

California executions remain on hold while lethal injection protocol reviewed

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SACRAMENTO, Calif. — There will be no executions by California in the near future.

An appellate court has ruled the state failed to follow required procedures in fashioning a revised protocol for administering lethal injections.

The revised protocol was not vetted through a period of public notice and comment, as required by the state's Administrative Procedures Act, a three-judge panel of the 1st District Court of Appeal in San Francisco ruled Friday.

The Department of Corrections and Rehabilitation's failure to comply invalidated the protocol, the panel concluded.

The ruling leaves the state with two options: send the protocol through the notice and comment process or appeal to the California Supreme Court, which may or may not agree to review the matter.

The APA requires notification of a proposed regulation and the reasons behind it, a period for feedback from the public, and written replies to the public comments. The entire package is then submitted to a state agency that reviews it for consistency with the law, clarity and necessity. Even without revisions that may have to be made, the process could take months, if not more than a year.

An appeal to the state high court could likewise take at least several months.

Corrections spokesman Seth Unger said Monday the department has not decided whether to appeal.

"If we decide to submit the matter to public comment, we will do so as expeditiously as possible," Unger said. "The ruling keeps us from carrying out the will of the people by lifting the moratorium on capital punishment."

The state's voters have endorsed the death penalty at the ballot box.

Brad Phillips, an attorney representing two condemned inmates challenging the protocol on APA grounds, said Monday he is hopeful prison officials will elect to seek public comment rather than pursue an appeal.

"Had they simply done the correct legal analysis to begin with and certainly no later than April 2006 when we filed our lawsuit they wouldn't have this problem," Phillips said. "If there is an appeal and the Supreme Court accepts review, I'm confident it would uphold the lower courts."

Friday's appellate ruling affirmed a Marin Superior Court judge's injunction barring use of the revised protocol.

The new method, unveiled in May 2007, came in response to a federal judge's finding that the protocol then in use to administer a lethal three-drug cocktail violated the U.S. Constitution's prohibition against cruel and unusual punishment.

U.S. District Judge Jeremy Fogel cited evidence that some of those put to death may not have been fully anesthetized and suffered excruciating pain that a paralyzing agent left them unable to express.

Fogel's December 2006 ruling froze executions in California, and his order remains in effect.

Gov. Arnold Schwarzenegger assembled a task force to draft a new protocol that would allay Fogel's concerns.

Only when the APA suit is resolved, however, will Fogel begin to examine the constitutionality of the revised protocol.

California has the largest death row in the nation, numbering 677 inmates. The last execution was in January 2006.

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