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**VIA E-MAIL AND U.S. MAIL**

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*Proposed Amendments to the California Code of Regulations Title 23. Waters. Division 3. State Water Resources Control Board. Chapter 6. Rules Governing Review by State Board of Action or Failure to Act by Regional Board*

Dear Mr. Regan:

The City of San Diego (City) appreciates the opportunity to comment on the proposed amendments to the State Water Resources Control Board (State Board) administrative petition regulations, as announced in the Notice of Proposed Rulemaking dated February 2014. The City generally supports the proposed changes as applied to petitions filed after the effective date of the new regulations because the current regulations are unclear and can lead to unreasonable delay in resolving petitions. Timely resolution of petitions is essential to ensure a meaningful opportunity for administrative review of regional board decisions, which have significant impacts on the affected parties and the public at large. The City applauds the State Board for initiating this rulemaking to expedite State Board review of petitions.

The City has serious concerns, however, about the application of these changes to petitions filed prior to the effective date of the new regulations. The State Board may not apply the new regulations retroactively because doing so would impair vested rights. The City is especially concerned with the potential effect of retroactive application of the proposed amendments on two petitions filed by the City: (1) regarding approval of increased discharge of groundwater into the City's municipal separate storm sewer system (MS4)[1]; and (2) regarding the San Diego Regional MS4 Permit.[2]

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[1] Petition No. A-2222, regarding San Diego Regional Water Quality Control Board Resolution No. R9-2012-0045, filed July 12, 2012.

[2] Petition No. A-2254(p), regarding San Diego Regional Water Quality Control Board Order No. 2013-0001, filed June 7, 2013.

The first petition challenged the San Diego Regional Water Quality Control Board's approval of groundwater discharge with elevated levels of total dissolved solids into the City's MS4 over the City's objection and in violation of the applicable groundwater discharge permit. This petition is the subject of a pending lawsuit in Riverside County Superior Court, which the discharger now asserts should be dismissed based on this rulemaking.[3] While the court has rejected the discharger's arguments to date, dismissal of the lawsuit based on retroactive application of these regulations could leave the City without any meaningful recourse.

The second petition challenges several provisions of the 2013 San Diego Regional MS4 Permit, most significantly, the receiving water limitations provisions. Under recent federal case law,[4] these provisions subject the City and other copermittees to immediate strict liability for exceeding water quality standards that the regional board admits cannot be met during the permit term. Timely resolution of this petition is of crucial importance to the City. If the proposed amendments are applied to this petition, however, then it would be sent to the back of the line just because it happened to be filed in 2013. Under the proposed regulations, petitions filed in 2013 would be processed last, as the State Board would have one year from the effective date of the amended regulations to even begin the review process. By contrast, earlier-received petitions would be acted on within 120 to 240 days of the effective regulations, while later-received petitions would be acted on within 90 days of receipt.

The retroactive application of the proposed amendments to petitions that were filed prior to the effective date of the amendments raises serious constitutional concerns. To avoid these concerns, the proposed amendments should be applied prospectively only, or only applied retroactively with consent of petitioners.

## I. THE CITY SUPPORTS THE PROPOSED AMENDMENTS TO SECTIONS 2050 AND 2050.5(A)-(E) BECAUSE THE CURRENT REGULATIONS ARE UNCLEAR AND CAN LEAD TO UNREASONABLE DELAY

The City generally supports the proposed changes to Sections 2050 and 2050.5(a)-(e) of Title 23 of the California Code of Regulations. The current regulations are unclear, causing petitioners to "lack certainty" about when the State Board will take affirmative action on their petitions, if at all.[5] The current regulations provide that upon receipt of a petition, the State Board "*may* either dismiss the petition pursuant to section 2052" for failure to raise a substantial issue, "or *may* provide written notification to the petitioner" and other interested persons that they have 30 days to respond to the petition.[6] No timeframe is included within which the State Board is required to take either of these actions. As a result, the State Board has failed to take either action on a large number of petitions. There are over 450 "open" water quality petitions listed on the

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[3] *City of San Diego v. California Regional Water Quality Control Board, San Diego Division*, County of Riverside Superior Court Case No. RIC 1313331.

