



Department of Corrections and Rehabilitation
NOTICE OF CHANGE TO REGULATIONS

Sections: 3000, 3043.8, 3045.1, 3323, 3336, 3338, 3341.9, 3375.3, 3375.4, 3375.5	NCR Number: 21-06	Publication Date: July 9, 2021	Effective Date: To Be Determined
--	-----------------------------	--	--

INSTITUTION POSTING AND CERTIFICATION REQUIRED

This Notice announces the proposed amendment of sections 3000, 3043.8, 3045.1, 3323, 3336, 3338, 3341.9, 3375.3, 3375.4, 3375.5 of the California Code of Regulations (CCR), Title 15, Crime Prevention and Corrections, Division 3, Chapter 1, regarding gassing, retention in restricted housing, manufacture of weapons, work groups, and definitions of regulatory terms.

PUBLIC COMMENT PERIOD

The public comment period will close on **August 25, 2021**. Any person may submit written comments about the proposed regulations by mail to the California Department of Corrections and Rehabilitation (CDCR), Regulation and Policy Management Branch (RPMB), P.O. Box 942883, Sacramento, CA 94283-0001, or by e-mail to RPMB@cdcr.ca.gov. All written comments must be received or postmarked no later than **August 25, 2021**.

POSTING

This Notice shall be posted immediately upon receipt at locations accessible to inmates, parolees, and employees in each Department facility and field office not later than five calendar days after receipt. Also, institutions and facilities shall make this Notice available for review by inmates in segregated housing who do not have access to the posted copies, and shall distribute it to inmate law libraries and advisory councils. CDCR Form 621-A (Rev. 05/19), Certification of Posting, shall be returned to RPMB by mail or email. See Department Operations Manual Section 12010.6.7 for posting and certification of posting procedures.

CONTACT PERSON

Inquiries regarding this Notice should be directed to Josh Jugum, by mail to California Department of Corrections and Rehabilitation, RPMB, P.O. Box 942883, Sacramento, CA 94283-0001, by telephone at (916) 445-2266, or e-mail to RPMB@cdcr.ca.gov. Inquiries regarding the subject matter of these regulations should be directed to Steve Jimenez, Division of Adult Institutions, at (916) 324-7956.

Original Signed By:

JEFF MACOMBER
Undersecretary, Operations
California Department of Corrections and Rehabilitation

Attachments

NOTICE OF PROPOSED REGULATIONS
California Code of Regulations
Title 15, Crime Prevention and Corrections
Department of Corrections and Rehabilitation

NOTICE IS HEREBY GIVEN that the Secretary of the California Department of Corrections and Rehabilitation (CDCR or Department), proposes to amend Sections 3000, 3043.8, 3045.1, 3323, 3336, 3338, 3341.9, 3375.3, 3375.4, 3375.5 into Title 15, Division 3, Chapter 1, regarding gassing, retention in restricted housing, manufacture of weapons, work groups, and definitions of regulatory terms.

PUBLIC COMMENT PERIOD

The public comment period begins **July 9, 2021** and closes on **August 25, 2021**. Any person may submit written comments by mail addressed to the primary contact person listed below, or by email to rpmb@cdcr.ca.gov, before the close of the comment period. For questions regarding the subject matter of the regulations, call the program contact person listed below.

No public hearing is scheduled for these proposed regulations; however, pursuant to Government Code section 11346.8, any interested person or their duly authorized representative may request a public hearing, no later than 15 days prior to the close of the written comment period.

CONTACT PERSONS

Primary Contact

Josh Jugum
Telephone: (916) 445-2266
Regulation and Policy
Management Branch
P.O. Box 942883
Sacramento, CA 94283-0001

Back-Up

Y. Sun
Telephone: (916) 445-2269
Regulation and Policy
Management Branch
P.O. Box 942883
Sacramento, CA 94283-0001

Program Contact

Steve Jimenez
Telephone: (916) 324-7956
Division of Adult Institutions

AUTHORITY AND REFERENCE

Government Code Section 12838.5 provides that commencing July 1, 2005, CDCR succeeds to, and is vested with, all the powers, functions, duties, responsibilities, obligations, liabilities, and jurisdiction of abolished predecessor entities, such as: Department of Corrections, Department of the Youth Authority, and Board of Corrections.

Penal Code (PC) Section 5000 provides that commencing July 1, 2005, any reference to Department of Corrections in this or any code, refers to the CDCR, Division of Adult Operations. **PC Section 5050** provides that commencing July 1, 2005, any reference to the Director of Corrections in this or any other code, refers to the Secretary of the CDCR. As of that date, the office of the Director of Corrections is abolished.

PC Section 5054 provides that commencing July 1, 2005, the supervision, management, and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline, and employment of persons confined therein are vested in the Secretary of the CDCR. **PC Section 5055** provides that commencing July 1, 2005, all powers and duties previously granted to and imposed upon the Department of Corrections shall be exercised by the Secretary of the CDCR. **PC Section 5058** authorizes the Director to prescribe and amend rules and regulations for the administration of prisons and for the administration of the parole of persons. **PC Section 5058.3** authorizes the Director to certify in a written statement filed with Office of Administrative Law that operational needs of the Department require adoption, amendment, or repeal of regulation on an emergency basis.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Aggravated battery by means of gassing is defined in California PC section 4501.1 as intentionally placing or throwing, or causing to be placed or thrown, upon the person of another, any human excrement or other bodily fluids or bodily substances or any mixture containing human excrement or other bodily fluids or bodily substances that result in actual contact with the skin or membranes to any non-inmate. The Department has not previously addressed the specific acts of aggravated battery by means of gassing or the act of battery on an inmate by means of gassing.

