard, and capable of avoiding judicial review such as this has been prohibited from the earliest times. See Hayburn's Case, (1792) 2 U.S. (Dall.) 408, 1 L.Ed. 436, and its progeny.

Based on the foregoing, it is clear that there is a need for public participation in the regulatory process which directs the attention of agency policymakers to the public they serve, and to ensure that those persons or entities whom a regulation will affect have a voice in its creation.

8. Certifications:

I certify that I have submitted a copy of this petition and all attachments to:

Stephen W. Mayberg, Ph.D., Director
California Department of Metal Health
1600 9th St., Suite 151
Sacramento, CA 95814
(916) 654-2413 / (916) 654-2309

I certify that all the above information is true and correct to the best of my knowledge.

_____ _____

MICHAEL GEORGE ST.MARTIN Date
PETITIONER