

INITIAL STATEMENT OF REASONS:

The California Prison Industry Authority (CALPIA) and the California Prison Industry Board (PIB) propose to adopt new Section 8106.1 of Article 6, of the California Code of Regulations (CCR), Title 15, Division 8, concerning substance abuse testing of CALPIA personnel¹.

California Legislature explicitly imparted the function of CALPIA in Penal Code (PC) section 2801. CALPIA is tasked with operating business enterprises as much like private businesses as possible (see 2801(b)) and making the enterprises profitable enough to sustain CALPIA (see 2801(c)). PC section 2801 provides CALPIA's purpose as an agency.

California Legislature explicitly imparted the function of the PIB in PC section 2808 and provided the PIB with *“all powers to do all of the things that the board of directors of a private corporation would do . . .”* PC section 2808 provides the PIB with the authority to approve CALPIA's rulemaking proposals concerning substance abuse testing of CALPIA personnel.

In PC section 2809, the California Legislature explicitly imparted CALPIA to apply practices and procedures that include disciplinary and dismissal procedures for all employees working under the jurisdiction of CALPIA. PC section 2809 provides CALPIA and the PIB with the authority to adopt regulations concerning substance abuse testing of CALPIA personnel.

Pursuant to Government Code section 11342.2, this proposed regulation is consistent and not in conflict with PC sections 2801, 2808, and 2809; this proposed regulation is reasonably necessary to effectuate the purpose of PC sections 2801, 2808, and 2809.

¹ Designated employees subject to drug testing are defined in 2 CCR § 599.961

In order to implement and make specific, PC sections 2801, 2808, and 2808, CALPIA and the PIB propose to adopt new regulations regarding CALPIA employee substance abuse testing.

In order to fully support CALPIA's purpose to operate like a private, self-sustaining business and have the ability to function safely and efficiently, new regulations are needed to increase the list of substances that CALPIA employees can be tested for. Currently, the only regulated substance abuse testing for California civil service employees is found in Title 2, Division 1, Chapter 3, Subchapter 1, Article 29 in the CCR (Article 29). Within Article 29 is a regulated list of substances (see 599.963(b)) that designated civil service employees can be tested for. Unfortunately, 2 CCR § 599.963(b) does not incorporate commonly abused substances such as: Ketamine, LSD, MDMA, Methadone, Phencyclidine, Propoxyphene, Hydrocodone, and Fentanyl. Although the Governor's Executive Order D-58-86, dated September 24, 1986 (incorporated in this rulemaking file) charges the California Department of Human Resources (CalHR)² to "*develop policies and guidelines designed to achieve a drug-free State work place,*" CalHR has not amended its regulations throughout the years to update and include all common substances that are abused. CALPIA and the PIB propose to adopt new regulations to expand the list of substances that CALPIA employees can be tested for in order to achieve a drug-free workplace.

The proposed amendments will be vetted through the public process of the PIB, as required in PC 2808(h) and (i), and promulgated through the regulatory process as specified in the APA. CALPIA will give notice to each recognized employee organization affected by the proposed regulation and give such organizations the opportunity to submit comments to CALPIA.

The PIB will vote on these proposed regulations at the Board Meeting on June 30, 2016. Upon approval, the PIB's Record of Vote and the applicable minutes

² Gov. George Deukmejian charged the Department of Personnel Administration, in consultation with the state Personnel Board, which is now known as California Department of Human Resources.

will be placed in this final rulemaking file. All rulemaking documents will be filed with the Office of Administrative Law (OAL) and are all available to the public on CALPIA's website.

Consideration of Alternatives:

CALPIA must determine that no reasonable alternatives considered, or that has otherwise been identified and brought to the attention of CALPIA, would be more effective in carrying out the purpose for which this action is proposed, would be as effective and less burdensome to affected private persons than the action proposed, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

CALPIA has made an initial determination that no reasonable alternatives to the regulation have been identified or brought to the attention of CALPIA that would lessen any adverse impact on small business.

Currently, no reasonable alternatives have been brought to the attention of CALPIA that would alter CALPIA's initial determination.

ECONOMIC IMPACT ASSESSMENT

In accordance with Government Code Section 11346.3(b), CALPIA has made the following assessments regarding the proposed regulations:

Significant Statewide Adverse Economic Impact on Business:

The CALPIA has initially determined that the proposed amendments will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states because they are not affected by the internal management of CALPIA employees.

Creation or Elimination of Jobs within the State of California

CALPIA has determined that increasing the list of substances that CALPIA employees can be tested for will have no impact on the creation or elimination of existing jobs or businesses within California because those jobs or businesses are not affected by the internal management of CALPIA employees.