This action will:

- Establish and define the act of Aggravated Battery by Means of Gassing, pursuant to Penal Code section 4501.1, and establish the act of battery on an inmate by means of gassing.
- Clarify the definition of the term “Same and Similar Behavior” as it relates to serious misconduct which may mitigate or aggravate a Security Housing Unit (SHU) term.
- Remove outdated language pertaining to inmate assignments to work groups in specific circumstances.
- Establish and update existing language pertaining to the application of a determinate Segregated Housing Unit (SHU) term assessment conducted by staff.
- Clarify and amend language pertaining to retaining an inmate in Administrative Segregation to ensure the inmate is afforded all procedural safeguards and due process rights.
- Clarify language to conform to the penal code and ensure consistency in the application of the points used to determine an inmate’s classification score.

DOCUMENTS INCORPORATED BY REFERENCE

None

SPECIFIC BENEFITS ANTICIPATED BY THE PROPOSED REGULATIONS

The Department has determined the proposed regulations may have a positive impact on worker and inmate’s safety by appropriately addressing sanctions for acts of battery by means of gassing against staff and inmates. The proposed regulations will also benefit inmates by ensuring procedural safeguards are addressed when circumstances for retention in segregated housing have changed.

EVALUATION OF INCONSISTENCY / INCOMPATIBILITY WITH EXISTING LAWS AND REGULATIONS

Pursuant to Government Code section 11346.5(a)(3)(D), the Department has determined the proposed regulations are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Department has concluded that these are the only regulations that concern the the regulatory provisions addressed by this rulemaking action.

LOCAL MANDATES

This action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement of costs or savings pursuant to Government Code Sections 17500 - 17630.

FISCAL IMPACT STATEMENT

- | | |
|--|-------------|
| • Cost or savings to any state agency: | <i>None</i> |
| • Cost to any local agency or school district that is required to be reimbursed: | <i>None</i> |
| • Other nondiscretionary cost or savings imposed on local agencies: | <i>None</i> |
| • Cost or savings in federal funding to the state: | <i>None</i> |

EFFECT ON HOUSING COSTS

The Department has made an initial determination that the proposed action will have no significant effect on housing costs.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS 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.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS

The Department has made an initial determination that the proposed regulations will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, because the proposed regulations place no obligations or requirements on any business.

EFFECT ON SMALL BUSINESSES

The Department has determined that the proposed regulations will not affect small businesses. This action has no significant adverse economic impact on small business because they place no obligations or requirements on any business.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

The Department has determined that the proposed regulation will have no effect on the creation of new, or the elimination of existing, jobs or businesses within California, or effect the expansion of businesses currently doing business in California. The Department has determined that the proposed regulation will have no effect on the state's environment. These regulations may benefit worker safety and the health and welfare of California residents by helping to make CDCR institutions safer for inmates, staff, and visitors. Additionally, safer institutions may provide an environment more conducive to rehabilitation, thereby reducing recidivism.

CONSIDERATION OF ALTERNATIVES

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 regulatory action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law. Interested persons are invited to present statements or arguments with respect to any alternatives to the changes proposed during the written comment period or at a scheduled hearing should one be scheduled.

AVAILABILITY OF PROPOSED TEXT AND INITIAL STATEMENT OF REASONS

The Department has prepared and will make available the text and the Initial Statement of Reasons (ISOR) of the proposed regulations. The rulemaking file for this regulatory action, which contains those items and all information on which the proposal is based (i.e., rulemaking file) is available to the public upon request directed to the Department's contact person. The proposed text, ISOR, and Notice of Proposed Regulations will also be made available on the Department's website: www.cdcr.ca.gov.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Following its preparation, a copy of the Final Statement of Reasons may be obtained from the Department's contact person.

AVAILABILITY OF CHANGES TO PROPOSED TEXT

After 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, amends or repeals the regulations as revised. Requests for copies of any modified regulation text should be directed to the contact person indicated in this Notice. The Department will accept written comments on the modified regulations for at least 15 days after the date on which they are made available.

TEXT OF PROPOSED REGULATIONS

In the following, underline indicates newly added text, and strikethrough indicates deleted text.

California Code of Regulations, Title 15, Division 3, Adult Institutions, Programs and Parole

Chapter 1. Rules and Regulations of Adult Operations and Programs

Article 1. Behavior

Section 3000. Definitions.

Section 3000 is revised to adopt, amend and alphabetically merge the definitions below with those which already exist.

*

*

Aggravated battery by means of gassing is defined as gassing committed upon a non-inmate by a person confined in a state prison.

*

*

Gassing means intentionally placing or throwing, or causing to be placed or thrown, upon the person of another, any human excrement or bodily fluids or bodily substances, or any mixture containing human excrement or bodily fluids or bodily substances, which results in actual contact with the person's skin or membranes.

*

*

~~Same and Similar Behavior means comparable serious misconduct warranting SHU term assessment, contained in section 3341.9(e), that may be used to aggravate and/or mitigate a SHU term. Specifically, acts of homicide, violence against persons, threats to kill or assault persons, as listed in subsection 3341.9(e)(1), (2) & (3), or any homicide, violence against persons or threats to kill or assault persons in conjunction with any other offense listed in 3341.9(e), are all considered same/similar to one another regardless of victim. Any possession of a weapon, as listed in 3341.9(e)(4), or any possession of a weapon in conjunction with any other offense listed in 3341.9(e), are all considered same/similar. Any distribution of a controlled substance, as listed in 3341.9(e)(5) is same/similar only to itself (possession of a controlled substance is not same/similar). Escapes, as listed in subsection 3341.9(e)(6), are same/similar only to themselves. Disturbances, riots or strikes as listed in subsection 3341.9(e)(7), are same/similar only to themselves. Harassment, as listed in subsection 3341.9(e)(8) is same/similar only to itself. Any theft or destruction of state property offenses, as listed in 3341.9(e)(9) or any theft or destruction of state property in conjunction with any other offense listed in 3341.9(e), are all considered same/similar. Any extortion or bribery offenses listed in subsection 3341.9(e)(10) are same/similar to one another. Sexual misconduct offenses listed in 3341.9(e)(11) are same/similar only to themselves.~~

