

FINAL STATEMENT OF REASONS
November 16, 2010

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
1001 I STREET, 22ND FLOOR
SACRAMENTO, CA 95814

PROPOSED AMENDMENTS TO THE CALIFORNIA CODE OF REGULATIONS

TITLE 23. WATERS
DIVISION 3. STATE WATER RESOURCES CONTROL BOARD AND REGIONAL
WATER QUALITY CONTROL BOARDS
CHAPTER 27. REGULATIONS FOR IMPLEMENTATION OF THE ENVIRONMENTAL
QUALITY ACT OF 1970

ADOPT SECTIONS 3775.5 and 3779.5

AMEND SECTIONS 3720, 3721, 3722, 3723, 3730, 3733, 3740, 3741, 3742, 3750,
3751, 3762, 3763, 3764, 3775, 3776, 3777, 3778, 3779, 3780,
3781, Appendix A, and Appendix C

REPEAL SECTIONS 3760, 3761, 3764, and 3782

UPDATE OF INITIAL STATEMENT OF REASONS

After the proposed regulations were circulated for public comment from January 1, 2010 through February 17, 2010, State Water Board staff made modifications to the proposed regulations. All of the modifications are sufficiently related to the originally proposed text. The modifications were both internally derived and in response to comments received. The specific purpose and necessity for modifying each affected section is as follows:

ALL SECTIONS: The authority cited and references were modified for each adopted or amended section to conform to current methods of citation. It is necessary to modify the citations for clarity and consistency.

SECTIONS 3720, 3721, 3775, 3781: These sections were modified to correctly identify the title of the Secretary for Natural Resources.

SECTION 3764: This section was repealed because it is vague and needs further clarification, it is unnecessarily duplicative of CEQA guideline 15045, and the use of the term “environmental documents” is too narrow.

SECTIONS 3775.5, 3777: These sections were modified to replace the word “means” with “methods” for clarity and to be consistent with CEQA guidelines 15187(b) and 15187(c).

SECTION 3776: This section was modified to clarify that a Notice of Decision will not be filed until the state board or OAL approves the regional water quality control plan or guidelines.

SECTION 3777: This section was modified to be consistent with CEQA guideline 15120(c) and to clarify what a draft substitute environmental document shall contain.

SECTION 3778: This section was modified to be consistent with CEQA guideline 15086(a)(3).

SECTION 3779: One commentor suggested that the reference in subsection (d) to “orally” in subsection 3779(d) be stricken because there is “no justification in CEQA for responding orally to timely comments made at the public comment hearing on the draft substitute environmental document simply because the comments were themselves oral.” In response to this comment, subsection (d) was modified to better clarify when and how the board must or may respond to oral and written comments received on the draft substitute environmental document. In addition, this subsection restored a sentence from the original proposed text in 3779(d) to clarify the board’s duty to respond to significant environmental issues raised at the hearing, and restored the last sentence in existing subsection 3779(b) (a sentence that was inadvertently deleted) to be consistent with the statutory requirements for certified regulatory programs by clarifying the board’s duty to put its responses to comments in the record of the board action.

SECTION 3779.5: This section was modified to clarify the timing of when a draft substitute environmental document becomes final: a board must approve the substitute environmental document before, or at the same time as, it adopts the project. In addition, this section was modified to be consistent with the CEQA guidelines and to clarify that a board uses a resolution to adopt a project.

SECTION 3780: This section was modified to clarify that a regional water quality control board may not adopt a proposed regional water quality control board project, and the State Water Resources Control Board may not adopt a proposed State Water Resources Control Board project, if either board finds that there are feasible alternatives or mitigation measures available that would substantially lessen any significant adverse impact that the proposed project may have on the environment. In addition, one commentor stated that it is confusing to remove the phrase “proposed activity” in the first half of the sentence and name it “project,” because the phrase “proposed activity” is used in the second half of the same sentence. In response this comment, subsection (a) was modified such that “proposed activity” was removed and replaced with the word “project.”

