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Via Electronic Submission

Mr. Tim Regan, Esq.
Office of Chief Counsel, California State Water Resources Control Board
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Re: Comments on the State Water Resources Control Board’s Proposed Amendments to California Code of Regulations, Title 23, Division 3, Chapter 6, Regarding Procedure for Administrative Review of Regional Board Orders

Dear Mr. Regan:

I write on behalf of LSI Corporation (“LSI”) concerning amendments proposed by the State Water Resources Control Board (“State Board”) to Sections 2050, 2050.5, and 2051 of Title 23 of the California Code of Regulations.¹ The proposed amendments would modify the procedures applicable to State Board review of petitions filed pursuant to Water Code Section 13320 that challenge the acts (or failures to act) of regional water boards.

LSI agrees with the State Board that the current regulations governing the petition procedure (Sections 2050, 2050.5, and 2051) are in need of amendment. However, LSI believes that the State Board’s proposed amendments are flawed in three respects, for the reasons discussed below. First, the amendments should shorten the maximum time within which the State Board must review a petition after it has sent the notice described by Section 2050.5(a), as the very long time limits now imposed by the current Section 2050.5(b) unnecessarily burden petitioners with significant uncertainty as to the outcome of their appeals and potentially delay the final resolution of issues among petitioners and the Regional Boards, to the detriment of both petitioners and the public. Second, the State Board’s proposed Section 2050.5(f), which would require the State Board to send the notice described by Section 2050.5(a) within certain time limits for all petitions that are pending at the time the proposed subsection (e) is enacted, should be modified to shorten the proposed time within which the State Board must send the notices. Third, the State Board should

¹ Notice of Proposed Rulemaking, Proposed Amendments to California Code of Regulations, Title 23, Division 3, Chapter 6, Rules Governing Review by State Board of Action or Failure to Act by Regional Board (February 2014, circulated by e-mail to interested parties on March 7, 2014). Unless otherwise indicated, all references to regulatory sections throughout this letter are to sections of Title 23 of the California Code of Regulations.

amend its regulations to delete Section 2050.5(c), which in the past has been cited by the State Board as the basis of its practice of indefinitely delaying resolution of a petition under the auspices of “own motion review.” Each of these issues is discussed below.

I. The State Board Should Amend Current Section 2050.5(b) to Shorten the Maximum Time For Review of Petitions

Under both the current and proposed regulations, the time the State Board gives to itself to finally dispose of a petition is excessive. Current Section 2050.5(b) provides that the State Board must resolve a petition within 270 days of the mailing of a notice under Section 2050.5(a) (the “2050.5(a) Notice”), or, if a hearing is held, within either 330 days from the date of the mailing of the 2050.5(a) Notice, or within 120 days of the close of the hearing (whichever is later). 23 C.C.R. § 2050.5(b). The proposed regulations make no substantive amendment to subsection (b). The maximum time limits for disposition of a petition imposed by current and proposed subsection (b) are unacceptably long and materially prejudice petitioners, particularly for those who are appealing Cleanup and Abatement Orders (“CAOs”) with short deadlines for action.

Section 2050.5(a) provides that “[u]pon receipt of a petition that complies with section 2050,” the State Board is to issue a notice to the regional board and other interested parties that they shall have 30 days from the date of the mailing of the notice to file a written response to the petition. Notwithstanding the fact that the current regulations require the State Board to mail the 2050.5(a) Notice “[u]pon receipt of a petition,” the State Board has routinely delayed the mailing of 2050.5(a) Notices for many months, effectively delaying the final determination of petitions and requests for stays for indefinite periods of time.

As the State Board noted in its Initial Statement of Reasons (“ISOR”), the State Board’s delay in the disposition of petitions has caused many petitioners to “lack certainty about whether the [State Board] will dismiss their petitions or adopt an order upholding, setting aside, modifying, or remanding the regional water quality control board’s action or failure to act” ISOR at 2 (Feb. 2014). The State Board’s delay in the resolution of petitions is prejudicial for all petitioners, and it poses an issue of constitutional significance for petitioners that are erroneously assigned liability by a regional water board pursuant to a CAO. Under both current and proposed regulations, parties that are erroneously assigned liability by a regional board under a CAO may petition the Board for a stay and review of the CAO. However, under both current and proposed regulations the petitioner faces uncertainty about its obligations under the CAO during the long pendency of the petition and/or stay request. Such a petitioner is “between a rock and a hard place,” as it may have to choose between incurring significant cost to comply with a CAO despite the fact that it may have a valid defense to liability under the CAO, or facing a potential enforcement action by the regional board. This Hobson’s choice would violate a petitioner’s due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. *See, e.g., Solid State Circuits, Inc. v. U.S. EPA*, 812 F.2d 383, 388-392 (8th Cir. 1987) (avoiding due process concerns by construing CERCLA to allow recipient of EPA cleanup order a “sufficient cause” defense to enforcement of the order during the pendency of judicial review); *Aminoil, Inc. v. U.S.*, 646 F. Supp. 294 (C.D. Cal. 1986) (same).

LSI agrees with the State Board that it should amend its regulations to expressly state a time by which the State Board must send the 2050.5(a) Notice, as in the proposed Section 2050.5(e). However, in order to fully address the fundamental problem of delay, the State Board should also amend current Section 2050.5(b) to shorten the maximum time within which it must finally dispose of a petition. Unless the State Board shortens the long periods for review provided by the current Section 2050.5 (b), petitioners will continue to suffer unnecessary uncertainty and prejudice during the review period.

