

ANALYSIS OF THE PROPOSED LETHAL INJECTION REGULATIONS

The California Department of Corrections and Rehabilitation (CDCR) has released proposed regulations on the lethal injection process for public comment. Any member of the public may comment on any aspect of the proposed regulations. *The CDCR must read and respond to every relevant comment.* This analysis is provided to assist interested members of the public in understanding how the proposed regulations impact individuals and the state, and in drafting relevant public comments.

Written comments may be submitted by mail, fax, or e-mail. They must be **received** by June 30, 2009 at 5:00 pm PDT. Comments should be directed to:

CDCR Regulation and Policy Management Branch
P.O. Box 942883,
Sacramento, CA 94283-0001
Email : RPMB@cdcr.ca.gov
Fax : (916) 255-5601

Written comments should note that they are regarding the proposed Amendments to *Title 15, Article 7.5, Sections 3349*. Members of the public may also speak at the public hearing on June 30, 2009, from 9:00 am to 3:00 pm, at the Department of Health Services, 1500 Capitol Avenue, Sacramento, CA.

SUMMARY OF ANALYSIS

I. Procedural Deficiencies in the Proposed Rulemaking

The CDCR has failed to satisfy the procedural requirements for state agency rulemaking, as established by the California Administrative Procedures Act (APA). These procedural requirements are important to check the power of the executive branch and to improve the quality of final rules and regulations. The public's right to a meaningful opportunity to comment on proposed regulations was violated when the CDCR failed to provide proper notification of the proposed rulemaking. The CDCR also violated state law by denying interested members of the public access to materials and referenced in the regulations, preventing the public from providing informed comments on substantial portions of the regulations.

II. Fiscal Impact of the Proposed Regulations

The CDCR is required to make an assessment of the fiscal impact of the proposed regulations. The CDCR has declared that the proposed regulations have no fiscal impact at all. This is incorrect. The public has a right to know exactly how much it will cost taxpayers to administer the death penalty system via lethal injection at San Quentin prison, as proposed in the regulations.

III. Media Access and the Public's Right to Know

If the state of California is to kill in the name of the people, then the people have a right to know the truth about the process. The First Amendment protects the right of the media to witness the

execution and to access information about the process. The proposed regulations unduly limit the media's access to information, and therefore the public's right to know.

IV. Religious Freedom and Rights

The Constitution, human rights norms, and basic human decency require that before the state takes a person's life, he or she should be provided with full access to and support of appropriate religious advisors. The proposed regulations unduly interfere with the religious rights of the person to be executed and fail to guarantee all necessary religious freedoms.

V. Treatment of the Person to be Executed and Family

Many aspects of the proposed regulations are unnecessarily dehumanizing and burdensome to the person to be executed and his family. Undoubtedly, the state's actions in carrying out the execution will always be hurtful to these individuals. But the proposed regulations impose many unnecessary burdens and restrictions that only serve to isolate and intimidate the person to be executed and his family.

V. Denial of Legal Rights

The proposed regulations fail to protect the legal rights of the person to be executed, particularly the rights of individuals with mental or physical disabilities. Further, the regulations ignore the rights of surviving family members to review and potentially contest the manner in which the execution was conducted.

VI. Other Issues of Concern

A. No Means to Reverse the Procedure in Case of Stay

The CDCR should be required to explain what steps will be taken to reverse the lethal injection process in the event that a stay or reprieve is issued after the process has begun.

B. Witnesses Should Represent a Cross-Section of the Community

The CDCR should be required to identify a fair process for selecting witnesses and ensuring that the official witnesses reflect the diversity of the state.

C. Failure to Identify Procedures for Female Inmates

The CDCR should be required to revise the regulations to explain how female inmates will be executed by lethal injection.

D. Failure to Identify Time of Execution

The proposed regulations should provide that the execution will be set at a reasonable time, during normal business hours.

