

**State of California
Office of Administrative Law**

**In re:
Department of Resources Recycling
and Recovery**

Regulatory Action:

**Title 14, California Code of
Regulations**

**Adopt sections: 17409.5.1,
 17409.5.2, 17409.5.3,
 17409.5.4, 17409.5.5,
 17409.5.6, 17409.5.7,
 17409.5.8, 17409.5.9,
 17409.5.10,
 17409.5.10.5,
 17409.5.11,
 17409.5.12, 17414.2,
 17896.44.1, 18981.1,
 18981.2, 18982,
 18983.1, 18983.2,
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 18984.4, 18984.5,
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 18988.1, 18988.2,
 18988.3, 18988.4,
 18989.1, 18989.2,
 18990.1, 18990.2,
 18991.1, 18991.2,
 18991.3, 18991.4,
 18991.5, 18992.1,
 18992.2, 18992.3,
 18993.1, 18993.2,
 18993.3, 18993.4,
 18994.1, 18994.2,**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2020-0121-03

OAL Matter Type: Regular (S)

18995.1, 18995.2,
18995.3, 18995.4,
18996.1, 18996.2,
18996.3, 18996.4,
18996.5, 18996.6,
18996.7, 18996.8,
18996.9, 18997.1,
18997.2, 18997.3,
18997.4, 18997.5,
18997.6, 18998,
18998.1, 18998.2,
18998.3, 18998.4,

Amend sections: 17402,
17402.5, 17403.0,
17409.5, 17852,
17855, 17867, 17869,
17896.2, 17896.6,
17896.25, 17896.45,
17896.57, 18083,
18815.4, 18815.5,
18815.7,

**Title 27, California Code of
Regulations**

Adopt sections: 20750.1, 21695

Amend sections: 20164, 21570,
21590, 21650, 21660.2

SUMMARY OF REGULATORY ACTION

On January 21, 2020, the Department of Resources Recycling and Recovery (Department) submitted to the Office of Administrative Law (OAL) its proposed action to establish policies and require the implementation of programs for the diversion of organic waste from landfill disposal to recovery activities to reduce the methane gas generation that would otherwise occur.

DECISION

On March 4, 2020, OAL notified the Department that it could not approve this action because of failure to meet the clarity and necessity standards and certain procedural requirements of the California Administrative Procedure Act (APA).

DISCUSSION

The adoption, amendment, or repeal of regulations by a state agency must satisfy the substantive and procedural requirements of Chapter 3.5 of the APA governing rulemaking proceedings. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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 the APA. (Gov. Code, sec. 11346.)

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL 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: consistent with statute, substantially necessary, 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 with regard to the substantive content of the regulation. (Gov. Code, sections 11340.1, subd. (a) and 11349.1, subdivisions (a) and (c).) 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 that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. CLARITY STANDARD

In adopting the APA, the Legislature found the language of many regulations to be unclear and confusing to persons who must comply with them. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349(c) defines "clarity" to mean "written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them."

The "clarity" standard is further defined in section 16, Title 1, of the California Code of Regulations (CCR), OAL's regulation on "clarity," which provides:

In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

- (a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:
 - (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning;
 - (2) the language of the regulation conflicts with the agency's description of the effect of the regulation;
 - (3) the regulation uses terms which do not have meaning generally familiar to those "directly affected" by the regulation, and those

terms are defined neither in the regulation nor in the governing statute;...

- (b) Persons shall be presumed to be “directly affected” if they:
- (1) are legally required to comply with the regulations; or
 - (2) are legally required to enforce the regulation; or
 - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
 - (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this regulatory action, the following provisions failed to meet the clarity standard.

1.1. Section 18982(a)(30.5).

This subdivision states:

“Hazardous wood waste” means wood that is subject to the regulations under Division 20, Chapter 6.5 of the Health and Safety Code and associated regulations...

Division 20, Chapter 6.5 contains hundreds of state statutes. It is unclear what the universe of regulations is under Chapter 6.5 that “hazardous wood waste” may be subject to or how one would identify all applicable regulations. In addition, it is unclear what additional regulations, other than those under Chapter 6.5, are included by the phrase: “and associated regulations.”

