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## OFFICE OF ADMINISTRATIVE LAW

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2008 OAL DETERMINATION NO. 19  
(OAL FILE # CTU 2008-0129-01)

**REQUESTED BY:** Michael St. Martin

**CONCERNING:** Department of Mental Health

### DETERMINATION ISSUED PURSUANT TO GOVERNMENT CODE SECTION 11340.5.

#### SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of a "regulation" as defined in Government Code section 11342.600<sup>1</sup> and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of a "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

#### ISSUE

On January 29, 2008, Mr. St. Martin (Petitioner) submitted a petition to OAL challenging the Clinical Evaluator Handbook and Standardized Assessment Protocol (2007) (Protocol)<sup>2</sup> issued by the Department of Mental Health (DMH) as an underground regulation<sup>3</sup> allegedly in violation of Government Code section 11340.5. California Code

<sup>1</sup> Section 11342.600 defines regulation as:

...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.

<sup>2</sup> The terms "Protocol" and "Handbook" are used interchangeably throughout the Protocol, the comments received from the public, the Department of Health's response, and the Petitioner's rebuttal. We will use the term "Protocol" but the term "Handbook" may also be used when quoting from these documents.

<sup>3</sup> An underground regulation is defined in title 1, California Code of Regulations, section 250:

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation

of Regulations, title 1, section 260(a)(3) requires that if the purported underground regulation is found in an agency manual, the petition shall identify the specific provision of the manual alleged to comprise the underground regulation. The petition included a list of ten provisions which contain the alleged underground regulation. This determination is limited to the following provisions specified in the petition:

1. Page 2, section titled "Evaluator Panel": "Evaluators are required to interview and evaluate persons in accordance with the protocol contained within this handbook...."
2. Page 2, section titled "Standardized Assessment Protocol": "This handbook and all supplemental instructions to DMH staff and contractors in the implementation of the [Sexually Violent Predator] law is the required standardized assessment protocol."
3. Page 4, section titled "Special requests from Courts & Attorneys": "DMH expects that evaluators will notify the SOCP [Sex Offender Commitment Program] Unit in Sacramento of all Court Orders and Attorney Requests that do not conform to the policies and procedures. DMH will then direct the evaluator in his/her response to such orders/requests."
4. Pages 9-11, section titled "The Clinical Interview": This section instructs the evaluator how to conduct the interview.
5. Page 9, section titled "Beginning the SOCP Evaluation": "In 'update' or 'replacement interview,' the court may issue an order that the evaluation be tape recorded, and/or an attorney be allowed to be present. The evaluator should comply with that order...."
6. Page 11, section titled "Historical Information": "Reliable history and prior clinical evaluations from the inmate's records should be used to provide a basis for decision making in [Sexually Violent Predator] evaluation."
7. Page 14, section titled "Subpoenas & Depositions": "If you receive such a subpoena, notify DMH who will advise you how to proceed."
8. Page 20, section titled "Psychological Testing": "While evaluators may organize their risk assessment in their own unique way, they must rely on the guidelines of this protocol and include the following elements of risk assessment."
9. Pages 16-32, section titled "SOCP Clinical Evaluation Protocol (Annotated)": this section contains detailed mandatory instructions in every facet of the clinical evaluation.
10. Page 35, section titled "[Sexually Violent Predator] Commitment Extension Evaluations": "Since the person has been committed as [a Sexually Violent Predator] 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...."

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and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

## **DETERMINATION**

OAL determines that the challenged language in the Protocol contains provisions that meet the definition of a "regulation" as defined in section 11342.600 and that those provisions should have been adopted pursuant to the APA. As noted in the response submitted by DMH, other provisions in the Protocol, which were not challenged in the petition, contain restatements of law and are not required to be adopted pursuant to the APA.

