

STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2003 - 0048

RESOLUTION ADOPTING AMENDED REGULATIONS GOVERNING REVIEW BY STATE
BOARD OF ACTION OR FAILURE TO ACT BY REGIONAL 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 (SWRCB or State Board) of any action or failure to act by a regional water quality control board.
2. Chapter 6 of Division 3 of Title 23 of the California Code of Regulations sets forth rules by which the SWRCB reviews actions and failures to act by regional water quality control boards pursuant to water quality petitions filed under Water Code section 13320.
3. On January 22, 2003, the SWRCB adopted Resolution No. 2003 - 0001 approving proposed amendments to the regulations governing water quality petitions.
4. The proposed regulations were forwarded to the Office of Administrative Law (OAL). After reviewing the proposed regulations, OAL issued a Notice of Disapproval of Regulatory Action on May 7, 2003.
5. On May 14, 2003, OAL issued a Decision Regarding Disapproval of a Rulemaking Action. The decision stated that three changes were not made available for public comment for the requisite 15-day period prior to adoption by the State Board; four provisions failed to comply with the clarity standard set forth in California Government Code section 11349.1; and a deletion from the existing regulatory language failed to comply with the necessity standard contained in Government Code section 11349.1.
6. State Board staff has revised the proposed amendments to Title 23 to address the problems identified in the OAL disapproval. A notice of modifications was sent to all interested parties, establishing a 19-day comment period.
7. The revision to the proposed amendments generated one comment letter. The State Board has considered the comment and determined that no further changes are warranted. The State Board has responded to all comments in an updated Final Statement of Reasons.

THEREFORE BE IT RESOLVED THAT:

The proposed amendments to Title 23, Division 3, Chapter 6 of the California Code of Regulations, as revised, 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 a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 16, 2003.

A handwritten signature in cursive script that reads "Debbie Irvin".

Debbie Irvin
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**

DRAFT

FINAL STATEMENT OF REASONS

JULY 2003

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD
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**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

In January 2003, the State Water Resources Control Board (State Board) adopted a resolution approving proposed amendments to Title 23, Div. 3, Chapt. 6, Review by State Board of Action or Failure to Act by Regional Board. The proposed amendments were forwarded to the Office of Administrative Law (OAL) in March 2003. On May 7, 2003, OAL issued a Notice of Disapproval of Regulatory Action, stating that the proposed amendments failed to comply with the Clarity and Necessity standard of Government Code section 11349.1 and that the agency had failed to follow the required procedure. In a Decision Regarding Disapproval of a Rulemaking Action (hereinafter OAL Disapproval Decision) dated May 14, 2003, OAL found that several changes from the previously-noticed version of the amendments had been made without the requisite fifteen-day notice for changes that are sufficiently related to the original text. OAL found that the public was not adequately placed on notice that the change could result from the originally proposed regulatory action. Also in the OAL Disapproval Decision was a finding that four provisions of the proposed amendments failed the clarity standard and one failed the necessity standard.

Accordingly, the State Board has made a number of clarifying changes to the proposed amendments. The Initial Statement of Reasons is updated as follows:

SECTION 2052(c)(2). Section 2052(c)(2) currently provides that where a hearing is held, the State Board may require submission of seven copies of proposed exhibits not later than ten days prior to the hearing. Proposed changes to section 2052(c)(2) would eliminate the rule requiring submittal of documents ten days before a hearing because Title 23, section 648.4(b) specifically addresses procedures for identification of witnesses and presubmission of testimony and exhibits in State Board adjudicative proceedings. Therefore, the rule currently set forth in section 2052(c)(2) is duplicative.

SECTION 2064. Section 2064 addresses the contents of the record before the State Board. The State Board previously proposed amendments that would allow the State Board to supplement the record even if no party has asked the State Board to do so. One commenter asked for changes establishing a rebuttal process, while the OAL Disapproval Decision stated that the previously noticed version did not meet the clarity standard. The State Board, in considering comments submitted as well as the OAL Disapproval Decision, has determined that the current language of Title 23, section 2064, together with Water Code section 13320(b), adequately sets forth the appropriate standard. Therefore, the State Board proposes that the only change to section 2064 from the version currently appearing in Title 23 is the correction of a reference to section 2066, which previously covered the process for parties to request submission of supplemental evidence. That process is now contained in section 2050.6, and this correction is reflected in the new version of the amendments.

The State Board has determined that there is no further need to update the Initial Statement of Reasons because all other modifications made to the proposed regulations in response to comments or the OAL Disapproval Decision are related to the originally proposed language and are in keeping with the intention set forth in that language and in the Initial Statement of Reasons.