FULL ANALYSIS

I. Procedural Deficiencies in Proposed Rulemaking

The CDCR has failed to satisfy the procedural requirements for state agency rulemaking, as established by the California Administrative Procedures Act (APA). These procedural requirements are important to check the power of the executive branch and to improve the quality of final rules and regulations. The public's right to a meaningful opportunity to comment on proposed regulations was violated when the CDCR failed to provide proper notification of the proposed rulemaking. The CDCR also violated state law by denying interested members of the public access to materials and referenced in the regulations, preventing the public from providing informed comments on substantial portions of the regulations.

a. Failure to Provide Requested Notification

The California Administrative Procedures Act, California Government Code § 11346.4, explicitly requires that the CDCR provide notice of proposed rules and regulations to anyone who requests it. On January 5, 2009 we made a request pursuant to the APA to be notified of any proposed regulations regarding the lethal injection protocol. As of June 18, 2009, we have yet to receive written notification of the proposed regulations even though the proposed regulations were released on May 1, 2009. While we are now aware of the proposed regulations, we are still concerned that other members of the public who requested notification have not been notified and are still unaware that proposed regulations have been released. The CDCR has also added material to the rulemaking file without providing notice to any members of the public. The CDCR is in violation of California law. The CDCR must provide written notice to anyone who requested it, and must then provide 45 days for those individuals to submit comments from the date of notification.

b. Failure to Provide Access to Materials Necessary for Meaningful Opportunity for Public Comment

1. Access to Newly Constructed Lethal Injection Facility

All of the proposed regulations are specific to the newly constructed lethal injection chamber at San Quinton Prison. In order to provide meaningful comments on the proposed regulations for lethal injection, we requested access to the lethal injection chamber to determine if the proposed regulations were suitable for that chamber. The CDCR denied this request. By preventing public access to the new lethal injection chamber at San Quinton, the CDCR has frustrated the public's right to be provided a meaningful opportunity to comment on the proposed regulations.

2. Access to Copy Written Materials

The CDCR has refused to place on its website hundreds of pages of materials that it allegedly relied on in formulating the new regulations, claiming that the material is copy written. The CDCR also will not let members of the public copy these materials if they are permitted to view them in public. This

is contrary to law and has denied members of the public the ability to review all of the research and data that the CDCR allegedly relied on in developing the proposed regulations.

3. Access to Rule Making File

The CDCR has not made the rulemaking file sufficiently available for members of the public to see, and has actively discouraged members of the public from trying to see it. Several members of the public have requested to view the rulemaking file, as is their right, and have yet to be able to do so. On June 18, the CDCR notified these individuals that they could now come view the file, in a remote location, until June 29. The CDCR is required to make the rulemaking file available for the entire comment period, not just for 7 business days before the end of the comment period. The public has a right to see the entire rulemaking file, including the comments others have provided, for the entire comment period. By preventing the public from seeing the rulemaking file, the CDCR is in violation of state law.

II. The Fiscal Impact of the Proposed Regulations

The CDCR is required to make an assessment of the fiscal impact of the proposed regulations on the state, local government, businesses and individuals. The CDCR has declared that the proposed regulations have no fiscal impact at all. This is incorrect. The public has a right to know how much it will cost taxpayers to administer the death penalty system via lethal injection at San Quentin prison. The costs below must be disclosed.

a. Significant Fiscal Burden Imposed on the State

1. Staff Time

The proposed regulations require hundreds, possibly thousands of hours of staff time to implement. The CDCR must calculate and disclose the cost of this staff time. Specifically, the CDCR must disclose the cost of the following staff time required by the proposed regulations:

- i. A minimum of 20 team members are needed for the execution process (3349.1.2(a)(1)).¹ These individuals are required to train eight hours every month with additional trainings scheduled in the 30 days prior to an execution (3349.1.4(d)(2)-(3)). In addition, for the three days prior to an execution, these team members are preparing for the process full-time and are removed from their regular assignments (3349.3.6(b)(1), 3349.3.3(c)(8)). Additional staff will be needed to cover their regular work assignments for these three days.
- ii. Significant time is also required from several other staff members for the 45 days prior to the execution. This includes the Warden, Assistant Warden, Public Information Officer, Assistant Secretary for CDCR, Chaplain, correctional counselor, support staff for the Warden, and the Litigation Coordinator.

¹ Numbers in parenthesis identify the relevant sections of the proposed regulations.