Same and Similar Behavior means comparable serious misconduct warranting Security Housing Unit (SHU) term assessment or equivalent behavior from a verifiable incarcerated period, contained in subsection 3341.9(e), which may be used to aggravate or mitigate a SHU term. Specifically, any acts of homicide, violence against another, threat to kill or assault another as listed in subsection 3341.9(e)(1), (2) & (3); or, any homicide, violence against another or threats to kill or assault another in conjunction with any other offense listed in subsection 3341.9(e), is considered same and similar to each other regardless of the victim. Any possession of a weapon, as listed in subsection 3341.9(e)(4), or any possession of a weapon in conjunction with any other offense listed in subsection 3341.9(e), is considered same and similar. Any distribution of a controlled substance, as listed in subsection 3341.9(e)(5) is considered same and similar to each other (possession of a controlled substance is not considered same and similar to distribution of a controlled substance). Any escapes, as listed in subsection 3341.9(e)(6), is considered same and similar to each other. Any disturbance, riots, or strike, as listed in subsection 3341.9(e)(7), is considered same and similar to each other. Any harassment, as listed in subsection 3341.9(e)(8), is considered same and similar to each other. Any Security Threat Group (STG) disruptive behavior, as listed in subsection 3341.9(e)(9) or any STG disruptive behavior in conjunction with any other offense listed in subsection 3341.9(e), is considered same and similar to each other regardless of the victim. Any theft or destruction of state property offenses, as listed in subsection 3341.9(e)(10), or any theft or destruction of state property in conjunction with any other offenses listed in subsection 3341.9(e), is considered same and similar to each other. Any extortion or bribery offense listed in subsection 3341.9(e)(11), is considered same and similar to each other regardless of the victim. Any sexual misconduct offense listed in subsection 3341.9(e)(12), is considered same and similar to each other regardless of the victim.

*
*

Note: Authority cited: Sections 243(f)(4), 2717.3, 3000.03, 5058, 5058.3 and 1170.05, Penal Code; Section 10115.3(b), Public Contract Code; and Sections 4525(a), 4526 and 14837, Government Code. Reference: Sections 186.22, 243, 314, 530, 532, 600, 646.9, 653, 832.5, 1170.05, 1203.8, 1389, 2080, 2081.5, 2600, 2601, 2700, 2717.1, 2717.6, 2932.5, 3003.5(a), 3020, 3450, 3550, 4501.1, 4570, 4576, 5009, 5050, 5054, 5068, 7000 et seq., 11180 and 11191, Penal Code; Sections 1132.4, 1132.8 and 1203(b)(1), Labor Code; Sections 10106, 10108, 10108.5, 10115, 10115.1, 10115.2, 10115.3 and 10127, Public Contract Code; Section 999, Military and Veterans Code; Section 391, Code of Civil Procedure; Section 297.5, Family Code; Sections 8550, 8567, 12838 and 12838.7, Government Code; Governor's Prison Overcrowding State of Emergency Proclamation dated October 4, 2006; *In re Bittaker*, 55 Cal.App. 4th 1004, 64 Cal. Rptr. 2d 679; Section 11007, Health and Safety Code; *Madrid v. Cate* (USDC ND Cal. C90-3094 TEH); *Sassman v. Brown* (E.D. Cal. 2015) 99 F.Supp.3d 1223; *Mitchell v. Cate*, USDC ED 2:08-CV-01196-TLN-EFB; *In re Garcia* (2012) 202 Cal.App.4th 892; and *Quine v. Beard*, No. C 14-02726 JST.

Article 3.5. Credits.

Section 3043.8. Impact of Transfer on Credit Earning.

Subsections 3043.8(a) through 3043.8(d)(2) remain unchanged.

Subsections 3043.8(e) and 3043.8(e)(1) remain unchanged. Subsection 3043.8(e) is shown for reference.

(e) Special housing unit transfers.

Subsection 3043.8(e)(2) is deleted:

~~(2) Inmates placed in a SHU, PSU, or in ASU for reasons specified in section 3043.4 shall be placed in workgroup D-2. All other inmates in SHU, PSU, or ASU shall be placed in Work Group D-1. The effective date of both workgroups shall be the first day of placement into SHU, PSU, or ASU.~~

Subsection 3043.8(f) is unchanged.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 1203.8, 1364, 2684, 2690, 2933, 2933.05, 2933.3, ~~2933.6~~, 5054 and 5068, Penal Code.

Section 3045.1. Timekeeping for Inmates in Administrative Segregation.

Subsection 3045.1(a) is amended.

(a) A classification committee shall evaluate the reasons for an inmate's ~~a~~Administrative s~~Segregation~~ placement to ensure appropriate credits are awarded to the inmate. If the placement was for:

Subsection 3045.1(a)(1) remains unchanged.

Subsection 3045.1(a)(2) is deleted.

~~(2) A disciplinary infraction for misconduct described in section 3043.4 for which the finding was guilty, the inmate shall remain in Work Group D-2 for the period of the credit loss assessment effective the date of their placement in ASU, whether or not a SHU term was assessed.~~

Note: Authority cited: Sections 2700, 2701 and 5058, Penal Code. Reference: Sections 2932, 2933, 2933.05, ~~2933.6~~, 2935, 5005, 5054 and 5068, Penal Code; and In re Monigold, 205 Cal. App. 3d 1224.

Subchapter 4. General Institution Regulations

Article 5. Inmate Discipline

Section 3323. Disciplinary Credit Forfeiture Schedule.

Subsection 3323(a) is unchanged but is shown for reference.

(a) Upon a finding of guilt of a serious rule violation, a credit forfeiture against any determinate term of imprisonment or any minimum eligible parole date for an inmate sentenced to an indeterminate sentence, as defined in section 3000 Indeterminate Sentence Law (ISL), shall be assessed within the ranges specified in (b) through (h) below:

Subsections 3323(b) through 3323(b)(10) remain unchanged.

