

PETITION TO THE OFFICE OF ADMINISTRATIVE LAW

RE: **ALLEGED UNDERGROUND REGULATION**
 Department of Mental Health, Coalinga State Hospital
 DMH WELLNESS AND RECOVERY PLAN MANUAL

FROM: MICHAEL GEORGE ST.MARTIN, Petitioner

DATE: _____

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

1. Identifying Information: Petitioner

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

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

Your Telephone Number: **(559) 935-0493 or (559) 935-0638**

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

2. State Agency or Department being challenged:

California Department of Mental Health ("DMH")
(Coalinga State Hospital ("CSH"))

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

Description of alleged Underground Regulation

Petitioner alleges the **ENTIRE** Department of Mental Health Operation Manual is an Underground Regulation, as there is no evidence that any portion of the DMH Operation Manual has been promulgated pursuant to the Administrative Procedures Act.

By this action, Petitioner specifically alleges the section of the DMH Operation Manual known as the ***DMH WELLNESS AND RECOVERY PLAN MANUAL*** is an underground regulation, as there is no evidence that this manual has been promulgated pursuant to the Administrative Procedures Act.

The ***DMH WELLNESS AND RECOVERY PLAN MANUAL*** is described as "INSTRUCTIONS FOR WELLNESS AND RECOVERY TEAM MEMBERS."

A true and correct copy of
DMH WELLNESS AND RECOVERY PLAN MANUAL
is attached hereto as EXHIBIT A.

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

The *DMH WELLNESS AND RECOVERY PLAN MANUAL* is applied to all persons, no matter what their classification who are detained at Coalinga State Hospital, and this includes, but is not limited to, all persons proposed or adjudicated to be SVPs in California who are detained by the Department of Mental Health. Its existence and use are not in controversy.

In fact, the use of the *DMH WELLNESS AND RECOVERY PLAN MANUAL* is required at all hospitals in the California Department of Mental Health system, its instructions are mandatory, and the use of the forms contained therein are mandatory.

The DMH has taken the firm position that none of its Manuals, Instructions, Administrative Directives, or Special Orders are regulations subject to the provisions of the APA.

Petitioner alleges that the *DMH WELLNESS AND RECOVERY PLAN MANUAL* is a regulation within the meaning of the APA.

"The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided.... (Tidewater Marine Western, Inc. v. Bradshaw, supra, 14 Cal. 4th at 571, 59 Cal.Rptr.2d 186.)" (*Morning Star Co. V. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 55)

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

DMH WELLNESS AND RECOVERY PLAN MANUAL
Is a Regulation Within the Meaning of the APA

Prior to implementation, or revision thereof, the Department was required to adopt the *DMH WELLNESS AND RECOVERY PLAN MANUAL*, or any revision thereof, but failed to do so, and thus, pursuant to the law the current version now being utilized is invalid and an "Underground Regulation."

Though the Director may prescribe rules and regulations such as the *DMH WELLNESS AND RECOVERY PLAN MANUAL*, they must be promulgated and filed per Chapter 3.5 of art. 1 of Division 3 of Title 2 of the Administrative Procedures Act, government Code, section 11340 et seq. There is no evidence that DMH has ever promulgated any version of the *DMH WELLNESS AND RECOVERY PLAN MANUAL*.

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

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

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

"[The APA] establishes 'minimum procedural requirements' for rulemaking. ([Govt. C.] § 11346(a).) The agency must provide notice of the proposed action (*Id.* §§ 11346.4, 11346.5), the complete text of the proposal (§ 11346.2(a)), and an initial statement of reasons for the proposal (§ 11346.2(b)), and a final statement of reasons (§ 11346.9(a)). The agency must provide a public hearing if an interested person timely requests a hearing (§ 11346.8(a)), provide an opportunity for interested persons to submit written comments if no hearing is held (*ibid.*), and respond in writing to comments in the final statement of reasons (§ 11346.9(a)(3)). The agency must submit the entire rulemaking file to the Office of Administrative Law (§§ 11347.3(c), 11342.550), which reviews the regulation for compliance with the law and other criteria and approves or disapproves the regulatory action. (§§ 11349.1, 11349.3 . . . " (14 Cal. 4th 557, 59 Cal.Rptr.2d 186.)

"No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." (Govt. Code § 11340.5(a).)

