

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – OFFICE OF CHIEF COUNSEL
OCTOBER 3, 2023**

ITEM 2

SUBJECT

CONSIDERATION OF A REVISED DELEGATION AGREEMENT TO THE EXECUTIVE DIRECTOR OF THE STATE WATER BOARD.

DISCUSSION

The current Delegation of Authority to the Executive Director (Resolution No. 2012-0061) (“Delegation”) does not expressly delegate to the Executive Director the authority to authorize minor, non-substantive changes to regulatory text, the state policy for water quality control, or water quality control plans, and accordingly, such changes cannot be made except as part of regulations approved by the full Board at a Board meeting. Cleanup of Board regulations would proceed more efficiently by allowing the Executive Director to authorize such non-substantive changes instead of using resources to bring such matters before the Board. The proposed Board Resolution for consideration, in the form of a revised Delegation of Authority to the Executive Director (Revised Delegation), provides the Executive Director with this authority in two specific situations, and clarifies that the Executive Director cannot approve, amend, or repeal regulations except as otherwise stated. It also includes a provision explicitly authorizing the Executive Director to dispose of securities and makes minor formatting changes. A comparison of the proposed and existing delegation agreements is included as Exhibit A; the prior resolution is included as Exhibit B.

As an initial matter, paragraph 3.1 of the Revised Delegation clarifies that the Executive Director is prohibited from

3.1 Adopting, approving, amending, or repealing regulations subject to chapter 3.5 (commencing with section 11340) of part 1 of division 3 of title 2 of the Government Code, state policy for water quality control, or water quality control plans.

While the existing Delegation prohibits the Executive Director from “adopting” regulations, state policy for water quality control, or water quality control plans, this revision makes it clear that the Executive Director cannot “approve,” “amend,” or “repeal” them, either. This change confirms existing understandings of the Delegation. The Office of Chief Counsel recommends formalizing these understandings.

Second, the Revised Delegation would give the Executive Director new authority to make minor, non-substantive changes to regulations. Under current law, the Board may add, revise, or delete text of a regulation without complying with the rulemaking procedures required by the Administrative Procedure Act when the change “does not materially alter any requirement, right, responsibility, condition, prescription or other

regulatory element of any California Code of Regulations provision.” (Cal. Code Regs., tit. 1, § 100, subd. (a).) These changes are commonly known as “section 100” changes, and the regulation lists common examples:

- (1) renumbering, reordering, or relocating a regulatory provision;
- (2) deleting a regulatory provision for which all statutory or constitutional authority has been repealed;
- (3) deleting a regulatory provision held invalid in a judgment that has become final, entered by a California court of competent jurisdiction, a United States District Court located in the State of California, the United States Court of Appeals for the Ninth Circuit, or the United States Supreme Court; however, OAL shall not approve any proposed change without regulatory effect if the change is based on a superior court decision which invalidated the regulatory provision solely on the grounds that the underlying statute was unconstitutional;
- (4) revising structure, syntax, cross-reference, grammar, or punctuation;
- (5) changing an “authority” or “reference” citation for a regulation; and,
- (6) making a regulatory provision consistent with a changed California statute if both of the following conditions are met:
 - (A) the regulatory provision is inconsistent with and superseded by the changed statute, and
 - (B) the adopting agency has no discretion to adopt a change which differs in substance from the one chosen.

(*Ibid.*)

The proposed change for the Board’s consideration would add the following text to the Delegation:

6. *The Executive Director may add, revise, or delete text of a regulation pursuant to section 100 of title 1 of the California Code of Regulations.*

This language clarifies that, although the Executive Director would otherwise be precluded by the terms of paragraph 3.1 of the Revised Delegation from “[a]dopting, approving, amending, or repealing regulations,” the Executive Director may approve minor, non-substantive changes consistent with section 100 without seeking Board approval.

For similar reasons, paragraph 4 of the Revised Delegation is a proposed change for the Board’s consideration to confirm that the Executive Director has the power to make “minor, non-substantive changes” to regulations, the state policy on water quality control, and water quality control plans during their review and approval process. The proposed new text states:

4. *If, during the process for Office of Administrative Law review and approval of the adoption, amendment, or repeal of a regulation, state policy for water quality control, or a water quality control plan, State Water Board or Office of Administrative Law staff identify minor, non-substantive corrections to the language of the regulation or supporting documentation that are reasonably necessary for clarity or consistency, the Executive Director may make those changes.*

Similar provisions have routinely been included in individual Board resolutions. The Office of Chief Counsel believes it would be wise to include it in the general Delegation and obviate any need to include it in more specific resolutions.

Finally, the draft delegation includes a provision explicitly authorizing the Executive Director to dispose of securities. While the Office of Chief Counsel believes the general delegation affords the Executive Director this authority, the heavily regulated securities industry prefers that the authority be expressly delegated.

13. *The Executive Director is authorized to sell, transfer, or otherwise dispose of any securities, including providing any necessary resolution under the Executive Director's signature, that the State Water Board or a California Regional Water Quality Control Board may acquire through bankruptcy or other proceedings.*

POLICY ISSUE

Should the State Water Board adopt the proposed Resolution to modify and clarify its delegation of authority to the Executive Director?

FISCAL IMPACT

No substantial fiscal impact is anticipated, but there are likely to be cost savings in future years by allowing staff to avoid the process of seeking Board approval for the non-substantive items under consideration.

REGIONAL BOARD IMPACT

None.

STAFF RECOMMENDATION

The Office of Chief Counsel recommends approval of this Resolution. The proposed Resolution changes the delegation to the Executive Director in limited contexts to make minor, non-substantive changes to regulations, the state policy for water quality control, and water quality control plans. The clear delegation of these minor, non-substantive matters to the Executive Director would allow the Board to focus on more important matters and would also allow staff to save resources. It is also prudent to make the clarifications provided by this proposed Resolution.