1.2. Section 18984.4(a)(3)(B).

This subdivision states:

Include copies of, [sic] quarterly and annual average mixed waste organic content recovery rates, for each of those facilities, as defined in Section 18984.3.

It is unclear if section 18984.3 is referred to for a definition of certain facilities or for a definition of mixed waste organic content recovery rates. In any case, section 18984.3 does not define either facilities or mixed waste organic content recovery rates.

1.3. Section 18984.5(d).

This subdivision states:

A jurisdiction that notifies the department that it intends to implement a performance-based source separated collection service pursuant to Section 18998.1 shall notify the department within 30 days of conducting two consecutive gray container samples that each demonstrate prohibited

container contaminants in the gray container exceed 25 percent of the measured sample by weight.

The term “intends” causes this subdivision to be unclear because it indicates that implementation of a performance-based system has not yet occurred. It is unclear whether a jurisdiction must conduct the two-consecutive-gray-container sampling before implementation of a performance-based system, or whether a jurisdiction may give notice of intent to implement such a system, implement the system, conduct the sampling, and then only notify the Department within 30 days of discovering an excess of 25 percent contaminants. In the latter situation, it is unclear how much time a jurisdiction would have, after implementation of a performance-based system, to conduct the sampling, and it is unclear if the discovery of an excess of 25 percent contaminants would require the jurisdiction to cease implementation of its performance-based system.

1.4. Section 18984.11(a)(2)(A).

This subdivision states:

A jurisdiction may waive a commercial business' or property owner's obligation to comply with some or all of the organic waste collection service requirements of this article if the commercial business or property owner provides documentation, or the jurisdiction has evidence from its staff, a hauler, licensed architect, engineer, or similarly qualified source demonstrating that the premises lack adequate space for any of the organic waste container configurations allowed...

As compared to the architect, it is unclear if the engineer must be licensed.

In addition, it is unclear what standards the Department will apply to determine whether a source of evidence (demonstrating that a premises lacks adequate space to comply with some or all of the requirements of this article) is “similarly qualified,” as jurisdiction staff, a hauler, an architect, or an engineer would be, to make that determination.

1.5. Sections 18984.13(b)(2); 18996.1(e), 18996.2(a), (a)(1), (a)(2) [twice], (a)(2)(A), and (a)(2)(A)3.; 18996.3 (first paragraph) and (a); 18996.5(d) and (e)(1); 18996.6(a), (a)(1) and (a)(2); 18996.7(a) [three instances]; 18996.9(a), (b)(1)(A), (b)(1)(B), (b)(1)(C), (b)(2)(A), (b)(2)(B), and (c).

These provisions contain a total of 25 instances in which the Department uses the permissive term “may” to describe when it may: waive certain requirements, commence enforcement, extend time, consider implementation schedules, issue certain orders, issue a corrective action plan, list a state agency in noncompliance, issue a Notice of Violation, commence an action to impose a penalty, grant certain relief, take a certain action, etc.

However, these provisions lack standards governing when the Department will or will not take the specified action so that persons directly affected know how to comply and avoid any adverse consequences of, or benefit from, the Department's potential action. As written, these provisions do not articulate how the Department will exercise this discretion and are, therefore, unclear.

1.6. Section 18987.1(a)(1).

This subdivision states:

- (a) A POTW generating biosolids is not subject to the following:
 - (1) The generator requirements set forth in Article 3 of this chapter.

The reference to the generator requirements set forth in Article 3 of this chapter is unclear because Article 3 is a large article containing primarily jurisdiction requirements. A directly affected person would not be able to easily identify the generator requirements in that article without a more specific reference to them.