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); Bay Area Clean Water Agencies (BACWA); Western States Petroleum Association (WSPA); Sacramento County Regional Sanitation District (SRCSD); Archer Norris; Sanitation Districts of Los Angeles County (Districts); and the Law Offices of Hans Herb. The comments raised are addressed below, grouped where appropriate.

Comment No. 1: CASA and BACWA propose that section 2050(a)(1) be amended to require additional contact information for petitioners in the filing requirements, specifically phone number and e-mail address.

Response: The State Board agrees. Section 2050(a)(1) is amended to read:

“Name, ~~and~~ address, telephone number and email address (if available) of the petitioner.”

Comment No. 2: CASA and BACWA propose that section 2050(a)(2) be amended to provide that a copy of a regional board order or resolution referred to in a petition only be required as a filing requirement if it is available at that time.

Response: The State Board agrees that copies of regional board orders or resolution that form the basis for a petition to the State Board are not always available within the thirty days provided for filing of a petition. Therefore, section 2050(a)(2) is amended to read:

“The specific action or inaction of the regional board which the state board is requested to review and a copy of any order or resolution of the regional board which is referred to in the petition, if available. If the order or resolution of the regional board is not available, a statement shall be included giving the reason(s) for not including the order or resolution.”

Comment No. 3: WSPA, CASA, and BACWA argue that section 2050(a)(7) should be amended to add a statement allowing petitioners to supplement the statement of points and authorities once the

administrative record and transcript are available. CASA argues in favor of this change by stating that the 30-day timeframe following regional board action or inaction is

insufficient to file an adequate statement of points and authorities, while BACWA notes that the administrative record is unavailable during the 30-day period within which a petition must be filed.

Response: *This comment does not relate to any change proposed by the State Board. Because the comment is based upon the current language of Title 23 rather than a proposed amendment, no justification is required for rejecting these comments. However, State Board will respond to the new regulatory provision proposed by these parties.*

The State Board disagrees. All documents relied upon by the regional board should be readily available to petitioners when the regional board acts, even if not formally compiled and paginated in an administrative record. A statement of points and authorities should refer to and include citations to such documents, where possible. The proposed amendment to section 2050.5(a) allows the State Board to consider additional submissions from petitioners where justified, while the process suggested by WSPA could routinely delay State Board review for a significant portion of the allotted 270-day period.

Comment No. 4: CASA and the Districts comment that the State Board process should be amended to establish a threshold determination regarding review prior to filing of points and authorities and preparation of the record. These parties believe that the State Board “need not, and indeed cannot, conduct a complete review on the merits of every petition filed, including review of points and authorities, examination of the regional board record, conduct of an evidentiary hearing, etc.” CASA, Dec. 13 comments, at 2. Therefore, the parties request that the State Board require only that a petitioner file a statement of the issues presented and the reasons that the State Board should take up the petition. Under the system envisioned by these parties, a comment period would ensue, followed by a threshold determination by the State Board, at which time the administrative record would be solicited, to be followed by points authorities of the petitioners and an additional comment period. The parties state that this procedure will also facilitate petitioners’ ability to file a more complete statement of points and authorities by removing that requirement from the 30-day statutory period for filing of a petition.

Response: *This comment does not relate to any change proposed by the State Board. Because the comment is based upon the current language of Title 23 rather than a proposed amendment, no justification is required for rejecting these comments. However, State Board will respond to the new regulatory provisions proposed by these parties.*

The State Board fundamentally disagrees with this proposal. Although the parties state that the State Board is unable to review all petitions for review on the merits, this is not the case. Under the current procedure set forth in Title 23, State Board staff review all issues presented in petitions and formulate proposals on resolution of those petitions accordingly, to be acted upon by the State Board or the Executive Director pursuant to delegated authority. Barring an unprecedented escalation in the rate of regional board orders and actions, this should continue to be both feasible and proper. The State Board does not believe that it is advisable or appropriate to make determinations on petitions for review without a reasonably complete statement from the petitioner, outlining both the reasoning and support for the petitioner’s position. The proposed

process would lower both the quality and quantity of review currently afforded by the State Board.

Apart from policy concerns, logistical issues would pose problems under the proposed system. Even if the start of the 270-day period for resolution of complete petitions were postponed until after the threshold determination, a significant portion of this period would still be lost while soliciting the administrative record, allowing time for filing of points and authorities, and soliciting comments from the regional board and other interested parties. This would leave the State Board with relatively little time to complete its review within the period provided. While that period could be extended, this would result in even greater delays before a resolution could be achieved by the State Board. As such, parties would argue an even greater need for stay of regional board proceedings, thus further impeding the regional boards' abilities to protect the state's waterways.

