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Tim Regan
Office of Chief Counsel
State Water Resources Control Board
P. O. Box 100
Sacramento, CA 95812-0100
Tim.regan@waterboards.ca.gov

Re: **Proposed Amendments to Sections 2050, 2050.5 and 2051 of Chapter 6 of Division 3 of Title 23 of the California Code of Regulations.**

Dear Mr. Regan:

I am both an attorney and a farmer. I am submitting herewith my comments to the State Water Board's proposed amendments to the hereinabove sections of Title 23 of the California Code of Regulations ("CCR").

As you well know, Section 13320 of the California Water Code confers upon an aggrieved person the right to file a Petition for Review of a Regional Board's action or inaction, provided such person files the Petition within 30 days after the Regional Board either acts or fails to act.

Section 13330 of the Water Code states that the State Board must make a *decision* regarding a Petition for Review before the aggrieved person can move on and have the State Board's *decision* reviewed by the Superior Court by filing a Petition for a Writ of Mandate. There is nothing in section 13320 that suggests that it is permissible for the State Board to simply "deem a petition dismissed." The Board has no authority to re-write the Water Code to avoid its affirmative statutory duty.

If the State Board is indisposed to perform the appellate functions assigned to it by section 13320, then I submit that the proper remedy is to ask the State Legislature to change the statute. Without such a change, I believe your proposed rule change does nothing to unburden yourself from the responsibilities placed upon the State Board by that section.

To put these issues into broader context, I looked at the State Board's website, at its list of Water Quality Petitions for Review. I assume that all of these petitions are pending decision by the State Board. As of today, there are 485 petitions listed, the oldest having been filed in March, 2005, *over nine years ago*.

A friend of mine filed a Petition for Review in November, 2011. At that time we counted 315 petitions posted ahead of his. Two and a half years later, his petition has not been acted upon by the State Board, and we still count 315 petitions posted ahead of his. Therefore, based on your

website, it would appear that the State Board has not acted upon any Water Quality Petitions for Review during the last two and a half years. Indeed, it does not appear that the State Board has acted on very many petitions at all to allow a backlog of 485 petitions to accumulate since 2005.

This is shameful. Since Water Code Section 13320 charges the State Board with this appellate function, its inaction to the extent reflected by the facts related above is inexcusable. Failure to deny or dismiss a Petition stands in the way of an aggrieved person moving on the next appellate recourse afforded by Water Code Section 13330. While the statute and the regulations do not prescribe any time limit for the State Board to act on these Petitions, I suspect it was the intent of the Legislature that the State Board was to act on them in a *timely* manner.

This is no small matter and should not be dismissed with a mere shrug of the shoulders. For example, persons have filed petitions challenging the lawfulness of both Dairy and Irrigated Lands General Orders. These Orders expressly admonish that a person is not excused from the monitoring and reporting requirements during the pendency of his/her appeal. Therefore, an aggrieved person must bear the costs and burdens imposed by the Orders as he/she awaits the appeal process. By sitting on such petitions, the State Board is standing in the way of an aggrieved person obtaining the relief he/she seeks through the appellate process, and exposes him/her to mounting costs and burdens during the period that the appellate process is not moving forward. Inaction or excessive delay by the State Board not only deprives the aggrieved person of what Water Code Sections 13320 and 13330 intends, it effectively constitutes an unconstitutional denial of due process.

I hope the State Board is not operating under the misapprehension that the proposed rule changes will make amends for or expunge the damage suffered by many aggrieved persons who have filed petitions over the last nine years, only to have their petitions languish without decision or action by the State Board. If the Board felt it did not have the time to hear and decide these petitions, nothing prevented it from giving prompt notification so that the petition would be deemed denied shortly thereafter and would open the door to allow the aggrieved person to proceed with the filing of a Petition for Writ of Mandate with the Superior Court under section 13330.

The proposed rule change also denies due process by shifting the burden of proof without notice or opportunity for a hearing. The proposed rule would deem pending petitions denied by administrative fiat. There is no legal basis for this action. Rather than deemed denied, the pending petitions should all be deemed granted on the basis of the failure of the regional board submitting any opposition within a reasonable time. In other words, a default should be entered against the regional board as would be the case in a normal civil suit.

I believe your proposed rule changes will present another awkward legal problem for the State Board. Unless the Board deems *all* of the petitions dismissed, rather than hearing and deciding

some and deeming the others dismissed, the Board will become subject to claims of acting arbitrarily and capriciously. Furthermore, such picking and choosing would also be a denial of equal protection, and subject the Board to further litigation.

Because your proposed rule changes represent the potential – nay, likelihood – that as many as 485 currently pending petitions will be deemed denied by your Board within the next year, it poses an unwelcome tidal wave of filings of Petitions for Writ of Mandate in an already overburdened Sacramento County Superior Court system. I would hope that you gave notice of your proposed rule changes to the courts and to the Administrative Office of the Courts so as to give them an opportunity for comment.

There is another issue that needs addressing, apart from your proposed rule changes. You and your colleagues are no doubt members of the California State Bar. As such, you are subject to its Rules of Professional Conduct. These rules specify that the definition of a "law firm" includes a publicly funded entity which employs more than one lawyer to perform legal services. I am aware that attorneys who are employees of the State Board advise and represent the regional boards regarding adjudicatory proceedings, providing counsel for the Prosecution Teams as well as for the Advisory Teams (the Regional Board). I also suspect that they have provided advice and counsel to the regional boards in the drafting and adoption of general waste discharge orders. In light of the State Bar's Rules of Professional Conduct, I fail to see how can you and your colleagues can permissibly advise and otherwise act on behalf of the State Board with respect to petitions filed to seek review of the decisions of the regional boards in these adjudicatory proceedings, or of petitions filed to challenge the general orders, when members of your "law firm" (the State Board) played advisory roles to the regional boards in these matters. You are subject to a professional obligation to avoid representation of conflicting interests. It is that simple. I believe you are under a duty to see that this problem is corrected.

Finally, I request that I be provided with hard copies of all future correspondence regarding your proposed rulemaking.

Sincerely,

Michael E. LaSalle