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Arnold Schwarzenegger
Governor

January 11, 2010

Honorable William R. McGuiness,
Administrative Presiding Justice
Associate Justices of the Court
Court of Appeal of the State of California
First Appellate District, Division Three
350 McAllister Street
San Francisco, CA 94102

Dear Administrative Presiding Justice McGuiness and Associate Justices:

CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, ET AL. V. ALAMEDA COUNTY SUPERIOR COURT, CASE NO. A127134: AMICI CURIAE LETTER

With the court's permission, we respectfully submit this letter on behalf of the State Water Resources Control Board (State Water Board) and the Central Valley Regional Water Quality Control Board (Central Valley Regional Water Board) as amici curiae in support of the Petition for Peremptory Writ of Mandate and/or Prohibition and Stay of the Alameda County Superior Court's December 7, 2009 order filed by the California Department of Parks and Recreation (Department) in this matter. The State Water Board and the Central Valley Regional Water Board (collectively, the Water Boards) have a unique interest in, and perspective on, this petition that will assist the court in reaching an appropriate decision.

The superior court ordered the Department to suspend all off-highway motor vehicle activity at the Carnegie State Vehicular Recreation Area (Carnegie Recreation Area) until the Central Valley Regional Water Board issues either waste discharge requirements or a waiver of waste discharge requirements. The Water Boards believe this action was improper for three reasons. First, the court's order improperly interferes with regulatory discretion that is within the sole purview of the Water Boards, which are not parties to the action. Second, the real parties in interest failed to exhaust available administrative remedies before filing their writ petition under Code of Civil Procedure section 1085, so the superior court did not have jurisdiction to act. Third, this action creates a de facto citizen suit that the Legislature did not include in the governing statute.¹

¹ The Water Boards agree with the Department's argument that a citizen suit is unavailable to enforce waste discharge requirements. Because the Department's petition adequately addresses this issue, however, the Water Boards will not address it further in this letter.

The Petition Should be Granted Because the Court's Order Interferes With the Water Boards' Exclusive Discretion

The Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) (Act) makes the State Water Board and the nine regional water quality control boards (regional water board[s]) “the principal state agencies with primary responsibility for the coordination and control of water quality” (Wat. Code, § 13001) and sets forth a detailed and specific process for addressing water quality concerns that includes the exercise of regulatory discretion by the State Water Board and regional water boards. Any person discharging waste must file a permit application, known as a report of waste discharge, with the appropriate regional water board, along with a filing fee according to a schedule adopted by the State Water Board.² (Wat. Code, § 13260.) Where a discharger fails to submit a report of waste discharge after a board requests the discharger to do so, the regional water board may assess administrative penalties or seek civil penalties or injunctive relief. (Wat. Code, §§ 13261-13262, 13267.) Similar remedies are available to address an unpermitted discharge. (Wat. Code, §§ 13264-13265.) These remedies are available to the State Water Board and regional water boards alone.

When a report of waste discharge is submitted to a regional water board, the board evaluates the discharge and its impact on the receiving watershed, and has broad discretion to determine an appropriate regulatory response. Indeed, there are numerous regulatory options available to the board, including: the issuance of waste discharge requirements (Wat. Code, § 13263); enrollment under a general permit (Wat. Code, § 13263, subd. (i)); issuance of a site-specific waiver (Wat. Code, § 13269)³, enrollment under a general waiver (Wat. Code, § 13269); and issuance of a cleanup and abatement order (Wat. Code, § 13304) or other enforcement order (see, e.g., Wat. Code, §§ 13301, 13308, 13350). A regional water board may also decide to develop a new general order to regulate an entire category of discharges rather than issue a new individual order. Where a discharger cannot immediately comply with regulatory requirements, the board may impose a schedule for compliance rather than immediately prohibit the discharge. (Wat. Code, §§ 13263, subd. (g), 13300, 13301, 13308.) The State Water Board can similarly take any of these actions, and extend the general waivers or permits to a statewide scope. (See, e.g., Wat. Code, §§ 13263, subd. (j), 13269, 13301, 13320, subd. (c), & 13350.)

The Act sets forth the proper procedure to challenge either an action or a failure to act on the part of a regional water board. A board's decision regarding what regulatory action, if any, is appropriate is reviewable by petition to the State Water Board. (Wat. Code, § 13320.) The State

² The requirement to file a report of waste discharge exists irrespective of how long the discharge has been taking place. (See, Wat. Code, §§ 13260, subd. (a)(1) [“[a]ny person discharging ... or proposing to discharge waste” must file a report of waste discharge], 13263 [allowing the board to issue waste discharge requirements for existing discharges].) The reference to a “new discharge” in Water Code section 13264 does not preclude the Central Valley Regional Water Board from regulating discharges that may have already commenced, or prohibiting further unregulated discharges.

³ The term “waiver” is a misnomer. Waivers may reduce some procedural permitting requirements and be subject to different enforcement authorities, but must include conditions appropriate to protect water quality. (Wat. Code, § 13269, subds. (a)(1)-(2).) Waivers are a type of discharge authorization.

