2/17/10 Board Hearing
CEQA Regulations
Deadline: 2/16/10 by 12 noon

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February 15, 2010

Chair Hoppin, and Members of the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

RE: Comment Letter – Proposed CEQA Regulations

Chair Hoppin and Members of the Board,

This letter provides the comments of the Western States Petroleum Association ("WSPA") on the proposed amendments (the "Amendments") to the State Water Resources Control Board ("State Board") regulations at 23 Cal. Code Regulations Section 3720 et seq., containing implementation procedures for compliance with the California Environmental Quality Act ("CEQA"), Pub. Res. Code Section 21000 et seq.

WSPA is a non-profit trade association representing twenty-eight companies that explore for, produce, transport, refine and market petroleum, petroleum-based products, natural gas and other energy products in California and five other western states.

We appreciate the opportunity to submit these comments to the State Board. Our comments below refer to specific sections which the State Board proposes to amend.

Section 3720(b)

This new subsection provides that the State Board's CEQA regulations, in their entirety, are inapplicable to activities that the State Board or a Regional Water Quality Control Board ("Regional Board") determines are not subject to CEQA. Based upon this exclusion it appears that, when the State or Regional Boards propose actions they believe to be exempt from CEQA, they are not to follow the other regulations providing for notice and comment when actions are subject to CEQA. Instead, it appears that stakeholders would have no notice or opportunity for

comment on the basis for a claim of exemption, such as reliance on a statutory, categorical or "common sense" exemption.

WSPA believes that the better policy is to provide for notice and comment on any CEQA exemptions at the same time that the relevant board gives notice and opportunity for comment on its proposed actions. This is consistent with the practice of the State and Regional Boards prior to the Amendments. In particular, regulatory agencies with jurisdiction over a particular medium, such as water quality, may be tempted to rely on the Class 7 and Class 8 categorical exemptions for actions to protect the environment (CEQA Guidelines, 14 Cal. Code Regs. Sections 15307, 15308).

However, it is well settled that if regulatory action will have adverse side-effects for other environmental media, such as air quality or hazardous waste, those consequences must be analyzed and feasible alternatives or mitigation incorporated in accordance with CEQA. CEQA Guidelines Section 15300.2; *County Sanitation District v. County of Kern* (2005) 127 Cal. App. 4th 1544; *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal. App. 4th 1392. Allowing an opportunity for stakeholder input on proposed exemptions during the administrative process would improve the process, reduce uncertainty for the agencies and the public, and allow an adequate record to be created in the event of a court challenge.

Sections 3740 and 3741

In these sections, the phrase "water reclamation" is replaced with "water recycling." The State Board's Initial Statement of Reasons ("ISOR") for the proposed Amendments indicates that the revision is intended to reflect "current usage and common parlance within the agency and the water recycling industry." We note that Water Code Section 230 refers to "reclamation of water from wastes for beneficial purposes" and Water Code Section 13050(n) similarly defines "recycled water" as "water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefore considered a valuable resource."

Moreover, the use of "recycled" is consistent with the terminology of the "Policy for Water Quality Control of Recycled Water" which the State Board adopted in 2009. Accordingly, we believe that this change is intended to be non-substantive and not to introduce any distinction between the former and amended language. However, we ask that the State Board confirm its non-substantive intent in response to these comments.

Sections 3742(b) and 3751

In these two sections, the State Board proposes that, when making CEQA decisions, the boards may take action "to prevent nuisance." Nothing in Public Resources Code Sections 21002, 21002.1 and 21082 (the purported authorities for Sections 3742(b) and 3751), nor in any other provision of CEQA, authorizes the State Board to use the CEQA process to regulate or abate nuisances generally.

Rather, CEQA provides authority for addressing "significant impacts" and for identifying mitigation measures or alternatives to reduce or avoid such impacts, as defined in the statute. Since these regulations are for the specific purpose of implementing CEQA, the references to preventing nuisance should be stricken.

Section 3764(b)

This section provides that "the State Board will estimate the cost of complying with CEQA for the project ... and will send a statement of the estimated cost to the person proposing such project." These unspecified costs are separate from and in addition to the "cost of preparing a negative declaration or an EIR" which are ordinarily charged to project proponents.

The ISOR refers to Department of Fish and Game fees as an example of such costs which an applicant should pay, and that example is understandable. However, Section 3764(b) neither identifies for agency staff nor puts applicants on notice of the types of costs that may be charged. Nor does it define what actions might be deemed necessary for "complying with CEQA", a phrase which is vague and without needed definition.

In fact, the Department of Fish and Game fee referenced in the ISOR is not a "cost of complying with CEQA" itself, but is separately required by Fish and Game Code Section 711.4. WSPA recommends that this section be clarified to identify specific types or categories of costs that are appropriate for this purpose, e.g., fees payable to other agencies as authorized by law.

Section 3775.5(c)

While the scoping process is generally optional under CEQA, when a lead agency does decide to hold a scoping meeting, providing notice to stakeholders is not optional. CEQA Guidelines Section 15082(c)(2). Accordingly, WSPA suggests the following text revision to this section:

> Notice of a scoping meeting shall be posted on the State Board's website and ~~should~~ *shall* be provided to all of the following: ...

