

## **FINAL STATEMENT OF REASONS:**

The Initial Statement of Reasons (ISOR) is incorporated by reference.

The California Department of Corrections and Rehabilitation (CDCR) proposes to revise under Chapter 1, Article 6.5, of Title 15, Division 3 of the California Code of Regulations, provisions concerning recall of commitment.

## **UPDATES TO THE INITIAL STATEMENT OF REASONS**

On June 17, 2011, CDCR submitted a request to the Office of Administrative Law for the Emergency adoption of these regulations concerning recall of commitment. This request was approved on July 7, 2011, with an effective date of July 7, 2011, as requested by CDCR.

The Notice of Emergency Regulations was published on July 22, 2011, which began the public comment period. The Department's Notice of Change to Regulations #11-10 was also mailed the same day, in addition to being posted on the CDCR internet and intranet websites. The public hearing was held on September 15, 2011, the final day of the public comment period. One person provided oral comments at the public hearing. This comment is discussed below under the heading, "*Public Hearing Comments.*" During the 45-day comment period, one written comment was received. This comment is discussed below under the heading, "*Comments Received During the 45-Day Comment Period.*" It was determined by the Department that additional clarification to the regulations were needed for clarification and consistency standards. This was accomplished by two 15-day Renotices. The changes to the originally proposed text and the reasons for them are found below under the heading, "*Changes to the Text of Proposed Regulations.*"

The first 15-day Renotice, with the effective dates of September 29, 2011 – October 17, 2011, included only the correction of a form title, referenced within subsection 3076.4(c)(2). The originally proposed text inadvertently omitted the word "Inmate" from the title of CDC Form 127, Notification in Case of Inmate Death, Serious Injury, or Serious Illness. The first 15-Day Renotice corrected this inadvertent omission.

After the completion of the first 15-day Renotice, CDCR Form 1707, Request for Victim Services, was revised and the Department issued a second 15-day Renotice. The second 15-day Renotice, with effective dates of October 19, 2011 – November 2, 2011, updated the form's revision date, referenced within section 3076.5. Both 15-Day Renotices were posted on CDCR's intranet and internet websites on September 29, 2011, and October 19, 2011, respectively. No comments were received during either two of the 15-day Renotices.

## **DETERMINATION**

The Department has determined that no reasonable alternatives considered would be more effective in carrying out the purpose of this action or would be as effective, and less burdensome to affected private persons, than the action proposed.

The Department, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document.

The Department has determined that no reasonable alternatives to the regulations have been identified or brought to the attention of the Department that would lessen any adverse impact on small business.

The Department has determined that the facts, evidence, and documents initially identified in the ISOR support an initial determination that the action will not have a significant adverse economic impact on business. Additionally, there has been no testimony or other evidence provided that would alter the Department's determination.

## **ASSESSMENTS, MANDATES, AND FISCAL IMPACT**

This action will neither create nor eliminate jobs in the state of California, nor result in the elimination of existing business, or create or expand business in the state of California.

The Department determines this action imposes no mandates on local agencies or school districts; no fiscal impact on State or local government; or Federal funding to the State, or private persons. It is also determined that this action does not affect small businesses nor have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states because they are directly affected by the internal management of State prisons; or on housing costs; and no costs or reimbursements to any local agency or school district within the meaning of Government Code Section 17561.

## **CHANGES TO THE TEXT OF PROPOSED REGULATIONS**

**Non-substantive formatting changes and typographical errors and/or omissions are corrected throughout the document to ensure clarity and consistency.**

### **Subsection 3076.4(c)(2) Recall of Commitment Processing for Penal Code Section 1170(e).**

**Subsection 3076.4(c)(2) is amended** to correct the reference to CDC Form 127, Notification of Inmate Death, Serious Injury, or Serious Illness because the originally proposed text inadvertently omitted the word “Inmate” from the form title.

### **Section 3076.5 Victim Notification for Recall of Commitment Recommendations.**

**Section 3076.5 is amended** to update the revision date of CDCR Form 1707, Request for Victim Services, because the Office of Victim and Survivor Rights and Services revised the form since the originally proposed text was noticed to the public on July 22, 2011.