Subsection 3323(c) is unchanged but is shown for reference.

(c) Division “A-2” offenses; credit forfeiture of 151-180 days.

New subsection 3323(c)(1) is adopted to read:

(1) Aggravated battery on a non-inmate by means of gassing.

Existing subsections 3323(c)(1) through 3323(c)(10) are renumbered to 3323(c)(2) to 3323(c)(11).

~~(1)~~(2) Arson involving damage to a structure or causing serious injury.

~~(2)~~(3) Possession of flammable, explosive or combustible material with intent to burn any structure or property.

~~(3)~~(4) Destruction of state property in excess of \$400 during a riot or disturbance.

~~(4)~~(5) Any other felony involving violence or injury to a victim not specifically listed in this schedule.

~~(5)~~(6) Attempted escape with force of or violence.

~~(6)~~(7) Introduction or distribution of any controlled substance, as defined in section 3000, in ~~an~~ institution, ~~facility~~, or contract health facility.

~~(7)~~(8) Extortion by means of force of or threat.

~~(8)~~(9) Conspiracy to commit any Division “A-1” or “A-2” offense.

~~(9)~~(10) Solicitation to commit an offense listed in subsections ~~(c)(1)~~(2), ~~(c)(3)~~(4), or ~~(c)(8)~~(9) above.

~~(10)~~(11) Behavior or ~~activities~~ activity defined as a division “A-2” offense that promotes, furthers, or assists a an STG or demonstrates a nexus to ~~the~~ an STG.

Subsections 3323(d) through 3323(d)(13) remain unchanged.

Subsection 3323(e) is unchanged but is shown as reference.

(e) Division “C” offenses; credit forfeiture of 91-120 days.

Subsections 3323(e)(1) through 3323(e)(14) are renumbered to 3323(e)(2) to 3323(e)(15).

New subsection 3323(e)(1) is adopted to read:

(1) Battery on an inmate by means of gassing.

Existing subsections 3323(e)(1) through 3323(e)(14) are renumbered to 3323(e)(2) to 3323(e)(15).

- (1)(2) Escape without force from a camp, community-access facility, or any Alternative Custody Program placement, as provided in cChapter 1, aArticle 6.8.
- (2)(3) Attempted escape without force from an institution or community correctional facility other than a camp or community-access facility.
- (3)(4) Furnishing equipment for or aiding and abetting an escape or escape attempt.
- (4)(5) Attempted extortion by means of threat.
- (5)(6) Bribery.
- (6)(7) Arson.
- (7)(8) Forgery, falsification or alteration of any official record or document prepared or maintained by the Department which could affect a term of imprisonment.
- (8)(9) Possession of any narcotic, drug, or controlled substance, as defined in section 3000, in a community-access facility or any Alternative Custody Program placement.
- (9)(10) Unauthorized possession of drug paraphernalia as defined in section 3000.
- (10)(11) The physical possession of alcohol in an institution, facility, or contract health facility.
- (11)(12) Accessory to any felony offense.
- (12)(13) Conspiracy to commit any Division "C" offense.
- (13)(14) Solicitation to commit an offense listed in subsections (e)(5)(6), (e)(6)(7), or (e)(7)(8) above.
- (14)(15) Behavior or ~~activities~~ activity defined as a division "C" offense that promotes, furthers, or assists an STG or demonstrates a nexus to ~~the~~ an STG.

Subsections 3323(f) through 3323(k)(4) remain unchanged.

Note: Authority cited: Sections 5058, 5058.3 and 1170.05, Penal Code. Reference: Sections 148, 241, 243, 295-300.3, 314, 647, 1170.05, 2932, 2933, 4500, 4501, 4501.1, 4573.6, 4576, 4600, 5054 and 12020, Penal Code.

Article 7. Segregated Housing.

Section 3336. Administrative Review of Administrative Segregation Unit Placement.

Subsections 3336(a) through 3336(c) remain unchanged.

Subsection 3336(c)(1) and 3336(c)(2) are amended to read:

- (1) Staff Assistance. The Administrative Reviewer, shall determine the need for a Staff Assistant (SA) in accordance with sSection 3340 and document on the Administrative Segregation Unit Placement Notice.
- (2) Investigative Employee (IE). If an inmate requests witnesses ~~and/or~~ the assistance of an IE, the Administrative Reviewer, may assign an IE in accordance with sSection 3340 and document on the Administrative Segregation Unit Placement Notice.

Subsection 3336(c)(3) remains unchanged.

Note: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code.

Section 3338. Amendment to Reasons for Segregation.

Subsections 3338(a) and 3338(a)(1) remain unchanged.

Subsection 3338(a)(2) is amended to read:

(2) The official ~~ordering~~ documenting retention shall ensure, and articulate on the Administrative Segregation Unit Placement Notice at the time of issuance, that all procedural safeguards have been provided, in accordance with subsections 3336(c)(1) through (3).

Subsections 3338(a)(3) through 3338(c) remain unchanged.

Note: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code; and Taylor v. Rushen (N.D. Cal.) L-80-0139 SAW.

Section 3341.9. Security Housing Unit Term Calculation and Assessment.

Subsections 3341.9(a) through 3341.9(d)(1) remain unchanged.

Subsection 3341.9(e) is amended as follows:

(e) SHU Term Assessment Chart (Calculating determinate confinement to SHU).