Finally, it should be noted that the benefits of the system proposed by these parties would be available under the current regulatory structure with the amendments proposed by the State Board. Proposed section 2050.5(a) would allow the State Board to dismiss a complete petition upon initial review, without soliciting the administrative record, response and other comments, if it fails to raise substantial issues warranting further review. Moreover, the State Board may and frequently does allow subsequent supplementation of a petition or statement of points and authorities after filing of the regional board's record and response. Therefore, the State Board believes that the changes to existing Title 23 regulatory procedures are unwarranted.

Comment No. 5: CASA and BACWA ask that the language in proposed section 2050(a)(7), directing use of citations in points and authorities, be amended so that such citations only be required where available.

Response: The regulation, as proposed, directs use of citations where appropriate. This language encompasses a requirement that petitioners include citations to any documents to which they refer in the petition, a necessity where lengthy documents are often offered in support of specific contentions. However, the language is general, so as to cover a range of situations, and need not be read to require citations to documents that are unavailable to petitioners.

Comment No. 6: BACWA and CASA contend that the regulations should be amended to recognize that the State Board has discretion to establish a briefing schedule similar to the process used in appellate practice.

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

The amendment is unnecessary. Proposed section 2050.5(a) specifically states that additional submissions are allowed at the discretion of the State Board. This discretion would allow the State Board to establish a briefing schedule for such submissions if desired.

Comment No. 7: WSPA and CASA agree with the State Board's proposed elimination of the requirement that a petitioner submit a list of interested parties.

Response: Comment noted.

Comment No. 8: Hans Herb endorses the changes set forth in proposed section 2050(b), commenting that the clarification of service requirements will be very helpful to practitioners in determining the process and timing of a petition.

Response: Comment noted.

Comment No. 9: WSPA, the Districts, BACWA and CASA argue that use of the term "contentions" in proposed sections 2050(a)(9) and 2050(c) (requiring "contentions" to be raised before the regional board) is unclear, too narrow, undefined, and subject to interpretation. The parties ask that the term "contentions" be replaced with "substantive issues or objections." CASA argues that the need to raise contentions before the regional board will require that an attorney be consulted and present for all regional board matters, thus impacting small businesses, and that regional board comment periods are too short to allow for exhaustive briefing of every issue. The parties also ask that the proposed regulation be amended to provide an exception where a petitioner was unable to raise particular contentions before the regional board.

Response: While the State Board does not agree that the terminology set forth in the proposed regulation is as unclear and open to interpretation as argued by those who offered comments, the State Board generally agrees that term "substantive issues and objections" is useful for clarifying the intent of the proposed regulation.

State Board staff have considered a number of alternatives to the language in the proposed regulation. The proposed regulation is not intended to require that "every factual allegation and every conceivable legal argument must be presented in comments to the Regional Board . . ." (Districts, at p. 1; similar language is used in the comments submitted by CASA, at 2; and WSPA, at p.2). Nor does the State Board expect that parties to regional board proceedings raise all legal arguments in all of their permutations to the degree necessary for litigation. Rather, the State Board intends that parties not introduce entirely new grounds upon which to attack a regional board action or inaction for the first time in a petition to the State Board if the regional board has not previously been afforded the opportunity to consider those grounds. The State Board will continue to retain the ability to review any matter or issue on its own motion, even if a petitioner did not raise the specific argument. This has previously been the case and will continue to be so. Nonetheless, the language suggested by the parties is helpful in elucidating the intended standard.

The State Board also agrees that this requirement should be narrowly tailored to allow new contentions to be raised before the State Board where it was previously not possible to raise them. Therefore, consistent with language suggested by WSPA, CASA, and BACWA, proposed section 2050(a)(9) is amended to read:

(a)(9) A statement that the ~~contentions~~ substantive issues and objections raised in the petition were raised before the regional board, or an explanation of why the petitioner was not required or was unable to raise these substantive issues and objections ~~contentions were not required to be raised~~ before the regional board.

Proposed section 2050(c) is amended to read:

(c) If the action or inaction that is the subject of the petition was taken by the regional board after notice and opportunity to comment, the petition to the state board shall be limited to those ~~contentions~~ substantive issues or objections that were raised before the regional board.

Comment No. 10: CASA and BACWA contend that proposed section 2050(b) should be amended to specify that for e-mail filings, the prior arrangement should be with the Office of Chief Counsel. CASA also suggests that e-mail filings be subject to the same instruction as facsimile, by excluding any attachment from the initial filing and directing the full submission to follow by hard copy. CASA suggests adding an original signature requirement for follow-up filings.