## **FACTUAL BACKGROUND**

On January 1, 1996, the California Sexually Violent Predator (SVP) law<sup>4</sup> became effective. The SVP law provides a process by which a current inmate of Department of Corrections and Rehabilitation (CDCR) can be civilly committed as a sexually violent predator and thereby becoming a patient of DMH.<sup>5</sup>

Pursuant to Welfare and Institutions Code section 6601, the Secretary of CDCR may determine, within six months prior to an inmate's scheduled release date, that an inmate is a sexually violent predator as defined in Welfare and Institutions Code section 6600. If the Secretary of CDCR makes such a determination, the inmate is referred to DMH for evaluation, pursuant to "a standardized assessment protocol, developed and updated by the State Department of Mental Health."<sup>6</sup>

Welfare and Institutions Code 6601 establishes the following procedure to be used if the inmate is determined by DMH to be a sexually violent predator. DMH may initiate a petition in the court in the county in which the person was convicted to have the inmate civilly committed to a state hospital. A judge in the superior court of that county must hold a probable cause hearing. If the judge finds there is no probable cause to find that the inmate is a sexually violent predator, the inmate is returned to CDCR for parole. If the judge finds that there is probable cause to find that the inmate is a sexually violent predator, the inmate is detained in a secure facility until a jury trial can be held. The civil commitment is reviewed at least once per year. If, after this independent review, DMH determines that the individual's diagnosed mental disorder has so changed that he or she is not likely to commit future acts of sexual violence, the civil commitment is terminated.

The Protocol, as revised in 2007, was issued by DMH and contains the procedures and protocols to be used by the independent evaluators. Welfare and Institutions Code section 6601(c) requires that a person referred from CDCR be evaluated in accordance

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<sup>4</sup> Welfare and Institutions Code section 6600 and following.

<sup>5</sup> A person who has been referred by CDCR to DMH for evaluation as an SVP is an "inmate" of CDCR. If that person is determined to be an SVP, he or she is transferred to a state hospital under the jurisdiction of DMH and is no longer an inmate of a CDCR prison. The SVP is then referred to as a "patient" or "individual."

<sup>6</sup> Welfare and Institutions Code section 6601(c).

with a standardized assessment protocol, developed and updated by DMH. The Protocol is the standardized assessment protocol required by section 6601(c).<sup>7</sup>

The Petitioner challenged the entire Protocol as an underground regulation and gave specific examples of provisions that were alleged underground regulations. Pursuant to California Code of Regulations, title 1, section 260(b)(3), OAL's acceptance of the petition was limited to the examples listed in the petition. This determination is limited to those examples listed above, except when it is necessary to discuss additional provisions cited in DMH's response.

On June 2, 2008, OAL received a response to the petition from DMH. We will address each argument in the Agency Response section below. DMH asserts:

1. The Protocol is not a regulation. "Instead, it is a guide and a uniform format to be used by clinical evaluators, psychologists and psychiatrists, to make case-specific determination using their education, experience, and expertise to form and report their opinion, in the exercise of their independent professional clinical judgment."<sup>8</sup>
2. The Protocol is not applied generally. The Protocol "does not declare how a certain class of cases will be decided. While the Protocol provides elements for evaluators to follow or look for, evaluators are asked to make a determination based on their own unique knowledge, experience, and personal assessment.... Two evaluators could evaluate the same patient, following the same elements set forth in the Protocol and still reach different conclusion."<sup>9</sup>
3. "The evaluations performed with the Protocol and resulting reports are clinical evaluations, necessarily requiring the exercise of specialized, professional clinical judgment.... Since the available studies and literature are constantly being augmented, the clinical standards of the professions of psychology and psychiatry evolve over time, the DMH does not have authority to dictate or control the standards or clinical profession of psychology or psychiatry."<sup>10</sup>
4. "The Protocol leaves the professional evaluation process in the hands of the evaluator. For example, it does not limit the factors the evaluator may consider in reaching an evaluation outcome.... [T]he Protocol expressly states that the evaluator, not the Protocol, will determine the evaluation's outcome."<sup>11</sup>
5. "The Protocol is not quasi-legislative. The Protocol sets forth a format for the professionals to use for court reports. ... [I]t does not tell the evaluator what determination to make.... While the format for the court report is intended to apply generally to all SVP reports, the format of the report in no way dictates the opinion of the evaluator."<sup>12</sup>

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<sup>7</sup> Page 2 of the Protocol, section titled "Standardized Assessment Protocol"

<sup>8</sup> Page 3 of the response.

<sup>9</sup> Page 3 of the response.

<sup>10</sup> Page 5 of the response.

<sup>11</sup> Page 6 of the response.