Creation of New Businesses or Elimination of Existing Businesses within the State of California

Increasing the list of substances that CALPIA employees can be tested for will have no effect on the creation of new or elimination of existing businesses with the State of California because those businesses are not affected by the internal management of CALPIA employees.

Expansion of Business Currently Doing Businesses within the State of California

Increasing the list of substances that CALPIA employees can be tested for will have no effect on the expansion of businesses currently doing business within the State of California because they are not affected by the internal management of CALPIA employees.

Benefits of the Regulations

The proposed regulatory action will benefit CALPIA by providing the ability to deter and/or detect employee substance abuse, beyond what is already regulated in 2 CCR § 599.963(b). These proposed regulations will help to ensure that CALPIA operations are performed efficiently and without undue risk of costly personal injuries and/or property damage.

Reports Relied Upon

CALPIA, in proposing amendments to these regulations, relied on expert consultation with personnel at Quest Diagnostics Laboratories, who recommended their list of commonly abused substances as a guideline for CALPIA to utilize for its substance abuse testing. (See Common Drugs of Abuse, incorporated in this rulemaking file)

Specific Purpose and Rationale, Per Government Code 11346.2(b)(1)

New Subsection 8106.1(a) is proposed to allow CALPIA to test its employees for substances, in addition to substances that are already regulated in 2 CCR § 599.963(b). It is necessary to deter and/or detect the additional substances for the following reasons:

- **Protect and maintain CALPIA’s purpose as an agency**
- **Prevent serious risk of human injury or property damage**
- **Avoid cost of government to the taxpayers of California**
- **Prevent negative impact on well-being and productivity**
- **Fulfill citizens’ and civil servants’ duties**
- **Assist the State in achieving drug-free workplaces**

Protect and maintain CALPIA’s purpose as an agency

Penal Code section 2801 imparts CALPIA with operating business enterprises as much like private businesses as possible (see 2801(b)), and making the enterprises profitable enough to sustain CALPIA and reduce operating expenses of the Department of Corrections and Rehabilitation (see 2801(c)). In order to achieve and protect its purpose as an agency, CALPIA needs the ability to deter and detect all types of employee substance abuse. Currently, the only regulated substance abuse testing for California civil service employees is found in Article 29 of Title 2 in the CCR (Article 29). Within Article 29 is a regulated list of substances (see 599.963(b)) that designated civil service employees can be tested for. Unfortunately, 2 CCR § 599.963(b) does not incorporate all common substances that are abused. Although the Governor's Executive Order D-58-86 (Executive Order), incorporated in this rulemaking file, charges CalHR to “*develop policies and guidelines designed to achieve a drug-free State work place,*” and to update policies to “*coincide with all new, upcoming illegal substances,*” Article 29 has not been updated to incorporate all common substances that are abused.

This creates loopholes for certain types of substance abuse to go undetected which poses a threat to CALPIA's purpose as an agency. Undetected substance use may hinder CALPIA's ability to function safely, efficiently, and like a private, self-sustaining business.

Prevent serious risk of human injury or property damage

Pursuant to the Executive Order, CALPIA is charged with a duty to protect its staff, inmates, contractors, visitors, etc. and to recognize, *“State employees in certain positions of sensitivity and trust pose a special risk to public safety; the State of California as an employer, has a responsibility to taxpayers to insure that state functions are performed without undue risk to the people of the state.”* Most CALPIA employees are assigned to work inside CDCR correctional institutions and are involved in operating or supervising the operation of large, potentially dangerous, industrial machinery where potential for serious injury exists. Unfortunately, CALPIA has already experienced a case where a serious injury (amputation of the hand) occurred while the machine operator was under the influence of methamphetamines. The profound cost of unnecessary accidents (caused by substance abuse) needs to be prevented.

Avoid cost of government to the taxpayers of California

Pursuant to the Executive Order, *employee substance abuse impairs the efficiency of State departments and agencies, undermines public confidence in them, and interferes with the job performance of employees who do not use illegal drugs, and thereby increases the cost of government to the taxpayers of California.* The profound cost of unnecessary inefficiency (caused by substance abuse) needs to be prevented.

Prevent negative impact on well-being and productivity

Pursuant to the Executive Order, *substance abuse has serious adverse effects upon both the abuser and those who rely on the abuser for support and services. Employees who abuse substances, whether on or off duty, are generally less productive, less reliable, and prone to greater absenteeism than employees who do not abuse substances. The illegal use of drugs has resulted in billions of dollars of lost productivity each year, occasioned by the reduced efficiency and increased absenteeism of employees who abuse drugs.* The profound cost of unnecessary inefficiency (caused by substance abuse) needs to be prevented.