Response: These changes are unnecessary. Prior arrangements for e-mail filings will in most cases be handled through the Office of Chief Counsel, but need not be so circumscribed. E-mail filings need not be subject to the same attachment instructions as facsimile filings, because they do not present the same issues of paper waste, copy quality, and fax line usage. Although an original signature is in most cases provided, the State Board has never proposed rejecting or denying a petition on this basis.

Comment No. 11: CASA, Archer Norris, and Hans Herb express concern that proposed section 2050(c) reflects an inappropriate determination that the State Board can or should address only those issues considered by the regional board rather than retaining broad authority to consider issues and evidence on its own motion.

Response: Proposed section 2050(c) in no way restricts State Board authority to consider any matter or issue on its own motion, as set forth in Water Code section 13320(a). The proposed regulation instead concerns those issues appropriately raised in a petition for State Board review. The proposed regulation requires that parties wishing to challenge a regional board action present any grounds for opposing the action or inaction to the regional board prior to seeking State Board review. Such a requirement ensures that the regional board has the benefit of all perspectives and questions when taking action. The authority of the State Board to consider any and all matters or issues according to its own discretion is unaffected.

Comment No. 12: CASA and the Districts suggest that proposed section 2050(c) may illegally circumscribe the statutory remedies available to a petitioner. CASA cites case law purporting to hold that the State Board may not create additional obstacles to review of regional board matters. Asuza Land Reclamation Co. v. Main San Gabriel Basin Water Master, (1997) 52 Cal.App.4th 1165, 1211-1212.

Response: The State Board disagrees. Proposed section 2050(c) does not restrict the statutory remedies available to a petitioner. The proposed regulation is consistent with general administrative and judicial practice of requiring that a party seeking review from an appellate body first raise any concerns before the trial court or regulatory entity acting as fact-finder. Petitioners retain the statutory right to request State Board review of any action or inaction of a regional board. Case law cited by CASA does not appear to support the argument that the State Board is restricted from requiring that regional boards first be allowed to consider a petitioner's basis for objecting to the regional board action or inaction.

Comment No. 13: WSPA and BACWA contend that proposed section 2050(c) must clarify that reasonable and adequate notice and opportunity to comment is required at the regional board level.

Response: The State Board disagrees. The phrase "notice and opportunity for comment" describes a specific standard to be met for certain regional board actions. If required notice and opportunity for comment are not reasonable and adequate, that standard is not met. The suggested additions are redundant.

Comment No. 14: CASA and BACWA contend that proposed section 2050(c) be amended to allow an exception where additional evidence is allowed pursuant to section 2050.6. CASA and BACWA argue that this language is necessary to specify that new legal argument must be allowed to respond to the subsequent level of review.

Response: The change is unnecessary. The proposal would provide a back door that would allow petitioners to raise new issues and objections not presented to the regional board. Because the standard for submission of additional evidence under proposed section 2050.6 would encompass those situations where evidence could not have been presented to the regional board or was improperly excluded, contentions associated with that evidence should meet the exception set forth in proposed section 2050(a)(9), as amended, providing for substantive issues and objections that a petitioner was unable to raise before the regional board. Creating a broader exception would defeat the purpose of including any limitation on contentions.

Comment No. 15: WSPA strongly supports the proposed addition of filing petitions by facsimile or e-mail.

Response: Comment noted.

Comment No. 16: WSPA proposes adding language to section 2050(b) clarifying that deadlines on filing and serving petitions be effective by close of business thirty days following the date of the action or inaction upon which the petition is based.

Response: The State Board generally agrees that the suggested change is helpful in clarifying applicable deadlines but proposes more exact wording. Therefore, proposed section 2050(b) is

amended to read: “. . . The petition must be received by the state board no later than 5:00 p.m. 30 days following the date of action or inaction by the regional board . . .”

Comment No. 17: CASA and BACWA contend that proposed section 2050.5(a) should be amended to require that responses to petitions include citations to documents or a transcript of the regional board hearing where appropriate, echoing the requirement introduced in proposed section 2050(a)(7) for petitions.

Response: The State Board agrees that responses to petitions should include the same citation requirement. Therefore, proposed section 2050.5(a) is amended to read:

(a) Upon receipt of a petition which that complies with section 2050 the state board shall give may either dismiss the petition pursuant to section 2052, or may provide written notification to the petitioner, informing the discharger, (if not the petitioner), the regional board, and other interested persons that they shall have 2030 days from the date of mailing such notification to file a response to the petition with the state board. ~~Respondents to petitions shall also send copies of their responses to the petitioner and the regional board, as appropriate.~~ The regional board shall file the administrative record specified in Section 2050(a)(10) within this 2030-day period., including a copy of the tape recording of the regional board action, or a transcript, if available. Responses to petitions and any other submissions shall be served concurrently upon the petitioner, the discharger (if not the petitioner) and the regional board, by any method listed in Section 2050(b). Any points and authorities filed in response to the petition shall include citations to documents or the transcript of the regional board hearing where appropriate. Any response which requests a hearing by the state board shall comply with Section 2050(b). The time for filing a response or the administrative record may be extended by the state board. Additional submissions will be allowed only upon written request and at the discretion of the state board.