[4] *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d 1194 (9th Cir. 2013).

[5] Notice of Proposed Rulemaking at 3.

[6] 23 Cal. Code Regs. § 2050.5(a) (emphasis added).

State Board's website, the oldest of which date back to 2005.[7] The Initial Statement of Reasons attributes this backlog to a lack of resources "to process every petition quickly."[8]

The State Board's inaction has deprived many petitioners of any meaningful administrative appeal. In at least one case, the State Board's inaction on a petition has raised confusion as to how administrative remedies are exhausted prior to challenging a regional board action in court. The discharger in that case has taken the position that if the State Board never took either of the actions in Section 2050.5(a), then exhaustion of administrative remedies cannot have occurred.[9] Thus, the discharger has attempted to use the State Board's inaction to block timely judicial review.[10]

To prevent this kind of confusion and administrative "black hole" going forward, the proposed amendments would add Section 2050.5(e), requiring the State Board to issue the notification described in Section 2050.5(a) within 90 days of receipt of a petition, or else the petition is deemed "dismissed by operation of law." As noted in the Initial Statement of Reasons, "[t]he proposed amendments will provide petitioners with certainty regarding the timing and status of their petition, so that petitioners can choose whether to seek judicial review."[11] The City supports this change as applied to petitions filed after the effective date of the amended regulations.

## II. SECTION 2050.5(F)-(G) IS RETROACTIVE REGULATION THAT VIOLATES DUE PROCESS AND EQUAL PROTECTION

Proposed new Section 2050.5(f)-(g) would establish a timeframe for the State Board to act on petitions not held in abeyance that were filed prior to the effective date of the amendments. The timeframe for the State Board to issue the written notification described in Section 2050.5(a) depends on when the petition was filed, but in all cases is longer than the 90-day timeframe established for petitions filed after the effective date of the amendments. The State Board would have 120 days from the effective date of the amendments to provide written notification for petitions filed in 2010 and earlier, 240 days for petitions filed from 2011-2012, and one year for petitions filed from 2013 until the effective date of the amendments.

These are new requirements that will affect substantive rights of petitioners. Retroactive application of these provisions would be unconstitutional.

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[7] http://www.swrcb.ca.gov/public_notices/petitions/water_quality/petitions.shtml, *last visited* Apr. 14, 2014.

[8] Initial Statement of Reasons at 2.

[9] *City of San Diego v. California Regional Water Quality Control Board, San Diego Division*, County of Riverside Superior Court Case No. RIC 1313331.

[10] The court has not adopted this interpretation and has allowed the lawsuit to proceed under the current regulations.

[11] Initial Statement of Reasons at 2.

### A. Section 2050.5(f)-(g) Violates Due Process

By its plain language, Section 2050.5(f)-(g) is retroactive regulation because it would apply to petitions filed prior to the effective date of the amendments. A new regulation may not be applied retroactively where it deprives a person of a vested right without due process of law.[12] An existing cause of action is generally recognized as a vested right that cannot be disturbed by retroactive application of a new law.[13] By the same reasoning, petitioners also have vested rights in their pending petitions. These vested rights would be impaired by Section 2050.5(f)-(g), which likely would result in mass dismissal of hundreds of petitions and would jeopardize at least one pending lawsuit.

Even a new regulation that would normally be considered "procedural" may affect substantive vested rights "where the legal effects of past events would be changed."[14] Likewise, "the legislature may not, under pretense of regulating procedure or rules of evidence, deprive a party of a substantive right such as a good cause of action or an absolute or a substantial defense."[15] In determining whether a regulation may be applied retroactively without violating due process, courts weigh two groups of factors: (1) the significance of the state interest served by the regulation and the importance of the retroactive application of the regulation to serve that interest; and (2) the extent and legitimacy of reliance upon the former regulation, the extent of actions taken on the basis of that reliance, and the extent to which retroactive application of the new regulations would disrupt those actions.[16]

As applied to Section 2050.5(f)-(g), these factors weigh heavily against retroactive application. The state interest appears to be limited to administrative convenience. The Initial Statement of Reasons explains, "The 120-day, 240-day, and one-year periods are necessary because this is the minimum amount of time necessary to evaluate the existing back log of petitions for completeness on a first-in first-out basis."[17] Setting aside for a moment the question of whether it is reasonable or fair for the State Board to take up to a year to review petitions "for completeness" that have already been pending for over a year, the state's interest in its own administrative convenience is relatively weak. While administrative convenience is a legitimate state interest, it is not a particularly strong one.[18] Likewise, the state interest served by applying these new regulations retroactively appears to be the administrative convenience of clearing the "back log" of petitions that the State Board has allowed to accumulate over the years.

