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Director

State of California—Health and Human Services Agency
California Department of Public Health



ARNOLD SCHWARZENEGGER
Governor

ACTION: Notice of Proposed Rulemaking
Title 22, California Code of Regulations

SUBJECT: Revised Drinking Water Standard for Arsenic, **DPH-04-017**

PUBLIC PROCEEDINGS: Notice is hereby given that the California Department of Public Health will conduct written public proceedings during which time any interested person or such person's duly authorized representative may present statements, arguments, or contentions (all of which are hereinafter referred to as comments) relevant to the action described in this notice.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW:

All suppliers of domestic water to the public are subject to regulations adopted by the U.S. Environmental Protection Agency (U.S. EPA) under the Safe Drinking Water Act (42 U.S.C. 300f et seq.) as well as by the California Department of Public Health (Department) under the California Safe Drinking Water Act [Sections 116270-116751 of the Health and Safety Code (H&S Code)]. Pursuant to California Public Health Act of 2006 (Act; S. B. 162, Section 1, Chap. 241, Stats. 2006, specifically H&S Code Sections 131050, 131051 and 131200), effective July 1, 2007, the California Department of Public Health has authority to adopt the subject regulations. California has been granted primacy for the enforcement of the Federal Act. In order to receive and maintain primacy, states must promulgate regulations that are no less stringent than the federal regulations.

In accordance with federal regulations, California requires public water systems to sample their sources and have the samples analyzed for inorganic and organic substances in order to determine compliance with drinking water standards, including maximum contaminant levels (MCLs). Primary MCLs are based on health protection, technical feasibility, and costs. The water supplier must notify the Department and the public when a primary MCL has been violated and take appropriate action. In 1977, the Department adopted the then effective federal MCL of 0.050 mg/L (50 ppb) for arsenic.

On January 22, 2001, the U.S. EPA adopted a revised MCL of 0.01 mg/L for arsenic [Federal Register 66(14), 6976-7066], to be effective January 23, 2006; subsequently U.S. EPA postponed the regulation, but on April 17, 2002, confirmed a January 23, 2006, effective date for implementing the MCL [Federal Register 67(74), 19037, footnote 3 of Table III-2]. Later, U.S. EPA added a terminal "zero" to the MCL and clarified that the revised MCL for arsenic is 0.010 mg/L [Federal Register 68(57), 14501-

14507, March 25, 2003]. Under federal primacy requirements, the State is required to adopt the 0.010 mg/L arsenic MCL or one more stringent.

Section 116361(b) of the California H&S Code mandates that the Department adopt a revised arsenic MCL, and Section 116365 of the California H & S Code requires that the Department set the MCL as close as possible to the public health goal (PHG), while considering cost and technical feasibility.

The California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA) finalized its PHG for arsenic in April 2004. OEHHA set the PHG at 0.004 µg/L (4 ppt). Subsequently, the Department conducted a comprehensive cost-benefit analysis to consider cost and feasibility, evaluating possible MCLs of 0.002, 0.004, 0.006, 0.008, and 0.010 mg/L. Based on that cost-benefit analysis, the Department is proposing to adopt an arsenic MCL in conformance with the federal MCL of 0.010 mg/L.

Therefore, to conform to the federal regulations, the Department proposes the following amendments to Chapter 15, Division 4, Title 22 of the California Code of Regulations:

- Amend Section 64431 (Maximum Contaminant Levels – Inorganic Chemicals) to adopt a revised arsenic MCL of 0.010 mg/L for conformance with the Code of Federal Regulations (CFR) 141.23 [Federal Register 66(14), 6976-7066];
- Amend Section 64432 (Monitoring and Compliance – Inorganic Chemicals), revising existing subsections (f) and (g) to establish compliance determination requirements in conformance with CFR 141.23(c) [Federal Register 66(14), 6976-7066];
- Amend Section 64447.2 [Best Available Technologies (BATs) – Inorganic Chemicals] by establishing two additional BATs for arsenic remediation (electrodialysis and oxidation/filtration);
- Amend Section 64445.1(c)(5) to clarify compliance determination requirements for organic contaminants in conformance with CFR 141.24(h)(11)(iv) and 141.24(f)(15)(iv) [Federal Register 66(14), 6976-7066];
- Amend Section 64482 to adopt additional health information in conformance with the CFR 141.154 [Federal Register 66(14), 6976-7066]. Additionally, subsection (d) would be repealed as it is no longer necessary.

