

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

<b>In re:</b>	)	
	)	
<b>AGENCY: STATE WATER RESOURCES CONTROL BOARD</b>	)	<b>DECISION REGARDING DISAPPROVAL OF A RULEMAKING ACTION</b>
	)	
<b>RULEMAKING ACTION: Adopt section 2050.6; amend sections 2050, 2050, 2050.5, 2051, 2052, 2053, 2064, 2066, and 2067 of Title 23 of the California Code of Regulations</b>	)	<b>(Gov. Code Sec. 11349.3)</b>
	)	
	)	<b>OAL File No. 03-0325-02s</b>

**SUMMARY OF RULEMAKING ACTION**

This rulemaking action revises procedural regulations for a review by the State Water Resources Control Board of a regional board action or failure to act, as authorized by Water Code Section 13320.

**SUMMARY OF DECISION**

On May 7, 2003, the Office of Administrative Law (OAL) disapproved the above-referenced rulemaking action. The reasons for the disapproval are summarized here and explained in detail below.

**A. The provision in regulation section 2050.5(d)(2) which provides that petitions may be held in abeyance "unless the regional board provides reasonable grounds for objection," and the provisions in regulation sections 2050(a)(9) and 2050(c), which limit the scope of the petition to the State Board to "substantive issues or objections raised before the regional board" have not been made available for public comment as required by subsection (c) of Government Code Section 11346.8.**

**B. The following provisions fail to satisfy the Clarity standard: (1) the part of 2050(a)(2) which provides that "a statement should be included" in the petition giving the reasons for not including a copy of the regional board order or resolution in the petition if it is unavailable; (2) the part of 2050(b) which provides: "[In the case of service by facsimile, only the petition itself should be sent. All exhibits should be included with the hard copy.]" (Brackets in original.); (3) the part of 2050.6 which provides that "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."; (4) the part of 2064 which provides: "The state board may, in its discretion, supplement the record with any other evidence and testimony deemed appropriate to consideration of the issues."

C. Necessity has not been demonstrated for the deletion of the existing provision in regulation 2052(c)(2) which provides that the state board may require parties to submit names of witnesses, qualifications of witnesses, subject of testimony, and may require copies of exhibits to be supplied to all parties and the board not later than 10 days prior to the hearing.

D. It is difficult to verify whether the record is complete because the tape of the workshop ends abruptly 5 1/2 minutes before the end of side A on a tape which also contains a side B

### DISCUSSION

The adoption of regulations by the State Water Resources Control Board must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency (APA). Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure is subject to the APA unless a statute *expressly* exempts the regulation from APA coverage.

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code Section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

#### A.

The provision in regulation section 2050.5(d)(2) which provides that petitions may be held in abeyance "unless the regional board provides reasonable grounds for objection," and the provisions in regulation sections 2050(a)(9) and 2050(c), which limit the scope of the petition to the State Board to "substantive issues or objections raised before the regional board" have not been made available for public comment as required by Government Code Section 11346.8(c).

The provision in regulation section 2050.5(d)(2) which provides that petitions may be held in abeyance "unless the regional board provides reasonable grounds for objection," and the provisions in regulation sections 2050(a)(9) and 2050(c) which limit the scope of the petition to the State Board to "substantive issues or objections raised before the regional board" were not included in the text initially proposed and made available for public comment for 45 days. (Rulemaking record, tab 2.) Consequently they are changes from the text originally made available and are thus subject to Government Code Section 11346.8(c), which provides:

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation. Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9.

The changes to section 2050.5(d)(2) and to sections 2050(a)(9) and 2050(c) are substantial, and sufficiently related. They are substantial because they are material alterations of the regulatory requirements that were made available in the initial proposal. (Cal. Code of Regs., Tit. 1, Sec. 40.) They are sufficiently related because a reasonable member of the directly affected public could have determined from the notice that this change could have resulted. (Cal. Code of Regs., Tit. 1, Sec. 42.) Thus, pursuant to Government Code Section 11346.8(c), the changes must have been made available to the public for comment for at least 15 day before they were adopted. They weren't. The only text of proposed modifications to the original proposal that was made available for public comment does not include these provisions. (See, rulemaking record, tab 5.) Consequently, the requirements of Government Code Section 11346.8(c) have not been satisfied.