SECTION 3781: This section was modified to clarify when the Notice of Decision is filed (after approval by the state board or OAL), and to clarify who does the filing (state board). In order to promote consistency and accountability, the state board will file all Notices of Decision with the Secretary for Natural Resources.

APPENDIX A: The Natural Resources Agency recently adopted revised CEQA guidelines pertaining to greenhouse gas (GHG) emissions. The GHG amendments include revisions to several portions of Appendix G, the initial study checklist. Consequently, this Appendix A was modified to be consistent with the revised CEQA guideline Appendix G.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INTIAL NOTICE PERIOD OF JANUARY 1, 2010 THROUGH FEBRUARY 17, 2010.

The originally proposed text was made available for public comment for at least 45 days from January 1, 2010 through February 17, 2010. Seven written comment letters were received during that period, and one oral commenter appeared at the public hearing on February 17, 2010, who merely reiterated some of the comments submitted in its written comment letter. Pursuant to Government Code sections 11346.9(a)(3) and (a)(5), the State Water Board has summarized and responded to those comments as follows:

Burhenn & Gest LLP

Comment 1: The commenter suggests adding a new subsection (b)(8) to section 3777 to reflect that the environmental impacts of mitigation measures must be analyzed in the Draft Substitute Environmental Document (SED).

Reject: Subsection 3777(b)(3) already requires an analysis of the mitigation measures necessary to avoid or reduce any adverse environmental impacts, which invariably includes an analysis of the impacts of those mitigation measures. In addition, the State Water Board’s regulations incorporate the CEQA guidelines by reference under subsection 3720(c). Therefore, it is unnecessary to duplicate all of the individual CEQA guidelines in the regulations.

Comment 2: The commentor suggests amending subsection 3779.5(a)(4) to allow for public review of other documentation that the board may add to the Final SED.

Reject: This section is consistent with CEQA guideline 15132, which states that the contents of a final Environmental Impact Report shall contain “[a]ny other information added by the lead agency.” In addition, if significant new information is added to the SED before adoption, the

board is required to recirculate the SED for public comment on the significant new information contained in the recirculated draft. See subsection 3779(e) and CEQA guideline 15088.5.

Comment 3: The commentor suggests amending subsections 3742(a) and (b) to more clearly state the board's authority to make findings that a project may be approved notwithstanding any economic, social, or other conditions that would make mitigation infeasible.

Reject: Section 3742 is not the exclusive list of reasons for the board to deny or limit waste discharge requirements, water recycling requirements, or other entitlements for use. As noted above, the CEQA guidelines are incorporated by reference in subsection 3720(c). (See CEQA guideline 15093 (statement of overriding considerations).) Therefore, the State Water Board finds it unnecessary to duplicate these guidelines in the regulations.

Coast Action Group

Comment 1: The commentor states that the regulations do not allow for a good, reliable, and comprehensive method of giving public notice.

Reject: The regulations provide good, reliable, and comprehensive public participation requirements. First, the regulations incorporate the CEQA guidelines in subsection 3720(c). (See CEQA guideline 15087 (public review of draft EIR).) Second, subsection 3777.5 sets forth regulations concerning early public consultation, which may include one or more scoping meetings. Third, section 3779 sets forth detailed regulations concerning the public comment period for both written and oral comments.

Comment 2: The commentor states that if a basin plan amendment or other project is substantially changed by the State Board, the project approval process must allow for recirculation and public review and comment.

Reject: First, the process of recirculation set forth in subsection 3776(d) is consistent with Water Code section 13245. The commentor needs to recognize that for basin plan amendments, the regional board is the lead agency and the State Water Board is the responsible agency. As such, and as reflected in subsection 3776(d), when the State Water Board is acting as the responsible agency, it is not responsible for modifying or recirculating the document. Only when the lead agency's responsibilities shift to the State Water Board will recirculation not apply, depending on CEQA guideline 15088.5. See also subsection 3779(e).

Fred Krieger

Comment 1: The commentor states that because TMDLs are a certified regulatory program, the regulations should ensure that the substitute environmental document assesses the cumulative impacts of TMDLs. The commentor suggests amending section 3777 to reflect this cumulative impacts assessment.