Water Board's decision on the petition is reviewable by a superior court pursuant to section 1094.5 of the Code of Civil Procedure. (Wat. Code, § 13330.) The administrative record of the regional water board determination is the foundation of both the administrative petition and any subsequent superior court review.

In this case, the superior court usurped the broad discretion afforded the Water Boards when it determined that either waste discharge requirements or a waiver must be issued by the Central Valley Regional Water Board for the Department to continue operation of the Carnegie Recreation Area. The superior court issued its order without the benefit of an analysis of pertinent water quality issues or an administrative record developed by the board. The Department only recently filed a report of waste discharge on December 21, 2009 pursuant to the superior court's order that it do so. A full technical administrative record has not yet been developed or analyzed by the board. The board should be permitted to exercise the full range of its discretion and make a determination regarding the appropriate regulatory response in accordance with the administrative procedure required by the Act. The board may ultimately decide to issue waste discharge requirements or a waiver, but it could also take an entirely different action or no action at all.

In addition to usurping the Central Valley Regional Water Board's authority to determine how to regulate the Carnegie Recreation Area, the superior court's order interferes with the board's discretion to determine when to regulate the area. Given that the regional water boards are often subject to competing priorities, they must decide when to take regulatory action based on site-specific conditions balanced against competing threats to water quality in the region. Sites that may be causing more severe water quality impacts will warrant immediate action, while other sites may not. In this case, the superior court's order inappropriately forces the Central Valley Regional Water Board to make the Carnegie Recreation Area a high priority, without regard to other regulatory considerations facing the board.

The superior court should not be permitted to constrain the Water Boards' discretion as to when and how to regulate the Carnegie Recreation Area through this third-party lawsuit. In this context, the suit amounts to a collateral attack on the Water Boards' process. Moreover, if the superior court's order stands, the Department will be in an untenable position. It may not operate the Carnegie Recreation Area without a permit or waiver that the Water Boards may determine is not appropriate. Such a result is inconsistent with the full array of options the Legislature has provided to the Water Boards in the Act.

The Petition Should be Granted Because the Real Parties in Interest Failed to Exhaust Administrative Remedies

The real parties in interest's administrative mandamus action against the Department brought under Code of Civil Procedure section 1085 is barred for failure to exhaust the administrative remedies set forth in the Act.⁴ The decision in *San Elijo Ranch, Inc. v. County of San Diego*

⁴ This issue was not raised by the Department in its petition before this court. Ordinarily, "[a]micus curiae must take the case as they find it." (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th (continued . . .))

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(1998) 65 Cal.App.4th 608, is instructive. In that case, the court found that a neighboring property owner's failure to exhaust administrative remedies available under the California Integrated Waste Management Act (Waste Act) to enforce permit conditions applicable to a landfill located adjacent to its property, barred its action to enforce those conditions under section 1085 of the Code of Civil Procedure. The court based its decision on the fact that the Waste Act establishes a comprehensive program for solid waste management and creates a board whose enforcement decisions are subject to court review. (*Id.* at p. 613.)

Like the Waste Act statutory scheme described in *San Elijo Ranch*, the Act provides a comprehensive program to regulate and enforce the claims brought by the real parties in interest in this case. As discussed above, the Central Valley Regional Water Board's decision regarding what regulatory action is appropriate for a given site is reviewable by petition to the State Water Board. (Wat. Code, § 13320.) This remedy applies to both an action by a regional water board and a failure to act. The Act thus provides interested persons with an administrative remedy to challenge a regional water board's failure to issue waste discharge requirements, require a report of waste discharge⁵, or other decision not to take one of the enforcement or regulatory actions available to the board. The State Water Board's decision on the petition is reviewable by a superior court pursuant to section 1094.5 of the Code of Civil Procedure. (Wat. Code, § 13330.) Failure to file an administrative petition with the State Water Board challenging a regional water board's action or failure to act is a jurisdictional bar to a civil challenge. (*Id.*) "[E]xhaustion of the administrative remedy is a jurisdictional pre-requisite to resort to the courts." (*San Elijo Ranch, supra*, 65 Cal.App.4th at 613 [citing *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293].) Here, because the real parties in interest did not pursue the administrative remedies available under the Act, their lawsuit to enforce the Water Code is barred and the superior court had no jurisdiction to issue its order.

For all of the reasons discussed above, we respectfully urge the court to grant the Department's petition.

Sincerely,



Michael A.M. Lauffer
Chief Counsel

(continued . . .)

1264, 1274-1275.) However, the rule is not absolute. An appellate court has discretion to consider new issues raised by an amicus. (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 502, 503.) Because the real parties in interest's failure to exhaust administrative remedies raises a jurisdictional question of law, we respectfully request that the court consider this argument. (*Id.*; *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510, 511.)

⁵ In this case, the Department has already filed a report of waste discharge and does not challenge in its petition the provisions of the superior court's order that required this filing.