- iii. Additional guards are needed to provide hourly checks and log updates on the status of the person to be executed for the 45 days prior to the execution (3349.3.1(b)). Additional guards are also needed to provide continuous monitoring and reports on the status of the person every 15 minutes for the last five days (3349.3.2(a)(6)).
- iv. The media center is staffed by seven people, in addition to Public Information Officer (3349.3.6(d)(1)).
- v. An “internal support team” is needed to assist with operation of the prison for three days preceding the execution (3349.3.6(c)(1)).
- vi. An unknown number of staff is re-assigned for the five days preceding the execution to serve on the “Crisis Response Team” (3349.3.3(b)).
- vii. Significant staff time is needed to screen and select applicants for the lethal injection team (3349.1.2(b)).
- viii. Three people are required to inspect the lethal injection facility monthly and prepare a written report. Weekly inspections are mandated 30 days prior to an execution, and daily inspections for the final five days (3349.2.1(e)).
- ix. The Emergency Operations Center is activated 24 hours prior to the execution, requiring additional staff (3349.4.1(b)).
- x. The sanity review process requires the time of three alienists (3349.3.2(a)).

2. Operations and Material Costs

The proposed regulations impose other significant operations and materials costs on the state that the CDCR must calculate and disclose. Specifically, the CDCR must disclose the costs of the following:

- i. The cost of activating the Emergency Operations Center 24 hours prior to the execution (3349.4.1(b)).
- ii. The cost of lockdown of the entire prison the day prior to and day of the execution (3349.4.4(b)(1)).
- iii. The costs of the drugs and all necessary equipment.
- iv. The cost of constructing the new execution chamber, built to implement the proposed regulations.

3. Litigation Costs

Because of the substantive deficiencies of the proposed regulations, the State will incur potentially hundreds of thousands of dollars in litigation expenses spent defending the protocols in federal court. Even if the proposed protocols pass constitutional muster with the federal court, there will be many months more of litigation in federal court. Thus, at a bare minimum, there will be additional litigation costs incurred by the State that would not be incurred but for the adoption of these lethal injection procedures. The CDCR must calculate and disclose the expected costs under the various possible litigation scenarios, including costs to other state departments such as the Department of Justice.

4. Costs of Demonstrations

Implementing the proposed regulations will result in significant demonstrations outside of San Quentin, as noted in the proposed regulations (3349.3.5(a)(1)). This will require the California Highway Patrol to assist local law enforcement with crowd control and Caltrans to assist with directing high traffic flow. The CDCR must calculate and disclose these costs to the state.

5. Opportunity Cost: Value of Land at San Quentin

The land at San Quentin has been valued at \$2 billion and the Governor has proposed selling it in order to raise funds for the depleted state coffers. The proposed regulations, however, are specific to San Quentin. If the proposed regulations are approved, the state will, by the Governor's own estimates, lose the ability to realize a \$2 billion gain from the sale of the San Quentin land. The CDCR must include this \$2 billion opportunity cost to the state in its fiscal impact.

b. Significant Costs to Local Government

In addition to costs to the state, the proposed regulations impose costs on local government. Implementing the regulations will cause demonstrations at San Quentin, causing significant additional cost to local law enforcement, particularly the Sheriff of Marin (3349.3.5(a)(1)). The proposed regulations will also impose costs on other local agencies such as the County Coroner. The CDCR must calculate and disclose these costs.

c. Significant Costs to Businesses

Implementing the regulations as proposed will also impact local businesses by decreasing the value of the land near San Quentin, drawing significant demonstrations, and impeding the operation of their businesses. The CDCR must calculate and disclose these costs.

d. Significant Costs to Individuals

Implementing the regulations as proposed will cause economic hardships to local land owners in San Quentin Village by significantly reducing the sale and rental value of their property and by preventing the sale of the prison to private developers, which would likely increase the value of their land. The CDCR must calculate and disclose these costs.

