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July 12, 2011

Via e-mail; Hard Copy to Follow

Thomas Howard, Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812
thoward@waterboards.ca.gov

Re: State Water Resources Control Board's Failure to Respond to Petition for Review of California Regional Water Quality Control Board, Central Valley Region's Resolution No. R5-2011-0017 Certifying the Final Program Environmental Impact Report for the Long-Term Irrigated Lands Regulatory Program Dated April 7, 2011

Dear Mr. Howard,

I am writing to protest the State Board's failure to dismiss or take action "upon receipt" of a pending petition for review and to request that the State Board to take immediate action on a new petition for review filed yesterday.

On May 6, 2011, the California Sportfishing Protection Alliance and California Water Impact Network (collectively "CSPA") filed a petition with the State Water Resources Control Board requesting review of the California Regional Water Quality Control Board, Central Valley Region's ("Regional Board") certification of the final "Irrigated Lands Regulatory Program – Program Environmental Impact Report" ("PEIR") prepared for anticipated regulatory approvals implementing the Regional Board's irrigated lands regulatory program. On June 9, 2011, the Regional Board adopted a resolution renewing the Coalition Group Conditional Waiver of Discharge Requirements for Discharges from Irrigated Lands, Regional Board Order No. R5-2006-0053, for an additional 24 months ("Waiver Renewal") relying upon the faulty PEIR. On July 11, 2011, CSPA filed a second petition seeking State Board review of the Waiver Renewal as well as the PEIR.

The State Board has a duty, *upon receipt* of a petition for review in compliance with 23 Cal. Admin. Code § 2050 either to dismiss the petition or send a notice requiring responses from the various parties. 23 Cal. Admin. Code § 2050.5(a).¹ Section 2050 sets forth the required contents of a complete petition for review. 23 Cal. Admin. Code § 2050. CSPA's May 6th petition was complete when filed. That same day, the State Board's Office of Chief Council acknowledged receipt of the petition. *See* Exhibit A (attached). CSPA has not heard a word from the State Board since. The July 11th petition also was complete when filed. The State Board has acknowledged receipt of that new petition. *See* Exhibit B (attached). Accordingly, the State Board's duty either to dismiss that new petition or send the notice requiring responses also is now

¹ Likewise, the State Board must inform a petitioner of any defects in a petition for review "upon receipt." 23 Cal. Admin. Code § 2051(a).

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triggered. This letter serves to notify the State Board that, should the State Board fail to take one of the requisite actions for each of the referenced petitions within 10 calendar days of the date of this correspondence, CSPA intends to seek a writ of mandate from a Superior Court ordering the State Board either to deny the petitions for review or issue notices of compliance and proceed to review the May 6, 2011 and July 11, 2011 petitions.

By requiring the State Board either to dismiss or send a notice “upon receipt” of a complying petition, Section 2050.5 establishes a ministerial duty in the State Board. *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v. County of Solano Dept. of Resource Management* (2008) 167 Cal.App.4th 1350, 1359 (agency’s “obligation to hold a hearing **upon receipt** of a petition challenging its alleged failure to act” qualifies as a ministerial duty subject to writ of mandate); *Fox v. Alexis* (1985) 38 Cal.3d 621, 625 (where agency required to suspend or revoke the license of any person convicted of specified DUI offenses “upon receipt” of a duly certified abstract judgment showing that the person has been convicted, “receipt of the abstract of judgment is the event which triggers administrative action”). “A refusal to exercise discretion is itself an abuse of discretion.” *Morris v. Harper* (2001) 94 Cal.App.4th 52, 62-63. Accordingly, although mandamus is not available to compel the exercise of the discretion in a particular manner or to reach a particular result, it does lie to command the exercise of discretion – to compel some action upon the subject involved under a proper interpretation of the applicable law. *Id.* at 63. “Where a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial.” *Id.* “Where a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion.” *Id.*

The immediate trigger for the State Board either to dismiss an appeal or issue the notice to respond upon receipt of a complete petition is consistent with both Porter-Cologne’s and the State Board regulations’ intentions to assure prompt review of administrative appeals. For example, Water Code § 13320 specifically sets a period of 60 days as indicative of a failure to act by a regional board subject to appeal to the State Board. The State Board itself must “review and act on the petition within 270 days from the date of mailing the notification described in (a)” unless a hearing is held by the state board, which extends the State Board’s deadline for completing its review. 23 Cal. Admin. Code § 2050.5(b). A petition may not be held in abeyance without the request or agreement of the petitioner. *Id.*, § 2050.5(d). The 30-day limit to appeal regional board decisions to the State Board as well as the 30-day limit to appeal most State Board decisions to Superior Court also underscore the Legislature’s intention that review of water quality decisions be expeditious. Water Code §§ 13320, 13330.