Comment No. 18: CASA and BACWA would alter proposed section 2050.5(a) to change any reference to “notification” to “notice.”

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

The State Board disagrees. “Notice” tends to connote a general standard, while the regulation refers to the mailing of a particular document providing notice.

Comment No. 19: CASA and BACWA contend that proposed section 2050.5(a) should be amended to include a statement that, as an alternative to the standard notification soliciting comments on a complete petition, the State Board may set up a formal briefing schedule following receipt of the administrative record.

Response: *Although this comment relates to a section that the State Board proposes to amend, the comment does not deal with any specific change proposed by the State Board. Rather, the comment is directed toward the current language of Title 23. Therefore, no justification is required to reject these comments. Regardless, the State Board will respond to the new regulatory provision proposed by these parties.*

The amendment is unnecessary. The regulation describes the general procedure for water quality petitions, and in no way effects State Board discretion to alter that procedure by providing for a briefing schedule if it so chooses.

Comment No. 20: CASA and BACWA propose that section 2050.5(a) be split into two sections, with the latter section covering preparation of the administrative record by the regional board. CASA proposes that this new section require that pages of the administrative record be Bates-stamped to facilitate citation and that the regional board be required to provide a copy of the record to the petition upon request.

Response: *Although this comment relates to a section that the State Board proposes to amend, the comment does not deal with any specific change proposed by the State Board. Rather, the comment is directed toward the current language of Title 23. Therefore, no justification is required to reject these comments. Regardless, the State Board will respond to the new regulatory provision proposed by these parties.*

The State Board disagrees. Although Bates-stamping may be helpful, citation should be to individual documents rather than to the administrative record generally, so the State Board does not propose requiring it in the regulations. Because all documents in the administrative record are available pursuant to the Public Records Act, the State Board does not propose requiring that the regional board in all cases bear the expense of providing a copy of the administrative record to the petitioner.

Comment No. 21: CASA, BACWA and the Districts argue that proposed section 2050.5(a), by removing mandatory written notification of a complete petition, will create confusion as to timelines for action on a petition and resolution of stay requests. CASA proposes that the State Board retain the notification of a complete petition as a requirement, but separate it from the notice inviting responses to the petition. CASA further proposes that the notification of a complete petition, separated from solicitation of comments, be required within 10 business days of filing a petition with the State Board. BACWA offers the same proposal with the time period narrowed to 5 business days.

Response: The State Board agrees that the proposed language in section 2050.5(a) may be problematic with respect to timelines for action on a petition and stay request. Therefore, the State Board has determined that the proposed regulation should be tailored to require the written notification unless the State Board determines that the petition is to be dismissed pursuant to section 2052. Therefore, proposed section 2050.5(a) is amended to read:

“Upon receipt of a petition ~~which~~ that complies with Section 2050, the state board shall give ~~may~~ either dismiss the petition pursuant to Section 2052, or may provide written notification to the petitioner . . .”

This modification provides for only two alternatives, dismissing or mailing the otherwise mandatory notification, and the State Board retains the ability to dismiss a complete petition without soliciting comments from all interested parties where it has determined that the petition fails to raise issues that are substantial and appropriate for State Board review.

The State Board believes that the alternative proposed by CASA and BACWA is unworkable. Providing written notification of receipt of a complete petition without soliciting comments from interested parties would give a fair indication that the State Board is considering dismissal and would encourage petitioners to seek justification or opportunity to amend petitions. The State Board, while still engaged in its review, should not be under restrictions that would prematurely communicate its intended action. Moreover, State Board staff is unable to assign, review, and respond to petitions within the timeframes that CASA and especially BACWA propose.

Comment No. 22: CASA and BACWA contend that proposed section 2050.5(c) should clarify that the State Board may review a regional board’s action or failure to act on its own motion in any circumstance, not just where the time limits for formal disposition of a petition have lapsed.

Response: The State Board agrees that this should be clarified. Therefore, proposed section 2050.5(c) is amended to read:

(c) The state board may, on its motion, review a regional board’s action or failure to act ~~if for any reason, including lack of formal disposition is not made by~~ the state board within the time limits provided in (b).