III. Impact of the Proposed Regulations on Media Access and Public's Right to Know

If the state of California is to kill in the name of the people, then the people have a right to know the truth about the process. The media serves as the conduit of information to the larger public. The First Amendment protects the right of the media to witness the execution and to access information about aspects of the process. The proposed regulations unduly limit the media's access to information, and therefore the public's right to know, as detailed below.

a. The Curtain Must Remain Open

The proposed regulations provide that the curtain in the execution chamber will be closed once the person is pronounced dead, but the regulations do not state when it will be opened (3349.4.6(a)(2), 3349.4.4(f)(4)). The regulations must clearly state that the curtain will be open before the person to be executed enters the chamber. It is critical that the media be able to view the insertion of the catheters, to report on whether the procedure is done properly. Further, there is no legitimate security need to close the curtain after the person is pronounced dead. The media should be permitted to view removal of the body and any activity that takes place in the chamber following the execution.

b. Greater Access for Interviews Should be Allowed

The proposed regulations prevent all contact between media witnesses and other witnesses, particularly the victims' families and witnesses of the person to be executed (3349.2.3(h)(1)). There is no legitimate reason to prevent all media access to other witnesses. Media should be permitted to interview those witnesses who are willing and should be permitted to sit in the same viewing area.

Similarly, greater media access should be provided to interview the person to be executed. The proposed regulations state that media access for interviews shall be according to the standard regulations (3349.2.3(k)). These provisions, however, are unduly restrictive. Greater media access should be allowed in the 45 days prior to an execution. Further, in the proposed regulations, media access to interview the person to be executed is terminated six hours prior to the execution (3349.4.2(b)). In other states, media access is permitted much closer to the time of execution. For example, in the New Jersey regulations, access was permitted until three hours prior to the execution. The regulations should allow media access for interviews much closer to the time of execution.

c. Remote Viewing Should be Permitted for Media Witnesses

The proposed regulations provide that if there are more members of the victims' families interested in watching the execution than space allows, arrangements will be made to allow viewing from a remote location using electronic transmission (3349.2.3(c)(2)). The same accommodation should be made for media witnesses when there are more media representatives interested in viewing the execution than space in the viewing room allows.

d. The Paralytic Drug Should Not be Used

The proposed regulations continue to use a paralytic drug in the execution process (3349.4.3(b)(2)). The drug unduly limits the ability of the press and the public to witness an execution by lethal injection. The paralytic drug should be eliminated from the process.

e. Media Should Be Allowed to Hear What is Happening in the Chamber

The proposed regulations state that a microphone will be turned on to allow the person to be executed to make his final statement and then the microphone will be turned off

(3349.4.5(f)(5)). Media witnesses should be permitted to hear what is happening in the execution chamber for the entire proceeding.

f. Media Should Be Allowed to View Preparation and Injection

The proposed regulations do not clearly state whether the media will be permitted to witness the activities in the Infusion Control Room (3349.2.1(b)). Based on the “Lethal Injection Facility Virtual Tour” on the CDCR’s website (http://www.cdcr.ca.gov/Reports_Research/capital.html), it appears that the Infusion Control Room is completely out of view of the witnesses. The mixing and injecting of the drugs is a critical phase in the lethal injection process. Media witnesses should be permitted to view all activities in the Infusion Control Room.

g. The Names of the Execution Team Members Should be Public

The proposed regulations provide that the names of execution team members shall not be disclosed (3349.1.2(a)(1)). The press and the public should be allowed to know who is involved in the execution process, as well as the rank, qualifications, training, and experience of each of the individual team members.

h. Greater Steps Must be Taken to Increase the Diversity of Media Coverage

The proposed regulations state that the prison will use only “recognized wire services” to notify the media about the opportunity to request access to the execution (3349.3.1(c)(1)). Greater notice should be provided to a wider range of media outlets including ethnic media.

Similarly, in selecting media witnesses, the proposed regulations state that consideration shall be given to the “broadest cross-section of media *format*,” and to outlets with “*greatest* circulation or viewers” (3349.3.1(c)(2)). Consideration should also be given to the ethnic community served and language used by the media outlet, to ensure that media are included that reach a broad cross-section of Californians. Equal access should be given to small media outlets rather than providing preference to large media companies.