<sup>12</sup> Page 6 of the response.

6. Specified provisions of the Protocol are restatements of the Welfare and Institutions Code.<sup>13</sup>

OAL received several comments from the public. The majority of the comments were from different regional offices of Protection and Advocacy, Inc. The comments uniformly expressed agreement with the arguments in the petition and support a finding that the challenged provisions in the Protocol meet the definition of a regulation. The commenters emphasized that evaluators are required to follow the Protocol and are not permitted to perform the evaluations in any manner not found in the Protocol.

On June 17, 2008, OAL received the Petitioner's rebuttal to DMH's response to the petition. The rebuttal reiterates the arguments made in the petition and disagrees with the arguments made in DMH's response.

### **UNDERGROUND REGULATIONS**

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA. It states as follows:

(a) 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 [Government Code] 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 [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency issued, utilized, enforced, or attempted to enforce a rule that meets the definition of a "regulation" as defined in section 11342.600 that should have been adopted pursuant to the APA. OAL's determination that an underground regulation was created is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.

### **ANALYSIS**

A determination of whether the challenged rule is a "regulation" subject to the APA depends on (1) whether the challenged rule meets the definition of a "regulation" within

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<sup>13</sup> Page 7 of the response.

the meaning of section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in section 11342.600 as:

. . . 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.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557, 571, the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) 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 (Gov. Code, § 11342, subd. (g)).

The first element of a regulation is whether the rule applies generally. As *Tidewater* pointed out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations. We will look at each of the challenged provisions in turn to determine if it applies to a clearly defined class of persons or situations:

1. Page 2, section titled "Evaluator Panel": "Evaluators are required to interview and evaluate persons in accordance with the protocol contained within this handbook..."

This provision applies to all evaluators. Evaluators are a clearly defined class of persons. Additionally, the provision applies to all CDCR inmates referred to DMH for evaluation pursuant to the SVP law because it mandates how the evaluation is to be conducted. Both evaluators and inmates are clearly defined classes; therefore, the first element of *Tidewater* is met for this provision.

2. Page 2, section titled "Standardized Assessment Protocol": "This handbook and all supplemental instructions to DMH staff and contractors in the implementation of the SVP law is the required standardized assessment protocol."

As with challenged provision 1, the requirement for DMH staff and contractors to use the Protocol in implementing the SVP law applies to evaluators, DMH staff and the inmates being evaluated. These are clearly defined classes; therefore, the first element of *Tidewater* is met for this provision.

3. Page 4, section titled "Special requests from Courts & Attorneys": "DMH expects that evaluators will notify the SOCP [Sex Offender Commitment Program] Unit in Sacramento of all Court Orders and Attorney Requests that do not conform to the policies and procedures. DMH will then direct the evaluator in his/her response to such orders/requests."

This requirement applies to evaluators, DMH staff and the inmates being evaluated. These are clearly defined classes; therefore, the first element of *Tidewater* is met for this provision.

4. Pages 9-11, section titled "The Clinical Interview": This section instructs the evaluator how to conduct the interview and includes the information the evaluator must give to the inmate. For example:
  - a. The evaluator should begin by describing the interview process
  - b. The inmate should be asked to sign a form providing information about Welfare and Institutions Code section 6600, the SVP law.
  - c. The evaluator should comply with a court order to tape record an "update" or "replacement" interview.
  - d. The section acknowledges that there are various approaches to interviewing sex offenders and the approach and structure of the interview is made by the evaluator. The Protocol specifies the questions that must be answered and the formats to be used.

This requirement applies to evaluators and also to the inmates being evaluated. These are clearly defined classes; therefore, the first element of *Tidewater* is met for this provision.

5. Page 9, section titled "Beginning the SOCP Evaluation": "In 'update' or 'replacement interview,' the court may issue an order that the evaluation be tape recorded, and/or an attorney be allowed to be present. The evaluator should comply with that order...."

This provision is part of challenged provision 4, above. This requirement applies to evaluators and also to the inmates being evaluated. These are clearly defined classes; therefore, the first element of *Tidewater* is met for this provision.

6. Page 11, section titled "Historical Information": "Reliable history and prior clinical evaluations from the inmate's records should be used to provide a basis for decision making in SVP evaluation."