Reject: An assessment of cumulative impacts is already set forth in CEQA guideline 15130. The State Water Board's regulations incorporate the CEQA guidelines by reference under subsection 3720(c). Therefore, it is unnecessary to duplicate all of the individual CEQA guidelines in the regulations.

Comment 2: The commentor states that the adoption of a Clean Water Act section 303(d) list of impaired waters (303(d) list) should be accompanied by an environmental assessment.

Reject: The adoption of the 303(d) list need not be accompanied by an environmental assessment because it has no environmental effect; any environmental effects would result from

the subsequent adoption of a TMDL for water bodies included on the 303(d) list, and the State Water Board's regulations require that the TMDL be accompanied by a substitute environmental document and environmental assessment. In addition, the State Water Board has no control over what is contained in the final 303(d) list because the list prepared by the State Water Board is provided to U.S. EPA as a recommendation of which waters should be recognized as not supporting their designated beneficial uses; it is ultimately up to U.S. EPA to issue the list.

Comment 3: The commentor states that subsection 3720(b) appears to give the board unlimited discretion to decide which activities or projects should be exempt from CEQA, and thus this subsection should be deleted.

Reject: Because the State Water Board is subject to CEQA, the Board does not have unlimited discretion to exempt programs or activities from CEQA chapters 3 and 4; only the Secretary for Natural Resources can certify which state regulatory programs are exempt.

Joyce Dillard

Comment 1: The commentor states that we cannot remain in drought conditions and allow pollution to inhibit the uses of water, and thus to comply with Water Code section 13377, beneficial uses should include water supply.

Reject: This comment does not address the regulations, and section 13377 is an existing provision of the Water Code that does not pertain to CEQA, so no changes to the proposed regulations are warranted by this comment.

Comment 2: The commentor states that environmental documents submitted on a project must be supplemented by scientific and factual data that was prepared by qualified individuals and peer reviewed. In addition, the commentor communicates her frustration with Joint Powers Authority. Finally, the commentor states that all CEQA submissions should be recorded with the County, and where applicable, the State Clearinghouse.

Reject: As to the first comment, section 3779.5 sets forth which documents must be included in the final substitute environmental documents, and section 3778 provides for peer review by qualified individuals. The second comment does not apply to the proposed regulations, so no changes to the proposed regulations are warranted by this comment. With respect to the third comment, no recording by the County is authorized by law, and CEQA submissions are widely circulated by the State Clearinghouse consistent with the CEQA guidelines, which are incorporated by reference in subsection 3720(c).

Comment 3: The commentor states that environmental documents submitted on a project must be peer reviewed by qualified individuals. In addition, the commentor states that "bond fraud containment needs to be considered"; the taxpayer is vulnerable to fraud, and the public needs to be assured that no fraud occurs during the process of submitting substitute environmental documentation.

Reject: As previously stated, the regulations already provide for peer review by qualified individuals in section 3778. However, these regulations are not intended to address the potential for fraud.

Comment 4: The commenter asks where proof of mitigation monitoring is contained.
General Answer: Section 3780 requires compliance with CEQA mitigation monitoring requirements.

Teresa Jordan

Comment 1: In section 3720, the commenter is opposed to the State Water Board “carving out an exception for certified regulatory programs.”

Reject: The exception for certified regulatory programs is statutory, set forth pursuant to Public Resources Code section 21080.5.

Comment 2: In section 3721, the commenter opposes the deletion of “environmental documents,” opposes the renaming of the Secretary for Resources to Secretary for Natural Resources, and opposes the deletion of subsections (e) and (f).

Reject: One of the purposes of rulemaking is to eliminate unnecessary duplication and redundancy. Therefore, it is appropriate to delete the definitions of “environmental documents,” “regional board,” and “state board” in order to avoid duplication and redundancy. With respect to the name of the Secretary for Natural Resources, it is appropriate to call persons by their correct titles in order to avoid confusion.

Comments 3-5: The commenter opposes the repeal of sections 3760 and 3761, and opposes the deletion of the last sentence in section 3762.