Fulfill citizens' and civil servants' duties

Pursuant to the Executive Order, *substance abuse by State employees is inconsistent with the law-abiding behavior expected of all citizens, and with the special trust placed in such employees as servants of the public.* Updated regulations are needed to hold employees to a proper standard of law abiding behavior. Without the updates, some common types of illegal substance abuse cannot be deterred or detected.

Assist CalHR to achieve drug-free workplaces

Pursuant to the Executive Order, CALPIA is requested to assist CalHR in discharging its responsibilities to achieve a drug-free workplace⁴. The current regulated substances to be tested for in Article 29 (see 599.963(b)) have not been updated since their effective date, October 7, 1988. CalHR currently contracts with Quest Diagnostics, a SAMHSA certified⁵ laboratory. Experts at Quest Diagnostics recommended their list of commonly abused substances as a guideline for CALPIA to utilize for its substance abuse testing. (See Common Drugs of Abuse, incorporated in this rulemaking file) In order to

⁴ All State agencies responsible to the Governor are directed, and all other public entities are requested, to assist the Department of Personnel Administration in discharging its responsibilities under this order.

⁵ The Substance Abuse and Mental Health Services Administration (SAMHSA) is the agency within the U.S. Department of Health and Human Services. SAMHSA's mission is to reduce the impact of substance abuse.

assist CalHR in achieving drug-free workplaces, CALPIA proposes to adopt regulations to update and include other types of substances that are commonly abused. Without the updates, CalHR's current regulations will not fully protect CALPIA from the harmful effects of employee substance abuse.

New Subsection 8106.1(b) specifies the substances to be tested for and provides the initial and confirmatory cut-off levels. This new subsection provides the precise criteria that will be used to determine if an employee, under reasonable suspicion, tests positive for substance abuse. Employees are prohibited from abusing any of the substances listed in new subsection 8106.1(b) based on the following reasons:

- Each substance has been placed in one of five schedules of the Schedules of Controlled Substances (21 CFR 1308.11 - 1308.14)⁶
- Their placement in the Schedules of Controlled Substances is based on medical use, potential for abuse, and safety or dependence liability pursuant to the United States Controlled Substance Act (21 U.S.C.S. § 812(b)(1)–(4))⁷
- Actual or potential for abuse exists. This means (1) there is evidence that individuals are taking the substance in amounts sufficient to create a hazard to their health or to the safety of other individuals or to the community; or (2) individuals are taking the substance on their own initiative rather than on the basis of medical advice from a practitioner⁸
- The substance is new and so related in its action to other substance already listed as having a potential for abuse to make it likely that the substance will have the same potential for abuse

After consulting with expert staff of Quest Diagnostics, CALPIA set test cutoff levels that will identify positive test samples while minimizing false positive test results. The cutoff levels in new subsection 8106.1(b) were recommended by Quest Diagnostics. It is necessary to provide cutoff levels for substance abuse testing so that everyone involved in the process understands what constitutes a positive test result from the urine sample.

New Subsection 8106.1(c)(1) is proposed to avoid duplicating regulations. Because procedures to test urine samples are already regulated by CalHR (see 2 CCR § 599.963 (e), (f), and (g)), it is unnecessary to create new or duplicate what already exists⁹. New Subsection 8106.1(c)(1) relies on the clarity, necessity, and

⁶ Code of Federal Regulations, Title 21, Chapter II, Part 1308

⁷ United States Code, Title 21, Chapter 13, Section 812

⁸ Page 8, 'Drugs of Abuse' 2015 Edition, Resource Guide: U.S. Department of Justice Drug Enforcement Administration (included in this rulemaking file)

⁹ Government Code Section 11349(f)

authority of subsections 599.963 (e), (f), and (g) to specify who may collect urine samples, how samples are collected and handled (with a strict chain of custody) and what types of laboratories may perform testing of samples.

New Subsection 8106.1(c)(2) will allow **liquid** chromatography/mass spectrometry (LC/MS) to be utilized (as an option) for confirming positive screen tests. Current regulations only allow for **gas** chromatography/mass spectrometry (GC/MS) (see 2 CCR § 599.963(a)). CalHR is in contract with a SAMHSA certified laboratory, Quest Diagnostics; this laboratory currently utilizes LC/MS and GC/MS. The contract language between CalHR and Quest Diagnostics only allows for GC/MS¹⁰.