On the other hand, petitioners who filed prior to the effective date of the new regulations, especially those who filed before the amendments were proposed in February 2014, have taken significant actions in reliance on the current regulations that may be disrupted by imposing the

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[12] U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7; *Strauss v. Horton*, 46 Cal. 4th 364, 473 (2009); *As You Sow v. Conbraco Indus.*, 135 Cal. App. 4th 431, 459 (2005) (noting that the rules regarding retroactivity of legislation apply equally to administrative regulations).

[13] *As You Sow*, 135 Cal. App. 4th at 461, citing *Morris v. Pacific Elect. Ry. Co.*, 2 Cal. 2d 764, 768 (1935).

[14] *Id.* at 462-63.

[15] *Morris*, 2 Cal. 2d at 768.

[16] *In re Marriage of Fellows*, 39 Cal. 4th 179, 189 (2006).

[17] Initial Statement of Reasons at 3.

[18] *Woods v. Horton*, 167 Cal. App. 4th 658, 675 (2008) (noting that "administrative convenience" is an inadequate state interest to withstand strict scrutiny).

proposed amendments. Based on the lack of resources noted in the rulemaking materials,[19] it is reasonable to assume that the State Board does not intend to deal with its "back log" by acting on the pending petitions, which it could have done already without amending the regulations, but by letting the time periods in Section 2050.5(f)-(g) expire in a large number of cases. This would result in mass dismissal of hundreds of petitions, leaving these petitioners without any meaningful administrative appeal.

While the City is not familiar with the circumstances of all of the 450-plus "open" petitions, the City's own experience is one example of the extent of actions taken in reliance on the existing regulations and the extent to which the new regulations may disrupt those actions. The City legitimately relied on the current regulations in determining it had exhausted its administrative remedies prior to filing a lawsuit to challenge the approval of a discharge into its MS4. Filing this lawsuit was a significant action in reliance on the current regulations, for which the City incurred substantial costs. The City has a vested right in this cause of action. The court has rejected the discharger's arguments that the City failed to exhaust administrative remedies under the current regulations. In an attempt to convince the court to reconsider its ruling on this matter, the discharger has argued that the City's lawsuit must be dismissed based on this rulemaking, presumably because application of the new regulations would transfer jurisdiction over the petition from the court -- where the lawsuit has already been pending for nearly a year -- back to the State Board. If the proposed amendments are applied to the City's petition on this matter and the court accepts the discharger's arguments, the court may dismiss the City's lawsuit, resulting in the continued discharge of contaminated groundwater into the City's MS4. Thus, application of the proposed amendments to the City's petition would significantly disrupt the City's actions taken in reliance on the current regulations.

### B. Section 2050.5(f)-(g) Violates Equal Protection

Equal protection under the federal and state constitutions requires persons similarly situated to receive like treatment.[20] The proposed classification of petitions based on filing date does not involve inherently suspect classifications or fundamental rights; therefore, rational basis review applies. Rational basis review requires that a regulation have a legitimate purpose, and that the governmental decision makers reasonably believe that the classification would promote that purpose.[21] The classification must not be arbitrary, and must have a substantial relationship to the state interest to be achieved.[22]

Section 2050.5(f)-(g) creates three classes of petitioners based on the date each petition was filed: (1) 2010 and earlier; (2) 2011 through 2012; and (3) 2013 through the effective date of the new regulations. The State Board would act on petitions filed before the effective date of the new regulations on timeframes ranging from 120 days to one year depending on these classifications. The purpose of Section 2050.5(f)-(g) is to "evaluate the existing back log of petitions for completeness on a first-in first-out basis."[23] The Initial Statement of Reasons

[19] Notice of Proposed Rulemaking at 3.