In addition, the Department proposes to amend:

- Section 64413.1(b), to clarify the calculation of points for determining water treatment facility classifications.
- Section 64413.1(b)(4), Table 64413.1-E, to clarify that the points are assigned for each contaminant. In addition, paragraph (b)(5) would be revised to reflect the proposed renumbering of Section 64432.
- Section 64414, to include subsection (f), which identifies the monitoring procedures specific to a standby source having had previous perchlorate detections. In addition, paragraph (a) would be revised to reflect the proposed renumbering of Section 64432 and the inclusion of a reference to the asbestos waivers described in 64432.2(c), which had been inadvertently previously omitted.
- Section 64432, as follows:

- Amend subsection (a) to reflect the renumbering of 64432 and the addition of proposed subsections (b) and (h);
- Adopt subsection (b) to clarify when monitoring for newly adopted inorganic MCLs would be initiated. The existing regulations do not provide such information;
- Amend existing subsection (f)(2), renumbered as (g)(2), to clarify existing confirmation sampling requirements;
- Adopt subsection (h) to require that water supplier to discontinue use of the source if the source is confirmed to exceed ten times an inorganic chemical MCL, consistent with existing Section 64445.1(c)(7) for organic chemicals;
- Amend existing subsection (g), renumbered as proposed subsection (i), to clarify the running annual average calculation when more than one sample is taken in a quarter;
- Existing subsections would be renumbered due to the addition of subsections (b) and (h); and
- Section 64432.2(a) and (b), Monitoring and Compliance – Asbestos, would be amended to revise the references to existing subsections in section 64432, which are proposed to be renumbered.
- Section 64432.8, to clarify that the confirmation sampling and exceedance procedures specified in existing sections 64432.1(a)(1), 64432.1(b)(1), 64432.1(c), and 64432.3(d) - for nitrate, nitrite, nitrate plus nitrite, and perchlorate, respectively - should be followed.
- Section 64433.3(d) would be revised to reflect the proposed renumbering of Section 64432.
- Section 64445.1(c)(5)(A) and (B) would be revised to reference existing Section 64469, as opposed to repealed Section 64451(a). Additionally, section 64445.1(c) would be revised to clarify existing requirements.

The net effects of the proposed regulations on community and nontransient-noncommunity water systems (CWS and NTNCWS) would be as follows:

- CWS and NTNCWS would be subject to a state arsenic MCL of 0.010 mg/L, instead of 0.05 mg/L. CWS and NTNCWS are currently required to comply with the federal MCL of 0.010 mg/L;
- CWS and NTNCWS would determine MCL compliance for all inorganic chemicals except nitrate, nitrite, perchlorate, and asbestos, on the basis of a running annual average of quarterly monitoring results instead of an average of a sample and its follow-up confirmation sample;
- CWS and NTNCWS that have a source exceeding ten times an inorganic chemical MCL would be required to discontinue use of the source until approved for use by the Department;
- CWS and NTNCWS that have annual arsenic averages exceeding 0.005 mg/L, but less than or equal to the proposed MCL of 0.010 mg/L, would have to provide specific health effects language in their Consumer Confidence Reports; and
- CWS and NTNCWS that need to treat sources to comply with the arsenic MCL would have two additional BATs from which to choose.

None of the proposed amendments would affect California's primacy status, because the net effect of these amendments is conformance with the new federal regulations.

AUTHORITY: Sections 100275, 106910, 116293(b), 116350, 116365, 116375, 116385, 116410, 116415 and 131200, Health and Safety Code.

REFERENCE: Sections 106875, 106910, 116275, 116361, 116365, 116385, 116410, 116415, 116450, 116460, 116470, 116555, 131050 and 131051, Health and Safety Code.

COMMENTS: Any written comments pertaining to these regulations, regardless of the method of transmittal, must be received by the Office of Regulations and Hearings by 5 p.m. on July 11, 2008, which is hereby designated as the close of the written comment period. Comments received after this date will not be considered timely. Persons wishing to use the California Relay Service may do so at no cost. The telephone numbers for accessing this service are: 1-800-735-2929, if you have a TDD; or 1-800-735-2922, if you do not have a TDD. Written comments may be submitted as follows:

1. By mail or hand-delivered to the Office of Regulations and Hearings, California Department of Public Health, MS 0507, 1501 Capitol Avenue, P.O. Box 997377, Sacramento, CA 95899-7377. It is requested but not required that written comments sent by mail or hand-delivered be submitted in triplicate; or
2. By fax transmission: (916) 440-7714; or
3. By email to regulations@cdph.ca.gov (it is requested that email transmissions of comments, particularly those with attachments, contain the regulation package identifier "DPH -04-017" in the subject line to facilitate timely identification and review of the comment).

All comments, including email or fax transmissions, should include the author's name and U.S. Postal Service mailing address in order for the Department to provide copies of any notices for proposed changes to the regulation text on which additional comments may be solicited.

INQUIRIES: Inquiries regarding the substance of the proposed regulations described in this notice may be directed to Michael G. McKibben, P.E., Senior Engineer, Standards and Technology Unit, Drinking Water Program, at (619) 525-4023.

All other inquiries concerning the action described in this notice may be directed to Barbara Gallaway of the Office of Regulations and Hearings at (916) 440-7689, or to the designated backup contact person, Miyoko Sawamura, at (916) 440-7690.

CONTACTS: In any inquiries or written comments, please identify the action by using the Department regulation package identifier, DPH -04-017.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF REGULATIONS: The Department has prepared and has available for public review an initial statement of reasons for the proposed regulations, all the information upon which the proposed regulations are based, and the text of the proposed regulations. The Office of Regulations and Hearings, at the address noted above, will be the location of public records, including reports, documentation, and other material related to the proposed regulations (rulemaking file). In addition, a copy of the final statement of reasons (when prepared) will be available upon request from the Office of Regulations and Hearings.

