

**State of California
Office of Administrative Law**

**In re:
State Water Resources Control Board**

**Regulatory Action: Title 22
California Code of Regulations**

**Adopt sections: 64417, 64418, 64418.1,
64418.2, 64418.3,
64418.4, 64418.5,
64418.6, 64418.7,
64418.8, 64419, 64420,
64420.1, 64420.2,
64420.3, 64420.4,
64420.5, 64420.6,
64420.7, 64420.8**

Amend sections:

Repeal sections:

**DISAPPROVAL DECISION OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2018-0823-02S

SUMMARY OF REGULATORY ACTION

On August 23, 2018, the State Water Resources Control Board (Board) submitted its regulatory action to the Office of Administrative Law (OAL). Through its regulatory action, the Board proposed to adopt regulations governing public water system implementation of point-of-use (POU) and point-of-entry (POE) treatment devices in lieu of centralized treatment.

On October 5, 2018, OAL notified the Board that OAL disapproved the proposed regulations pursuant to the Administrative Procedure Act (APA). This Disapproval Decision of Regulatory Action explains the reasons for OAL's disapproval.

DECISION

OAL disapproved the regulatory action on the following grounds: the proposed regulations fail to comply with the APA standards for (1) clarity, and (2) necessity. The Board must resolve all APA issues detailed herein before OAL can approve any resubmission.

DISCUSSION

The Board's regulatory actions must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, § 11346.) Before any regulation subject to the APA may become effective, OAL reviews the regulation for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1.

Generally, to satisfy the standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency regarding the substantive content of the proposed regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure agencies provide the public with a meaningful opportunity to comment on regulations before they become effective. Each ground for the disapproval is set forth below.

1. Clarity

For APA purposes, the term *clarity* means regulations are written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them. (Gov. Code, §§ 11340, subd. (b), 11349, subd. (c), 11349.1, subd. (a)(3).) Each instance of non-compliance with the clarity standard of the APA is set forth below.

The proposed regulations call for the Board to exercise its discretion regarding various aspects of POU/POE water treatment approaches. However, many of these proposed regulations are unclear because they fail to articulate a regulatory standard by which the Board is to make its decisions. The proposed regulations which are unclear for these reasons are as follows:

- 1.1. Whether to approve the POU/POE generally, following a review of the enumerated classes of evidence (Sections 64418.2(a)(2), 64420.2(a)(2));
- 1.2. Whether to approve the POU/POE pilot testing protocol (Sections 64418.2(b)(1), 64420.2(b)(1));
- 1.3. Whether the Board will request equipping a POU with a totalizing flow meter (Section 64418.2(a)(5));
- 1.4. Whether to approve the POU/POE Treatment Strategy (Sections 64418.3(a), 64420.3(a));

- 1.5. Whether to approve the customer education program component of the POU/POE treatment strategy (Sections 64418.3(a)(6), 64420.3(a)(6));
- 1.6. Whether to approve the consumer notification protocol component of the POU/POE treatment strategy in the event the installed POU/POE fails to produce water meeting applicable drinking water standards (Sections 64418.3(a)(9), 64420.3(a)(9));
- 1.7. Whether to approve the component of the POU/POE treatment strategy calling for a plan for the provision of an alternative water supply in the event the installed POU/POE fails to provide water meeting applicable drinking water standards (Sections 64418.3(a)(9)(B), 64420.3(a)(9)(B));
- 1.8. Whether to approve the component of the POU/POE treatment strategy calling for a customer notification protocol for routine notifications (Sections 64418.3(a)(10), 64420.3(a)(10));
- 1.9. Whether to approve the anticipated schedules for each item enumerated in the subdivision (Sections 64418.3(a)(11), 64420.3(a)(11));
- 1.10. Whether to approve the POU/POE Operations and Maintenance (O&M) program (Sections 64418.4(a), 64420.4(a));
- 1.11. Whether to approve the replacement schedules component of the O&M program (Sections 64418.4(a)(4), 64420.4(a)(4));
- 1.12. Whether to approve the POU/POE waste-handling and disposal procedures component of the O&M program (Sections 64418.4(a)(6), 64420.4(a)(6));
- 1.13. Whether to approve the POU/POE monitoring program (Sections 64418.5(a), 64420.5(a));
- 1.14. Whether to utilize the alternative monitoring of POU/POE effluent from one-twelfth of the units monthly to one-quarter of the units quarterly; (Sections 64418.5(a)(3), 64420.5(a)(3));
- 1.15. Whether to utilize reduced on-going monitoring, after no less than one year of monitoring, based upon an application (including the lack of clarity regarding the Board's decisions regarding the appropriate level of reduced on-going monitoring) (Sections 64418.5(b), 64420.5(b));
- 1.16. Whether to utilize additional monitoring based upon the enumerated classes of evidence (Sections 64418.5(c), 64420.5(c));

1.17. Whether to approve the revision of POU/POE monitoring programs (Sections 64418.5(d), 64420.5(d))

The Board has not adopted standards applicable to the exercise of its discretion in each of the foregoing matters. The proposed regulations are not easily understood by those persons directly affected by them; and thus are unclear.