Section 3776

This section attempts to clarify the roles of the State and Regional Boards by identifying when a Board serves as the "lead agency" pursuant to CEQA. However, the structure of this provision conflicts with the State Board's statutory role in approving certain actions of the Regional Boards in accordance with the Water Code.

For example, subsection (b) states that "the regional board shall be the lead agency with respect to adoption or amendment of any of its regional water quality control plans or guidelines, as described in Water Code Sections 13240 through 13244 and 13245.5." However, pursuant to Water Code Section 13245.5, "Guidelines adopted by a regional board shall not become effective unless and until approved by the State Board." A "lead agency" must have authority to "carry out or approve the project." CEQA Guidelines Sections 15051, 15367.

In situations where the Regional Board's action does not become effective without State Board approval, the State Board must be the lead agency for purposes of CEQA, and therefore must take the final action to adopt or certify the substitute environmental document ("SED") for the project. CEQA Section 21080. While nothing in CEQA prevents a Regional Board from preparing the draft SED, responding to comments and even recommending final action, the Regional Board cannot take final action on the SED where, as a matter of law, final approval authority is retained by the State Board.

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This issue regarding the State Board's role as final approval authority is also reflected in subsections (c) and (d) of Section 3776. Subsection (c) provides that "the state board shall review the substitute environmental document of the regional board, and consider the regional board's findings under Section 3777 subdivisions (d), (e), and (f)." As noted above, however, where the State Board has ultimate approval authority over the action of the Regional Board, the State Board cannot merely "consider the regional board's findings" but must exercise its own independent judgment when evaluating the SED, and must itself make the necessary findings regarding the document's sufficiency. Pub. Res. Code Sections 21080, 21081.

Similarly, subsection (d) provides that the State Board "shall become the lead agency" for purposes of approval of a regional water quality control plan (i.e., a basin plan) under certain circumstances, when the State Board revises a basin plan that was previously returned to the Regional Board for reconsideration. However, Water Code § 13245 provides that basin plans are not effective until the State Board approves them.[1]

Accordingly, the State Board is always the lead agency for CEQA purposes, since it has ultimate approval authority under the law. Moreover, it is incorrect to state that the "the state board need not duplicate the CEQA process performed by the regional board" since it is the State Board, as the approving agency, that has lead agency responsibility for the CEQA process.

The State Board may not use its CEQA implementation regulations to divest itself of its responsibility under the Water Code and CEQA, as Section 3776 purports to do. While there are indeed situations in which a Regional Board is the proper lead agency for purposes of approving and conducting CEQA compliance for local projects, Section 3776 as currently drafted seems to lump such actions together with actions where the State Board has ultimate responsibility. WSPA recommends that this entire section be substantially revised to better reflect the State Board's statutory role in the approval of actions by the Regional Boards.

Section 3777(d)

WSPA suggests the following minor text revisions to this section, to clarify that the proposed findings and statement of overriding considerations appearing in a draft SED are, at that stage, merely "proposed." The findings and statement do not become final until acted upon by the decision-making body of the lead agency.

> As to each impact identified in subdivisions (b)(2) and (b)(5), the SED shall contain *proposed* findings as described in State CEQA Guidelines Section 15091, and if applicable, a *proposed* statement described in Section 15093.

Section 3777(e) and (f)

These sections indicate that the SED may omit analysis of mitigation measures if there is no "fair argument" that the project may have potentially significant environmental impacts. The "fair argument" standard, as developed in CEQA case law, is the same standard for determining

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[1] Proposed Section 3781(b) of the Amendments acknowledges this fact, by providing that it is the State Board, and not the Regional Boards, that files the Notice of Decision ("NOD") for adoption or amendment of water quality control plans and guidelines, after the State Board's approval action. The NOD, in turn, triggers the statute of limitations for a court challenge. This provision is appropriate given that the State Board has final statutory approval authority for water quality control plans and guidelines under Water Code Sections 13245 and 13245.5.

whether an environmental impact report ("EIR") or negative declaration is required. However, by providing for the SED either to contain the equivalent of an EIR analysis or to find that no analysis of mitigation is necessary, the language of these sections excludes the intermediate outcome: that the SED may need to contain analysis of mitigation measures, in order to serve as the equivalent of a mitigated negative declaration.

WSPA suggests the following text changes to clarify this point and the one raised in our previous comment.

> If the State Board determines that no fair argument exists that the project, *without mitigation,* could result in any reasonably foreseeable significant adverse environmental impacts, the SED shall include a *proposed* finding to that effect in lieu of the analysis described in subdivision (b)(3).
>
> (f) If the State Board determines that no fair argument exists that the reasonably foreseeable means of compliance with the project, *without mitigation,* could result in any reasonably foreseeable significant adverse environmental impacts, the SED shall include a *proposed* finding to that effect in lieu of the analysis described in subdivisions (b)(6) and (b)(7).