Reject: Regarding sections 3760 and 3761, the commenter provides insufficient information for the State Water Board to respond to these comments. Regarding section 3762, the State Water Board’s regulations incorporate the CEQA guidelines by reference under subsection 3720(c) and it is unnecessary to duplicate all of the individual CEQA guidelines in the regulations. (See CEQA guideline 15045(b).).

Comment 6: In section 3775, the commenter opposes the renaming of the Secretary for Resources to Secretary for Natural Resources.

Reject: As previously stated, it is appropriate to call persons by their correct titles in order to avoid confusion.

Comment 7: The commenter supports the addition of section 3775.5.

Accept: Comment noted.

Comment 8: In section 3776, the commenter opposes the elimination of the environmental document recirculation provision.

Reject: There was no provision deleted from section 3776 that concerned the recirculation of environmental documents. In addition, section 3779 contains provisions for recirculation of the draft substitute environmental document.

Comment 9: In subsection 3780(a), the commenter states that it is confusing to remove the phrase “proposed activity” in the first half of the sentence and name it “project,” because the phrase “proposed activity” is used in the second half of the same sentence.

Accept: The commentor is correct, and staff has made changes in response to this comment such that any reference to “proposed activity” is removed and is replaced with the word “project.”

Comment 10: In Article 1, the commentor suggests that the regulations spell out California Code of Regulations, title, division, chapter, and Public Resources Code, wherever they appear. In addition, the commentor suggests that the parentheses in the authority cited and reference areas be deleted.

Accept in part, Reject in part: The State Water Board uses standard citation practices set forth in the California Style Manual. When used in a sentence, statutes and other laws should be spelled out. In response to this comment, the staff has revised the authority cited and reference areas at the bottom of the page, to spell out the statutes and other laws accordingly. However, when simply citing to a statute or law, the abbreviated form is correct and those references will not be revised. In addition, to be consistent with OAL practice, the parentheses in the authority cited and reference areas have been removed.

Comment 11: In section 3720, the commentor opposes the deletion of the phrase “these regulations” in subsection (a), and also points out that in subsection (b), “activity” is not replaced with the word “project.”

Reject: The comment is noted as to subsection (a). With respect to subsection (b), the use of the term “activity” is consistent with the context of the sentence; the subsection is not specifically referring to projects.

Comment 12: In section 3721, the commentor opposes the deletion of subsections (e) and (f) and opposes amending subsection (a).

Reject: These comments are a general objection to proposed section 3721. No change to the proposed regulation, as explained in the initial statement of reasons, is warranted by this comment.

Comment 13: In subsection 3750(a), the commentor opposes substituting the word “municipality” with “public agency,” and opposes deleting the reference to the National Environmental Policy Act (NEPA).

Reject: The word “public agency” is used instead of “municipality” because entities other than municipalities can apply for financial assistance. “Public agency” is a better and broader description of this type of entity. The reference to NEPA was deleted because a NEPA document cannot be used to comply with CEQA.

Comment 14: In subsection 3775.5(b), the commentor opposes the substitution or deletion of various words or phrases. In subsection (c), the commentor suggests the addition of (c)(4) to say “Any interested person.”

Reject: Because section 3775.5 is new, there has been no substitution or deletion of any words or phrases. With respect to subsection (c), individuals who have filed a written request for the notice of a scoping meeting are considered to be interested individuals. Therefore, interested persons are already included in subsection (c)(3).

Comment 15: In section 3777, the commentor opposes modifying the environmental checklist in subsection (a)(2) and is generally opposed to subsections (c), (e), and (f).

Reject: Subsection (a)(2) is consistent with CEQA guideline 15063(f), which allows public agencies to devise their own format for a checklist. The remaining comments are a general objection to proposed section 3777. No change to the proposed regulation, as explained in the initial statement of reasons, is warranted by this comment.

Comment 16: In section 3778, the commentor opposes changing “should” to “may.”

Reject: Comment noted.

Comment 17: In subsection 3779(f), the commentor notes that when a regional board does not respond to timely submitted comments, the person submitting comments should explain why the regional board’s response was inadequate, and the regional board must explain why it did not respond to that comment in the first instance. In addition, the commentor notes that a regional board may suppress evidentiary material in certain circumstances.

