

1 **Matthew S. Hale, Esq.**
2 **HALE & ASSOCIATES**
3 **Calif. State Bar No. 136690**
4 **1900 Johnson Road**
5 **Elizabeth City, NC 27909**

6 **Telephone No. (757) 645-5082**
7 **E-Mail: matt@haleesq.com**

8 **Attorney for Petitioner, WILLIAM ELLIOTT**

9 **CALIFORNIA WATER RESOURCES CONTROL BOARD**

10 **In re: William Elliott**

11)
12) **PETITION TO REVIEW MARCH 29,**
13) **2011 ACTION OF ROGER BRIGGS,**
14) **EXECUTIVE DIRECTOR OF THE**
15) **CALIFORNIA REGIONAL WATER**
16) **QUALITY CONTROL BOARD,**
17) **CENTRAL COAST REGION,**
18) **EMBODIED IN EXECUTIVE OFFICER**
19) **ORDER NO. R3-2011-0208**
20) **PURPORTEDLY BY A DELEGATION**
21) **OF AUTHORITY FROM THE**
22) **REGIONAL BOARD, TO MODIFY AND**
23) **EXTEND THE TERMINATION DATE**
24) **OF CENTRAL COAST REGIONAL**
25) **WATE QUALITY CONTROL BOARD**
) **ORDER R3-2004-0117 WITHOUT**
) **HEARING OR ACTION OF THE**
) **REGIONAL BOARD**

1 Pursuant to Water Code §2050, William Elliott hereby petitions the State Water
2 Resources control Board (“State Board”) to review the March 29, 2011 action of Roger Briggs,
3 Executive Director of the Central Coast Regional Water Quality Control Board (“Regional
4 Board”), extending by Executive Officer Order No. R3-2011-0208, the March 31, 2011
5 termination date of Regional Board Order No. R3-2004-0117 (the “Conditional Waiver of Waste
6 Discharge Requirements for Discharges from irrigated Lands”)(“hereafter “2004 Agricultural
7 Order”), and thereby affecting a modification of that Order. He did so purportedly by exercise
8 of a delegation of authority to him from the Regional Board dated October 12, 1990 (Regional
9 Board Resolution No. 90-05).

10
11 **I. NAME AND CONTACT INFORMATION OF PETITIONER**

12 William Elliott
13 323 McCarthy Avenue
14 Oceano, California 93445
15 805.473.9377
ElliottSLO@aol.com

16 **II. REGIONAL BOARD ACTION BEING PETITIONED**

17 This Petition seeks review of the Executive Director’s March 29, 2011 renewal and
18 extension, by Executive Officer Order R3-2011-0208, of the termination date of the 2004
19 Agricultural Order from March 31, 2011 to September 30, 2011. Executive Director Briggs did
20 so purportedly pursuant to a delegation of authority and California Water Code § 13223 (2011).
21 A true and correct copy of Executive Officer Order No. R3-20100-0208 is attached hereto as
22 Exhibit A and is incorporated herein by reference. A true and correct copy of Regional Board
23 Resolution No. 90-06 (“Delegation of Powers and Duties to the Executive Director”) is attached
24 as Exhibit B hereto and is incorporated herein by reference.
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2 **III. THE DATE THE EXECUTIVE DIRECTOR ACTED**

3 March 29, 2011.

4 **IV. STATEMENT OF REASON THE EXECUTIVE DIRECTOR'S ACTION**
5 **WAS INAPPROPRIATE, IMPROPER, AND ILLEGAL**

6 Water Code § 13223 permits the Regional Board to delegate many of its powers and
7 duties to its Executive Director, Roger Briggs. That statutory delegation of authority, however,
8 is not without limitation:

9 “(a) Each regional board may delegate any of its powers and duties vested in it by
10 this division to its executive officer **excepting only the following: ... (2) the**
11 **issuance, modification, or revocation of any water quality control plan, water**
qualify objectives, or waste discharge requirement ...” (Emphasis added)

12 In spite of this limitation (which statute is referred to in Res. 90-06(3)), the Executive Director,
13 by Executive Officer Order No. R3-2011-0208 dated March 29, 2011) affected a modification of
14 the termination date, and hence renewal of the 2004 Order, from March 31, 2011 to September
15 30, 2011. That falls far outside of his authority under the terms of the Regional Board's
16 delegation and, indeed, Section 13223(a) since a change in the termination date of Order No.
17 R3-2004-0177 (entitled “Conditional Waiver of Waste Discharge Requirements for Discharges
18 from Irrigated Lands,” which includes a monitoring and reporting program waiving waste
19 discharge requirements for discharges of waste from irrigated lands in the Central Coast Region)
20 is a modification of “waste discharge requirements” within the meaning and coverage of Section
21 13223(a). That is, any extension of the life of a regulatory program such as that underlying this
22 matter is “any ... modification” which requires Regional Board action rather than action by the
23 Executive Director alone. Hence, the Director acted well outside the scope of his delegation.
24
25

1 His March 29, 2011 Order and the extension of Resolution No. R3-2004-0177 is thus
2 inappropriate, improper, illegal, and void on its face.