II. The State Board Should Modify Proposed Section 2050.5(f) to Require the State Board Promptly to Send 2050.5(a) Notices For Those Petitions Pending Before the Effective Date of the Proposed Regulations

The State Board's proposed regulation would require it to send Section 2050.5(a) Notices for petitions that are pending at the time of the new regulation's enactment within certain extended time periods. Specifically, proposed Section 2050.5(f) provides as follows:

For petitions received by the state board before the effective date of [Section 2050.5,] subdivision (e) that are not being held in abeyance and for which the state board has not issued the notification described in [Section 2050.5,] subdivision (a), the time limit for providing the notification described in subdivision (a) shall be as follows:

- (1) For petitions received before January 1, 2011, within 120 days of the effective date of subdivision (e).
- (2) For petitions received from January 1, 2011 to December 31, 2012, within 240 days of the effective date of subdivision (e).
- (3) For petitions received from January 1, 2013 to the day before the effective date of subdivision (e), within one year of the effective date of subdivision (e).

Proposed 23 C.C.R. § 2050.5(f) (Feb. 2014).

LSI agrees that the State Board should amend Section 2050.5 to limit the time in which the State Board must send 2050.5(a) notices for currently pending petitions. However, the time limits in proposed Section 2050.5(f) are far too long, particularly for petitions that have been filed since 2011. Petitioners who have already waited months or years for the State Board to resolve their petitions should not now have to wait additional months or years until the review process is finally *initiated* by the State Board's mailing of a 2050.5(a) Notice – a notice that under current Section 2050.5(a) *should* have been sent by the State Board “upon receipt” of the petition.

III. The State Board Should Delete Current Section 2050.5(c), Which the State Board Wrongly Relies On for Authorization of Its Practice of Indefinitely Delaying Resolution of a Petition Under the Auspices of “Own Motion Review”

In addition to delaying the mailing of 2050.5(a) Notices, the State Board has engaged in another practice that can cause petitioners significant delay and uncertainty. After the State Board has finally issued a 2050.5(a) Notice, and when the end of the time limit for final resolution of a petition provided by Section 2050.5(b) is approaching, the State Board frequently dismisses the petition and states that it intends to take up the issues raised by the petition on its “own motion,” thereby delaying the final administrative resolution of the issues raised in the petition beyond the time limit provided by subsection (b).

For example, in the petition of *California Sportfishing Protection Alliance*, Waste Discharge Requirements Order No. R5-2007-0113, 2008 Cal. Env. LEXIS 112 (July 15, 2008), the State Board issued an order that included the following statements:

If the State Water Board has not made a formal disposition of a petition within the 270-day period, the Board’s regulations deem the petition denied. (Cal. Code Regs., tit. 23, § 2050.5, subd. (b).) The denial of a petition for review would ordinarily require a petitioner to file any judicial challenge within 30 days of the denial. (See Wat. Code, § 13330, subd. (b).) When the State Water Board anticipates addressing a petition on the merits after the period for review passes, it may indicate that it will review the matter on its motion to avoid unnecessary or premature litigation. The State Water Board anticipates issuing an order addressing some issues raised in the petition, but not by August 4, 2008. Therefore, the State Water Board has decided to review the [challenged] order on its own motion. (See Wat. Code § 13320, subd. (a); Cal Code Regs., tit. 23, § 2050.5(c).)

Id. at *1-2; see also *In the Matter of the Petitions of Sacramento Regional County Sanitation District et al.*, Waste Discharge Requirements Order No. R5-2010-0014, 2011 Cal. Env. LEXIS 52 (Sept. 19, 2011) (including language nearly identical to that quoted above). The State Board has issued a great number of orders evoking “own motion review” with language nearly identical to that quoted above.

The State Board apparently views the announcement of its intent to review a regional board order *at some indeterminate, future date* on its own motion pursuant to Water Code Section 13320(a) and 23 C.C.R. Section 2050.5(c) as having the effect of precluding a petitioner from seeking judicial review of the State Board’s denial of a petition. To the extent the State Board holds this view, it is mistaken: Water Code Section 13320(a) does not authorize the State Board to indefinitely delay judicial review of its decision to deny a petition.

The current and proposed Section 2050.5(c), which purports to allow the State Board to “on its own motion, review a regional board’s action or failure to act for any reason,

including lack of formal disposition by the state board within the time limits provided in [subsection] (b),” is the cause of further uncertainty and prejudice for petitioners. While there are undoubtedly circumstances in which it is proper for the State Board to take up by its own motion the review of a regional board act or failure to act, it is not proper for the State Board to indefinitely delay the administrative resolution of issues *raised* by a petition filed pursuant to Water Code Section 13320.

Petitioners should be assured that the time limits imposed by current Section 2050.5(b), current Section 2053(d), and proposed Section 2050.5(f) are meaningful and concrete. Accordingly, LSI proposes that the State Board delete subsection (c) of the current and proposed Section 2050.5.

In sum, LSI agrees that the State Board should amend its regulations to clarify its petition procedures, and limit the delay and uncertainty currently experienced by petitioners. Making the requested changes, rather than leaving the proposed amendments unchanged, would be as effective and less burdensome to affected private persons and equally effective in implementing the purpose of the regulations. See Cal. Gov. Code § 11346.5(a)(13). LSI’s comments are directed to improving the clarity and fairness of the Water Board’s current and proposed regulations, and to achieving compliance with the due process guarantees of the United States Constitution.

Sincerely,

Jocelyn T. de Grandpre