Materials regarding the action described in this notice (including this public notice, the regulation text, and the initial statement of reasons) that are available via the Internet may be accessed at www.cdph.ca.gov by clicking on these links, in the following order: Decisions Pending and Opportunity for Public Participation, Regulations, Proposed.

In order to request a copy of this public notice, the regulation text, and the initial statement of reasons be mailed to you, please call (916) 440-7690 (or California Relay at 711/1-800-735-2929), or email regulations@cdph.ca.gov, or write to the Office of Regulations and Hearings at the address noted above. Upon specific request, these documents will be made available in Braille, large print, and audiocassette or computer disk.

AVAILABILITY OF CHANGED OR MODIFIED TEXT: The full text of any regulation which is changed or modified from the express terms of the proposed action will be made available by the Department's Office of Regulations and Hearings at least 15 days prior to the date on which the Department adopts, amends, or repeals the resulting regulation.

FISCAL IMPACT ESTIMATE:

- A. Fiscal Effect on Local Government: \$127.7 million annually that is not reimbursable by the State pursuant to Section 6 of Article XIII of the California Constitution and Sections 175000et seq. of the Government Code because these regulations implement the Federal mandate contained in Federal Register 66(14), 6976-7066.
- B. Fiscal Effect on State Government: \$2.0 million annually, anticipated to be absorbable by State agencies within their existing budgets.
- C. Fiscal Effect on Federal Funding of State Programs: No fiscal impact exists because this regulation does not affect any federally funded State agency or program.
- D. All cost impacts, known to the Department at the time the notice of proposed action was submitted to the Office of Administrative Law, that a representative private person or business would necessarily incur in reasonable compliance with the proposed action: The regulation will not have a fiscal impact on private persons or businesses. The annual cost to privately owned water systems is \$52 million.
- E. Other Nondiscretionary Cost or Savings Imposed on Local Agencies: None.

DETERMINATIONS: The Department has determined that the regulations would not impose a mandate on local agencies or school districts, nor are there any costs for which reimbursement is required by Part 7 (commencing with Section 17500) of Division 4 of the Government Code.

However, if they were to incur costs, those costs would be of the following nature:

First, some local agencies would incur costs in their operation of public water systems. These costs would not be the result of a “new program or higher level of service” within the meaning of Article XIII B, Section 6 of the California Constitution because they apply generally to all individuals and entities that operate public water systems in California and do not impose unique requirements on local governments. Therefore, no state reimbursement of these costs would be required.

Second, some local agencies could incur additional costs in discharging their responsibility to enforce the new regulations for the small public water systems (under 200 service connections) that they regulate. However, the Department has determined that any increase in the local agency costs resulting from enforcing this regulation would be insignificant. Furthermore, local agencies are authorized to assess fees to pay reasonable expenses incurred in enforcing statutes and regulations related to small public water systems, H&S Code section 101325. Therefore, no reimbursement of any incidental costs to local agencies in enforcing this regulation would be required, Government Code section 17556(d).

The Department has made an initial determination that the regulations would not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The Department has determined that the regulations would not significantly affect the following:

- (1) The creation or elimination of jobs within the State of California. The requirements summarized above should not have any affect in this area in that there would not be any change in water system or regulatory personnel needed for compliance with the proposed requirements.
- (2) The creation of new businesses or the elimination of existing businesses within the State of California. The nature of the water industry is such that the proposed regulation will not result in the creation or elimination of water systems. The impact of these regulations will be insignificant.
- (3) The expansion of businesses currently doing business within the State of California. Since water system size is basically a function of the number of service connections (consumers) served, the proposed regulations should not have any affect on expansion.

The Department has determined that the proposed regulations would not affect small business, since Government Code Chapter 3.5, Article 2, section 11342.610 excludes drinking water utilities from the definition of small business.

The Department has determined that the regulations will have no impact on housing costs.

The proposed regulations require water systems to report results of their water quality tests to the California Department of Public Health. It is necessary for the health, safety, or welfare of the people of the state that the reporting requirement applies to businesses.

ADDITIONAL STATEMENTS AND COMMENTS: In accordance with Government Code Section 11346.5(a)(13) 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 or would be as effective and less burdensome to affected private persons than the proposed action.

No hearing has been scheduled; however any interested person or his or her duly authorized representative may request in writing, no later than 15 days prior to the close of the written comment period, a public hearing pursuant to Government Code Section 11346.8.

For individuals with disabilities, the Department will provide assistive services such as sign-language interpretation, real-time captioning, note takers, reading or writing assistance, and conversion of public hearing materials into Braille, large print, audiocassette, or computer disk. To request such services or copies in an alternate format, please call or write: Barbara Gallaway, Office of Regulations and Hearings, MS 0507, P.O. Box 997377, Sacramento, CA 95899-7377, voice (916) 440-7689 and/or California Relay 711/1-800-735-2929. Note: The range of assistive services available may be limited if requests are received less than ten business days prior to a public hearing.

CALIFORNIA DEPARTMENT OF PUBLIC HEALTH

DPH -04-017

Date:

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Director