Offense	TYPICAL TERM (Mos)		
	Low	Expected	High
(1) Homicide:			
(A) Murder, attempted murder, solicitation of murder, or voluntary manslaughter of a non-inmate.	36	48	60
(B) Murder, attempted murder, solicitation of murder, or voluntary manslaughter of an inmate.	24	36	48
(2) Violence Against Persons:			
(A) Battery on a non-inmate with a weapon capable of causing serious or mortal injury; caustic substance or other fluids capable of causing serious or mortal injury; or physical force causing serious injury.	18	30	42
(B) Assault on a non-inmate with a weapon, capable of causing serious or mortal injury; caustic substance or other fluids capable of causing serious or mortal injury.	9	15	21
(C) Rape, sodomy, or oral copulation on a non-inmate, or any attempt.	18	30	42

(D) Battery on an inmate with a weapon capable of causing serious or mortal injury; caustic substance or other fluids capable of causing serious or mortal injury or physical force causing serious injury.	12	18	24
(E) Assault on an inmate with a weapon capable of causing serious or mortal injury; caustic substance or other fluids capable of causing serious or mortal injury.	6	9	12
(F) Rape, sodomy, or oral copulation on an inmate accomplished against the inmate's will, or any attempt.	12	18	24
(G) Battery on a non-inmate without serious injury.	6	12	18
(H) Assault on a non-inmate.	3	6	9
(I) Battery on an inmate without serious injury. (2 or more offenses within a 12 month period- <u>the initial offense may be an offense listed within the subsection 3341.9(e)(1)-(2) or 1 with direct STG nexus</u>).	2	4	6
(J) <u>Aggravated battery by means of gassing intentionally placing or throwing, or causing to be placed or thrown upon the person of a non-inmate, any human excrement or bodily fluids or bodily substances, or any mixture containing human excrement or other bodily fluids or bodily substances, which results in actual contact with the person's skin or membranes.</u>	<u>12</u>	<u>20</u>	<u>28</u>
(K) <u>Battery on an inmate by means of gassing intentionally placing or throwing, or causing to be placed or thrown upon the person of an inmate, any human excrement or bodily fluids or bodily substances, or any mixture containing human excrement or other bodily fluids or bodily substances, which results in actual contact with the person's skin or membranes.</u>	<u>8</u>	<u>12</u>	<u>16</u>
Subsections 3341.9(e)(3) through 3341.9(e)(3)(B) remain unchanged and are omitted for clarity and brevity.			
(4) Possession of a Weapon:			
(A) Possession of a firearm or possession, <u>manufacture or attempted manufacturing</u> of an explosive device.	18	30	42
(B) Possession, <u>or manufacture/manufacturing or attempted manufacture</u> of a Weapon <u>including</u>	4	8	12

materials altered from their original manufactured state or purpose and which can be made into a weapon other than a firearm or explosive device and which has been manufactured or modified so as to have obvious intent or capability of inflicting serious injury, and which is under the immediate or identifiable control of the inmate.			
Subsections 3341.9(e)(5) through 3341.9(e)(7)(C) remain unchanged and are omitted for clarity and brevity.			
(8) Harassment: a willful course of conduct <u>which that alarms, annoys or terrorizes a specific person, group, or entity in the free society, and which serves no legitimate purpose, either directly or indirectly.</u>	6	12	18
Subsections 3341.9(e)(9) through 3341.9(e)(11)(B) remain unchanged and are omitted for clarity and brevity.			
(12) Sexual Misconduct:			
(A) Indecent E exposure	3	6	9
(B) Sexual D isorderly conduct (<u>2 two or more offenses within a 12 twelve month period. The initial offense may be any offense listed within the subsection 3341.9(e)(12).</u>	3	6	9
Subsections 3341.9(e)(13) through 3341.9(14) remain unchanged and are omitted for clarity and brevity.			

Subsections 3341.9(f) through 3341.9(f)(3) remain unchanged.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections ~~2933.6~~, 4501.1, 4502, 5054 and 5068, Penal Code; *Sandin v. Connor* (1995) 515 U.S. 472; *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146; *Toussaint v. McCarthy* (9th Cir. 1990) 926 F.2d 800; *Toussaint v. Yockey* (9th Cir. 1984) 722 F.2d 1490; *Castillo v. Alameida*, et al., (N.D. Cal., No.C94-2847); *Coleman v. Wilson* 912 F. Supp. 1282 (E.D. Cal. 1995); and *Clark v. California* 123 F. 3d 1267 (9th Cir. 1997).

Article 10. Classification

Section 3375.3. CDCR Classification Score Sheet, CDCR Form 839, Calculation.

Subsections 3375.3(a) through 3375.3(b)(4)(E) remain unchanged.

Subsection 3375.3(b)(4)(F) is amended to read:

For each possession, manufacture or attempted manufacture of a deadly weapon:

1. Four points shall be entered in Boxes 59–60 for each well documented incident of an inmate's ~~manufacture or possession~~, of a manufacture or attempted manufacture of a deadly weapon where apparent use was intended (does not include possession of commonly available and unmodified objects unless used as a weapon and this fact is documented in the disciplinary hearing process). Include possession of a razor blade (whether modified or not) in a segregated program-housing unit (e.g. Administrative Segregation Unit, Security Housing Unit, Psychiatric Services Unit, etc.); or,
2. Eight points shall be entered in Boxes 59–60 for each possession, manufacture or attempted manufacture of a deadly weapon incident, which occurred within five years of the inmate's reception to the Department on the current term.

Subsections 3375.3(b)(4)(G) through (g)(2) remain unchanged.

NOTE: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Sections ~~3540~~, 4502, 5054 and 5068, Penal Code; *Wright v. Enomoto* (1976) 462 F Supp. 397; *Stoneham v. Rushen* (1984) 156 Cal. App. 3d 302; and *Castillo v. Alameida, et al.* (N.D. Cal., No. C94-2847).

Section 3375.4. CDCR Reclassification Score Sheet, CDCR Form 840, Calculation

Subsections 3375.4(a) through (b)(4) remain unchanged.

Subsection 3375.4(b)(5) is amended to read:

For each well-documented serious misbehavior for possession, manufacture or attempted manufacture of a deadly weapon where apparent use was intended, 16 points shall be entered in Boxes 64–65. Points shall not be assessed for possession of commonly available and unmodified objects, unless they were used as weapons and that fact is documented in the disciplinary report. Include possession of a razor blade (whether modified or not) in a segregated program-housing unit (e.g., Administrative Segregation Unit, Security Housing Unit, Psychiatric Services Unit, etc.).