3 **V. STATEMENT OF POINTS AND AUTHORITIES**

4 **A. Factual Background**

5 The chronological facts pertaining to this matter are set forth in Exhibit A, Executive
6 Officer Order No. R3-2011-0208.

7
8 On July 9, 2004, the Regional Board adopted Order No. R3-200409117 (entitled
9 “Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands,”
10 which includes a monitoring and reporting program waiving waste discharge requirements for
11 discharges of waste from irrigated lands in the Central Coast Region) as well as a Negative
12 Declaration under CEQA. On July 9, 2009 – as a regularly noticed agenda item – the Regional
13 Board renewed that Order for a term ending on July 10, 2010. On July 8, 2010, the Regional
14 Board renewed the 2004 Agricultural Order again as a regularly notice agenda item following
15 proper public notice for a term ending on March 30, 2011.

16 Thereafter, the Regional Board engaged in a lengthy public process to consider renewal
17 of the 2004 Agricultural Order with modification. The most recent of these was a regularly
18 noticed meeting of the Regional Board on March 17, 2011 at which modifications recommended
19 by the Staff and the public were discussed. No action was taken on that date or at that time,
20 excepting that a further duly noticed public meeting on the matter of the modification and
21 extension of the 2004 Agricultural Order is set for May 4, 2011. Even though the Regional
22 Board lacked a quorum to approve or disapprove the modifications suggested by Res. No. R3-
23 2010-0040 (the modified update of the 2004 Agricultural Order) at the March 17, 2011, it failed
24 to set forth any notice of intent to again extend that order past the imminent termination date of
25

1 March 30, 2011. Indeed, no action was timely taken by the Regional Board by publicly notice
2 to extend that date.

3 With the March 31, 2011 termination date looming, the Regional Board did not either
4 schedule an emergency or expedited meeting or otherwise address the necessity for extension of
5 the 2004 Agricultural Order. It took no action in spite of its statements made during the public
6 meeting of July 8, 2010 which had previously extended the program. As is stated in the Minutes
7 of that meeting, a true and correct copy of which is Exhibit C hereto and is incorporated herein
8 by reference:

9 “By extending the existing order to March 2011, this scenario [‘the Board will
10 hear all the testimony and may direct staff to provide some additional information
11 or analysis to bring back to the next meeting’] can be accommodated without
having to re-agendize another extension resolution.”

12 Instead, Executive Director Briggs stepped in and issued the challenged Executive Director
13 Order that extended the termination date of the 2004 Agricultural Order to September 30, 2011.
14 In doing so, he noted that his action was making a “modification” of that Order, albeit one that
15 he viewed as not being sufficiently “major” so as to fall outside the parameters of his
16 purportedly delegated authority. While Executive Director Brigg’s action are bureaucratically
17 laudable, they constitute nothing more than a failed “Hail Mary” play to save the 2004
18 Agricultural Order from terminating on its own terms two days later.¹

19
20 **B. The Rules of Statutory Interpretation Applied To Section 13223, And**
21 **Estoppel Arising From The Regional Board’s Prior Actions In Extending**
22 **The Termination Date Establish That The Exclusion of “Any”**
23 **“Modifications” From A Delegation Of Power By The Regional Board To**
Executive Director Briggs Precludes His Making A Modification To The
Termination Date Of The 2004 Agricultural Order

24 ¹ “Hail Mary” is a most appropriate description of Executive Director Briggs’ action. See,
25 e.g., Nortel Networks, Inc. v. State Board of Equalizations, 191 Cal.App.4th 1259, 1272
(2011)(describing a change to a regulation as being “a very tardy ‘Hail Mary’ pass after the last
whistle blew and the fans were filing towards the exits”).