1.7. Sections 18988.2(c)(1) and 18998.1(e)(1).

These subdivisions contain the same unclear text. Section 18988.2(c)(1), for example, states:

- (c) Notwithstanding (a), this section is not applicable to:
 - (1) A hauler that is consistent with Article 1, Chapter 9, Part 2, Division 30, commencing with Section 41950 of the Public Resources Code, transporting source separated organic waste to a community composting site;

It is unclear whether the Department means a hauler as defined in the Public Resources Code beginning at section 41950, or a hauler that complies with requirements for haulers in the Public Resources Code beginning at section 41950, is not subject to this section [or, in the case of section 18988.1(e)(1), the requirements of subdivision (d) of that section].

1.8. Section 18990.1(c)(5).

This subdivision states:

- (c) This section does not do any of the following:
 - (5) Exempt a jurisdiction, generator, or hauler from compliance with regulations in Division 4.5 of Title 22 of the [CCR] relative to the proper handling of hazardous or universal waste pursuant, [sic] or regulations in Title 3. Food and Agriculture, Division 2. Animal Industry, Chapter 4. Meat Inspection, Subchapter 2. Rendering and Pet Food, Article 48. General Provisions, [section] 1180.48 Disposal

of Parts and Products of Animals Not Intended for Use as Human Food.

The use of the term “regulations” in relation to Title 3 makes it unclear if a jurisdiction is prohibited from exempting itself and others from all regulations in Article 48 of Subchapter 2 of Division 2 of Title 3 or only from section 1180.48 of that Article. The provision also uses language incorrectly pursuant to Title 1 CCR section 16(a)(4).

1.9. Section 18995.2(d).

This subdivision states:

All records and information shall be included in the Implementation Record within 60 days.

It is unclear in this subdivision, and including the surrounding context, when the 60-day period begins to run.

1.10. Section 18995.4(a)(3).

This subdivision states:

Except as otherwise provided in Section 18984.5, the jurisdiction shall commence an action to impose penalties pursuant to Article 16 of this chapter within the following time frames:

It is unclear what the phrase: “Except as otherwise provided in Section 18984.5” means. It is unclear if section 18984.5, or some part of it, is an exception to the enforcement process and timelines outlined in section 18995.4 and may be used in lieu of section 18995.4. It is unclear if the notice described in section 18984.5(b)(1) is synonymous with, or an alternative to, the Notice of Violation described in section 18995.4(a)(1). It is unclear if the time limits specified in section 18995.4(a)(3) for a jurisdiction to commence an action to impose penalties, if they apply to section 18984.5, begin to run with the issuance of a notice under section 18984.5(b)(1).

1.11. Sections 18995.4(a) and 18997.2(a)(1).

These sections state in pertinent part:

18995.4

(a) For violations of this chapter occurring on or after January 1, 2024, the jurisdiction shall take enforcement action as set forth in this section.

(1) The jurisdiction shall issue a Notice of Violation within 60 days of a determination that a violation has occurred.

- (2) The jurisdiction shall conduct follow-up inspections to determine if compliance is achieved at least every 90 days following the issue date of an initial Notice of Violation and continue to issue Notices of Violation until compliance is achieved or a penalty has been issued.
- (3) Except as otherwise provided in Section 18984.5, the jurisdiction shall commence an action to impose penalties pursuant to Article 16 of this chapter within the following time frames:
 - (A) For a first offense, no later than 150 days after issuance of the initial Notice of Violation.
 - (B) For a second, third and all subsequent offenses, no later than 90 days after the issuance of the initial Notice of Violation.
 1. The commencement of each action to impose a penalty pursuant to Article 16...shall constitute an offense for purposes of the penalty calculations in Section 18997.2.

18997.2(a)

- (1) For a first violation, the amount of the base penalty shall be \$50-\$100 per offense.
- (2) For a second violation, the amount of the base penalty shall be \$100-\$200 per offense.
- (3) For a third or subsequent violation, the amount of the base penalty shall be \$250-\$500 per offense.