Subsections 3375.4(b)(6) through (m) remain unchanged.

NOTE: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Sections 4502, 5054 and 5068, Penal Code; *Wright v. Enomoto* (1976) 462 F.Supp. 397; and *Stoneham v. Rushen* (1984) 156 Cal.App.3d 302.

Section 3375.5 CDCR Readmission Score Sheet, CDCR Form 841, Calculation.

Subsections 3375.5(a) through (b)(5) remain unchanged.

Subsection 3375.5(b)(6) is amended to read:

For each well-documented serious disciplinary for possession, manufacture or attempted manufacture of a deadly weapon where apparent use was intended, 16 points shall be

entered in Boxes 66–67. Points shall not be assessed for possession of commonly available and unmodified objects, unless they were used as weapons and that fact is documented in the disciplinary report. Include possession of a razor blade (whether modified or not) in a segregated program-housing unit (e.g., Administrative Segregation Unit, Security Housing Unit, Psychiatric Services Unit, etc.).

Subsections 3375.5.5(b)(7) through (k)(1)(B)3 remain unchanged.

NOTE: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Section 4502, 5054, Penal Code.

INITIAL STATEMENT OF REASONS

The California Department of Corrections and Rehabilitation (CDCR or the Department) proposes to amend the California Code of Regulations (CCR), Title 15, Division 3, sections 3000, 3043.8, 3045.1, 3323, 3336, 3338, 3341.9, 3375.3, 3375.4 and 3375.5. The purpose of these amendments is to:

- Establish and define the act of Aggravated Battery by Means of Gassing, pursuant to Penal Code (PC) section 4501.1, and establish the act of battery on an inmate by means of gassing.
- Clarify the definition of the term “Same and Similar Behavior” as it relates to serious misconduct which may mitigate or aggravate a Security Housing Unit (SHU) term.
- Remove outdated language pertaining to inmate assignments to work groups in specific circumstances.
- Establish and update existing language pertaining to the application of a determinate Segregated Housing Unit (SHU) term assessment conducted by staff.
- Clarify and amend language pertaining to retaining an inmate in Administrative Segregation to ensure the inmate is afforded all procedural safeguards and due process rights.
- Clarify language to conform to the penal code and ensure consistency in the application of the points used to determine an inmate’s classification score.

The proposed amendments to sections 3000, 3323 and 3341.9 establishes aggravated battery by means of gassing pursuant to PC section 4501.1 and the act of battery on an inmate by means of gassing. The Department has not previously addressed the specific acts of aggravated battery by means of gassing or the act of battery on an inmate by means of gassing. Aggravated battery by means of gassing is defined in California PC section 4501.1 as intentionally placing or throwing, or causing to be placed or thrown, upon the person of another, any human excrement or other bodily fluids or bodily substances or any mixture containing human excrement or other bodily fluids or bodily substances that result in actual contact with the skin or membranes to any non-inmate. This rulemaking action will establish the act of battery on an inmate by means of gassing as intentionally placing or throwing, or causing to be placed or thrown, upon the person of another, any human excrement or other bodily fluids or bodily substances or any mixture containing human excrement or other bodily fluids or bodily substances that result in actual contact with the skin or membranes to any inmate. This rulemaking action will define these acts, establish the acts as serious disciplinary offenses, and include a penalty and credit forfeiture comparable to similar serious disciplinary offenses.

Additionally, the proposed amendment to section 3000 is to update existing language specific to the definition for “Same and Similar Behavior”. This proposed amendment is necessary to improve clarity and ensure consistency in the application of a determinate Segregated Housing Unit (SHU) term assessments conducted by staff.

The proposed amendments to sections 3043.8 and 3045.1 are necessary to delete outdated language that is no longer relevant to departmental operations due to the passage of Senate Bill 759 in 2016.

Subsections within sections 3336 and 3338 are revised to accord with current language already specified in subsections 3338(a) and 3338(b)(3). These proposed amendments are to ensure clarity and consistency throughout Title 15 regulations when retention of an inmate in segregated housing occurs, and the official authorizing such retention documents the procedural safeguards afforded to the inmate.

The proposed amendments to subsection 3341.9(e) is to introduce the act of aggravated battery by means of gassing and battery on an inmate by means of gassing to SHU Term Assessment Chart. Additionally, language is being added to existing regulation delineated in subsection 3341.9(e) to ensure clarity and consistency during the application of SHU term assessments conducted by staff.

CONSIDERATION OF ALTERNATIVES:

The Department must determine that no reasonable alternative considered, 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 this action is proposed, would be as effective and less burdensome to affected private persons than the action proposed, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Currently, no reasonable alternatives have been identified that would alter the Department's initial determination.

ECONOMIC IMPACT ASSESSMENT:

In accordance with Government Code section 11346.3(b), the Department has made the following assessments regarding the proposed regulations:

Significant Adverse Economic Impact on Business

The Department has made an initial determination that the proposed regulatory action will not have a significant adverse economic impact on business. Additionally, there have been no facts, evidence, documents, testimony, or other evidence provided that would alter the Department's initial determination. The proposed regulations do not have a direct impact on California businesses as the proposed regulations affect the internal management of prisons only.

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

The Department has determined that the proposed regulations will not have an impact on the creation of new, or elimination of existing, jobs within California as the proposed regulations only affect the internal management of prisons.

Creation of New, Expansion or the Elimination of Existing Businesses Currently Doing Business within the State of California

The Department has determined that the proposed regulations will not have an impact on the creation of new, or the elimination of existing, businesses within California, or affect the expansion of businesses currently doing business in California as the proposed regulations only affect the internal management of prisons.