Comment No. 23: Hans Herb comments that the process for filing “protective petitions” should be formalized, to address the problem presented by disputes arising more than thirty days following the issuance of a regional board order. Mr. Herb cites Water Code section 13330(c), which provides that, where no party petitions for writ of mandate within thirty days of a State Board decision or order or a denial of State Board review, a decision or order of the State Board or a regional board shall not be subject to review by any court. The finality of this Code provision, it is argued, requires that a procedure be available to file petitions even where there is no current active dispute.

Response: This concern is addressed by proposed section 2050.5(d), which allows action on a petition to be held in abeyance at the petitioner’s request. A party intending to fully comply with a regional board order may file a petition with the State Board, simultaneously requesting that action on the petition be held in abeyance. This has the effect of a “protective filing,” since the petitioner can request that the petition be activated at any time that an active dispute arises. The Water Code section cited by Mr. Herb relates solely to situations where a petition has been filed and the State Board has in

some way resolved the petition, either by issuing a decision or order, or by denying review. That Code section does not illustrate any manner in which the proposed

Title 23, section 2050.5(d) would fail to afford the desired precautionary effect described in Mr. Herb's comment.

Comment No. 24: CASA and BACWA contend that proposed section 2050.5(d)(2) should be altered to provide that a regional board's ground for objecting to a petition being held in abeyance must be reasonable. WSPA asks that the section be deleted, citing similar concerns at a regional board's unconditional veto over abeyance requests.

Response: While the State Board does not anticipate unreasonable objections to the abeyance process from regional boards, the State Board is nonetheless amenable to clarifying this standard. Therefore, proposed section 2050.5(d)(2) is changed to read:

Petitions will may be held in abeyance only if unless the regional board provides reasonable grounds for objection does not object. For petitions challenging the assessment of administrative civil liability or penalties, written agreement from the regional board is required.

Comment No. 25: CASA and BACWA comment that the proposed deletion of section 2050(b), as it currently appears in Title 23, is acceptable "assuming the changes to section 2050.6 are maintained and adopted." Otherwise, CASA opposes deletion of that language.

Response: The State Board continues to propose the language set forth in proposed section 2050.6. It is unclear whether CASA and BACWA's comment refers to incorporation of their suggested changes to section 2050.6, which are addressed below.

Comment No. 26: CASA comments that the broad nature of State Board review requires that a petitioner's right to present additional evidence not be unduly circumscribed.

Response: No statute or regulation gives petitioners the unfettered right to supplement the record with additional evidence. The State Board, as the decision-making authority, must retain the ability to limit additional submissions from petitioners who have not made a specified showing, in order to maintain control over the proceeding. The proposed section 2050.6, dealing with supplemental evidence, provides this ability and the standards with which to implement it.

Comment No. 27: CASA and the Districts argue that proposed sections 2050.6 and 2064 would limit a petitioner's opportunity to present evidence while inappropriately allowing the State Board the unbridled opportunity to consider evidence outside the record.

Response: To the extent that CASA and the Districts contend that 2050.6 should allow petitioners an unrestricted right to present additional evidence, the State Board does not agree, for the reasons stated in the response to Comment No. 26. The concern expressed by CASA and the Districts that previously proposed section 2064 will allow the State Board to consider evidence outside the record is unfounded, since section 2064, both in its current and previously proposed form, serves to define the

scope of the record, not to allow the State Board to sidestep the record when it so chooses. Regardless, the State Board has determined that the proposed

additions and deletions to section 2064 are unnecessary. As set forth in the Update to the Initial Statement of Reasons, the State Board now proposes only a minor reference correction to section 2064, such that the regulation will now read, as amended:

When a state board hearing is held the decision of the state board will be based on that evidence and testimony in the record of the hearing. When no hearing is held, the decision of the state board will be based on the record before the regional board. Except that in either case the record may be supplemented by any other evidence and testimony accepted by the state board pursuant to section 2050.6~~2066~~. Upon the close of a hearing, the presiding officer may keep the hearing record open for a definite time, not to exceed thirty days, to allow any party to file additional exhibits, reports or affidavits.

Section 2066 previously served to provide the process by which a petitioner could request additions to the administrative record. Because that process is now contained in section 2050.6, the reference to section 2066 should be corrected.

Comment No. 28: WSPA contends that proposed section 2050.6 is inconsistent with section 2064 in that 2050.6 sets forth a standard for submission of supplemental evidence only when that evidence was not presented to the regional board or was improperly excluded by the regional board, while section 2064 does not similarly restrict the State Board. WSPA also argues that section 2050.6 could limit the ability of an interested party to contradict late additions to the record by the regional board, as well as limiting the ability of an interested party to contest evidence included in the record late in the permit adoption process.