This subsection is necessary to allow other testing methods, such as LC/MS, which is currently being used and has been proven to be reliable to test specimens. Guidelines for confirmatory substance testing are specified in the Federal Register, 73 FR 71858 (November 25, 2008); see section 11.13 of Subpart K, Page 71893¹¹. These SAMHSA approved guidelines allow for LC/MS; Quest Diagnostics follows the guidelines (mentioned above) for LC/MS.

Without this regulation, an employee may challenge their positive test result if liquid chromatography/mass spectrometry is utilized to produce a positive result.

For the same reasons listed above, new subsection 8106.1(c)(2) also allows LC/MS confirmatory testing when the testing is implemented pursuant to subsections 2 CCR § 599.96 (b)(1) through (8). This is needed to update current regulations and bring them into compliance with the APA.

New Subsection 8106.1(c)(3) will allow for validity testing of urine samples to detect adulteration. An adulterated urine sample is one that has been altered, as evidenced by test results showing either a substance that is not a normal constituent for that type of specimen or showing an abnormal concentration of an endogenous substance. Validity testing of urine samples will ensure consistency with normal human urine and detect added substances, dilution, or substitution.

CalHR's current regulation (see 2 CCR § 599.963 (e)) states: "The Department shall specify procedures to ensure that true samples are obtained." When asked to produce policy that '*specifies procedures to ensure a true sample is obtained*,' CalHR provided its current standard agreement (contract) for substance testing as its written policy/rule. The language in CalHR's current contract for substance testing with an outside vendor specifically states: "The Contractor shall test for adulterants as specified by 49 CFR Part 40¹² and specified by DPA.¹³" (DPA is now known as CalHR) Unfortunately, using contract language to satisfy 2 CCR § 599.963 (e) is not helpful to employees that are

¹⁰ Page 7 of 12, Agreement Number S1150006, Comprehensive Drug Testing, Inc. (included in this rulemaking file)

¹¹ Federal Register, 73 FR 71858 (November 25, 2008) (included in this rulemaking file)

¹² Title 49, Subtitle A, Part 40 of Code of Federal Regulations

¹³ Page 6 of 12, Agreement Number S1150006, Comprehensive Drug Testing, Inc. (included in this rulemaking file)

subject to substance abuse testing. Employees would not know to seek out contract language if they wanted to know more about substance abuse testing rules.

CALPIA determined it is necessary to protect its own substance testing regulations by adopting APA¹⁴ compliant language that specifies validity testing. CALPIA's regulations do not contradict CalHR's contract language. New subsection 8106.1(c)(3) complies with and relies on the clarity of Sections 40.89 through 40.96 of 49 CFR Part 40, to specify procedures to ensure that true, unadulterated samples are obtained.

New Subsection 8106.1(c)(3) is necessary to bring validity testing of urine samples into compliance with APA. For the same reasons listed above, new subsection 8106.1(c)(3) also brings validity testing of urine samples, that are implemented pursuant to subsections 2 CCR § 599.96 (b)(1) through (8), into compliance with the APA.

Without this regulation, an employee may challenge their positive test result, if they are unclear or cannot easily obtain rules they are subject to regarding validity testing. Employees may be unclear because the rules are hidden in contract language; employees may be unable to obtain rules because they would not know to look in contracts (with outside vendors) for rules they are subjected to.

New Subsection 8106.1(d) details CALPIA's authority to implement discipline to a suspected employee who is being uncooperative or refusing any part of the testing process. This new subsection is necessary to ensure an employee cannot create reasons or excuses to avoid a substance test. If an employee is able to avoid any part of testing through refusal or by not cooperating, CALPIA will be unable to detect and/or deter reasonably suspected substance abuse.

New Subsection 8106.1(d)(1)-(3) specifies what it means to impede or attempt to impede any part of the testing process. CalHR does not specifically define or regulate rules that prohibit impediment. CalHR's uses contract language to specify that Federal drug testing standards and procedures as established by 49 CFR Part 40 will be complied with.¹⁵ Although 49 CFR Part 40 contains a section that details impediment, CalHR is using contract language as its written policy. CALPIA determined this new subsection is necessary to protect its own substance testing regulations and adopt APA compliant language that clarifies impediment. CALPIA's new subsection will not contradict CalHR's contract language, with one exception to time constraints to produce a urine sample; see explanation below. New subsection 8106.1(d)(1)-(3) will clarify that any type of impediment or attempt to impede during any part of the testing process will create consequences for an employee. Refusal and non-cooperative behavior is defined as impediment; it includes but is not limited to the following actions:

- Fail to remain at the testing site until the testing process is complete and a required medical evaluation determines there was no adequate medical explanation for the failure remain and complete the process
- Fail to provide a sufficient amount of urine; at least 45 mL of urine within 60 minutes after being directed by lab personnel and a required medical evaluation

