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California Energy Commission
Dockets Unit
Docket # 12-AAER-2C



Re: 2013 Water Appliances Efficiency Rulemaking

To Whom it May Concern:

I am writing regarding the California Energy Commission's upcoming workshop, scheduled for May 31, 2013, regarding proposed water appliance efficiency regulations. Badger Meter appreciates the opportunity to participate in the workshop and to provide useful information to the CEC and its professional staff. Nevertheless, we have a fundamental concern in that we do not believe the Commission has the authority to regulate water meters.

The general statutory authority cited as the basis for its proposed rulemaking is Public Resources Code section 25213, which permits the CEC to "adopt rules and regulations, as necessary, to carry out" its statutory purposes, and section 25218(e), which similarly permits CEC to adopt "any rule or regulation, or take any action, it deems reasonable and necessary to carry out" its enabling act. More specifically, however, CEC cites section 25402(c)(1), which permits it to prescribe regulations "to promote the use of energy and water efficient appliances . . ." Neither section 25402(c)(1) specifically nor the Warren-Alquist Act as a whole, however, defines the term "appliances." As discussed below, based on well-established rules of statutory construction, we do not believe water meters can be defined as appliances, and thus CEC lacks authority to regulate them.

The CEC's Proposed Regulation of Water Meters Exceeds Its Statutory Authority.

"Rules adopted by an administrative agency may not exceed the scope of the authority granted the agency in the relevant enabling legislation . . ." *Selby v. Dep't of Motor Vehicles*, 110 Cal. App. 3d 470, 474-75 (1980). Here, defining water meters as appliances would expand the jurisdiction given to CEC by its enabling legislation because, although Public Resources Code section 25402(c)(1) grants the CEC the authority to regulate "appliances" and does not define the term, the legislature did not consider the term to include water meters.

First, the statute elsewhere defines "gas appliance" as "any new residential-type furnace, air conditioner, heater, refrigerator, stove, range, dishwasher, dryer, decorative fireplace log, or

other similar device, except a water heater, which uses a gaseous fuel” Pub. Resources Code § 25950. Although a water meter obviously would not be listed as a gas appliance, the appliances listed provide context for what the legislature intended the term “appliance” to mean, and the terms are in a different category than water meters. Indeed, notably absent from the list of “gas appliances” are gas meters.

Second, prior to the enactment of the Warren-Alquist Act, the legislature had defined the term “appliance” in another statutory context. *See* Bus. & Prof. Code § 9801(i). That definition did not include water meters.

Finally, various statutory provisions explain that the purpose of the Warren-Alquist Act was to reduce “the rate of growth of energy consumption” and reduce wasteful “uses of energy.” Pub. Resources Code § 25007. But water meters do not “consume” energy, and thus their regulation does not serve the goals of the Act. The rationale for regulating water-using appliances and plumbing devices for purposes of energy conservation is that they often use hot water, which takes energy to create, or water that takes energy to pump. But because the only water used in a usual domestic situation passes through other CEC-regulated devices like faucets, washing machines, and toilets, it is not clear how regulating water meters will serve to reduce “the rate of growth of energy consumption” or wasteful “uses of energy.”

The Proposed Regulation of Water Meters Is Inconsistent With the CEC’s Own Regulations And Its Interpretations Thereof.

The CEC is also prohibited from regulating water meters as appliances because to do so is inconsistent with its existing regulations. *See Motion Picture Studio Teachers & Welfare Workers v. Millan*, 51 Cal. App. 4th 1190, 1195 (1996).

First, the proposed regulations seek to amend Title 20, sections 1601 – 1608, which are the Appliance Efficiency Regulations. Within those regulations, section 1601 provides an exhaustive list of the “appliances” to be regulated, and section 1602 provides a detailed definition for those appliances. Neither of these sections mentions “water meters.”

Second, CEC has never acted as though it had the authority to regulate water meters. Public Resources Code section 25402(c)(1) requires CEC to “involve all parties who would be subject to the proposed regulations in public meetings regarding the proposed regulations.” That CEC has never previously involved water meter manufacturers in its public meetings for proposed regulations undermines any claim that water meters were intended to be covered by CEC regulations. *See Ste. Marie v. Riverside County Regional Park and Open-Space Dist.*, 46 Cal.4th 282, 292 (2009) (longevity of an agency’s interpretation is relevant consideration for deference given to that interpretation).

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Based on our analysis of these authorities, Badger Meter does not believe the CEC has the authority to regulate water meters. We therefore urge the CEC not to proceed with the proposed rulemaking as to water meters, which would exceed the CEC's statutory authority.

If Commission staff or attorneys have questions or would like to share any contrary authority with me, I would be happy to discuss this matter in more detail. We thank you for the opportunity to share our views with the Commission.

Sincerely,

BADGER METER, INC.

A handwritten signature in cursive script that reads "William Bergum".

William Bergum
Vice President-General Counsel and Secretary

cc: Michael Levy, Esq., Chief Counsel