Reject: The State Water Board responds to comments in a manner consistent with the CEQA guidelines. (See CEQA guideline 15088.)

Comment 18: In Appendix A, the commentor opposes the deletion of “Date of Checklist Submitted” and also notes that it was inexcusable for the State Water Board to not include the checklist in a track changes format.

Reject: The date the checklist is submitted is covered in the notice of filing. In addition, it was not feasible to show in redline strikeout the changes made to old checklist, because too many formatting changes occurred and it would be unreadable. Providing the new checklist for public review was sufficient.

Patricia McPherson

This commentor makes various comments about the Los Angeles Regional Water Quality Control Board and how this regional board has ignored or failed to comply with various statutory or regulatory responsibilities. Because none of these comments pertain to the regulations at issue, it is not appropriate to respond to these comments.

Western States Petroleum Association

Comment 1: The commentor states that when the board makes a determination under subsection 3720(b), the regulations should allow for an opportunity for stakeholder input on the proposed exemption.

Reject: Activities listed in Public Resources Code subsection 21080(b) are not subject to CEQA. This exemption is statutory, and thus the board can make a determination under subsection 3720(b) consistent with the statute. In addition, because the Public Resources Code does not provide for public input on these statutory exemptions, it is likewise unnecessary to include an opportunity for such input.

Comment 2: The commentor seeks confirmation that, in sections 3740 and 3741, the substitution of “water recycling” for “water reclamation” was for a non-substantive purpose.

Answer: Yes, the substitution of the term “water recycling” for “water reclamation” is a non-substantive change without regulatory effect. This substitution reflects current usage and common parlance within the agency and water recycling industry.

Comment 3: The commentor states that in subsection 3742(b) and section 3751, the State Water Board may take action “to prevent nuisance.” However, nothing in the Public Resources Code or in CEQA gives the public agency authority to use CEQA to regulate or abate nuisances generally. Therefore, references to preventing nuisance should be stricken.

Reject: The CEQA guidelines neither expand nor contract the State Water Board’s authority to prevent nuisance, and neither do the regulations. Moreover, Water Code sections 174, 13263(a), and 13304 provide agency authority to abate nuisance. With respect to section 3751, the board’s authority to give financial assistance is discretionary; if the board is aware that a project will create a nuisance, that nuisance could be a reason for the board to deny, postpone, or condition the award of financial assistance. (See also Water Code sections 13478 and 13481.)

Comment 4: The commentor states that subsection 3764(b), which concerns the cost of complying with CEQA, is vague and needs to be clarified to identify the specific types or categories of costs.

Accept: Staff agrees that this subsection is vague and needs further clarification. In response to this comment, the State Water Board has decided to repeal section 3764 in its entirety, because (1) the use of the term “environmental documents” is too narrow; and (2) this section is unnecessarily duplicative of CEQA guideline 15045.

Comment 5: The commentor states that, pursuant to CEQA guideline 15082(c)(2), providing notice to stakeholders of a scoping meeting is not optional. The commentor suggests that the word “should” be replaced with the word “shall” in the third sentence of subsection 3775.5(c).

Reject: The commentor cites to CEQA guideline 15082(c)(2), which applies only to environmental impact reports (EIR). Section 3775.5 of the regulations applies only to certified regulatory programs and substitute environmental documents, not EIRs. Because Article 6 of the regulations contains the State Water Board’s exclusive procedural requirements for certified regulatory programs, the regulations need not be completely consistent with the CEQA guidelines. For example, section 3775.5 requires web posting for all scoping meetings, whereas the CEQA guidelines do not. Likewise, the substitute environmental document may or may not include an EIR-level of analysis. It is therefore acceptable to retain the word “should.”

Comment 6: The commentor suggests that the State Water Board be the lead agency for purposes of CEQA, and that section 3776 be revised to better clarify the State Water Board’s statutory role and approval authority over regional board actions.