IV. Impact of the Proposed Regulations on Religious Freedom and Rights

The moment at which life ends is perhaps the most sacred moment in our lives. The Constitution, human rights norms and basic human decency require that before the state takes a person’s life, he or she should be provided with full access to and support of appropriate religious advisors. The proposed regulations unduly interfere with the religious rights of the person to be executed and fail to guarantee all necessary religious freedoms.

a. The State Chaplain Cannot be Asked to Disclose Private Communications

The proposed regulations require the State Chaplain to report to the Warden the contents of private conversations with the person to be executed (3349.3.1(e), 3349.3.3(f)). This is an unnecessary violation of the clergy-penitent relationship, is contrary to the ethical obligations of clergy, and may violate state law.

b. Accommodation Must be Made for End of Life Rituals

The proposed regulations make no accommodation for end of life rituals such as sweat lodges (3349.3.4(e)). The regulations are silent as to how such requests will be handled. The CDCR previously denied at least one Native American's request to have a sweat lodge prior to execution. The regulations should include a process for requesting and accommodating such rituals.

c. All Spiritual Advisors Should be Allowed Cell Front Visiting

The proposed regulations only permit the State Chaplains to visit the person to be executed in front of his cell to conduct necessary religious rituals (3349.3.4(e), 3349.4.2(b)). All other spiritual advisors are limited to visiting in the common visiting area, a space that may be inappropriate for some rituals such as confessions. All spiritual advisors should be allowed equal access to cell front visiting.

d. A Spiritual Advisor Should be Permitted in the Execution Chamber

The proposed regulations limit the spiritual advisors to visiting in the holding area next to the execution chamber, and do not permit the advisor to accompany the person to be executed into the chamber (3349.3.4(e)(3)). Under the proposed regulations, other individuals are stationed in the chamber, particularly a non-guard execution team member (3349.4.5(e)(8)) and the Warden (3349.4.5(f)(1)). Texas has long permitted the prison chaplain to enter the execution chamber and to touch the person during the execution. There is no legitimate reason to exclude the spiritual advisor from the execution chamber or prohibit physical contact with the person being executed.

V. Treatment of the Person to be Executed and Family

Many aspects of the proposed regulations are unnecessarily dehumanizing and burdensome to the person to be executed and his family. Undoubtedly, the state's actions in carrying out the execution will always be hurtful to these individuals. The proposed regulations, however, impose many unnecessary burdens and restrictions that do not serve a legitimate security interest but only serve to isolate and intimidate the person to be executed and his family.

a. Service of the Warrant Without Support

In the proposed regulations, prison staff are directed to serve the execution warrant and interview the person to be executed without any provision for a spiritual advisor, attorney or other support person (3349.3(a)(1)). This is unnecessary and cruel. Accommodation should be made for the presence of a support person or attorney.

b. Unnecessary Isolation of the Person to be Executed

Under the proposed regulations, an individual housed in East Block is moved from his familiar cell 45 days prior to the execution (3349.3.1(b)(1)(A)). Further, regardless of where housed, the

person being executed is moved to a more isolated cell five days prior to the execution and has all his personal property taken away (3349.3.4(a)(1), 3349.3.4(b)(3)). This is unnecessary and cruel. The person to be executed should be allowed to stay in his familiar cell until the day of the execution.

c. Unnecessary Surveillance of Person to be Executed and Family

The proposed regulations state that all non-legal mail is screened by the Warden's Administrative Assistant beginning 45 days prior to the execution (3349.3(g)(2)) and all visits are reported to the Litigation Coordinator (3349.3(f)(3)). For the last seven days, the Public Information Officer is notified of every visit every day (3349.3(i)(1)). During the last five days, the person to be executed is subject to 24-hour surveillance (3349.3.4(a)(1)). In the last five days, all phone calls are monitored with the exception of legal calls (3349.3.4(d)(4)). All of this heightened surveillance is unnecessary and serves merely to intimidate the person to be executed and his family.

d. Unnecessary Limitations on Visiting

The proposed regulations state that Grade B inmates are completely precluded from contact visits (3349.3.4(c)(1)). In the last five days, the person to be executed is forced to wear waist restraints during all visits (3349.3.4(c)(3)). Visiting is closed for all other inmates in the prison the day before and day of the execution (3349.3.4(c)(7)). These limitations on visiting are unnecessary and should be eliminated.