Where, as here, the underlying actions at issue involve CEQA and a Regional Board decision that is two-years in duration, time is also of the essence. Given the two-year term of the Waiver Renewal, any effort by the State Board to prolong its review process by not responding to complete petitions undermines citizens’ ability to exhaust their substantive concerns and objections. Likewise, CEQA is imbued with provisions to assure that both environmental analyses and challenges are expedited. The State Board should not arbitrarily prolong the appeal process in order to stultify the public’s right to seek redress both before the Board itself and, if necessary, the courts.

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The State Board has now failed to act on CSPA's May 6th petition for more than 60 days. The more recent July 11th petition also is complete, containing each of the required elements and was received by the State Board on July 11, 2011, triggering one of the responses required. 23 Cal. Admin. Code § 2050.5(a). CSPA requests that the State Board immediately dismiss one or both of the petitions for review or issue the notices as required by 23 Cal. Admin. Code § 2050.5(a). If the State Board fails to take one of these two steps within ten days of the date of this correspondence, CSPA intends to file a petition for writ of mandate in Superior Court. Please do not hesitate to call to discuss the above concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Lozeau", with a stylized flourish at the end.

Michael Lozeau
Lozeau Drury LLP
Attorneys for California Sportfishing Protection Alliance

Cc via e-mail: Bill Jennings, CSPA
Michael Lauffer, Chief Counsel, SWRCB
Jeannette L. Bashaw, SWRCB

EXHIBIT A

From: Jeannette Bashaw (JBashaw@waterboards.ca.gov)

To: toyer@lozeaudrury.com;

Date: Fri, May 6, 2011 12:22:48 PM

Cc: Deltakeep@aol.com; william.thomas@bbklaw.com; rfiroved@calrice.org; tjohnson@calrice.org; dorth@krcd.org; michael@lozeaudrury.com; michaelkw@msn.com; bruceh@norcalwater.org; bry.jasper@oregonstate.edu; info@sjdeltawatershed.org; rstiefvater@speccrop.com; waynez@stanfarmbureau.org; jmcgahan@summerseng.com; pklassen@unwiredbb.com; pcreedon@waterboards.ca.gov; omckinnis@westlandswater.org; sramos@westlandswater.org; rvranglr@yahoo.com;

Subject: Re: Petition to Review re California Regional Water Quality Control Board, Central Valley Regions Resolution No. R5-2011-0017

Mr. Gear,

The State Water Resources Control Board Office of Chief Counsel acknowledges receipt of the California Sportfishing Protection Alliance's and California Water Impact Network's petition on May 6, 2011, at 11:55 a.m.

Jeannette L. Bashaw
Legal Analyst
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor (95814)
P.O. Box 100
Sacramento, CA 95812-0100
Telephone: (916) 341-5155
Facsimile: (916) 341-5199
E-Mail: jbashaw@waterboards.ca.gov

>>> Toyer Gear <toyer@lozeaudrury.com> 5/6/2011 11:55 AM >>>

Dear Ms. Bashaw:

Attached please find the Petition To Review Or, Alternatively, Request For Own Motion Review Of California Regional Water Quality Control Board, Central Valley Region's Resolution No. R5-2011-0017 Certifying The Final Program Environmental Impact Report For The Long-Term Irrigated Lands Regulatory Program Dated April 7, 2011. If you could please confirm receipt of the attached petition would be appreciated.

If you have any questions please feel free to contact our office.

Regards,
Toyer Gear
Lozeau | Drury LLP

Legal Assistant to Michael R. Lozeau
410 12th Street, Suite 250
Oakland, CA 94607
510-836-4200
510-836-4205 fax

toyer@lozeaudrury.com

EXHIBIT B

From: Jeannette Bashaw (JBashaw@waterboards.ca.gov)
To: michael@lozeaudrury.com;
Date: Tue, July 12, 2011 5:43:12 AM
Cc: deltakeep@me.com; AMayer@waterboards.ca.gov; pcreedon@waterboards.ca.gov;
Subject: Re: Petition for Review of Central Valley Board's Renewal of Irrigated Lands Waiver and Accompanying PEIR

Mr. Lozeau,

The State Water Resources Control Board Office of Chief Counsel acknowledges receipt of the California Sportfishing Protection Alliance and California Water Impact Network petition for review on July 11, 2011, at 11:14 a.m.

Jeannette L. Bashaw
Legal Analyst
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor (95814)
P.O. Box 100
Sacramento, CA 95812-0100
Telephone: (916) 341-5155
Facsimile: (916) 341-5199
E-Mail: jbashaw@waterboards.ca.gov

>>> Michael Lozeau <michael@lozeaudrury.com> 7/11/2011 11:14 AM >>>
Dear Ms. Bashaw,

Attached please find a petition for review filed on behalf of California Sportfishing Protection Alliance and California Water Impact Network seeking review of the Central Valley Regional Board's recent renewal of the Coalition Group Conditional Waiver of Discharge Requirements for Discharges From Irrigated Lands, Resolution No. R5-2011-0032, and the accompanying Irrigated Lands Regulatory Program, Program Environmental Impact Report, Resolution No. R5-2011-0017. If you could please confirm receipt of the attached petition would be appreciated.

Sincerely,

Michael R. Lozeau
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