Benefits to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

The Department anticipates the proposed regulations will enhance the safety of both staff and inmates by establishing and addressing the act for aggravated battery by means of gassing. The proposed amendments will also clarify existing CCR language that will enhance the understanding of specific day-to-day custodial functions. The proposed regulations will not affect worker safety or the State's environment.

MATERIALS RELIED UPON:

In proposing additions and amendments to these regulations, the Department has not identified or relied on any technical, theoretical, or empirical study, report, or similar document.

SPECIFIC PURPOSE AND RATIONALE FOR EACH SECTION, PER GOVERNMENT CODE SECTION 11346.2(B)(1):

Section 3000. Definitions

Section 3000 is amended:

The terms "Aggravated battery by means of gassing" and "Gassing" are defined in this sections as these acts are defined in Penal Code section 4501.1 and have not previously been established in Title 15 regulations. The Department acknowledges that these definitions duplicate the statutory language of PC section 4501.1. This is necessary because the population directly affected by this rulemaking action includes incarcerated inmates, who do not have immediate access to current Penal Code editions and do not have internet access. Incorporating the statutory language will establish the foundation for the regulation to ensure an understanding of the statutory authority. It is the Department's position that any duplication of statute in these regulations does not serve the same purpose as the above referenced PC section and, as provided in

Government Code section 11349(f), is necessary in order to satisfy the clarity standard in Government Code section 11349.1(a)(3).

The proposed amendment to the definition of “Same and Similar Behavior” is to improve clarity and ensure consistency in the application of a determinate SHU term assessment conducted by staff. A SHU term assessment is a disciplinary tool used to remove an inmate from the general population for a determinate period. A determinate SHU term is applied to an inmate who commits a serious disciplinary offense considered so grievous that the conduct endangers the safety of others or jeopardizes the security of the institution.

The period of time in which an inmate is assessed a SHU term is calculated by mitigating or aggravating factors. One of the mitigating and aggravating factors staff review when completing a determinate SHU term assessment is the history of same and similar behavior. For instance, if the inmate has not been involved in prior serious misconduct of the same or similar nature within the last five calendar years from the date the serious disciplinary act is committed, the determinate SHU term assessment shall be mitigated. In contrast, if the inmate has been involved in prior serious misconduct of the same or similar nature within the last five calendar years from the date the serious disciplinary act is committed, the determinate SHU term shall be aggravated.

Existing same and similar behavior language has led to inconsistent application of mitigating and aggravating factors by staff. By amending current language, staff will have a better understanding in the utilization of same and similar behavior when conducting a determinate SHU term assessment. The phrase “or equivalent behavior from a verifiable incarcerated period” is added to correspond with existing language delineated in subsection 3341.9(a)(1). The phrase “or any Security Threat Group (STG) disruptive behavior in conjunction with any other offense listed in subsection 3341.9(e)” is added to specify any offense listed in 3341.9(e)(9) shall be considered same and similar to any offense listed within subsection 3341.9(e) when the act is perpetrated with a STG nexus. Security Threat Group is the Department’s method used to identify gangs and a STG nexus is used when the unlawful act is discovered to have occurred on behalf of the STG.

Article 3.5. Credits

Section 3043.8. Impact of Transfer on Credit Earning.

Subsections 3043.8(a) through 3043.8(e)(1) are unchanged.

Subsection 3043.8(e)(2) is deleted. This language is outdated as a result of previous amendments made to section 3043.4 and subsection 3044(b)(6) wherein assignment of Work Group D-2, zero credit earning, for inmates placed in segregated housing is now effective the date of the Rule Violation Report (RVR) and is determined by the assessment of both a SHU term and a credit forfeiture. Current

language in these sections is no longer relevant due to the passage of Senate Bill 759 in 2016. This bill repealed and replaced PC section 2933.6, affecting the assignment of inmate work groups upon an inmate's placement in segregation housing. The Department has previously amended regulations due to this statutory revision and updated Title 15 language under section 3044, Inmate Work Groups and Privilege Groups.

Section 3045.1. Timekeeping for Inmates in Administrative Segregation.

Subsections 3045.1(a) through 3045.1(a)(1) are unchanged.

Subsection 3045.1(a)(2) is deleted. As described in subsection 3043.8(e)(2) above, this language is outdated as a result of previous amendments made to subsection 3043.4 and subsection 3044(b)(6) wherein assignment of Work Group D-2, zero credit earning, for inmates placed in segregated housing is now effective the date of the RVR and is determined by the assessment of both a SHU term and a credit forfeiture.

Subchapter 4. General Institution Regulations

Article 5. Inmate Discipline

Section 3323. Disciplinary Credit Forfeiture Schedule.

Subsections 3323(a) through 3323(c) are unchanged.

New subsection 3323(c)(1) is adopted to establish aggravated battery on a non-inmate by means of gassing as a Division A-2 offense that will cause a forfeiture of credit as described in subsection 3323(c). The Department has determined that this offense is comparable to other Division A-2 offenses and that credit forfeiture of 151-180 days is appropriate for this serious disciplinary offense.

Existing subsections 3323(c)(1) through 3323(c)(10) are renumbered to 3323(c)(2) through 3323(c)(11) to allow for the inclusion of new subsection 3323(c)(1).

Subsections 3323(d) through 3323(e) are unchanged.

New subsection 3323(e)(1) is adopted to establish the offense of battery on an inmate by means of gassing as a Division C offense that will cause a forfeiture of credit as described in subsection 3323(e). The Department has chosen to adopt this provision as the act of battery on an inmate by means of gassing has not previously been addressed. This act will carry a somewhat lesser penalty compared to the same act against a non-inmate as the penal code only addresses aggravated battery by means of gassing on a non-inmate. Acts committed by inmates against non-inmates generally incur more severe sanctions than acts committed against fellow inmates. The Department has determined that this offense is comparable to other Division C offenses and that credit

forfeiture of 91-120 days is appropriate for this serious disciplinary offense.