## **INCORPORATION BY REFERENCE**

**Subsection 3076.4(c)(2)** incorporates by reference CDCR Form 7385 (Rev. 09/09), Authorization for Release of Information; CDC Form 127 (Rev. 06/01), Notification in Case of Inmate Death, Serious Injury, or Serious Illness; CDCR Form 3038 (12/10), Notification to Inmate/Inmate Designee – Recall and Re-Sentencing Procedure; and, CDCR Form 3039 (12/10), Waiver of Defendant’s Personal Presence at the Recall and Re-sentencing Hearing.

As stated in the ISOR, CDCR Form 7385 is a current, approved form which is necessary to comply with the requirements of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, which protects information relative to an individual’s past, present, or future physical or mental health or condition, the provision of health care to the individual, and past, present, or future payment for the provision of health care to the individual. Since PC Section 1170(e)(4) mandates the inmate must designate a family member or outside agent to receive information about his or her medical condition and prognosis, the Department is required to obtain written authorization from the inmate allowing for the release of the information.

As stated in the ISOR, CDC Form 127 is a current, approved form which is also utilized to comply with the requirements of PC Section 1170(e)(4), wherein if an inmate is deemed mentally unfit to designate a family member or outside agent to receive information about his or her medical condition and prognosis, as well as the recall and resentencing procedure, the Department shall contact the inmate’s emergency contact. This form is completed by the inmate, on an annual basis, with information pertaining to his or her emergency contact, and is filed in the inmate’s Central File.

CDCR Form 3038 serves to meet the notification requirements established by PC 1170(e)(4). CDCR Form 3039 serves as written notice to the sentencing court that the defendant has waived his or her right to be present at the recall hearing. These documents were created by the Department to help facilitate the Recall of Commitment process, and are available to the public upon request; therefore, it would be impractical and cumbersome to publish in the California Code of Regulations.

The forms incorporated by reference in subsection 3076.4(c)(2) forms were made available to the public throughout the rulemaking process, and will continue to be made available to the public.

**Section 3076.5** Incorporates by reference CDCR Form 1707 (10/11), Request for Victim Services. CDCR Form 1707 is a current, approved form which helps the Department comply with California laws that assist crime victims and witnesses when the offender was sentenced to the California Department of Corrections and Rehabilitation. CDCR Form 1707 was made available to the public throughout the rulemaking process, and will continue to be made available to the public.

## **PUBLIC HEARING COMMENTS**

### **Public Hearing: Held September 15, 2011, at 10:30 a.m.**

One person provided a statement at the public hearing.

#### **SPEAKER #1**

**Comment 1A:** Commenter provides a personal introduction and states he is an advocate for persons with disabilities and is also a licensed nursing administrator. Commenter is a former research analyst with the Los Angeles County Health Department, a former co-chair of the U.S.-Mexico border Public Health Association, a former counselor at San Quentin prison, a former volunteer at the Oakland State civic center, and a former U.S. Army. Commenter asks that the Department mail the final regulations to three individuals, and gives the names and addresses of these individuals.

Commenter states that having a permanently medically incapacitated person eligible for recall of commitment consideration is a very good thing, and that from the standpoint of the cost and the human factors and the family concerns, the regulations seem to be on-target. However, Commenter is concerned that regarding the eligibility procedure, the Board and the Department may not be communicating with each other.

Commenter then discusses item number six, on page five (subsection 3076.2(b)(2)(A)(6)), and suggests elaborating on “educational assignments” listed in that subsection. Commenter suggests the language instead read: “educational assignments and inmate-initiated.” Commenter states that inmates can do things on their own and have learning experiences, such as programs via T.V., long-distance learning, internet, mail and correspondence, and any other means consistent with the Department’s policies. Commenter also suggests adding the text, “inmate supervised groups” to the already listed topic, “participation in activities” because Commenter states there are some inmate supervised groups that offer self-help activities, such as PACE within the prisons, as well as many groups outside the prison such as Alcoholics Anonymous, Al-Anon, and Recovery Incorporated.

Lastly, Commenter notes that there was only one person testifying at the hearing and suggests that the Department increase its outreach, or modify the current procedures, to encourage more involvement from the public.