Section 3779

Pursuant to Public Resources Code § 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. *See e.g., East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155; *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal. App. 4th 1109. Accordingly, proposed Section 3779(b) improperly limits the State Board's consideration of public comments on the SED by providing that the "State Board is not required to consider any written comment that is received after the deadline" for the written comment period.

While CEQA Guidelines Section 15088(a) provides that a lead agency need not respond in writing to comments after the close of the written comment period, it does not relieve the lead agency of considering comments at the final hearing to adopt the project. Similarly, proposed Section 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" where oral comments on the SED are received. Comments made outside of the formal comment period are part of the administrative record of proceedings, whether or not the State Board staff chooses to prepare written responses to them. At the very least, the State Board as the decision-making body has a duty to consider those comments as part of its evaluation of the project.

In addition, proposed Section 3779(d) provides that the State Board may respond "orally to significant environmental issues raised at the public hearing." Pursuant to CEQA Guidelines Section 15088(a), "the lead agency shall evaluate comments on environmental issues ... *and shall prepare a written response.*" This section does not distinguish between written and oral comments on the environmental document, but instead mandates written responses to *all* timely comments.

There appears to be 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

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oral. See also *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal. App. 4th 1392, 1442 ("An agency seeking certification [of its regulatory program] must adopt regulations requiring that final action on the proposed activity include *written responses* to significant environmental points raised during the decisionmaking process")(emphasis added and citations omitted). WSPA recommends the reference to "oral" responses be stricken.

Finally, WSPA recommends that Section 3779(d) identify the period in which copies of written responses will be available for review prior to approval of the SED. Given that the intent of this provision is to make responses available for review, commenters and other stakeholders should be allowed 10 days as a meaningful period in which to do so. This change would be consistent with the last sentence of Section 3779(d), which allows a 10 day period for such review by public agencies.

> (d) The State Board shall prepare written responses to the significant environmental issues raised in the comments received during the written comment period. The State Board shall respond in writing ~~or orally~~ to significant environmental issues raised at the public hearing. The State Board may respond to comments received after the comment period, but is not required to respond. Copies of written responses shall be available for any person to review *at least 10 days* prior to the State Board's approval of the SED. Copies of written responses to public agency comments shall be provided to those agencies at least 10 days prior to the State Board's approval of the SED.

Section 3779(f)

As discussed in our comment on Section 3776, above, the State Board is the final approving authority and therefore the lead agency for purposes of water quality control plans and guidelines. Thus, the State Board retains the duty to receive comments on the SED or proposed project up to the final adoption of the project. *See East Peninsula Ed. Council, Inc., supra.*

Proposed Section 3779(f) circumscribes the State Board's responsibilities under CEQA by limiting the right of the public to comment at the State Board hearing level. Specifically, this section provides that "if the regional board previously responded to the comment, the commenter must explain why it believes that the regional board's response was inadequate." This provision is essentially an exhaustion of administrative remedies requirement, familiar in judicial challenges to administrative actions.

However, under the structure of the Water Code provisions as discussed above, the State Board is not acting as a reviewing court, but as the final administrative decision-making body. It is therefore the State Board's responsibility to certify that the SED and the responses to comments comply with CEQA. CEQA Guidelines Section 15088.

Further, proposed Section 3779(f) provides that "the State Board may refuse to accept any comments that do not include such a statement ... [and] is not required to consider any comment that is not in compliance with this section." However, refusal to accept comments submitted at the hearing on the merits of a particular 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." Pub.

Res. Code Section 21177. The State Board may not use its CEQA regulations to limit the rights granted by CEQA itself.

In sum, it is improper to shift the burden to the commenter to exhaust its remedies at the Regional Board level when, as lead agency for CEQA purposes, it is the State Board's responsibility, as the ultimate decision-making body, to consider comments at the final hearing to adopt the project – that is, at the final hearing before the *State Board*, not the Regional Board. The exhaustion of administrative remedies provisions should therefore be stricken from this section.

Section 3779.5(b)

WSPA recommends the following minor text change to conform Section 3779.5(b) with Section 3780(b), by requiring inclusion of the mitigation monitoring and reporting plan in the final SED:

> (b) The Final SED must include:
> (1) The materials described in Section 3777;
> (2) Comments and Responses to Comments, pursuant to Section 3779;
> (3) The State Board resolution approving the project; ~~and~~
> *(4) A mitigation monitoring and reporting plan, if required pursuant to Section 3780(b); and*
> ~~(4)~~*(5)* Other documentation as the State Board may prescribe.

Appendix C – Notice of Filing

We note that the Notice of Filing form has been modified to delete reference to waste discharge requirements. The prior form was confusing in that it appeared to suggest that waste discharge requirements were part of the CEQA certified regulatory program of the State and Regional Boards.

Since that program is limited to "the Water Quality Control (Basin)/208 Planning Program" of the State and Regional Boards, per CEQA Guidelines Section 15251(g), this revision makes sense. However, it would be appropriate for the State Board to provide an additional Notice form for non-certified regulatory program decisions.

WSPA appreciates the opportunity to comment on these proposed changes. If you have any questions, please feel free to contact me in our Sacramento office.

Sincerely,

Kevin Buchan

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