Reject: It is not necessary or appropriate for the State Water Board to be the lead agency for all purposes of CEQA. As the commentor correctly recognizes, the State Water Board and the regional boards are separate agencies. For example, when a regional water quality control board’s water quality control plan (basin plan) is amended, two levels of agency action are required: it must be adopted by the regional board, the lead agency, and then approved by the State Water Board, the responsible agency. Unless there is a shift in lead agency responsibilities

pursuant to 15052, the regional board has broader discretion when it adopts a basin plan; when the basin plan is before the State Water Board, the basin plan can either be approved or remanded to the regional board to reconsider and make further modifications as appropriate. Consequently, the regulations are consistent with CEQA guidelines 15051 and 15051(c).

Comment 7: The commentor suggests that the word “proposed” be added in subsection 3777(d) to clarify that the proposed findings and statement of overriding considerations appearing in a draft SED are, at that stage, merely “proposed.”

Reject: It is unnecessary to label any specific provisions as “proposed” because when an SED is in its draft stage, it will be labeled as the “draft SED.” Therefore, it is understood that the findings and statement of overriding considerations in the draft SED are not final.

Comment 8: The commentor states that subsections 3777(e) and (f) should include language that the SED may need to contain analysis of mitigation measures in order to serve as the equivalent of a mitigated negative declaration.

Reject: Because projects in the certified regulatory program are, by definition, water board projects, the water boards will not need to impose additional mitigation measures because those measures will already be incorporated into the projects themselves.

Comment 9: The commentor makes several comments concerning section 3779 that are addressed separately below.

9a: The commentor states that, pursuant to Public Resources Code section 21177, any comment made “prior to the close of the public hearing on the project before issuance of the notice of determination” may be the basis for a legal challenge to an environmental document. The commentor then cites *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School District*. (1989) 210 Cal.App.3d 155 and *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109 for the proposition that subsection 3779(b) improperly limits the State Water Board’s consideration of written comments on the draft SED that are submitted after the deadline for submitting written comments.

Reject: Public Resources Code section 21177, subdivision (a), applies only to actions brought under Public Resources Code section 21167. Certified regulatory programs are exempt from Public Resources Code section 21167, in accordance with Public Resources Code section 21080.5, subdivision (c). Therefore, the commentor’s reliance on Public Resources Code section 21177, subdivision (a) is misplaced. The cases cited by the commentor interpret and apply Public Resources Code section 21177, subdivision (a), so the commentor’s reliance on *East Peninsula* and *Galante Vineyards* is also misplaced. It is important to note, however, that if the written comment period closes before the hearing, oral comments at the hearing would still be timely and would be considered by the board.

9b: The commentor states that oral comments made outside of the formal comment period are part of the administrative record and the State Water Board has a duty to respond to those comments. Subsection 3779(c) goes too far in providing that the “State Board is not required to consider any oral comment that is received after the public hearing” on the SED.

Reject: For similar reasons as stated above, the board is not required to consider late oral comments after the hearing on the SED unless there's a subsequent hearing on the project's approval at which the board states that it will accept additional comments on the SED.

9c: The commentor suggests that the reference to "orally" in subsection 3779(d) be stricken because there is "no justification in CEQA for responding orally to timely comments made at the public comment hearing on the draft SED simply because the comments were themselves oral."

Accept in part, Reject in part: The originally proposed subsection 3779(d) provided that the board "shall respond in writing or orally" to any comment received, in writing or at the public hearing, so long as that comment is received before the close of the comment period. However, in response to this comment, this subsection was proposed to be modified to better clarify when and how the board must or may respond to oral and written comments received on the draft SED. The proposed modification to the regulation stated that "[t]he board shall prepare written responses to the significant environmental issues raised in the comments received during the written comment period, including written comments and oral comments received at the public hearing, if the public hearing is held prior to the close of the written comment period. The board may respond orally or in writing to comments received after the written comment period, but is not required to respond."