Response: The State Board does not agree. Proposed section 2050.6 concerns the showing to be made by parties requesting that the State Board supplement the record with evidence that was not considered by the regional board and was not made a part of the regional board's administrative record. The limitations placed on petitioners seeking to introduce new evidence are necessary to enable the State Board to maintain control over the administrative record, as illustrated in the response to Comment No. 26. Section 2064, by contrast, defines the scope of the record before the State Board. To the extent that WSPA objects to language contained in the previously proposed version of section 2064, the State Board has determined that the previously proposed amendments to that section are unnecessary, as set forth in the Update to the Initial Statement of Reasons.

The State Board does not agree that the provisions of proposed section 2050.6 limit or restrict an interested party's ability to contest evidence introduced late in the regional board's process. If relevant evidence becomes available that was unavailable during the regional board proceeding or was excluded by the regional board, the petitioner will be able to make the proper showing for State Board consideration of that evidence. If a petitioner seeks to exclude evidence improperly included in the regional board record, nothing in proposed section 2050.6 precludes a petitioner from raising that issue. These scenarios would also cover the situation cited by WSPA, where a regional board introduces late

evidence without affording a proper opportunity for interested parties to evaluate and contest that evidence.

Comment No. 29: CASA and BACWA request that section 2050.6(a) be amended to apply restrictions on submitting supplemental evidence to the regional board as well as other parties.

Response: The State Board agrees that regional boards, as parties to petitions, should be subject to the same process for submitting supplemental evidence. Therefore, proposed section 2050.6(a) is amended to read:

(a) If any person requests that the state board consider evidence not previously provided to the regional board, that person shall provide a statement that additional evidence is available that was not presented to the regional board or that evidence was improperly excluded by the regional board. Any request by a regional board to present additional evidence shall comply with (a)(1) through (3).

Comment No. 30: WSPA requests that proposed section 2050.6 be amended to reinsert the last sentence of the current section 2064, which the State Board was previously proposing to delete: “Upon the close of a hearing, the presiding officer may keep the hearing record open for a definite time, not to exceed thirty days, to allow any party to file additional exhibits, reports or affidavits.”

Response: The State Board has determined that the previously proposed amendments and deletions in section 2064 are unnecessary. Therefore, the final sentence of section 2064 will continue in effect.

Comment No. 31: WSPA, CASA, and BACWA request that the term “contentions” as used in proposed section 2050.6(b) be replaced with “substantive issues or objections,” as in comments on proposed section 2050(a)(9).

Response: The State Board disagrees. Use of the term “contentions” is appropriate here. The reasons advanced for substitution of the terms in comments on proposed section 2050(a)(9) do not appear to apply to use of the term in proposed section 2050.6(b). The term, as used generically here, only describes what the petitioner is already presenting and therefore could not be construed as a method of excluding any arguments the petitioner seeks to support.

Comment No. 32: WSPA contends that proposed section 2052(b) should be deleted, arguing that the decision of whether a petition for review raises a substantial issue appropriate for review should be made by the State Board.

Response: The State Board disagrees. WSPA’s comment essentially seeks to require the State Board itself to consider all water quality petitions, including those ultimately dismissed. This would be contrary to current practice, under which the State Board’s Executive Director, pursuant to delegated authority, may act in the State Board’s stead by dismissing petitions that fail to raise issues that are substantial and appropriate for State Board review. Because the State Board may receive hundreds of water quality petitions each year, it is unreasonable to require formal State Board action on each and every petition. State Board Resolution 2002-0104

delegates authority to dismiss water quality petitions for failure to raise issues that are appropriate for State Board review.

Comment No. 33: CASA and BACWA contend that proposed section 2052(a)(2) should be amended to specify that a review of only part of the administrative record should be “pertinent,” arguing that the current language would allow the State Board to subvert due process by reviewing only documents adverse to a petition.

Response: The State Board disagrees. The State Board is required to observe due process requirements in its review of petitions. That requirement is not altered by virtue of the language in the proposed regulation.

Comment No. 34: CASA and BACWA request that proposed section 2052(b) be amended to state that the executive director’s refusal to review a regional board’s action or failure to act must be in writing, dated and served upon the petitioner, regional board, discharger (if not the petitioner) and shall constitute a final action of the state board for purposes of Water Code section 13330.

Response: The change is unnecessary. The amendments proposed would re-state laws, standards, and processes already in place independent of the regulations. State Board procedures require that correspondence and actions be dated, and any deviation is solely due to error. A State Board order or other decision made on behalf of the State Board is a final decision of the State Board for purposes of the Water Code section described, whether or not this is repeated in the language of the regulations.