**B.**

**The following provisions fail to satisfy the Clarity standard: (1) the part of 2050(a)(2) which provides that "a statement should be included" in the petition giving the reasons for not including a copy of the regional board order or resolution in the petition if it is unavailable; (2) the part of 2050(b) which provides: "[In the case of service by facsimile, only the petition itself should be sent. All exhibits should be included with the hard copy.]" (Brackets in original.); (3) the part of 2050.6 which provides that "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."; (4) the part of 2064 which provides: "The state board may, in its discretion,**

**supplement the record with any other evidence and testimony deemed appropriate to consideration of the issues."**

A regulation must satisfy the Clarity standard. (Gov. Code Sec. 11349.1.) "'Clarity' means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (Gov. Code Sec. 11349.)

(1) Regulation 2050(a)(2) provides that the petition shall contain a copy of the regional board order or resolution, if available. It then provides that if it is not available "a statement should be included" giving the reasons for not including it. The "should" is ambiguous. Is a statement required or not?

(2) Regulation 2050(b) authorizes service of a petition by facsimile. It then includes two parenthetical provisions. "[In the case of service by facsimile, only the petition itself should be sent. All exhibits should be included with the hard copy.]" The shoulds are ambiguous. Under the regulation may exhibits be faxed or not?

(3) Regulation 2050.6 provides that "[i]f 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." In response to a comment that this restriction on submitting supplemental evidence should apply to the regional board as well as to any other parties, the board explains the change is unnecessary because, "The language does not exclude application of the standards to the regional board, as a party to the petition." It is not easy to understand from the language of this section that the regional board is a "person" subject to the provision.

(4) Regulation 2064 provides, in part: "The state board may, in its discretion, supplement the record with any other evidence and testimony deemed appropriate to consideration of the issues." The regulations do not expressly provide that parties will be allowed to respond to the supplemental evidence. In response to comments raising this concern the board explains that "As a practical matter petitioners are allowed to respond to any supplementation of the record." This appears to be a policy of general application that is not clear from the text of the regulations.

### C.

**Necessity has not been demonstrated for the deletion of the existing provision in regulation 2052(c)(2) which provides that the state board may require parties to submit names of witnesses, qualifications of witnesses, subject of testimony, and may require copies of exhibits to be supplied to all parties and the board not later than 10 days prior to the hearing.**

Regulation 2052(c)(2), which provides that the state board may require parties to submit names of witnesses, qualifications of witnesses, subject of testimony, and may require copies of exhibits to be supplied to all parties and the board not later than 10 days prior to the hearing, is amended to delete the requirement that such actions must be done at least 10 days prior to the hearing.

Every regulation must satisfy the Necessity standard. (Government Code Section 11349.1(a.) "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to facts, studies, and expert opinion." (Government Code Section 11349.) We turn to the rulemaking record to determine whether the need has been demonstrated for deleting the 10-day requirement. The record fails to explain the need for this action. It says only that, "amendments to the Administrative Procedures [sic] Act and to Chapter 1.5 of Title 23 already address such requirements." (Rulemaking record, tab 3, Initial Statement of Reasons, p. 3.) This explanation is not sufficiently specific to demonstrate the need for deleting this requirement. Consequently, the need for deleting the 10-day requirement has not been demonstrated.

**D.**

**It is difficult to verify whether the record is complete because the tape of the workshop ends abruptly 5 1/2 minutes before the end of side A on a tape which also contains a side B.**

A rulemaking agency must provide a complete rulemaking record to OAL for review. (Gov. Code Sec. 11347.3(c).)

Side A of the tape recording of the SWRCB January 7, 2003, Workshop drops out 5 1/2 minutes before the end of the tape in the middle of a commentor's testimony. The B side starts with a commentor's testimony. It is not possible, however, to easily determine from the tape itself whether all of the testimony submitted at the Workshop is included on the tape and included in the summary and response to comments.

**For these reasons** OAL disapproved the above-referenced rulemaking action.

Date: May 14, 2003

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MICHAEL McNAMER  
Senior Counsel

for: Sheila R. Mohan  
Acting Director/Chief Counsel

Original: Celeste Cantu, Executive Director  
cc: Marleigh Wood