¹⁴ California Administrative Procedure Act

¹⁵ Page 2 of 12, Agreement Number S1150006, Comprehensive Drug Testing, Inc. (included in this rulemaking file)

determines there was no adequate medical explanation for the failure to timely provide urine

- Refuse to empty pockets when directed by lab personnel
- Behave in a confrontational way that disrupts the collection process
- Fail to wash hands after being directed to do so by lab personnel
- Fail to permit the observation or monitoring of providing of a specimen
- In the event of an observed collection, fail to follow the observer's instructions to raise your clothing above the waist, lower clothing and underpants, and to turn around to permit the observer to determine if you have any type of prosthetic or other device that could be used to interfere with the collection process
- Possess or wear a prosthetic or other device that could be used to interfere with the collection process
- Admission to lab personnel or Medical Review Officer of adulteration or substitution of urine sample
- Any other act by the employee which could prevent, interfere with, or defeat the purpose of testing

Without this regulation, an employee may challenge substance abuse testing processes, if they are unclear or cannot easily obtain rules they are subject to regarding impediment or attempting impediment. Employees may be unclear because current rules are hidden in CalHR's contract language; employees may not be able to obtain rules because they would not know to look in contracts (with outside vendors) for rules they are subjected to. This new subsection is necessary for clarity reasons pursuant to APA.

New Subsection 8106.1(e) details CALPIA's authority to implement discipline for employees who test positive for substance abuse. Substance abuse is dangerous to the employee, other employees and the agency as a whole. This subsection is necessary to give CALPIA the authority implement discipline to deter dangers and risks that substance abuse creates.

New Subsection 8106.1(f) is proposed to avoid duplicating regulations, while also remaining compliant with CalHR's regulations regarding how positive tests results are reviewed. Procedures for Medical Review Officers are already regulated by CalHR (see 2 CCR § 599.965). It is unnecessary to create new or duplicate what already exists pursuant to Government Code Section 11349(f). New Subsection 8106.1(f) relies on the clarity, necessity, and authority of 2 CCR § 599.965 to specify how Medical Review Officers are appointed and specifies their role in reviewing the results of positive test results.

New Subsection 8106.1(g) is proposed to give CALPIA the authority to determine the outcome for any misinterpretation of new section 8106.1. CALPIA will provide its due diligence to promulgate and implement new section 8106.1 to be fair, clear, thorough and in compliance the APA. CALPIA will notify all persons affected and also include CalHR and affected bargaining units in its notice. In the event any part of new section 8106.1 is contested due to misinterpretation, CALPIA will interpret its own

regulation based on this rulemaking file. CALPIA's interpretation of Penal Code 2809 should not be disturbed unless a court finds that it is clearly erroneous or unauthorized. Penal Code 2809 states CALPIA shall establish '*... disciplinary and dismissal procedures and practices which will meet the unique personnel needs of the authority ...*' New section 8106.1 makes Penal Code 2809 specific, by authorizing CALPIA to discipline employees in sensitive positions that engage in substance abuse; CALPIA's ability to detect and deter substance abuse relies heavily on new section 8106.1 for procedural purposes. CALPIA proposes to adopt, interpret, and execute new section 8106.1 for protection against dangers and risks created by substance abuse in the workplace. Without the ability to decide any dispute over the standards and procedures listed in new section 8106.1, CALPIA may be challenged on small, miniscule technicalities that are contested by a disgruntled employee who tests positive for substance abuse. This rulemaking file is fair, clear, and as thorough as possible; any interpretation should be left to CALPIA and not an employee that engages in substance abuse while on duty.

New Subsection 8106.1(h) is proposed to avoid duplicating regulations, while also remaining compliant with CalHR's regulations regarding employees' bargaining unit rights during any substance abuse conversations and testing procedures (see 2 CCR § 599.964). It is unnecessary to create new or duplicate regulations that already exist pursuant to Government Code Section 11349(f). New Subsection 8106.1(h) relies on the clarity, necessity, and authority of 2 CCR § 599.964 to specify employee entitlement to representation during any interrogative interviews with the affected employee that could lead to a decision by the appointing power to take adverse action against the employee.

New Subsection 8106.1(i) is proposed to avoid duplicating regulations, while also remaining compliant with CalHR's regulations regarding confidential record maintenance of the circumstances and results of any employee testing procedures (see 2 CCR § 599.966). It is unnecessary to create new or duplicate regulations that already exist pursuant to Government Code Section 11349(f). New Subsection 8106.1(i) relies on the clarity, necessity, and authority of 2 CCR § 599.966 to specify documented information pertaining to an employee's substance testing and terms of confidentiality.