2. Necessity

For APA purposes, the term *necessity* means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. The initial statement of reasons supporting a regulatory action must include a statement of (1) the specific purpose of each adoption, amendment, or repeal; (2) the problem the agency intends to address; and (3) the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it proposed. (Gov. Code, §§ 11349, subd. (a), 11349.1, subd. (a)(1), 11346.2, subd. (b)(1).) Each instance of non-compliance with the necessity standard of the APA is set forth below.

2.1. POU/POE Treatment Strategies

Two sections of the proposed regulations require a public water system to obtain Board approval for POU/POE treatment strategies. Subdivision (a) of each of these proposed sections requires a POU/POE treatment strategy to include multiple specific enumerated elements. (Sections 64418.3(a), 64420.3(a).)

The initial statement of reasons (ISOR) for these proposed regulations states,

“Utilizing [POUs/POEs] in lieu of centralized treatment brings with it a host of issues and concerns that must be considered prior to implementation. To ensure a [public water system] has considered and addressed such concerns, [these sections] would require a [public water system] develop a [POU/POE] treatment strategy and submit the strategy for ... Board review and approval ... [The ISOR then describes the *purposes* of the enumerated elements.] These elements are needed to ensure that the various aspects are considered prior to implementing a [POU/POE] treatment strategy.” (ISOR, at p. 5.)

While the ISOR states the purpose of each of the enumerated mandatory elements of a POU/POE treatment strategy, it fails to state a rationale for the determination by the Board that the adoption of each mandatory element is reasonably necessary to carry out its purpose and address the problem for which it is proposed. For example, the ISOR fails to state what specific “issues and concerns” make the “description of the compliance issues for which [POUs/POEs]

are being proposed” reasonably necessary as a mandated element of a treatment strategy. The record of the rulemaking proceeding fails to demonstrate by substantial evidence the need for each proposed regulation in subdivision (a) of sections 64418.3 and 64420.3. Thus, this part of the rulemaking action fails to meet the necessity standard.

2.2. POU/POE Recordkeeping

The proposed regulations create various POU/POE recordkeeping requirements, including the types of information a public water system must record and the duration of the recordkeeping requirement. Subdivision (a) of each recordkeeping section requires a ten-year recordkeeping requirement for four enumerated classes of information. (Sections 64418.7, 64420.7.)

For each of these sections, the ISOR says,

“Subsection (a) would require a [public water system] to maintain, and make available to the State Water Board on request, the records described in paragraphs (1) through (4) for a period of no less than ten years. The ten year timeframe is consistent with other recordkeeping requirements.” (ISOR, at p. 7.)

However, the ISOR fails to provide substantial evidence demonstrating why the following is necessary to address a problem: (1) each of the four classes of recordkeeping information described; and (2) the requirement that a public water system provide the records to the Board when requested. Further, the ISOR fails to provide substantial evidence of necessity for the proposed ten-year recordkeeping timeframe by stating the ten year timeframe is “consistent with other recordkeeping requirements” without identifying any “other recordkeeping requirements.” Thus, this part of the rulemaking action fails to meet the *necessity* standard.

CONCLUSION

For the reasons discussed above, the Board has failed to comply with the requirements of the APA. Thus, OAL disapproved this proposed regulatory action.

If the Board wishes to continue with this regulatory action, then it must resolve these issues through modified regulatory text and an addendum to the ISOR. It must make the modified text and ISOR addendum available to the public for comment for at least 15 calendar days before the Board adopts the modified regulations, having considered any new public comments submitted during this comment period. (Gov. Code, §§ 11346.8, subd. (a), 11347.1.)

The Board must then resubmit the action to OAL for review within 120 days of the Board’s receipt of this written opinion, which OAL e-mailed to the Board on the date indicated below. The resubmitted regulatory file must contain the following: (1) evidence or documentation that the Board reviewed and adopted the final modified regulation text after complying with all

public availability requirements and considering any public comments received; (2) any comments made in relation to the modified text and ISOR addendum; and (3) a summary of and response to the comments in the Final Statement of Reasons. (Gov. Code, §§ 11346.8, subd. (c), 11346.9, subd. (a)(3), 11349.4, subd. (a).)

Date: October 12, 2018



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