1 Even assuming, arguendo, that Mr. Briggs' March 29, 2011 Executive Officer Order No.
2 R3-2011-0208 is a bureaucratically laudable act necessary to "save" the 2004 Agricultural
3 Waiver from lapsing according to its termination date of March 31, 2011, such an assumption
4 does not support the legality of that Order. Rather, its appropriateness and legality rest upon
5 application of well-settled rules of statutory interpretation [see 2A, Statutes and Statutory
6 Construction (Singer ed., 2007) at sect. 47.1 et seq.], applied to the internal limitations placed by
7 Water Code §13223(a) on what matter cannot be delegated to an officer of a Regional Water
8 Board. Section 13223(a) provides in pertinent part:

9 "Each regional board may delegate any of its powers and duties vested in it by
10 this division to its executive officer excepting only the following: ... (2) the
11 issuance, **modification**, or revocation of **any** water quality control plan, water
quality objectives, or **waste discharge requirements**" (Emphasis supplied).

12 As used in the statute, "modification" must be afforded its usual legal meaning. See Arnett v.
13 Dal Cielo (1996) 14 Cal.4th 4, 19.² That meaning is clear:

14 "(1) a change in something; an alteration ,a contract modification....; (2) a
15 qualification or limitation of something ,a modification of drinking habits...."

16 Black's Law Dictionary (9th ed. 2009), p. 1095. The situation does not change even when
17 the "usual" rather than the "legal" definition of "modification" is used: i.e.

18 "The act or state of being modified; the altered result; an alteration in form,
19 appearance, or character..."

20 Living Webster Encyclopedic Dictionary (1971), p. 614.

22 ² The California Supreme Court in Arnett held:

23 "It is true that courts ordinarily give the words of a statute the usual, everyday
24 meaning they have in lay speech. But that rule has an important exception, and it
25 governs this case: when a word used in a statute has a well-established *legal*
meaning, it will be given that meaning in construing the statute. This has long
been the law of California..." (Internal cites omitted, italics in original)

1 It cannot seriously be argued or much less believed that renewing the 2004 Agricultural
2 Order by extending the date of its termination through Executive Director fiat is anything other
3 than a “modification” of the waste discharge requirements or other characteristics of the 2004
4 Agricultural Order. Without it, the Order would have terminated. Even though Executive
5 Officer Order No. R3-2011-0208 states that its renewal of the 2004 Agricultural Order by
6 extending its termination date does not “modify” other terms of the 2004 Agricultural Order that
7 had been subject to public notice and Board action, such an averment is of no moment. Indeed,
8 the Executive Order appears to inappropriately conflate the “modification” exclusion of Section
9 13223 with the “modification” language of other sections of the Water Code which deal with the
10 situation in which “modifications” may require reexamination of CEQA concerns and studies.
11 The Executive Director’s position – analogous to the old saying about being “a little bit
12 pregnant” -- is an oxymoron that offers no support to the illegal action.³ The question is solely
13 whether a **modification** occurred when the program was saved from extinction by extending its
14 termination date. It most assuredly since f that is not a “modification” then nothing can qualify
15 as one. Clearly it was and, just as clearly, the Regional Board made clear by its action of June 8,
16 2010 that such a modification necessarily involved and required a public notice pursuant to Cal.
17 Govt. Code §§ 11120 et seq. (governing what matters must be the subject of public meetings)
18 and placement on an agenda. As indicated in the Minutes of its July 8, 2010 meeting, the Board
19 committed itself to “re-agendizing” any further extension. Just as the Board’s July 8 renewal
20 and extension modified the 2004 Agricultural Order, the Executive Director’s action did the
21 same to “any” waste water discharge requirement or program within the meaning of Section
22 13223, is in and of itself sufficient to require that the instant petition be sustained.
23
24

25 ³ See, e.g., Cowan v. Myer (1986) 187 Cal.App.3d 968, 993.

1 At the end of the day, it is clear that the Regional Board and its Staff let the renewal by
2 extension of the 2004 Agricultural Order's termination date slip through the cracks until it was,
3 alas, too late for it to take any legally authorized action to save that Order and its conditional
4 discharge waiver from terminating according to its terms. The answer to the uncomfortable
5 position in which the Regional Board and its Staff now finds themselves is resolved only by
6 looking anew and afresh at the 2004 Agricultural Order and its modification. That will require a
7 new resolution and a new consideration of, among other important things, the environmental
8 impact of a revised conditional waiver and attainment of water purification standards. Like it or
9 not, that is the only option left to the Regional Board unless, as the result of sheer hubris, it acts
10 as though the Executive Officer Order No. R3-2011-0208 is effective and proceeds as planned at
11 its upcoming May 4, 2011 meeting to continue its consideration of previously-proposed
12 modifications to the 2004 Order. Then, upon final adoption of that modification, if any, the
13 legal challenge to the Board's action will include procedural as well as substantive grounds
14 sufficient to undo the years of hard work and unnecessary delay in the achievement of the waste
15 discharge requirements.
16