Section 18995.4 provides that penalties for violations of this chapter are imposed through the commencement of an action to impose penalties pursuant to Article 16. Paragraph 1. of subdivision (a)(3)(B) provides that the commencement of an action to impose a penalty pursuant to Article 16 *shall constitute* an offense for purposes of the penalty calculations in Section 18997.2. In other words, if the jurisdiction wishes to impose a penalty for a second violation, it must commence an action to impose a penalty, but the commencement of an action by the jurisdiction to impose a penalty is, itself, another offense by the violator. This provision renders superfluous section 18997.2(a)(2) for purposes of imposing a \$100 to \$200 penalty for a second offense, because a penalty can never be imposed except by the commencement of an action to impose it, and the commencement of such an action is, itself, an offense, i.e., a third offense, by the violator for purposes of calculating the amount of the penalty under section 18997.2.

Section 18995.4(a)(3)(B)1. is inconsistent with section 18997.2(a)(2) and, therefore, unclear, because section 18997.2(a)(2) provides a penalty range for second offenses, but actual imposition of the second penalty range will never occur for second offenses because of the operation of section 18995.4(a)(3)(B)1.

Section 18995.4(a)(3)(A) is unclear because it conflicts with subdivisions (a)(1) and (2). Pursuant to subdivision (a)(1), a jurisdiction issues a, presumably, initial Notice of Violation. Pursuant to subdivision (a)(2), a jurisdiction must conduct at least two follow-

up inspections, a minimum of 90 days apart, to determine if compliance is achieved. However, pursuant to subdivision (a)(3)(A), if a jurisdiction must resort to imposition of a penalty to obtain compliance, an action to impose a penalty must be commenced within 150 days of the initial Notice of Violation. A jurisdiction cannot conduct follow-up inspections requiring at least 180 days after the initial Notice of Violation and, if necessary, commence an action to impose a penalty no later than 150 days after the initial Notice of Violation.

Subdivision (a)(3)(B) is unclear because it could be interpreted to have more than one meaning. It is unclear if the reference to "the initial Notice of Violation" is a reference to the, presumably, initial Notice of Violation issued pursuant to subdivision (a)(1), or if it is referring to an initial Notice of Violation issued for a second or subsequent violation. If the former, then it clearly conflicts with the operation of subdivision (a)(3)(B), because the initial Notice of Violation issued under subdivision (a)(1), which must be followed by at least two follow-up inspections at least 90 days apart, will preclude a jurisdiction from ever commencing an action to impose a penalty for a second or subsequent violation within 90 days of that initial Notice of Violation. If the latter, subdivision (a)(3)(B) is still unclear, because it is unclear if the requirement of follow-up inspections 90 days apart in subdivision (a)(2) also applies to second and subsequent violations. Because if it does, a jurisdiction is still precluded, by the 90-day time limit in subdivision (a)(3)(B), from commencing an action to impose a penalty for a second or subsequent violation, even if the reference to "initial Notice of Violation" is not to the original Notice of Violation issued pursuant to subdivision (a)(1) but rather to a later-issued "initial Notice of Violation" for a second or subsequent violation.

1.12. Section 18995.4(b).

This subdivision states:

The jurisdiction may extend the compliance deadlines set forth in Subdivision (a) if it finds that extenuating circumstances beyond the control of the respondent make compliance within the deadlines impractical.

The subdivision is unclear, because there are no compliance deadlines set forth in subdivision (a).

1.13. Section 18997.3(b)(2) and (3).

These subdivisions state in pertinent part:

(2) A "Moderate" violation means a violation involving moderate deviation from the standards in this chapter where the entity failed to comply with critical aspects of the requirement... [penalty range of \$4,000 to \$7,000 per violation per day]

(3) A "Major" violation means a violation that is a substantial deviation from the standards in this chapter... [penalty range of \$7,500 to \$10,000 per violation per day]

The distinction, if any, between "failure to comply with critical aspects of a requirement," for purposes of a \$4,000 to \$7,500 penalty assessed under subdivision (b)(2), and "substantial deviation from the standards in this chapter," for purposes of a \$7,500 to \$10,000 penalty assessed under subdivision (b)(3), is not clear.

1.14. Section 18997.3(b)(3)(F).

This subdivision states:

(3) ...For purposes of this subsection, a major violation shall always be deemed to include the following types of violations:

...