This requirement applies to evaluators and also to the inmates being evaluated. These are clearly defined classes; therefore, the first element of *Tidewater* is met for this provision.

7. Page 14, section titled "Subpoenas & Depositions": "If you receive such a subpoena, notify DMH who will advise you how to proceed."

This requirement applies to evaluators. This is a clearly defined class; therefore, the first element of *Tidewater* is met for this provision.

8. Page 20, section titled "Psychological Testing": "While evaluators may organize their risk assessment in their own unique way, they must rely on the guidelines of this protocol and include the following elements of risk assessment." The elements include approaches to risk assessment, actuarial risk assessment and adjusting an actuarial risk score.

This requirement applies to evaluators and also to the inmates being evaluated. These are clearly defined classes; therefore, the first element of *Tidewater* is met for this provision.

9. Pages 16-32, section titled "SOCP Clinical Evaluation Protocol (Annotated)": this section contains detailed mandatory instructions in every facet of the clinical evaluation. For example,
  - a. The evaluator must include specific identifying information;
  - b. The evaluation must contain answers to specific questions such as:
    - i. Has the inmate been convicted of a sexually violent criminal offense specified in WIC 6600 against one or more victims. This question includes a discussion of what information must be included (the use of force, violence, etc., any prior determinations that the inmate was a Mentally Disordered Sex Offender, etc.) Requirements for how the information should be presented in the evaluation are also included;
    - ii. Does the inmate have a diagnosed mental disorder that predisposes the person to the commission of criminal sexual acts? This question is followed by a detailed discussion of the "diagnosed mental disorder" and how that diagnosis is arrived at.

The requirements in this section apply to evaluators and also to the inmates being evaluated. These are clearly defined classes; therefore, the first element of *Tidewater* is met for this provision.

10. Page 35, section titled "SVP Commitment Extension Evaluations": "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 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 required to consult with the Department on their conclusion.”

The requirements in this section apply to evaluators and also to the inmates being evaluated. These are clearly defined classes; therefore, the first element of *Tidewater* is met for this provision.

The first element of *Tidewater* is, therefore, met for all the challenged provisions in the Protocol.

The second element of *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency’s procedure. The SVP law requires inmates who are referred by CDCR to DMH as possible sexually violent predators to be evaluated by DMH. Pursuant to Welfare and Institutions Code section 6601(c) and (d), DMH must evaluate the person in accordance with a standardized assessment protocol, developed and updated by DMH to determine whether the person is a sexually violent predator. The standardized assessment protocol must require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. The risk factors which must be considered include criminal and psychosexual history, type, degree, and duration of sexual deviation and severity of mental disorder. The evaluation must be made by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist designated by DMH.<sup>14</sup>

On page 2 of the Protocol, DMH states:

[Welfare and Institutions Code] Section 6601(c) requires that a person referred from CDCR be evaluated in accordance with a standardized assessment protocol, developed and updated by the DMH. This clinical evaluator handbook is the centerpiece of that protocol. This handbook may be supplemented by additional instructions to clinical evaluators as necessary. *This handbook and all supplemental instructions to DMH staff and contractors in the implementation of the SVP law is the required standardized assessment protocol.* (Emphasis added.)

The challenged provisions of the Protocol contain detailed requirements the evaluator must use to make the risk assessment required by Welfare and Institutions Code section 6601(c). For example, the challenged provisions require that the evaluator ask specific questions of the inmate, that the evaluator notify DMH of requests from the court or attorneys, and that the clinical interview provide specific information to the inmate. The Protocol itself states that it implements the SVP law which is enforced or administered by DMH.<sup>15</sup> Hence, the challenged provisions of the Protocol implement or make specific the SVP law or govern DMH’s procedures implementing the SVP law.

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<sup>14</sup> Welfare and Institutions Code section 6601(c) and (d).

<sup>15</sup> Page 2 of the response.

The second element in *Tidewater* is therefore met.

Finding that both elements of *Tidewater* have been met, OAL concludes that the challenged provisions of the Protocol meet the definition of a "regulation" as defined in section 11342.600.

The final issue to examine is whether the challenged provisions of the Protocol fall within an exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies.<sup>16</sup> Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to section 11346, the procedural requirements established in the APA "shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly."