"A substantial failure to comply with chapter 3.5 of the APA renders the regulation invalid. § 11350(a); *Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal. 4th at 576, 59 Cal.Rptr.2d 186.)"

"A regulation subject to the APA thus has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided . . . Second, the rule must 'implement, interpret, or make specific, the law enforced or administered by [the agency], or . . . govern [the agency's] procedure.' ([Former] Govt. Code § 11342(g) [now § 11342.601].) Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases . . . Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. ([Former] Govt. Code § 11343(a)(3), 11346.1(a) [now § 11340.9(I)].) Thus, if an agency prepares a policy manual that is no more than a summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations . . . A policy manual of this

kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes."(Emphasis added.) (Tidewater Marine Western, Inc. v. Bradshaw, supra, 14 Cal. 4th at 571, 59 Cal.Rptr.2d 186.)"

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

The ***DMH WELLNESS AND RECOVERY PLAN MANUAL*** is a regulation. It is applied to all persons proposed or adjudicated to be SVPs in California who are detained at Coalinga State Hospital, and to all persons held under each and every other civil commitment scheme under the jurisdiction of the California Department of Mental Health.

The ***DMH WELLNESS AND RECOVERY PLAN MANUAL*** is replete with the use of the words "shall" and "should" as it declares:

- The basic principles of Wellness and Recovery Planning
- The nature and functions of the Wellness and Recovery Planning Team
- The scope and requirements of the Wellness and Recovery Plan
- The scope of therapeutic and rehabilitation services to be provided
- The requirements for discharge and planning and community integration
- Some cultural considerations in Wellness and Recovery Planning
- Mandatory use of the Forms contained in Appendixes A through E
- Exactly how each of the Forms is to be completed and distributed
- Admission and Discharge Procedures
- Wellness and Recovery Plan Schedules
- Wellness and Recovery Team Membership Responsibilities
- Wellness and Recovery Plan Objectives and Interventions
- Nursing Care Plans for Medical, Health and Wellness
- Psychosocial Rehabilitation Malls (The "Mall Program")
- The Wellness and Recovery Planning Conference Process
- Monitoring of the patient, including observation, chart entries, chart audits, etc.

The use of the ***DMH WELLNESS AND RECOVERY PLAN MANUAL*** is mandatory. Thus the mandate of the ***DMH WELLNESS AND RECOVERY PLAN MANUAL*** implements, enforces or otherwise makes specific the language of each and every civil commitment scheme or category contained in the California Welfare and Institutions Code, and the California Penal Code.

**NO EXCEPTION EXCLUDES THE
DMH WELLNESS AND RECOVERY PLAN MANUAL
FROM THE APA PROCEDURES.**

Clearly inapplicable are the provisions of Govt. Code § 11340.9 excluding:

"(d) A regulation that relates only to the internal management of the state agency..."

"(f) A regulation that embodies the only legally tenable interpretation of a provision of law..."

"(I) A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state."

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

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

The ***DMH WELLNESS AND RECOVERY PLAN MANUAL*** in question here fits the above description perfectly. Although it is referred to as "Instructions For Wellness and Recovery Team Members" it is called an "Manual," and is replete with mandatory words such as "shall" and "should" in regard to actions to be taken. It contains mandatory language thus making it much more than simple "Instructions For Wellness and Recovery Team Members," policies, interpretations, guides, standards, or the like. Instead, it is a forbidden underground regulation which has not been adopted pursuant to the Administrative Procedures Act.

Nowhere within the four corners of the ***DMH WELLNESS AND RECOVERY PLAN MANUAL*** is a justification or authorization for its implementation stated.

THE *DMH WELLNESS AND RECOVERY PLAN MANUAL* APPLIES GENERALLY TO ALL PERSONS DETAINED BY THE DEPARTMENT OF MENTAL HEALTH

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

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

"The APA is partly designed to eliminate the use of 'underground' regulations; rules which only the government knows about. If a policy or procedure falls within the definition of a regulation within the meaning of the APA, the promulgating agency must comply with the procedures for formalizing such regulations, which include public notice

and approval by the Office of Administrative Law (OAL). Failure to comply with the APA nullifies the rule. (Govt. Code § 11350(a); *Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 4") (Emphasis added.)