NOTE: The following two comments relate to a proposal that the State Board institute an automatic stay of certain regional board actions that are the subject of State Board petitions. Therefore, these comments are presented together and answered in a joint response.

Comment No. 35: CASA, BACWA, and the Districts ask that proposed section 2053(c) be amended to include a limited automatic stay to NPDES permit holders, in order to shield such permit holders against mandatory minimum penalties and third party lawsuits.

Comment No. 36: Archer Norris also seeks an automatic stay of contested provisions of an order if it would require the discharger to expend any funds that would not be required in the event that the order is set aside by the State Board. Archer Norris proposes that the automatic stay would only be defeated if the State Board’s Executive Director determines that the potential for irreparable harm to the public interest outweighs the potential harm to the discharger.

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

The State Board believes that an automatic stay is inadvisable. Among other things, such a stay would provide greater incentive for dischargers to file frivolous petitions. By requiring the

regional boards to defend a petition before a permit can become enforceable, the State Board would frustrate the regional boards' ability to protect water quality and would place a greater strain on limited agency resources while worsening the existing permit backlog.

State Board staff have considered various methods of expediting stay requests and minimizing harm to dischargers subject to orders that may ultimately be set aside. The proposals offered would fundamentally alter the balance of competing interests by placing the needs of dischargers over concerns for protecting the state's waterways. The State Board believes that the current regulations are appropriate and should not be altered in the manner proposed.

Comment No. 37: Archer Norris, CASA, and BACWA ask that the current regulations be altered to lower the standard for granting a stay of a regional board action. The proposal would change the showing from a requirement of "proof" to one of "evidence."

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

The State Board disagrees with the proposal. As stated above in the response to Comments No. 35 and 36, the purpose of the current standard required for a stay is to ensure that the public interest in water quality is protected, even where a petitioner claims that he or she will suffer harm. The State Board believes that lowering the standard required for a stay would subvert that purpose.

Comment No. 38: CASA and the Districts ask that the current regulations be amended to implement a balancing test whereby parties requesting a stay would no longer be required to show lack of harm to other interested parties, but would merely be required to show that harm to the petitioner outweighs harm to other parties.

Response: *This comment does not relate to any change proposed by the State Board. Because the comment is based upon the current language of Title 23 rather than a proposed amendment, no justification is required for rejecting these comments. However, State Board will respond to the new regulatory provision proposed by these parties.*

The State Board disagrees with the proposal. See, response to Comments No. 35 and 36 above.

Comment No. 39: SRCSD comment that a petitioning party "cannot realistically . . . be expected to present its entire 'case' in a thorough and cogent manner a mere thirty days from the date of Regional Board action or inaction. It is important, then, to preserve the ability to treat the appeals as a normal appeal proceeding."

Response: Although this comment appears aimed at the same concerns expressed regarding the need to allow amended filings and submissions, it is not immediately clear what is meant by “the ability to treat the appeals as a normal appeal proceeding.” Therefore, the State Board finds that

no changes are warranted on the basis of this comment. It should be noted that petitions to the State Board are not properly termed “appeals” because that term connotes review as a matter of right, whereas the State Board has discretion to deny petitions for review. See, *People v. Barry* (1987) 194 Cal.App.3d 158, 171-72.

Comment No. 40: CASA and BACWA ask that section 2053 require that a decision of the State Board on a request for stay be in writing, dated, served upon all parties, and constitute a final action of the State Board for purposes of Water Code section 13330.

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

As with the response to Comment No. 34, this comment proposes to state requirements and standards that already exist independent of the proposed language.

Comment No. 41: CASA and BACWA ask that proposed section 2066 be amended to provide that comments at the workshop meeting be based on evidence in the record and upon legal argument, except in accordance with section 2050.6.

Response: The change is unnecessary. Any evidence considered by the State Board pursuant to 2050.6 would constitute an addition or supplementation to the record. Therefore, the language of the proposed regulation would encompass such evidence.

Comment No. 42: CASA and BACWA propose that section 2067 be amended to add a section providing that the State Board’s decision on a petition is to be in writing, dated, served upon all parties, and shall constitute final action of the State Board for purposes of Water Code section 13330. CASA and BACWA state that there have been orders issued by the State Board that were undated.

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

The change is unnecessary. As stated above, State Board procedures require that correspondence and actions be dated, and any deviation is solely due to error. See, response to Comment No. 34.

Alternatives to the Regulation/Small Business Impact

The State 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 Board did not identify any alternatives that would lessen any adverse impact on small businesses. The State 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 Board and does not impose any obligations on the business community or otherwise affect the cost of doing business.