We find no APA exemptions that would apply to the Protocol. DMH has not identified any express exemption from the APA that would include the Protocol.

As noted in DMH's response to the petition, some provisions in the Protocol, which were not challenged in the petition, are restatements of existing law. A restatement is not an exemption from the APA; rather, it repeats the law and does not further implement, interpret or make specific any provision of law. A restatement does not need to be adopted pursuant to the APA. Examples of restatements in the Protocol are:

1. Appendix A restates Welfare and Institutions Code section 6600 and the following sections in their entirety.
2. The Introduction includes a summarization of the requirements of the SVP law without further implementing, interpreting or making specific the SVP law.
3. The section titled "Evaluator Liability" on page 2 restates Penal Code section 1618.
4. The section titled "Definitions Relevant to SOCP" on page 6 contains a list of definitions restated from various Penal Code sections.

Such restatements do not meet the definition of "regulation" and are, therefore, not required to be adopted pursuant to the APA.<sup>17</sup>

### **AGENCY RESPONSE**

As noted above, in its response DMH makes several arguments. We will address each in turn.

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<sup>16</sup> See Government Code section 11340.9.

<sup>17</sup> The definition of "regulation" in Government Code section 11342.600 means that the rule must "implement, interpret or make specific" the law enforced or administered by a state agency, or govern its procedure. A restatement of existing law is not an interpretation or implementation of that law.

1. The Protocol is not a regulation. “Instead, it is a guide and a uniform format to be used by clinical evaluators, psychologists and psychiatrists, to make case-specific determination using their education, experience, and expertise to form and report their opinion, in the exercise of their independent professional clinical judgment.”<sup>18</sup>

We disagree with DMH’s argument. A regulation is defined in Government Code section 11342.600 as:

...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.

The challenged sections of the Protocol establish standards every evaluator must follow. On page 11, the Protocol states

While this Evaluator Handbook *specifies the questions that must be answered and formats to be used*, it does not address everything an evaluator may need to consider. (Emphasis added.)

While the Protocol may be characterized as a “guide and a uniform format,” the Protocol, by its own terms, is a document which the evaluators must use.<sup>19</sup> It contains specific instructions to the evaluators on how to conduct an evaluation, the questions they must ask, how to submit their findings, etc. The Protocol states: “All evaluations are assigned, supervised, and submitted to SOCP Evaluation Unit in Sacramento in accordance with instructions contained in this handbook.”<sup>20</sup> By imposing these requirements on evaluators, the Protocol meets the definition of “regulation.”

2. The Protocol is not applied generally. The Protocol “does not declare how a certain class of cases will be decided. While the Protocol provides elements for evaluators to follow or look for, evaluators are asked to make a determination based on their own unique knowledge, experience, and personal assessment.... Two evaluators could evaluate the same patient, following the same elements set forth in the Protocol and still reach different conclusion.”<sup>21</sup>

OAL disagrees with this argument. In its analysis of the first element of *Tidewater, supra*, OAL determined that the challenged provisions of the Protocol are rules of general application because they apply to the class of evaluators and/or inmates. The Protocol requires that evaluators to conduct the evaluations in a specific way by asking specific questions or making specific findings. The conclusion reached by an individual evaluator

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<sup>18</sup> Page 3 of the response.

<sup>19</sup> Page 2 of the Protocol.

<sup>20</sup> Page 2 of the Protocol.

<sup>21</sup> Page 3 of the response.

may be based upon his or her “unique knowledge, experience, and personal assessment” but the standards to be used, the questions to be asked, and the conduct of the evaluation are mandated by the Protocol.

3. “The evaluations performed with the Protocol and resulting reports are clinical evaluations, necessarily requiring the exercise of specialized, professional clinical judgment....Since the available studies and literature are constantly being augmented, the clinical standards of the professions of psychology and psychiatry evolve over time, the DMH does not have authority to dictate or control the standards or clinical profession of psychology or psychiatry.<sup>22</sup>”

We agree that DMH does not have the authority to dictate or control the standards or clinical profession of psychology or psychiatry. However, the Protocol does mandate how the evaluation is conducted and how the results of the evaluation are presented. For example, on page 9 of the Protocol (in the challenged provision listed above as number 4), in the section titled “Drawing Clinical Conclusions,” the Protocol states:

Each evaluator should produce a report that represents his or her best judgment. Clearly state definitive opinions with a YES or NO answer to each clinical question are required. At times, the facts may be conflicting or incomplete, making an unequivocal clinical opinion impossible. If, after review of all the information available, you are unable to support an affirmative conclusion regarding a criterion, then that criterion has not been met and the answer is **NO**.

