

STATE WATER RESOURCES CONTROL BOARD  
RESOLUTION NO. 2002 - 0166

RESOLUTION ADOPTING AMENDED REGULATION  
GOVERNING ADJUDICATIVE PROCEEDINGS

WHEREAS:

1. Section 648(b) of Title 23 of the California Code of Regulations provides that, subject to certain exceptions, all adjudicative proceedings before the State Water Resources Control Board (State Board) and the regional water quality control boards (regional boards) shall be governed by Chapter 4.5 of the Administrative Procedure Act (APA), commencing with section 11400 of the Government Code.
2. Section 648(c) of Title 23 indicates which Articles in Chapter 4.5 of the APA are not applicable to such proceedings.
3. In 1998, the California Legislature amended Chapter 4.5 of the APA to add Article 16 (A.B. 2164, codified at Gov. Code §§ 11475 to 11475.70). Article 16 made the Code of Judicial Ethics, which was adopted by the Supreme Court for the conduct of judges, applicable to administrative law judges (Gov. Code § 11475.10(a)(1)).
4. Article 16 also provided that the Code of Judicial Ethics would apply to presiding officers of administrative agencies if the Article was made applicable by agency regulation (Gov. Code § 11475.10(a)(2)).
5. By definition, all members of the State and regional boards are presiding officers (Gov. Code § 11405.80).
6. Since Title 23, California Code of Regulations, section 648(b), which predated Article 16 of the APA, made all of Chapter 4.5 of the APA applicable (unless excepted under section 648(c)), Article 16 arguably became applicable to all members of the State Board and regional boards.
7. Amendment of section 648(c) is necessary to clarify that Article 16 will not apply to such board members.
8. Article 16 grants agencies the discretion to determine, by promulgating regulations, if its provisions should be made applicable to presiding officers within the agency.
9. In terms of its applicability to presiding officers at the State Board and regional boards, Article 16 was unintentionally given effect due to the structure of pre-existing regulations (section 648(b)).

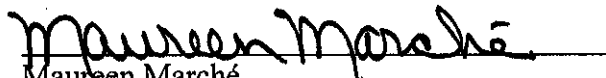
10. Experience with Article 16 has indicated that the majority of its provisions are duplicative of existing law in the APA and the Political Reform Act (Gov. Code § 81000 et seq.), and that the remaining provisions are unduly vague or not conducive to the efficient performance of the duties of presiding officers.
11. The SWRCB published a Notice of Proposed Rulemaking on March 22, 2002.
12. The proposed amendment generated one comment letter and a response is included in the Final Statement of Reasons indicating that no change in the proposal is warranted by the comments.

THEREFORE BE IT RESOLVED THAT:

The proposed amendment to Title 23, California Code of Regulations, section 648(c) is adopted, and the Executive Director is authorized to transmit the amendment 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 November 19, 2002.

  
Maureen Marché  
Clerk to the Board

**PROPOSED AMENDMENTS  
TO THE  
CALIFORNIA CODE OF REGULATIONS  
TITLE 23, STATE WATER RESOURCES CONTROL BOARD  
SECTION 648, Laws Governing Adjudicative Proceedings**

**FINAL STATEMENT OF REASONS**

**NOVEMBER 2002**

**STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD**

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<p><b>TITLE 23, STATE WATER RESOURCES CONTROL BOARD SECTION 648, Laws Governing Adjudicative Proceedings</b></p>
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**Update of Initial Statement of Reasons**

The State Water Resources Control Board (State Board) has determined that there is no need to update the Initial Statement of Reasons because the State Board has not made any changes to the proposed regulation.

**Local Mandate**

The proposed regulation does not impose any mandate on local agencies or school districts.

**Response to Comments**

Written comments were received from the law firm of Bartkiewicz, Kronick & Shanahan which argues that the State Board should not exempt itself from the Code of Judicial Ethics because the courts have held that the State Board has concurrent jurisdiction with the courts over certain water rights issues and that consequently State Board members are in the position of judges with respect to these water rights issues. The State Board has considered this comment and concluded that it is unnecessary to change any part of the proposed regulation to accommodate the comment. Under the doctrine of concurrent jurisdiction a party may choose its forum to resolve a dispute, in this case the State Board or the Superior Court. This is an exception to the more customary doctrine of primary jurisdiction where a party must first go through the administrative process before an agency and exhaust its administrative remedies before seeking court review. Even under the doctrine of concurrent jurisdiction, a party may seek review in the Superior Court of a State Board water rights decision. Thus, parties in water rights proceedings have the same judicial review remedies available as are available to parties involved in non-water rights proceedings before the State Board. More importantly, if anything, parties in water rights proceedings are less in need of protection from arbitrary State Board action than in proceedings where the State Board has primary jurisdiction. This is because in the water rights proceedings where the State Board has concurrent jurisdiction with the Superior Court, parties may elect to go directly to court if they fear they will be subject to unethical treatment before the State Board.

In the alternative, the comments recommended that the State Board adopt conflict of interest and *ex parte* communication regulations. This comment is rejected because, as discussed in the Notice of Proposed Rulemaking and Initial Statement of Reasons, existing law in the Administrative Procedure Act and the Political Reform Act contain these requirements and they are applicable to the State Board.

**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 affected private persons than the proposed regulation. The State Board did not identify any alternatives that would lessen any adverse impact on small business. The State Board has determined that the proposed amendment will not have a significant adverse economic impact on business. The amendment pertains to the conduct of State Board and regional board members and does not impose any obligations on the business community or otherwise affect the cost of doing business.

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