

# **D R A F T**

## **STATE WATER RESOURCES CONTROL BOARD BOARD MEETING – OFFICE OF CHIEF COUNSEL MARCH 6, 2007**

### **ITEM 4**

#### **SUBJECT**

CONSIDERATION OF A RESOLUTION TO AMEND REGULATION GOVERNING REVIEW BY STATE WATER RESOURCES CONTROL BOARD (STATE WATER BOARD) OF ACTION OR FAILURE TO ACT BY REGIONAL WATER QUALITY CONTROL BOARD (REGIONAL WATER BOARD)

#### **DISCUSSION**

Chapter 6 of title 23 of the California Code of Regulations sets forth the rules that apply to petitions for review of actions or failures to act by the nine regional water boards. Section 13321 of the Water Code allows the State Water Board to stay in whole or in part the effect of a decision of a regional water board while the State Water Board reviews the matter under petition. The State Water Board must provide notice and a hearing, if a hearing is requested, prior to issuing a stay. Before 2004, the statute required a hearing in all cases.

California Code of Regulations, title 23, section 2053 sets forth the requirements and process for issuance of a stay. On October 13, 2006, the State Water Board published a Notice of Proposed Rulemaking and publicly circulated a draft of proposed revisions to Section 2053. The proposed amendment would allow the State Water Board to issue a stay without holding a hearing if a hearing is not requested by specified persons. Under the proposed amendment, the following may request a stay: the petitioner, the discharger (if not the petitioner), the regional water board, any person designated as a party by the regional water board, and any person designated by the State Water Board consistent with California Code Regulations, title 23, section 648.1, subdivision (a). The State Water Board received one favorable comment letter during the public comment period.

#### **POLICY ISSUE**

Should the State Water Board amend Section 2053 as proposed?

#### **FISCAL IMPACT**

None.

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## **REGIONAL WATER BOARD IMPACT**

None.

## **STAFF RECOMMENDATION**

That the State Water Board adopt the proposed amendment to Section 2053, Division 3, Chapter 6 of Title 23.

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## STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2007-

### RESOLUTION ADOPTING AMENDED REGULATION GOVERNING REVIEW BY STATE WATER BOARD OF ACTION OR FAILURE TO ACT BY REGIONAL WATER BOARD

#### WHEREAS:

1. Section 13320 of the California Water Code provides that an aggrieved party may seek review by the State Water Resources Control Board (State Water Board) of any action or failure to act by a regional water quality control board (regional water board).
2. Section 13321 of the California Water Code provides that, for matters under review by the State Water Board pursuant to Section 13320, the State Water Board may stay, in whole or in part, the effect of a decision or order of a regional water board or the State Water Board. The State Water Board must provide notice and a hearing, if a hearing is requested, prior to issuing a stay.
3. Section 13321 of the California Water Code was amended in 2004 to require a hearing only if one is requested. Previously, the statute required a hearing in all cases before a stay could be issued.
4. Section 2053, Title 23 of the California Code of Regulations sets forth rules and procedures for State Water Board consideration and issuance of a stay. Contrary to the terms of the statute, the language of Section 2053 still requires a hearing to be held prior to issuance of a stay.
5. On October 13, 2006, the State Water Board published a Notice of Proposed Rulemaking and publicly circulated a draft of proposed revisions to Title 23, Section 2053. The proposed revisions set forth a revised procedure for consideration of stay requests and specify persons who may request that the State Water Board hold a hearing prior to issuance of a stay.
6. The 45-day comment period generated one favorable comment letter. The State Water Board did not receive a request for hearing.
7. The State Water Board considered the comments received and has responded to all comments in the Final Statement of Reasons. The State Water Board has determined that no changes are warranted.

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THEREFORE BE IT RESOLVED THAT:

The proposed amendments to Title 23, Section 2053 of the California Code of Regulations are adopted, and the Executive Director is authorized to transmit the amendments to the Office of Administrative Law for filing with the Secretary of State.

## **CERTIFICATION**

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 6, 2007.

AYE:

NO:

ABSENT:

ABSTAIN:

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Song Her  
Clerk to the Board

**PROPOSED AMENDMENTS  
TO THE  
CALIFORNIA CODE OF REGULATIONS  
TITLE 23, STATE WATER RESOURCES CONTROL BOARD  
CHAPTER 6: RULES GOVERNING REVIEW BY STATE BOARD  
OF ACTION OR FAILURE TO ACT BY REGIONAL BOARD**

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**FINAL STATEMENT OF REASONS**

**FEBRUARY 2007**

**STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD**

**TITLE 23, STATE WATER RESOURCES CONTROL BOARD  
DIV. 3, CHAPT. 6, Review by State Board of Action or Failure to Act by Regional  
Board**

**Update of Initial Statement of Reasons**

The State Water Resources Control Board (State Water Board) has determined that there is no need to update the Initial Statement of Reasons because no modifications were made to the proposed regulations.