Minor changes to the modification in subsection 3779(d) are warranted in order to retain the substance of the original proposed regulation and to provide greater clarity than was provided by the modification. The modification's deletion of the sentence, "The board shall respond in writing or orally to significant environmental issues raised at the hearing," resulted in less, rather than more, clarity. Upon further consideration, this sentence will be retained, exactly as in the original proposed regulation. In addition, due to the modification's insertion of the word "written" immediately preceding "comment period" in the modification's second sentence, the modification inadvertently suggested that no response is necessary even if the comment was a timely oral comment made during a hearing held after the written comment period. Upon further consideration, this sentence will be changed to be consistent with the original proposed regulation, and will also provide greater clarity. It will now simply state, "The board is not required to respond to late comments." The end result is that the board may respond orally, rather than in writing, to timely oral comments made at the hearing. As already provided in subdivisions (b) and (c) of section 3779, the board is not required to consider or respond to any late comments, whether oral or written. Finally, the last sentence of existing subsection 3779(b) is restored into 3779(d), because it is necessary to be consistent with the statutory requirements for certified regulatory programs and to clarify that the board's responses to comments will be included in the record. These changes to the modifications of subsection 3779(d) are not substantial changes from the original proposed regulations, so recirculation under the Administrative Procedures Act is not required.

It should be noted that the proposed regulatory language regarding how the board will respond to oral comments also does not represent a substantial change from existing section 3779. Existing section 3779 provides that the board shall respond orally to significant environmental points raised at the hearing. Existing section 3779 also provides that the comments and the responses shall be included in the record. Because the proposed regulations continue to require oral

responses to significant environmental points (issues) raised in oral comments at the hearing, and because a written transcript of the hearing is a part of the administrative record for the project, this approach satisfies the requirement in Public Resources Code section 21080.5, subdivision (d)(2)(D), that the board “include the written responses of the [board] to significant environmental points raised during the evaluation process.”

Incidentally, the commentor’s September 8, 2010 comment letter on the modifications to the regulations states that the modifications “properly reflect the State Board’s obligation . . .” on this issue.

9d: The commentor recommends that subsection 3779(d) identify the period in which copies of written responses will be available for public review prior to approval of the SED.

Reject: CEQA guideline 15088 does not specify a time period for public review of the response to comments, and it is not necessary to specify one.

Comment 10: The commentor suggests that the exhaustion of administrative remedies provisions be stricken from subsection 3779(f), because the State Water Board’s ability to refuse to accept comments submitted at the hearing on the merits of a project runs afoul of CEQA’s mandate that parties may challenge an agency action under CEQA based on comments made “prior to the close of the public hearing on the project before issuance of the notice of determination.”

Reject: Staff disagrees with the commentor’s suggestion that people should be able to raise issues for the first time with the State Water Board on regional board projects. When the regional board is the lead agency for a regional water quality control plan amendment or guideline, the State Water Board’s authority (as responsible agency) to require additional environmental documentation is circumscribed by CEQA guidelines 15052 and 15162, and also limited by circumstances where, due to the addition of new information, a comment could not have been raised before the regional board. Accordingly, the State Water Board may refuse to accept comments that do not include an explanation why the commenter was unable to raise the specific comment before the regional board.

Comment 11: The commentor suggests that subsection 3779.5(b) be revised such that the final SED requires the inclusion of a mitigation monitoring or reporting plan, if required pursuant to 3780(b).

Reject: Subsection 3779.5 is consistent with CEQA guideline 15097(a). A mitigation monitoring or reporting plan is a separate document from the EIR. Therefore, it would also be a separate document from the final SED that is not included in the final SED’s environmental documentation.

Comment 12: The commentor suggests that that an additional Notice of Filing form is provided for non-certified regulatory program decisions of the state and regional boards.

Reject: This request is satisfied by the incorporation of the CEQA guidelines into subsection 3720(c). For example, CEQA guideline 15094 concerns Notices of Determination for projects with an EIR.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE PERIOD THE MODIFIED TEXT WAS AVAILABLE TO THE PUBLIC.