This is an example of language in the Protocol that requires the evaluation to be conducted in specified manner, that specific clinical questions be asked, and the submission of the result to be in a specified manner. The evaluator is required to adhere to these standards and procedures.

4. “The Protocol leaves the professional evaluation process in the hands of the evaluator. For example, it does not limit the factors the evaluator may consider in reaching an evaluation outcome.... [T]he Protocol expressly states that the evaluator, not the Protocol, will determine the evaluation’s outcome.<sup>23</sup>”

We agree that the evaluation is based upon the evaluator’s professional opinion; however, the procedures and requirements for the evaluation are contained in the Protocol. The evaluator is required to follow these procedures. The outcome of the evaluation may be the opinion of the evaluator, but that opinion is developed by complying with the required procedures and standards.

5. “The Protocol is not quasi-legislative. The Protocol sets forth a format for the professionals to use for court reports.... [I]t does not tell the evaluator what determination to make.... While the format for the court report is intended to

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<sup>22</sup> Page 5 of the response.

<sup>23</sup> Page 6 of the response.

apply generally to all SVP reports, the format of the report in no way dictates the opinion of the evaluator.<sup>24</sup>,

The issue in this determination is not that compliance with the Protocol will result in a specific outcome. Rather the issue is whether the procedures and standards in the Protocol which all evaluators are required to use “implement, interpret, or make specific the law enforced by the agency; or govern the agency's procedure.”<sup>25</sup>

As noted above, Welfare and Institutions Code section 6601(c) requires that a person referred from CDCR be evaluated in accordance with a standardized assessment protocol, developed and updated by DMH. The Protocol itself states that it is the required standardized assessment protocol.<sup>26</sup> The Protocol clearly implements, interprets, or makes specific the law enforced by the agency, or governs the agency's procedure.

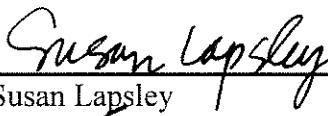
6. Specified provisions of the Protocol are restatements of the Welfare and Institutions Code.<sup>27</sup>

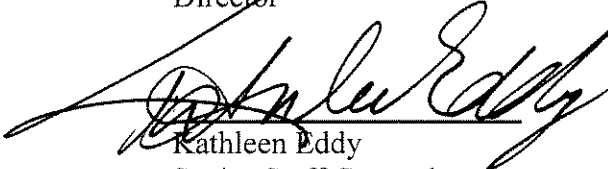
We agree that many provisions of the Protocol are restatements of the Welfare and Institutions Code. A restatement of law does not meet the definition of a “regulation” because it does not “implement, interpret, or make specific the law enforced by the agency; or govern the agency's procedure.”<sup>28</sup> Restatements, then, are not required to be adopted as regulations pursuant to the APA. To the extent that the Protocol contains solely restatements of law, those provisions are not underground regulations.

## CONCLUSION

The challenged provisions in the “Clinical Evaluator Handbook and Standardized Assessment Protocol (2007)” issued by DMH meet the definition of a “regulation” as defined in section 11342.600 that should have been adopted pursuant to the APA. The Protocol also contains provisions that were not challenged in the petition that merely restate existing law, as noted in DMH's response. The restatements of law do not meet the definition of “regulation” and are not required to be adopted pursuant to the APA.

Date: August 15, 2008

  
Susan Lapsley  
Director

  
Kathleen Eddy  
Senior Staff Counsel

<sup>24</sup> Page 6 of the response.

<sup>25</sup> *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557, 571.

<sup>26</sup> Page 2 of the Protocol, section titled “Standardized Assessment Protocol”

<sup>27</sup> Page 7 of DMH's response.

<sup>28</sup> *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557, 571.