**Local Mandate**

The proposed regulations do not impose any mandate on local agencies or school districts.

**Response to Comments**

Written comments were received from the California Association of Sanitation Agencies (CASA). The comments raised are addressed below.

**Comment No. 1:** CASA supports adoption of the proposed amendments, particularly the proposed showing to be made by an interested person other than a petitioner or discharger who requests a hearing prior to issuance of a stay.

**Response:** Comment noted.

**Comment No. 2:** CASA recommends an addition to proposed Section 2053(b)(4) requiring that the State Water Board provide a rationale for denial of a stay request.

**Response:** *This comment does not relate to the changes proposed by the State Water Board. Because the comment is based upon the current language of Title 23 rather than a proposed amendment, no response is necessary. However, State Water Board will respond to the new regulatory provision proposed by these parties.*

The State Water Board disagrees with this proposal. The requested addition to Section 2053 would require that “[t]he order denying the stay shall state the reasons for denying the stay.” Such language would routinely require adoption of an order in cases where a stay is considered, as opposed to allowing the Executive Director to deny a request for stay pursuant to delegated authority. Such a requirement would lengthen rather than expedite the process for consideration of any request for a stay.

As provided in Water Code Section 13321, the State Water Board, “upon notice and hearing, if a hearing is requested, may stay in whole or in part the effect of the decision and order of a regional board or of the state board.” Thus, the granting of a stay is permissive and is not predicated on any specified showing. By requiring the State Water Board to provide a basis for determining not to take such action, the proposed amendment would alter the existing standard for issuance of a stay. The State Water Board declines to do so.

### **Alternatives to the Regulation/Small Business Impact**

The State Water Board has determined that no alternative would be more effective at carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation. The State Water Board did not identify any alternatives that would lessen any adverse impact on small businesses. The State Water Board has determined that the proposed amendment will not have a significant adverse economic impact on business. The amendment pertains to procedures before the State Water Board and does not impose any obligations on the business community or otherwise affect the cost of doing business.

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CALIFORNIA CODE OF REGULATIONS

TITLE 23. WATERS  
DIVISION 3. STATE WATER RESOURCES CONTROL BOARD  
AND  
REGIONAL WATER QUALITY CONTROL BOARDS

CHAPTER 6. REVIEW BY STATE BOARD OF ACTION OR FAILURE TO ACT BY REGIONAL BOARD

s 2053. Stay Orders.

- (a) A stay of the effect of an action of a regional board shall be granted only if petitioner alleges facts and produces proof of all of the following:
- (1) substantial harm to petitioner or to the public interest if a stay is not granted,
  - (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted, and
  - (3) substantial questions of fact or law regarding the disputed action.

A petition for a stay shall be supported by a declaration under penalty of perjury of a person or persons having knowledge of the facts alleged.

(b) Upon a documented showing by petitioner that the request complies with the prerequisites for a stay, the state board shall issue a notice to all interested persons that a stay is being considered.

(1) The state board must hold a hearing prior to issuing a stay if requested by any of the following: the petitioner, the discharger (if not the petitioner), the regional board, any person designated as a party by the regional board, or any person designated pursuant to subparagraph (2). A hearing may be held by the state board or a member of the state board will hold a hearing. A request for a stay may be denied without a hearing.

(2) Any interested person may request that the board designate him or her as a party consistent with section 648.1, subdivision (a). The request shall include a statement explaining the basis for requesting designated party status, including why the petitioner, discharger (if not the petitioner), regional board, or any other designated party does not adequately represent the person's interests.

(3) If a hearing is held, notice shall be given in such manner and to such persons, in addition to the petitioner, as the board deems appropriate.

(4) A request for a stay may be denied without a hearing.

(5) If no hearing is held, the state board may issue a stay only after providing all interested persons with notice and an opportunity to comment on the request for stay.



(bc) Nothing in subsection (a) shall preclude the state board from issuing a stay of the effect of an action of a regional board, ~~after hearing~~, upon its own motion. The requirement of a declaration under penalty of perjury may be waived by the board in case of an emergency.

(ed) The state board shall review and act on the request for a stay within 60 days from the date of mailing the notification described in section 2050.5(a). This limit may be extended by written agreement from the petitioner.

Note: Authority cited: Section 1058, Water Code. Reference: Section 13321, Water Code.