17 **VI. PETITIONER IS AGGRIEVED**

18 Petitioner is aggrieved by the Executive Officer Order No. R3-2011-0208 as a
19 stakeholder, consultant to other stakeholders, and as a resident in an area falling within the
20 geographic coverage of the Regional Board. As such, he has an interest in assuring that the
21 actions taken by the Regional Board to protect the environment and meet its mandate under the
22 Water Code are done in a legal fashion best designed to serve the interests of the residents of the
23 Region and, of course, fulfill the mandate of the Regional Board in a legal, ethical fashion.
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1 **VII. REQUESTED STATE BOARD ACTION**

2 Petitioner requests the State Board to issue an order: (1) finding that Regional Board
3 Director Briggs acted in excess of his delegable authority and contrary to the limitations of
4 Water Code § 13223 in issuing Executive Officer Order No. R3-2100-0208; (2) finding that
5 insofar as the Regional Board delegated the right and duty to modify the termination date of the
6 2004 Agricultural Order to Executive Director Briggs that it acted in excess of its authority to
7 delegate such a matter to Executive Director Briggs and contrary to the limitations of Water
8 Code § 13223; (3) finding that Executive Officer Order No. Re-2011-0298 is improper,
9 inappropriate, illegal, and must be withdrawn by the Regional Board so that the 2004
10 Agricultural Waiver lapsed on its own terms on March 31, 2011; and, (4) award of attorneys
11 fees as allowed by law. In turn, Petitioner requests that the State Board find and issue an order
12 that any further consideration of amending or readopting in whole or in part the now-lapsed
13 2004 Agricultural Order must begin anew, including a new evaluation of the environmental
14 impacts of any such proposed adoption.
15

16
17 **VIII. STATEMENT OF COPIES SENT TO THE REGIONAL BOARD**

18 Copies of this petition are being sent to the Regional Board at the following addresses:

19 (By personal delivery)
20 Roger Briggs, Executive Officer
21 Central Coast Regional Water Quality Control Board
22 895 Aerovista Place, Ste. 101
23 San Luis Obispo, California 93401

24 (By personal delivery)
25 Chairman
Central Coast Regional Water Quality Control Board
895 Aerovista Place, Ste. 101
San Luis Obispo, California 93401

1 (By e-mail)
2 Frances McChesney
3 Senior Staff Counsel
4 State Water Resources Control Board
5 1001 I Street, 22d Floor
6 Sacramento, California 94418
7 fmchesney@waterboards.ca.gov

8 **IX. ISSUES RAISED BEFORE REGIONAL BOARD**

9 Petitioner certifies that the issues set forth above will be presented to the Regional Board
10 in writing or orally at the scheduled May 4, 2011 meeting of that Board.

11 Respectfully submitted,

12 

13 Date: April 29, 2011

14 Matthew S. Hale, Esq.,
15 Counsel for Petitioner
16 William Elliott
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REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION
EXECUTIVE OFFICER ORDER NO. R3-2011-0208
TO EXTEND TERMINATION DATE
OF ORDER NO. R3-2004-0117

Waiver of Waste Discharge Requirements for Discharges of Waste from
Irrigated Lands in the Central Coast Region

The Executive Officer of the Regional Water Quality Control Board, Central Coast Region (Central Coast Water Board), pursuant to authority delegated under section 13223 of the California Water Code, makes the following findings and orders the extension of the termination date of Order No. R3-2004-0117:

1. On July 9, 2004, the Regional Water Quality Control Board, Central Coast Region (Central Coast Water Board or Board) adopted Order No. R3-2004-0117, the "Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands" that includes a Monitoring and Reporting Program, waiving waste discharge requirements for discharges of waste from irrigated lands in the Central Coast Region (2004 Agricultural Order) and adopted a Negative Declaration under CEQA (2004 Negative Declaration). On July 10, 2009, the Board renewed the 2004 Agricultural Order without any substantive revisions for a term ending on July 10, 2009. On July 8, 2010, the Board renewed the 2004 Agricultural Order again without any substantive revisions for a term ending on March 31, 2011.
2. The Central Coast Water Board has engaged in a lengthy public process to consider renewal of the 2004 Agricultural Order with modifications. Since the beginning of 2009, the Central Coast Water Board and/or staff has convened meetings with grower and environmental and community group representatives, met individually with many groups and individuals, held several public workshops and informational meetings, provided multiple documents for written comments, and prepared and circulated documents pursuant to the California Environmental Quality Act (CEQA). On November 19, 2010, the Central Coast Water Board released for public comment a draft Order to renew the 2004 Agricultural Order with modifications and received significant numbers of comments on the Draft.
3. The Central Coast Water Board intended to hold a hearing on March 17, 2011 to consider adoption of an Order renewing the 2004 Agricultural Order with modifications. Due to Board member conflicts, the Central Coast Water Board did not have a quorum to take action to adopt a renewal of the 2004 Agricultural Order with modifications by March 31, 2010, the termination date for the 2004 Agricultural Order. On March 17, 2011, the Board held a panel hearing consisting of the four current Board members who do not have a conflict. Due to time constraints, the Board continued the hearing until May 4, 2011 and will continue to hear remaining public comments from those who

submitted testimony cards on March 17, 2011, and provide direction to staff with respect to the renewal of the 2004 Agricultural Order.