Existing subsections 3323(e)(1) through 3323(e)(14) are renumbered to 3323(e)(2) through 3323(e)(15) to allow for the inclusion of new subsection 3323(e)(1).

Subsections 3323(f) through 3323(k)(4) are unchanged.

Article 7. Segregated Housing

Section 3336. Administrative Review of Administrative Segregation Unit Placement.

Subsections 3336(a) through 3336(c) are unchanged.

Subsection 3336(c)(1) is amended to add syntax and non-substantive changes in an effort to gain an overall consistency throughout section 3336.

Subsection 3336(c)(2) is amended to add syntax and non-substantive changes in an effort to gain an overall consistency throughout section 3336.

Subsection 3336(c)(3) is unchanged.

Section 3338. Amendment to Reason for Segregation.

Subsections 3338(a) through 3338(a)(1) are unchanged.

Subsection 3338(a)(2) is amended as this specific section refers to the official documenting retention in segregated housing rather than the ordering of placement in segregated housing. Therefore, “documenting” is replacing “ordering” to ensure clarity and consistency. The reference to the Administrative Segregation Unit Placement Notice is added to ensure documentation that procedural safeguards were provided. The Administrative Segregation Unit Placement Notice is already incorporated by reference in this section. An example of the automated Administrative Segregation Unit Placement Notice is included with this rulemaking action.

Subsections 3338(a)(3) through 3338(c) are unchanged.

Section 3341.9. Security Housing Unit Term Calculation and Assessment.

Subsections 3341.9(a) through 3341.9(e)(2)(H) are unchanged.

Subsection 3341.9(e)(2)(I) is amended to add language to provide consistency for staff applying a Segregated Housing Unit (SHU) term for acts of Battery on an inmate without serious injury. The proposed additional language will conform to Same and

Similar Behavior as defined in section 3000.

New subsection 3341.9(e)(2)(J) is adopted to add the charge of aggravated battery on a non-inmate by means of gassing as described in PC section 4501.1 to the list of offenses that will incur a term in the Segregated Housing Unit (SHU). The Department has determined that a term length of 12, 20, or 28 months is appropriate based on the SHU terms for comparable offenses.

New subsection 3341.9(e)(2)(K) is adopted to add the charge of battery on an inmate by means of gassing to the list of offenses that will incur a term in the SHU. The Department has determined that a term length of 8, 12, or 16 months is appropriate based on the SHU terms for comparable offenses.

Subsection 3341.9(e)(3) remains unchanged and is omitted for clarity and brevity.

Subsection 3341.9(e)(4)(A) is amended to add the term ‘attempted’ to simplify and improve the clarity of regulatory language. This is necessary to accord with penal code section 4502(b).

Subsection 3341.9(e)(4)(B) is amended. The phrase ‘or attempted manufacture’ was added to provide clarity and conform to penal code section 4502(b) standards. Additionally, language was stricken from this subsection which describes the manufacturing of a weapon and identifying circumstances where a modified object could be considered a weapon. The intent of the stricken text was to describe the attempt in the manufacturing of a weapon.

Subsections 3341.9(e)(5) through 3341.9(e)(7)(C) remain unchanged and are omitted for clarity and brevity.

Subsection 3341.9(e)(8) is amended to add language to provide consistency with existing language delineated in section 3000. Furthermore, the addition of this language will clarify and differentiate when a Segregated Housing Unit (SHU) term assessment is appropriate for the act of Harassment. The additional language is necessary to provide staff with appropriate direction when applying a SHU term for the guilty finding for Harassment. Specifically, the phrase “in free society” is added to distinguish non-departmental persons, groups or entities from departmental persons, groups and entities. For Harassment to be considered a SHU-eligible offense, the victim is required to be a non-departmental person, group or entity. Statutes and regulations that apply to inmates commonly provide for more serious sanctions when the prohibited acts are committed against non-inmates.

Subsections 3341.9(e)(9) through 3341.9(e)(11)(B) remain unchanged.

Subsection 3341.9(e)(12)(B) is amended to add language to provide consistency for staff applying a SHU term for acts of sexual misconduct. The proposed additional language will conform to “Same and Similar Behavior” as defined in section 3000.

Subsections 3341.9(e)(13) through 3341.9(f)(3) remain unchanged.

Article 10. Classification

Section 3375.3. CDCR Classification Score Sheet, CDCR Form 839, Calculation.

Subsections 3375.3(a) through (b)(4)(E) remain unchanged.

Subsection 3375.3(b)(4)(F) is amended to add the phrase ‘manufacture and attempted manufacture’ to provide clarity, align with section 3323(b)(8) and to conform to penal code section 4502(b) standards.

Subsection 3375.3(b)(4)(F)1 and 2 are amended to add the phrase ‘manufacture and attempted manufacture’ to ensure consistent application, align with section 3323(b)(8) and to conform to penal code section 4502(b) standards. Additionally in 3375.3(b)(4)(F)1 the word ‘manufacture’ was moved to appear after possession for syntax.

Subsections 3375.3(b)(4)(G) through (g)(2) remain unchanged.

Section 3375.4. CDCR Reclassification Score Sheet, CDCR Form 840, Calculation

Subsections 3375.4(a) through (b)(4) remain unchanged.

Subsection 3375.4(b)(5) is amended to add the phrase ‘manufacture and attempted manufacture’ to provide clarity, align with section 3323(b)(8) and to conform to penal code section 4502(b) standards.

Subsections 3375.4(b)(6) through (m) remain unchanged.

Section 3375.5 CDCR Readmission Score Sheet, CDCR Form 841, Calculation.

Subsections 3375.5(a) through (b)(5) remain unchanged.

Subsection 3375.5(b)(6) is amended to add the phrase ‘manufacture and attempted manufacture’ to provide clarity, align with section 3323(b)(8) and to conform to penal code section 4502(b) standards.

Subsections 3375.5(b)(7) through (k)(1)(B)3 remain unchanged.