**Accommodation:** None.

**Response 1A:** The Department disagrees with Commenter. The proposed regulatory section 3076.2(b)(2)(A)(6) outlines the information the Department and BPH will consider in assessing the inmate’s adjustment to the institution setting during his or her current term of incarceration. Participation in an educational assignment, whether in a group or self-initiated or a self-help activity that is supervised by an inmate, provided they are approved by the Department will be considered.

**COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD:**

**COMMENTS #1**

**Comment 1A:** Commenter states that one proposed section of the regulations restricts eligibility to six months or less to live. Commenter argues that if the inmate is disabled to the extent outlined by statute, then the inmate should be eligible for recall of commitment even if he or she has longer than six months to live.

**Accommodation:** None.

**Response 1A:** The Department disagrees with Commenter. Penal Code (PC) Section 1170(e)(2)(A) reads, “The prisoner is terminally ill with an incurable condition caused by an illness or disease that would produce death within six months, as determined by a physician employed by the department,” and PC Section 1170(e)(2)(C) reads, “The prisoner is permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care, including, but not limited to, coma, persistent vegetative state, brain death, ventilator-dependency, loss of control of muscular or neurological function, and that incapacitation did not exist at the time of the original sentencing.” As outlined in the PC, an inmate is eligible for recall of commitment consideration if he or she meets the criteria described in PC Section 1170(e)(2)(A) or PC Section 1170(e)(2)(C). The statute does not require inmates to meet both standards simultaneously.

**Comment 1B:** Commenter states that eligibility for recall of commitment consideration should not be limited to “incurable” conditions, and gives the example of a female prisoner who is dying of breast cancer. Commenter suggests adding the language, “in that particular case,” to this provision.

**Accommodation:** None.

**Response 1B:** The Department disagrees with Commenter. PC Section 1170(e) outlines the medical eligibility criteria for recall of commitment consideration. **See Commenter 1, Response 1A, above.**

**Comment 1C:** Commenter states that if an inmate medically qualifies for recall of commitment consideration, then the notoriety of the offense, the fear purported by a victim, or whether or not the offense was violent, is of no consequence to the stated purpose of the regulations.

**Accommodation:** None.

**Response 1C:** PC Section 1170(e)(2)(B) reads, “The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety.” CDCR and the Board of Parole Hearings (BPH) must consider the totality of the inmate’s case factors in order to assess if the inmate’s presence in society would have the potential to pose a risk to others. Additionally, pursuant to Marsy’s Law, the Department is mandated to perform certain notifications to victims or victim’s next-of-kin, and victim’s information is sometimes needed in order to make these notifications. Pursuant to Marsy’s Law, victims also have a right to be heard at the public hearing when BPH reviews recall of commitment cases for possible referral to the sentencing court.

**Comment 1D:** Commenter states that whether or not the inmate under consideration for recall of commitment is sentenced to death is obviously of no consequence because the inmate is going to die anyway, and argues these inmates should not be disqualified from recall of commitment consideration.

**Accommodation:** None.

**Response 1D:** The Department disagrees with Commenter. PC Section 1170(e)(2)(C) states inmates that are “sentenced to death or a term of life without the possibility of parole” are not eligible for recall of commitment consideration. The exclusion of condemned inmates is mandated by statute.

**Comment 1E:** Commenter states that the regulations do not allow for review by higher Department authorities of an application that has been disapproved by a warden or wardens’ staff. Commenter states that the warden and the Classification and Parole Representative lack expertise and may be biased, and states that a denied application still deserves the review by the Board or Department’s chief.

**Accommodations:** None.

**Response 1E:** The Department disagrees with Commenter. PC Section 1170(e)(2)(C) outlines the exclusions from recall of commitment eligibility: a prisoner “sentenced to death or a term of life without the possibility of parole.” The regulations include the procedures for denial in section 3076.4(c)(1), which are mandated by statute. When it is discovered that an inmate is statutorily excluded from recall of commitment consideration, as described within PC Section 1170(e)(2)(C), the Department discontinues any further processing. **See Commenter 1, Response 1D.**

**SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS RECEIVED DURING THE FIRST 15-DAY RENOTICE.**

No one provided comment.

**SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS RECEIVED DURING THE SECOND 15-DAY RENOTICE.**

No one provided comment.