4. The current 2004 Agricultural Order will terminate on March 31, 2011, without further action by that date. If the 2004 Agricultural Order terminates, considerable uncertainty will be created as there will be no Water Board Order in existence to regulate discharges of waste from irrigated lands. The 2004 Agricultural Order provides a waiver of waste discharge requirements for those enrolled in the Order and requires payment of annual fees. Persons enrolled in the 2004 Agricultural Order are required to implement management practices to control discharges of waste and to comply with water quality standards, among other conditions. The 2004 Agricultural Order includes a monitoring and reporting program, including a cooperative monitoring program. If the Order terminates, the conditions of the waiver would no longer apply to the dischargers, the fee requirement would terminate, the monitoring and reporting program would no longer be in effect, and the monitoring data base continuity would be interrupted, potentially adversely affecting trend analyses. For those reasons, and others, it would not be in the public interest for the 2004 Agricultural Order to terminate pending the availability of a quorum of the Board to renew the Order with modifications.
5. Water Code section 13223 authorizes the Central Coast Water Board to delegate any of its powers and duties to its Executive Officer except "(1) the promulgation of any regulation; (2) the issuance, modification, or revocation of any water quality control plan, water quality objectives, or waste discharge requirements; (3) the issuance, modifications, or revocation or any cease and desist order; (4) the holding of any hearing on water quality control plans; and (5) the application to the Attorney General for judicial enforcement . . .". The Central Coast Water Board has delegated to the Executive Officer all of its powers and duties except those enumerated above. Pursuant to that delegation, the Executive Officer has the power to extend the termination date of the 2004 Agricultural Order. The Order is not a regulation, water quality control plan, or waste discharge requirement, nor does it constitute the adoption of water quality objectives.
6. Water Code section 13269 authorizes the Central Coast Water Board to waive waste discharge requirements as to specific types of discharges. Water Code section 13269(f) requires that prior to renewal of any waiver that the regional board shall review the waiver at a public hearing. On July 8, 2010, the Central Coast Water Board held a public hearing to renew the 2004 Agricultural Order and extended the termination date to March 31, 2011. The Executive Officer's action in this Order to Extend the Termination Date does not modify the terms of the current 2004 Agricultural Order, therefore, no further public hearing is necessary prior to this extension of the termination date.

**EXECUTIVE OFFICER ORDER
NO. R3-2011-0208**

March 29, 2011

7. This Order to Extend the Termination Date of Order No. R3-2004-0117 does not modify that Order. Order No. R3-2004-0117 contains findings required by Water Code section 13269 and CEQA and those findings are incorporated by reference into this Order to Extend Termination Date.
8. The adoption of this Executive Officer Order to Extend the Termination Date of Order R3-2004-0117 is in the public interest because it continues the conditional waiver of waste discharge requirements to assure protection of water quality that requires actions by dischargers to control discharges of waste and compliance with water quality standards, continues the monitoring and reporting program, and continues the payment of fees, pending the availability of a quorum of the Central Coast Water Board to adopt a renewed and modified waiver of waste discharge requirements.
9. Any person affected by this Central Coast Water Board action may petition the State Water Resources Control Board to review the action in accordance with Section 13320 of the California Water Code and CCR, Title 23, Section 2050. The State Water Board, Office of Chief Counsel, must receive the petition within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request.

THEREFORE IT IS ORDERED pursuant to sections 13223 and 13269 of the California Water Code:

1. The termination date of Central Coast Water Board Order No. R3-2004-0117, a Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands, including a Monitoring and Reporting Program, is hereby extended until September 30, 2011.
2. No other modifications are made to Order No. R3-2004-0117.
3. Any person enrolled in Order No. R3-2004-0117 is not required to submit a new notice of intent to enroll in the Order.

CERTIFICATION

I, Roger W. Briggs, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of Executive Order No. R3-2011-0208 issued on March 29, 2011.



Roger W. Briggs
Executive Officer

Exhibit A