The ***DMH WELLNESS AND RECOVERY PLAN MANUAL*** is neither intended nor utilized to make specific determinations but is utilized generally when determining the admission procedure, psychological treatment types and procedures, medical treatment and procedures, and release criteria and procedures of all persons detained by the Department of Mental Health. Thus, the ***DMH WELLNESS AND RECOVERY PLAN MANUAL*** is a regulation that must be promulgated as a regulation but otherwise is a null and void underground regulation.

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

The state authorized enforcement by state employees of the numerous statutory and constitutional violations contained in each and every un-promulgated, underground,” Manual, Instructions, Administrative Directive, or Special Order has resulted in a great deal of litigation at great expense to the taxpayers of California. The OAL, pursuant to its regulatory duties, is in a position to bring these underground regulations into the oversight process, and has a duty to the taxpayers to do so.

Public comment and OAL oversight is needed in order to halt the “bureaucratic tyranny” warned of in *Tidewater* and *Morning Star*.

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

7. (Optional) Please attach any additional relevant information that will assist OAL in evaluating your petition.

Every day, each and every person detained by the Department of Mental Health pursuant to one of the State's civil commitment laws is directly affected by the DMH Wellness and Recovery program through the mandates of the ***DMH WELLNESS AND RECOVERY PLAN MANUAL***. Thus, the ***Manual*** dictates rules of general application rather than for a specific case.

The ***DMH WELLNESS AND RECOVERY PLAN MANUAL*** sets forth rules, instructions, or mandates that implement, interpret, or make specific, nearly every law enforced or administered by Department of Mental Health, and it governs the DMH procedure regarding the care and treatment of each and every person detained by the DMH.

Notwithstanding numerous requests, grievances and complaints to the DMH, and even petitions submitted to the OAL, the Department of Mental Health has steadfastly refused and failed to follow the law as set forth in the Administrative Procedures Act and promulgate its guidelines, criteria, bulletins, manuals, instructions, orders, standards of general application, or other rules.

This type of obdurate opposition to correcting illegal and unconstitutional content in its guidelines, criteria, bulletins, manuals, instructions, orders, standards of general application, or other rules, perfectly illustrates why the Legislature established the procedures set forth in the Administrative Procedures Act. This clearly demonstrates the absolute need for oversight and public input to halt the type of bureaucratic tyranny exhibited by the Department of Mental Health by issuing, using, enforcing, or attempting to enforce this type of underground regulation.

CONCLUSION

The Department of Mental Health is not, and has not been, responsive to the public they serve. Nor has the DMH been responsible to the taxpayers who must pay the bills that result from the failure of the DMH to follow the law and serve the public who pays their salaries. The California Supreme Court directed attention to this problem by stating:

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

Such bureaucratic tyranny has been a problem throughout the history of this country. Now, it must be stopped once again. The tyrannical bureaucrats in the Department of Mental Health must be directed to follow the law.

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

To allow the DMH to continue to utilize a controversial Administrative Directive, such as the **DMH WELLNESS AND RECOVERY PLAN MANUAL**, would be to allow the sort of unfettered power in the Executive Branch that is a step toward a totalitarian concentration of power in the executive; a power to be exercised with inadequate legislative standard, and capable of avoiding judicial review, particularly when done through sleight-of-hand tactics designed to avoid review, has been prohibited from the earliest times. See *Hayburn's Case*, (1792) 2 U.S. (Dall.) 408, 1 L.Ed. 436, and its progeny.

Petitioner takes the position that the justification for using underground rules and regulations is not relevant to the question presented in this Petition. The questions before the OAL are: (1) Is the *DMH WELLNESS AND RECOVERY PLAN MANUAL* a regulation within the meaning of the Administrative Procedures Act; and, (2) Did the Department of Mental Health promulgate the *DMH WELLNESS AND RECOVERY PLAN MANUAL* pursuant to the Administrative Procedures Act.

Petitioner submits that the *DMH WELLNESS AND RECOVERY PLAN MANUAL* is a regulation within the meaning of the Administrative Procedures Act, and that the Department of Mental Health has not promulgated the *DMH WELLNESS AND RECOVERY PLAN MANUAL* pursuant to the Administrative Procedures Act, and it is therefore an underground regulation that must be declared null and void.

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

8. Certifications:

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

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

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

MICHAEL GEORGE ST.MARTIN
PETITIONER

Date