e. Unfair and Disparate Treatment of Witnesses

According to the proposed regulations, all other witnesses are escorted to the viewing area by an assistant to the Warden; but the witnesses for the person being executed are escorted by a correctional officer who then stays with them during the execution (3349.4.4(e)(1)-(2)). Likewise, all other witnesses are "escorted back to their designated staging area," after the execution; but the "inmate's witnesses shall be transported to the West Gate and processed out of the institution" (3349.23(i)(1)). The witnesses for the person to be executed should be afforded the same dignity and respect shown to all other witnesses.

Further, the proposed regulations provide that if there are more family members of victims interested in watching the execution than space allows, arrangements will be made to allow viewing from a remote location using electronic transmission (3349.2.3(c)(2)). Similar accommodations should be made for family of the person to be executed.

VI. Impact on Legal Rights of Person to be Executed and Family

In several key areas, the proposed regulations fail to protect the legal rights of the person to be executed, particularly the rights of individuals with mental or physical disabilities. Further, the rights of surviving family members to review and potentially contest the manner in which the execution was conducted are ignored.

a. Attorney Should be Given Opportunity to Contest Sanity Findings

The proposed regulations include the procedures for determining if the person to be executed is sane and, therefore, whether the execution may proceed (3349.3.2(a)-(b)). However, the proposed regulations do not provide any opportunity for counsel to contest the sanity findings. The regulations must state how counsel for the person to be executed may challenge the sanity finding.

b. Accommodation Must be Made for Disabilities and Inability to Understand and Speak English

In the proposed regulations, no accommodation is made for individuals facing execution who may have severe mental or physical disabilities or who are non-English speakers and who therefore may not understand the instructions and the process. The regulations must provide for appropriate accommodation for these individuals, particularly individuals with mental disabilities who may be confused by the process and may not understand their legal rights.

c. Attorney Should be Allowed to Visit In-Person

The proposed regulations limit the attorney to phone contact with the person to be executed for the final six hours prior to execution (3349.3.4(c)(9), 3349.4.2(b)). This is an unnecessary restriction on the right to counsel. Counsel should be permitted to visit in-person, just as the spiritual advisor is allowed to.

d. Attorney Should be Allowed Post-Execution Review

The proposed regulations provide for record keeping of the execution process but do not provide for access by counsel to the records after the execution is complete (3349.4.6(l)). Nor do the proposed regulations provide an opportunity for counsel to request an autopsy. The family of the person to be executed may have a legal right to challenge the manner in which the execution was completed. Thus, counsel should be permitted to review the execution records and to request an autopsy.

VII. Other Aspects of the Proposed Regulations that Impact Individuals and the Public

A. Failure to Account for Last Minute Stay

The proposed regulations provide no procedures in case there is a stay or reprieve issued after the process has begun. The state court in New Jersey faulted that state's Department of Corrections for failing to account for a last minute stay and failing to provide an explanation for how the process might be reversed. Similarly, the CDCR should be required to include in the regulations an explanation of what steps will be taken to reverse the lethal injection process in the event that a stay or reprieve is issued after the process has begun.

B. Failure to Ensure Witnesses Represent a Cross-Section of Community

The proposed regulations vest the Warden with full and exclusive authority for selecting the official witnesses (3349.3.1(a)(1)). No accommodation is made to ensure that the witnesses

represent a diverse cross-section of the California community. The CDCR should be required to establish a fair process for selecting witnesses and ensuring that the official witnesses reflect the diversity of the state.

C. Failure to Identify Procedures for Female Inmates

The proposed regulations fail to explain how female inmates will be executed. The CDCR should be required to revise the regulations to explain how female inmates will be executed by lethal injection, and should be required to release new proposed regulations, allowing 45 days for public comment.

D. Failure to Identify Time of Execution

The proposed regulations do not state the time the execution will take place. Setting executions at midnight causes additional expense and hardship on the media, public, and individuals involved in the process. The proposed regulations should provide that the execution will be set at a reasonable time, during normal business hours.