The modified text was made available for public comment from August 24, 2010 through September 8, 2010. Five written comment letters were received during that period. Pursuant to Government Code sections 11346.9(a)(3) and (a)(5), the State Water Board has summarized and responded to those comments as follows:

Natural Resources Defense Council

Comment 1: The commentor requests that the Appendix A checklist be revised to ensure that a project's impacts on climate change, and climate change's impacts on the project, are more fully considered. Specifically, the commentor requests additions to Section VII of the Checklist that ask whether a project would "place substantial additional demands on resources that are projected to be adversely affected by climate change," and whether the project would "bring or promote development into areas that are projected to be adversely affected by climate change, creating a significant hazard to the public."

Reject: While the State Water Board fully appreciates the significant impacts that climate change will have on California's water supplies and water resources, and has adopted policies to address climate change in actions taken by the state and regional boards, it is premature, at this time, to add the commentor's suggested language to Appendix A Section VII. First, the Natural Resources Agency recently went through a rigorous public process to adopt CEQA guideline amendments pertaining to greenhouse gases, and it is not appropriate for the State Water Board to repeat that public process. Second, and perhaps more importantly, these proposed regulations indicate in section 3777(a)(2), the environmental checklist is just a sample that "may be modified as appropriate to meet the particular circumstances of a project." As such, nothing precludes the state or regional board from considering any additional climate change impacts on a project-by-project basis. At this time, it is sufficient to conform the Appendix A checklist to the amended Appendix G checklist.

Joyce Dillard

Comment: The commentor raises general objections to the proposed regulations that either have nothing to do with the proposed regulations themselves, or have nothing to do with the specific modifications that were subject to public comment.

Reject: Because comments on the proposed modifications were required to be limited to those modifications only, no responses to these comments will be provided. For further information, see the initial statement of reasons.

Teresa Jordan

Comments 1-15 and 19: The commentor concurs with the proposed modifications made.

Accept: Comments noted.

Comments 16-18: The commentor raises general objections to the proposed regulations.

Reject: No changes to the proposed regulations, as explained in the initial statement of reasons, are warranted by these comments.

Comment 20: The commentor expresses discontent that the Los Angeles Regional Water Quality Control Board never responded to her written comments submitted in 2009 on the draft Ventura Countywide MS4 NPDES Permit, and that adopted permit is incomplete because staff never truly responded to her written comments.

Reject: Because this comment does not pertain to the proposed modifications, no response will be provided.

Vicki Fry

Comment: The commentor states that it is unclear how the questions in Appendix A section VII are substantially different from the questions listed under section III. The commentor suggests that, instead of creating a new section VII entitled Greenhouse Gas Emissions, any questions regarding greenhouse gas emissions should be moved to Section III Air Quality. The commentor explains that the proposed questions in section VII are redundant and unnecessary if greenhouse gas emissions are included in Section III.

Reject: As explained above in the response to comments from the Natural Resources Defense Council, staff modified Appendix A to reflect the most recent CEQA guideline amendments adopted by the Natural Resources Agency. The decision to create a new section VII entitled Greenhouse Gas Emissions went through an extensive public process that need not be duplicated by the State Water Board.

Western States Petroleum Association

Comments 1 and 2: The commentor appreciates that we deleted section 3764 in response to its previous written comments, and modified section 3779(d) to more clearly reflect the obligation to respond to all timely submitted written and oral comments.

Accept: Comments noted.

Comment 3: The commentor requests that the Final Statement of Reasons (FSOR) be circulated to the public in a manner timely enough for the regulated community to provide input prior to any State Water Board decision to finalize the amendments.

Reject in part: First, this comment does not pertain to the actual proposed modifications. Second, while the commentor should note that the rulemaking agency has no obligation under the Administrative Procedures Act or the Government Code to release the FSOR prior to board adoption of the proposed regulations, the State Water Board intends to publicly release the FSOR before the adoption hearing.

Comments 3-6: These comments reprise comments that were previously submitted during the first written comment period.

Reject: The State Water Board will consider and respond to comments that pertain to the proposed modifications. These particular comments pertain to the original proposed text without the modifications; see responses to those comments above.

LOCAL MANDATE DETERMINATION

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

ALTERNATIVES DETERMINATION

The State Water Resources Control Board had determined that no alternative would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

ECONOMIC IMPACT ON SMALL BUSINESS

No commenter proposed an alternative to lessen any adverse economic impact on small businesses.