[20] U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7; *Yoshioka v. Superior Court*, 58 Cal. App. 4th 972, 986 (1997).

[21] *Yoshioka*, 58 Cal. App. 4th at 986.

[22] *People v. Health Laboratories of North America, Inc.*, 87 Cal. App. 4th 442, 447-48 (2001).

[23] Initial Statement of Reasons at 3.

indicates that "[t]he 120-day, 240-day, and one-year periods are necessary because this is the minimum amount of time necessary" to evaluate the pending petitions for completeness.[24]

The State Board's desire to clear its docket of pending petitions equates to administrative convenience, which is recognized as a legitimate state purpose.[25] The classifications, however, appear to be arbitrary and lacking a substantial relationship to the state interest of administrative convenience. As an example, a petition filed the day before the amendments become effective would not be acted on for one year under Section 2050.5(f)(3), while a petition filed two days later would be acted upon within 90 days under Section 2050.5(e). Perhaps even more unfairly, a petition filed in 2013, which may have been already pending for a year by the effective date of the new regulations, may sit idle for another year after the new regulations are adopted. The City's petition on the San Diego Regional MS4 Permit would be placed in this predicament. These scenarios do not support the stated purpose of evaluating petitions "on a first-in first-out basis." There is no substantial relationship between the disparate treatment of the classifications and the state purpose, so these classifications do not withstand rational basis review.

As there is no way to apply Section 2050.5(f)-(g) in its current form prospectively to avoid due process and equal protection issues, the State Board should not adopt these amendments. If the State Board desires to clear its docket of pending petitions, there are other alternatives that would be more equitable and would avoid constitutional concerns. One way to avoid due process and equal protection concerns would be to obtain consent from petitioners prior to applying the regulations to them retroactively.[26] For example, the State Board could adopt Section 2050.5(f)-(g) without infringing on constitutional rights if the following change is made to Section 2050.5(f):

(f)With consent of the petitioner, fFor petitions received by the state board . . . [remainder unchanged].

## III. A TIMEFRAME SHOULD BE PROVIDED FOR THE STATE BOARD TO PROVIDE NOTICE THAT A PETITION IS DEFECTIVE UNDER SECTION 2051(A)

The City suggests adding a timeframe in which the State Board is required to provide notice that a petition is defective. As currently proposed, there is no such timeframe in Section 2051(a) besides "upon receipt," which is the same uncertain language that has created the need for this rulemaking when used in Section 2050.5(a).

The lack of a certain timeframe makes unclear how the notification of a defective petition under Section 2051(a) interacts with notification of the date the State Board received the petition in Section 2050(d), and the 90-day period from the date of receipt in which the State Board is required to send out the written notification under Section 2050.5(e) or else the petition is deemed dismissed. One reading of these provisions would allow the State Board to take no

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[24] *Id.*

[25] *Woods*, 167 Cal. App. 4th at 675.

[26] *See McKeon v. Hastings College*, 185 Cal. App. 3d 877, 888 (1986) (noting that a party's acceptance of retroactive application of new rules waives the protection of the general rule against retroactivity).

action on allegedly defective petition indefinitely. In order to achieve the stated purpose of the proposed amendments to "provide petitioners with certainty regarding the timing and status of their petition,"[27] Section 2051(a) should be revised to require the State Board to send notice of a defective petition within a certain timeframe of receiving the petition.

The City suggests the following change to Section 2051(a):

> ~~Upon~~ Within 30 days of receipt, as indicated in the notice provided pursuant to subdivision (d) of section 2050, of a petition that does not comply with Section 2050, the state board shall notify the petitioner of the manner in which the petition is defective and the time frame within which an amended petition may be filed . . . [remainder unchanged].

## IV. CONCLUSION

While the City generally supports the proposed changes to petitions filed after the effective date of the new regulations, the retroactive application of new regulations to petitions filed before the effective date raises serious constitutional concerns. The City looks forward to participating in the public hearing on this rulemaking.

Sincerely,

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By _____
Heather L. Stroud
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[27] Initial Statement of Reasons at 2.