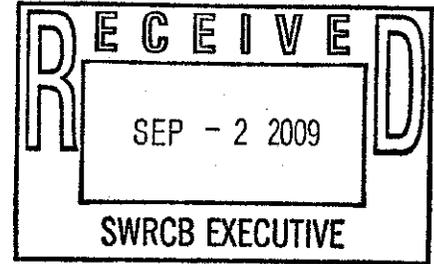


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State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100



Re: Comments to A-1972- September 15th Board Meeting

This letter is to comment on the proposed order concerning Petition for Review A-1972 (PR), which challenged Cleanup and Abatement Order No. R2-2008-0095 (CAO), approved on November 12, 2008 by the San Francisco Bay Regional Water Quality Control Board (Regional Board).

A proposed order dated July 2, 2009 (Draft Order) was considered by the State Water Quality Control Board (State Board) at a workshop held on September 1, 2009. The Draft Order remanded the matter back to the Regional Board and directed that the Regional Board "may" (1) find that the underlying project was eligible for a statutory exemption from the requirement to prepare an environmental analysis pursuant to the California Environmental Quality Act (CEQA, Public Resources Code (PRC) §21000 and following), or (2) prepare such an analysis.

Following the workshop, the State Board proposed an amended order dated September 1, 2009 (Amended Order). The Amended Order made one clarifying grammatical change on page 2 (of the Amended Order) and substantially changed the direction given to the Regional Board. In addition to finding that the Regional Board may find that the project qualifies for a statutory exemption or may prepare an environmental analysis, the Amended Order also indicates that the Regional Board may (3) find that the project qualifies for CEQA's "common sense exception".

The action proposed in the amendment is not lawful because the State Board does not have the authority to amend State law. The common sense exemption developed in CEQA case law only applies when a project obviously has no potential for any significant adverse impact on the physical environment. The project at issue does have the potential for a significant adverse impact, and that fact is known by the State Board.

The PR in this matter included a copy of the CAO and therefore is evidence in the Record of Proceedings of the State Board. The imperative statement in the CAO requires the performance and completion of 11 Tasks, some of which obviously have the potential for adverse impacts on the environment.

In particular, Task No. 4 requires the Discharger to propose a UST Management Plan (UMP). According to the CAO in the text of Task No. 4, the intent of the UMP "... is to determine the extent of contamination remaining in the eleven USTs and determine if active remediation is required or to determine if monitored natural attenuation is adequate ..." The fact that determination remains to be made precludes use of the common sense exemption.

The legal question that arises from the Amended Order is whether an option that invites the Regional

Board to violate the law is itself a violation of the law. The PR in this case documented that the Regional Board failed to comply with CEQA and both the Draft and Amended Orders implicitly preclude that particular violation from being repeated. The Draft Order prescribes potential actions by the Regional Board that are clearly lawful, but the Amended Order adds a potential action that has the same effect as the original violation (namely, the approval of a project prior to determining the effect on the environment), although the mechanism of violation is different.

One way for Petitioners to proceed would be to file a subsequent Petition for Review if the Regional Board were to take the unlawful action suggested by the State Board. That would place the potential for adverse impacts described in Task No. 4 of the CAO properly before the State Board in a manner clearly subject to judicial review. It would also introduce even more delay.

Another way for Petitioners to proceed would be to seek judicial review of the potential action included in the Amended Order. CEQA requires complete compliance, but the fact that two of the three authorized actions are lawful weakens any argument that the Amended Order as a whole is unlawful. On the other hand, the last minute inclusion of an unlawful option supports a more general argument that may be made in a Declaratory Relief case that the State Board is deliberately orchestrating non-compliance with CEQA by the Regional Board.

Therefore Petitioners respectfully request the State Board to make its intention regarding compliance with CEQA clear. If the State Board believes Task No. 4 in the CAO, which the Board members surely considered during their deliberations on the PR underlying this case, is exempt from CEQA because of the "common sense exemption", then the other two options should be removed from the Amended Order. That action will facilitate judicial review so that the remediation project may continue at the earliest time.

However, if it is the intention of the State Board that the Regional Board should comply with CEQA, then the grammatical amendment on page 2 of the Draft Order should be adopted and the unlawful option proposed on page 4 be rejected.

Sincerely,

Ken Berry,
California Citizens For Environmental Justice