(F) A jurisdiction fails to report any information to the Department as required in Sections 18994.1 and 18994.2.

Sections 18994.1 and 18994.2 call for the reporting of approximately 31 pieces of information. As written, this subdivision characterizes the failure of a jurisdiction to report any of the 31 pieces of information as a major violation which can result in a \$10,000 penalty per violation per day. However, the provision might also be interpreted to mean that a person's reporting of none of the information required in sections 18994.1 and 18994.2 is what constitutes a major violation.

1.15. Section 18997.3(d)(4).

This subdivision states:

The penalty amount shall be calculated by determining an [sic] penalty range based on the factors in Subdivision (c) above, and multiplying that number by the number of days determined according to Subdivision (d)(3)...

The subdivision is unclear because the penalty range is determined on the basis of the seriousness of the violation pursuant to subdivision (b), not the factors in subdivision (c). The actual penalty amount is determined within the range selected from subdivision (b) based on the factors specified in subdivision (c). This subdivision is also unclear because a penalty range is not a number that can be multiplied by a number of days.

1.16. Section 18998.2(a)(2).

This subdivision states:

The container labeling requirements in Section 18984.4, and waivers and exemptions in Section 18984.11.

The subdivision is unclear because section 18984.11 does not appear to contain exemptions.

1.17. Section 18998.2(a)(5).

The subdivision states:

The recordkeeping requirements in Section 18985.3 except the provisions related to edible food recovery in that section.

The subdivision is unclear because section 18985.3 does not appear to contain provisions related to edible food recovery.

1.18. Sections 17409.5.9(a), (b) and (c), 17867(a)(16)(E), and 17896.44.1(d).

These subdivisions state, respectively:

(a) The EA may approve, with concurrence by the Department, alternative measurement protocols to the requirements of Sections 17409.5.2... as long as they will still ensure that the measurements will be as accurate.

(b) ...If scales are not accessible, the EA may approve, with concurrence by the Department, the operator to report the tonnages using a method described in Section 18815.9(g).

(c) The EA may approve, with written concurrence by the Department, a substitute to certain requirements to sample and measure specific types of organic waste...

(E) An alternative measurement protocol for determining the amount of organic waste sent to landfill disposal may be approved by the EA, with concurrence by the Department.

(d) An alternative measurement protocol...may be approved by the EA, with the concurrence of the Department.

These provisions are unclear because they include no standards under which the Department will exercise its discretion to concur or not to concur so that the public and regulated entities know how the concurrence of the Department can be obtained.

1.19. Section 18815.5(e).

This subdivision states:

The Department shall determine if a facility meets or exceeds the recovery efficiency percentages specified in Sections 18984.3 and 17409.5.1 of this division...

The subdivision is unclear because section 18984.3 does not appear to specify recovery efficiency percentages.

1.20. Title 27 CCR sections 21570(g)(2) and 21650(g)(5).

These subdivisions state:

(2) Provide a summary of the comments received at the public meeting, and, where applicable, responses to public comments...

(5) Any written public comments received on a pending application and a summary of comments received at the informational meeting and, where applicable, responses to public comments...

The subdivisions are unclear because they lack standards for when it would be applicable to provide responses to public comments and when it would not.

1.21. Title 27 CCR section 21695(b).

This subdivision states:

The SIR shall be prepared by a California registered civil engineer or certified engineering geologist.

The subdivision is unclear, because the California Department of Consumer Affairs Board of Professional Engineers, Land Surveyors, and Geologists provides for the licensing, as opposed to registration or certification, of these professionals.

Prior to resubmission of this matter to OAL for review, the Department must revise the text of the regulations discussed above to make them clear and make the revised text available for public comments for a minimum of 15 days pursuant to Government Code section 11346.8(c) and Title 1 CCR section 44.

2. NECESSITY STANDARD

Government Code section 11349.1, subdivision (a)(1), requires OAL to review all regulations for compliance with the necessity standard. Government Code section 11349, subdivision (a), defines "necessity" to mean: