

INITIAL STATEMENT OF REASONS

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
1001 I STREET, 22ND FLOOR
SACRAMENTO, CA 95814

PROPOSED AMENDMENTS TO THE CALIFORNIA CODE OF REGULATIONS

TITLE 23. WATERS
DIVISION 3. STATE WATER RESOURCES CONTROL BOARD AND REGIONAL
WATER QUALITY CONTROL BOARDS
CHAPTER 27. REGULATIONS FOR IMPLEMENTATION OF THE ENVIRONMENTAL
QUALITY ACT OF 1970

ADOPT SECTIONS 3775.5 and 3779.5

AMEND SECTIONS 3720, 3721, 3722, 3723, 3730, 3733, 3740, 3741, 3742, 3750,
3751, 3762, 3763, 3764, 3775, 3776, 3777, 3778, 3779, 3780,
3781, Appendix A, and Appendix C

REPEAL SECTIONS 3760, 3761, and 3782

INTRODUCTION

The California Environmental Quality Act (CEQA) authorizes the Secretary for Natural Resources to certify that State regulatory programs that meet certain environmental standards are exempt from CEQA chapters 3 and 4 – the requirements for preparing environmental impact reports (EIRs), negative declarations (NDs), and initial studies. The Secretary for Natural Resources has certified the following regulatory programs of the State Water Resources Control Board (State Water Board) as exempt: The adoption or approval of standards, rules, regulations, or plans to be used in the Basin/208 Planning program for the protection, maintenance, and enhancement of water quality in California, and the regulatory program used to establish instream beneficial use protections.¹ These certified regulatory programs must still conduct a meaningful review of a project's environmental impacts. As required by CEQA, the State Water Board adopted regulations setting forth the rules and procedures that apply to environmental review and public comment for actions taken by the State and Regional Water Boards for their certified regulatory programs. See Chapter 27 of Title 23 of the California Code of Regulations.

The State Water Board has determined that it is appropriate to amend its existing CEQA regulations, including those that concern certified regulatory programs, for the reasons set forth herein. The last substantive revision of the CEQA regulations was in 1982. Since then, statutory revisions to CEQA have occurred and various court decisions have provided direction regarding the interpretation of CEQA with respect to certified regulatory programs. Accordingly, these regulatory amendments are necessary to revise the existing regulations to address the court decisions and the many statutory revisions that have occurred since the regulations were last updated. In addition, these regulatory amendments are necessary to improve clarity in both language and organization, and to provide a more orderly process such that they are easier and more efficient for staff of the State and Regional Water Boards to implement.

The State Water Board did not rely upon technical, theoretical, or empirical studies, reports, or documents in proposing these regulatory amendments. No reasonable alternatives to the proposed regulations were presented to or identified by the State Water Board. The State Water Board has determined that the proposed regulations will not have a significant adverse economic impact on small businesses. Consequently, there are no reasonable alternatives that would lessen the economic impact on small businesses. The proposed amendments to the regulations do not unnecessarily duplicate or conflict with any federal law or federal regulation.

SPECIFIC PURPOSE AND NECESSITY OF THE PROPOSED REGULATIONS

The specific purpose of each amendment, and the rationale for the determination that each amendment is reasonably necessary to carry out the purpose for which it is proposed, together with a description of the problem, administrative requirement, or other condition or circumstance that each amendment is intended to address, is as follows:

¹ The regulatory program used to establish instream beneficial use protections has since been repealed and no longer exists.

SECTION 3720. PURPOSE

- (a) This subsection sets forth the purpose of Title 23, Chapter 27 of the California Code of Regulations. It is amended to clarify that Chapter 27 applies only to those regulations in Chapter 27, and not all of the State Water Board’s regulations.
- (b) This subsection is added to clarify that the State Water Board has discretion to determine when Chapter 27 does not apply to a given activity.
- (c) This subsection is added for three reasons. First, the word “subchapter” is no longer used in the California Code of Regulations. Second, to ensure consistency with court decisions concluding that the State Water Board must comply with the State CEQA Guidelines. Third, to clarify that the State Water Board is carving out an exception for Certified Regulatory Programs, and that Article 6 of these regulations preempt any contradictory CEQA guideline.
- (d) This subsection is added to clarify that Chapter 27 does not preclude the State Water Board from applying other laws to preserve, enhance, and restore the quality of California’s water resources.

SECTION 3721. DEFINITIONS

- (a) This subsection is amended to ensure consistency with the definitions set forth in Title 23, Section 640 of the California Code of Regulations. Because one purpose of amending these regulations is to make them more helpful for staff to implement, the State Water Board finds it helpful to include this reference, even though it is repeated elsewhere in Title 23.
- (b) The definition of “environmental documents” is deleted to avoid redundancy; it duplicates what is already set forth in Title 14, Section 15361 of the California Code of Regulations.
- (c) This subsection will become (b). It is amended to ensure consistency with the exemption for certified regulatory programs and related State CEQA Guidelines. The State Water Board does not have any certified regulatory programs for leases, permits, licenses, or other entitlements for use; such entitlements are subject directly to the CEQA Guidelines, including for example “Notices of Determination,” rather than “Notices of Decision.” The phrase “or related project” is also added because the State Water Board intends to include project-level approvals that fall within the scope of original program-level approvals (e.g. an individual waiver in accordance with a basin plan programmatic waiver). And finally, the subsection is amended to reflect the current title of the Secretary for the California Natural Resources Agency.
- (d) This subsection will become (c). It is amended to implement and clarify the application of Public Resources Code § 21080.5 to State Water Board certified regulatory programs.
- (e), (f) These subsections are deleted to avoid redundancy. See subsection (a) of this Section.

SECTION 3722. COMPLIANCE WITH PERMIT STREAMLINING ACT

This Section is amended to implement and ensure consistency with current law. The phrase “except as provided by Water Code § 13264” is added because CEQA falls outside of the Permit Streamlining Act (PSA). The PSA states that if any agency fails to approve or disapprove of development projects within a certain period of time, the failure to act is deemed an approval of the permit application. (Government Code § 65956.) However, state agencies may not waive the application of CEQA even though the PSA time limitations may apply. The CEQA process must be completed before the State or Regional Water Board may issue waste discharge requirements or other entitlement for use. (Water Code §§ 13260, 13264.)

SECTION 3723. MASTER ENVIRONMENTAL ASSESSMENT

This Section contains amendments without regulatory effect. The amendments are made for clarity and to accommodate statutory changes.

SECTION 3730. MINISTERIAL PROJECT EXEMPTION

- (d) This subsection is amended to ensure consistency with current law.
- (e) This subsection is amended to clarify and ensure consistency with current law.
- (f) This subsection is deleted because the State Water Board no longer issues these types of certificates to the California Pollution Control Financing Authority. Accordingly, the deletion of this subsection helps prevent any confusion or ambiguity.
- (g) This subsection is deleted because Water Code Section 13169 no longer pertains to the issuance of a license or exemption of any oil spill cleanup agent. The section of the Water Code relating to oil spills was repealed by Statutes 1995, chapter 265, section 6 in S.B. 1083. Accordingly, the deletion of this subsection is necessary to prevent any confusion or ambiguity, because current Section 13169 pertains to groundwater protection programs.

SECTION 3733. WASTE DISCHARGE REQUIREMENTS ADOPTED PURSUANT TO WATER CODE DIVISION 7, CHAPTER 5.5

Water Code Section 13389 provides, “Neither the state board nor the regional boards shall be required to comply with [CEQA] prior to the adoption of any waste discharge requirement, except requirements for new sources as defined in the [Clean Water Act] or acts amendatory thereof or supplementary thereto.” The State Water Board has found that applicants for waste discharge requirements (WDRs) and interested persons frequently misunderstand Section 13389. First, it is frequently misunderstood that all waste discharge requirements (WDRs) are exempt from CEQA, when in fact the exemption applies only to WDRs that serve as an NPDES permit issued pursuant to Water Code Section 13377. In 2006, the Court of Appeal held that Section 13389 fully exempts NPDES permits from CEQA. (See *County of Los Angeles v. California State Water Resources Control Board* (2d Dist. 2006) 143 Cal.App.4th 985, 1005, stating that it is “beyond question” that CEQA does not apply to NPDES-issued permits.) Second, the definition of the term “new sources”

as used in Section 13389 is also frequently misunderstood. CEQA compliance is required only for those sources that are “new sources” as defined in the Clean Water Act. Accordingly, it is necessary to amend this Section for clarity, and to avoid any confusion as to which types of WDRs require compliance with CEQA.

SECTION 3740. SUBMISSION OF INFORMATION

This subsection is amended to replace the term “water reclamation” with the term “water recycling” to reflect current usage and common parlance within the agency and water recycling industry.

SECTION 3741. ADDITIONAL INFORMATION REQUIREMENTS

(a)(2) This subsection is amended because the word “subchapter” is no longer used in the California Code of Regulations, and to provide a clear and concise statement of which regulations govern whether a project qualifies for an exemption from CEQA.

All other amendments to this Section are nonsubstantive without regulatory effect.

SECTION 3742. DENIAL OR LIMITATION OF WASTE DISCHARGE REQUIREMENTS, WATER RECYCLING REQUIREMENTS, OR OTHER ENTITLEMENT FOR USE

This Section’s amendments are primarily intended to clarify the board’s authority and role when taking action on a given entitlement. Before, only a vague statement set forth the board’s authority to prohibit or condition these entitlements in order to protect water quality. These amendments better manifest the boards’ authority to prohibit, postpone, condition, or deny an entitlement. In addition, the amendments help to distinguish between the board’s respective roles when acting as a responsible versus a lead agency. This latter amendment limits the scope of the responsible agency’s authority when considering alternatives and mitigation measures, and adopting findings or a statement of overriding considerations. It is important to emphasize that CEQA does not authorize the board, when acting as a responsible agency, to consider environmental impacts beyond its statutory authority; doing so would be inconsistent with the provisions of CEQA distinguishing the roles of lead and responsible agencies.

The phrase “other entitlements for use” is also added because the previous regulations did not address the full range of permit-type approvals that the State and Regional Water Boards issue. The term “water recycling” replaces the term “water reclamation” to reflect current usage and common parlance within the agency and water recycling industry.

SECTION 3750. SUBMISSION OF INFORMATION

These subsections are amended to be consistent with current law with respect to applications for funding from the State Water Board. The State Water Board provides financial assistance to public agencies and persons other than public agencies, not just municipalities. It is sufficient to have two categories with respect to financial assistance rather than three. Financial assistance from the United States Environmental Protection Agency is not subject to CEQA and is deleted from these regulations.

SECTION 3751. LIMITATION OF FUNDING

- (a), (b) These subsections are amended to clarify that the State Water Board, acting as either a responsible or lead agency, can limit and even dismiss the award of financial assistance if an applicant fails to submit the required environmental documentation on time. This amended language neither expands nor limits the State Water Board's existing authority under CEQA.
- (c) This subsection is deleted because it is ambiguous and unnecessary. It is unclear whether it is meant to be direction to staff or intended as a backstopping measure in case the particular financing agreement fails to include NEPA conditions. If it is the former, staff does not need regulatory direction to include project-specific language in a particular financing agreement. If it is the latter, it should be clarified. For reasons of transparency and contract interpretation, the State Water Board prefers not to rewrite it, but to delete it, and to continue to incorporate project-specific funding conditions into its financing agreements in an explicit manner.

SECTION 3760. REPEALED

This Section, originally entitled "Time Limits in Action by Responsible Agency," is being repealed because to the extent necessary, it is already covered under Section 3722. In addition, this Section is either duplicative of Article 5 of the Permit Streamlining Act (commencing with Government Code Section 65950), or not relevant to CEQA.

SECTION 3761. REPEALED

This Section, originally entitled "Determination As to Completeness of Application," is being repealed because to the extent necessary, it is already covered under Section 3722. In addition, this Section is either duplicative of Government Code Section 65643 of the Permit Streamlining Act, or not relevant to CEQA.

SECTION 3762. AVAILABILITY OF ENVIRONMENTAL DOCUMENTS

The last sentence of this Section is deleted because it duplicates Title 14, Section 15045(b) of the California Code of Regulations, which the State Water Board incorporates by reference. To the extent the language is different, eliminating the duplication also improves clarity. All other changes are nonsubstantive without regulatory effect.

SECTION 3763. PUBLIC PARTICIPATION AND HEARINGS

This Section is amended to ensure consistency and uniformity throughout these regulations by replacing the word "activity" with the word "project."

SECTION 3764. CHARGES FOR PREPARATION OF ENVIRONMENTAL DOCUMENTS

This Section's subdivisions are amended because they are too narrow. The boards may charge and collect fees not just for the preparation of EIRs, but also for the preparation of negative declarations and other costs of complying with CEQA, such as Department of Fish and Game fees. Therefore, the amendments are necessary to clarify that the boards have authority to estimate, charge, and collect fees for the preparation of environmental documents and the costs of complying with CEQA.

SECTION 3775. APPLICABILITY

This Section is amended to address, in one location, when Article 6 of this Chapter applies, and which projects are deemed exempt certified regulatory programs. To accomplish this, the State Water Board is incorporating language from Section 3782 (which is now being repealed) into Section 3775. Instead of having separate regulations that explain which projects meet the requirements of Public Resources Code Section 21080.5, incorporating the Water Quality Control (Basin)/208 Planning Program and related water quality plans and policies into Section 3775 provides a clear and concise statement of the law, avoids confusion, and ensures uniformity in presentation. The addition of the last sentence also improves clarity, such that staff better understands which procedural requirements are applicable to certified regulatory programs. Subsection (b) is deleted because it is overbroad, and eliminating overbroad language will greatly improve the regulation's clarity. And finally, this Section is amended to reflect the current title of the Secretary for the California Natural Resources Agency.

SECTION 3775.5. EARLY PUBLIC CONSULTATION

This Section is new. Although the State CEQA Guidelines do not specifically require early public consultation, scoping meetings are strongly recommended to help staff identify the relevant issues that may arise during the environmental review process. (See Cal. Code Regs., tit. 14, § 15083.) For this reason, the State Water Board has decided that early public consultation should be required prior to the review of draft substitute environmental documentation. It is better to require early public consultation in all cases rather than have staff try to decide whether it is necessary. Therefore, all certified regulatory programs of statewide, regional, or area-wide significance must undergo early public consultation. Not only is early public consultation an effective way to facilitate problem solving, but it is also consistent with the State Water Board's 2008-2012 Strategic Plan that seeks to enhance collaboration with the public, regulated and scientific communities, and other stakeholders to improve organizational performance and focus staff's efforts on projects that benefit California's water resources.

SECTION 3776. ROLES OF STATE BOARD AND REGIONAL BOARDS

This Section is entirely rewritten. The original language is revised significantly and incorporated into Sections 3777 and 3779. The amendments in this Section are needed to clarify the State and Regional Water Boards' roles when acting as a lead agency to adopt or amend an action taken pursuant to a certified regulatory program. Consequently, the State Water Board helps to avoid unnecessary and premature litigation, because the public will know whom to sue. The goal of

preventing a multiplicity of litigation works in conjunction with Section 3781, which instructs the public *when* to sue the lead agency.

The purpose of subsection (d) is to make CEQA review more efficient. Presently, when the State Water Board takes over the role of lead agency from the Regional Water Board, the State Water Board is required to recirculate the environmental document prior to certification, even when no new significant information is added. This procedure essentially duplicates the Regional Water Board's already completed CEQA process, which unnecessarily prolongs environmental review. Accordingly, this subsection eliminates the recirculation requirement (unless significant new information is added), which will help avoid administrative duplication and will greatly improve the efficiency of the environmental review process.

3777. SUBSTITUTE ENVIRONMENTAL DOCUMENTATION: REQUIREMENTS FOR ADOPTION OR APPROVAL OF PLANS OR POLICIES

Amendments to this Section are largely a rewrite of what was originally Section 3776. They are intended to clarify that substitute environmental documentation (SED) includes a compilation of several documents, and what findings go into the SED. In addition, these amendments are necessary to comply with and implement Public Resources Code Sections 21080.5(d)(2)(A)-(F), 21082, and 21159.

3778. CONSULTATION.

These amendments are necessary to clarify that this Section only applies to the Draft SED, not just any written report. In addition, the word "project" replaces the word "activity" to ensure consistency and uniformity throughout these regulations.

3779. NOTICE OF FILING OF DRAFT SED; PUBLIC COMMENTS.

- (a) This subsection is amended to combine original Sections 3776(c) and 3777(b) into one Notice of Filing requirement for the State Water Board. This eliminates duplication in the regulations and avoids confusion for staff. In addition, this subsection is amended to clarify that the comment period and public hearing on the Draft SED may be separate from the comment period and public hearing on the project. This subsection also furthers the goal of achieving a paperless office, because any Notices of Filing are now posted on the internet.
- (b)-(c) These subsections are necessary to prescribe a more orderly process for the submittal of written comments and the receipt of oral comments during a public hearing. Experience has taught the State Water Board that the practice of responding to all comments, regardless of whether they were submitted late, is impractical. Accordingly, a deadline is being implemented to ensure the timely and orderly submittal of comments, and to assist staff in responding to those comments.
- (d)-(e) These subsections are necessary to clarify staff's responsibilities when responding to comments submitted on the adequacy of the Draft SED. Again, experience has taught the State Water Board that it is impractical to respond to late-submitted comments, or comments

on a recirculated Draft SED that are not limited to the significant new information in the recirculated draft.

- (f) This subsection is necessary to codify, simplify, and clarify the exhaustion process that interested persons must follow when the State Water Board is considering approval of a basin plan amendment or guideline. Any submitted comments that do not comply with these rules will be ignored for failure to exhaust.

3779.5 FINAL SUBSTITUTE ENVIRONMENTAL DOCUMENTATION (SED)

This Section is new.

- (a),(b) Before the State or Regional Water Board can adopt a resolution approving an action taken under the certified regulatory program, it must consider the Final SED and all materials generated from compiling the SED. This process is the functional equivalent to the process of approving an EIR or ND. Because Chapter 27 of these regulations concern the process of approving a certified regulatory program, it is necessary to provide a clear and concise statement of when the State or Regional Water Board can adopt or approve the project, and what is included in a Final SED.
- (c) The State Water Board finds that as a policy matter, requiring significant impacts findings for certified regulatory programs will provide for a more orderly process for the approval of a Final SED. This subsection borrows concepts from the State CEQA guidelines that only apply to EIRs, and creates similar requirements for Final SEDs. In essence, this subsection is necessary to codify the State Water Board's practice when it considers a Final SED.

3780. APPROVAL

This Section is amended to create two subsections. Subsection (a) removes the word "proposed" for the sake of clarity. Subsection (b) is added for similar reasons as Section 3779.5(c). The State Water Board again borrows concepts from the State CEQA Guidelines, and creates similar requirements for certified regulatory programs. Specifically, Title 14, Section 15097 of the California Code of Regulations requires an agency to "adopt a monitoring or reporting program on the revisions which it has required in the project and the measures it has imposed to mitigate or avoid significant environmental effects" so as "to ensure that the mitigation measures and project revisions identified in the EIR or negative declaration are implemented." (See also Pub. Resources Code § 21081.6(a)(1).) The State Water Board believes that requiring the adoption of a monitoring or reporting program for certified regulatory programs is consistent with the 2008-2012 Strategic Plan and simply a matter of good State policy.

3781. NOTICE OF DECISION

The purpose of this Section's amendments is to clarify that people cannot sue the lead agency until the Notice of Decision is filed, which helps to avoid unnecessary and premature litigation. This goal works in conjunction with Section 3776, which delineates who is acting as the lead agency and therefore subject to legal action. Pursuant to Public Resources Code Section 21080.5(g), the thirty-

day statute of limitations begins to run when the Notice of Decision is filed. In addition, this Section is amended to reflect the current title of the Secretary for the California Natural Resources Agency.

3782. REPEALED

This Section, originally entitled “Exempt Regulatory Programs,” is being repealed to avoid duplication in these regulations; the relevant language from this Section is revised and incorporated into Section 3775.

APPENDIX A

Appendix A, the Environmental Checklist Form, is amended for four principal reasons. First, it is updated to accommodate these regulations’ amendments and to ensure consistency with the State CEQA Guidelines (which have been revised several times since Appendix A was last published). Second, it is tailored to specifically apply to certified regulatory programs. Third, it provides staff with a more orderly process to follow when completing the checklist as part of each SED. Fourth and perhaps most visibly notable, the template is completely revised in order to create a clear and coherent document that is easier for staff to follow. Appendix G of the State CEQA Guidelines was used as a model for revising Appendix A’s template.

APPENDIX C

Appendix C is amended to reflect that Section 3779 pertains to Notices of Filing. In addition, this Appendix is amended to inform people of the procedures for the submittal and receipt of oral and written comments on the adoption or amendment of a certified regulatory program. These procedures are established to help make the comment period and public hearing a more orderly process.