



California Regional Water Quality Control Board Lahontan Region



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Secretary of
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Arnold Schwarzenegger
Governor

MINUTES

April 14-15, 2010

Regular Meeting

Lake Tahoe Community College
Board Room
One College Drive
South Lake Tahoe, CA 96150

Chairman Clarke called the meeting to order at 3:00 p.m. on April 14, 2010.

Board Members Present

James W. M. Charlton, Palmdale
Jack Clarke, Apple Valley
Mike Dispenza, Palmdale
Keith Dyas, Rosamond
Amy Horne, Ph.D., Truckee
Don Jardine, Markleeville
Eric Sandel, Truckee

Board Member Absent

Don Jardine (4/14 absent afternoon session)

State Water Board Liaison to Lahontan Water Board

Art Baggett, Member, State Water Resources Control Board

Legal Counsel

David Coupe, Office of Chief Counsel, State Water Resources Control Board
Mayumi Okamoto, Office of Enforcement, State Water Resources Control Board

Court Reporter for Items 7 and 10

Esther Schwartz, Capitol Reporters

Staff Present

Harold Singer, Executive Officer	Carly Nilson, Env. Scientist
Lauri Kemper, Assistant Executive Officer	Lisa Scorale, Eng. Geologist
Charles Curtis, Supervising WRCE	Eric Shay, Assoc. Gov. Program Analyst
Laurie Applegate, Executive Assistant	Doug Smith, Senior Eng. Geologist
Doug Cushman, Senior WRCE	Angie Sturm, Student
Taylor Farnum, Env. Scientist	Dan Süssman, Env. Scientist
Scott Ferguson, Senior WRCE	Eric Taxer, WRCE
Mary Fiore-Wagner, Env. Scientist	Bruce Warden, Env. Scientist
Bruce McKenna, Student	Taylor Zentner, Env. Scientist

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Addressing the Board

Laurel Ames, Friends of Silver King Creek
Dr. Lars Anderson, US Dept. of Agriculture
Art Baggett, Member, State Water Resources Control Board
Mike Caltagirone, Sagebrush Chapter of Trout Unlimited
Drs. Don and Nancy Erman
Jenny Hatch, CalTrout
Monte Hendricks
Stafford Lehr, Department of Fish and Game
David Long
Neil Manji, Department of Fish and Game
Allan Marshall
Kevin Mather, Sacramento-Sierra Chapter of Trout Unlimited
Stefan McLeod, New Truckee River Chapter of Trout Unlimited, Tahoe/Truckee Fly Fishers, California Fly Fishers and Sierra Fishermen
Nancee Murray, Department of Fish and Game
Jon Regan, Trout Unlimited
Reed Sato, Office of Enforcement, State Water Resources Control Board
James Starr, Department of Fish and Game
Debbi Waldear, Friends of Hope Valley

INTRODUCTIONS

Mr. Clarke introduced the Board members. Mr. Jardine was not present for the afternoon session on April 14, 2010.

Mr. Clarke introduced Art Baggett, member of the State Water Board and liaison to the Lahontan Water Board. Mr. Baggett gave an update about water rights and water quality issues being considered by the State Water Board.

1. Proposed Dye Tracer Study in Lake Tahoe, El Dorado County

Dan Sussman gave the staff presentation. He discussed the pros and cons of three options before the Board. Mr. Sussman recommended the Board implement Option 2, directing the Executive Officer to issue an investigative order pursuant to Water Code section 13267. Mr. Sussman introduced Dr. Lars Anderson, US Dept. of Agriculture, and project proponent; and Steve Chilton, US Fish and Wildlife Service and Co-Chair of the Lake Tahoe Aquatic Invasive Species Coordination Committee. Mr. Sussman, Mr. Coupe and Dr. Anderson answered questions from the Board.

Board members discussed the need for a thorough public outreach program. Dr. Anderson answered questions from Mr. Singer about the public outreach program.

Following discussion, it was the consensus of the Board to direct Mr. Singer to implement Option 2, issuing an investigative order pursuant to Water Code



section 13267, including implementation of an effective public notification process.

OTHER BUSINESS

2. Executive Officer's Report

Mr. Singer discussed items from the April 2010 written report and answered questions from the Board.

Mr. Singer gave an update regarding Nursery Products.

Board members will be receiving the National Pollutant Discharge Elimination System Yearly Conflict Disclosure Form. The form must be returned to the State Water Board's Office of Chief Counsel by April 30, 2010.

The May 2010 Water Quality Coordination Committee meeting has been cancelled.

3. CLOSED SESSION

The Board met in closed session from 4:55 p.m. to 5:05 p.m. to discuss Item 3.h. Authority: Government Code section 11126(e). The Board reconvened in open session at 5:06 p.m.

The Board recessed for dinner at 5:06 p.m.

Regular Meeting, continued
7:00 p.m., April 14, 2010

Chairman Clarke called the meeting to order at 7:00 p.m.

Board members present: James W. M. Charlton, Jack Clarke, Mike Dispenza, Keith Dyas, Amy Horne, Don Jardine, and Eric Sandel. Board members absent: None.

INTRODUCTIONS

Mr. Jardine joined the Board at 7:00 p.m. on April 14, 2010.

4. PUBLIC FORUM

No one addressed the Board during the Public Forum.



5. **MINUTES**

Minutes of the Regular Meeting of March 10, 2010 in Victorville

- **Motion:** Moved by Dr. Horne, seconded by Mr. Dispenza and **unanimously carried** to adopt the March 10, 2010 minutes as written.

6. **ADOPTION OF THE UNCONTESTED CALENDAR**

Note: An (**) appears next to items adopted by the Board on the uncontested calendar.

Mr. Singer recommended the Board adopt Items 8 and 9 as proposed on the uncontested calendar.

- **Motion:** Moved by Dr. Horne, seconded by Mr. Dyas and **unanimously carried** to adopt Items 8 and 9 as proposed on the uncontested calendar.

OTHER BUSINESS

****8. Adoption of the Priority List for the Emergency, Abandoned, Recalcitrant (EAR) Account, Fiscal Year 2010-2011**

See Item 6 for Board action.

****9. Proposed Resolution Requesting Funds from State Cleanup and Abatement Account to Survey and Eradicate Asian Clam Infestation in Lake Tahoe's Emerald Bay, El Dorado County**

See Item 6 for Board action

NEW WASTE DISCHARGE REQUIREMENTS AND NPDES PERMIT

7. **California Department of Fish and Game, Paiute Cutthroat Trout Restoration Project (NPDES No. CA0103209), Alpine County**

Note: A transcript of this item is available by contacting Esther Schwartz, Capitol Reporters.

Mr. Jardine stated that he had previously taken a position in this matter and recused himself from participating during this item.

Dr. Bruce Warden gave the staff presentation. He discussed two late revision sheets outlining proposed changes to the Order, discussed comments received and staff's response to comments and recommended the Board adopt the Order as revised.



Stafford Lehr, Department of Fish and Game, discussed the Paiute Cutthroat Trout Restoration Project.

Dr. Warden and Mr. Lehr answered questions from the Board regarding the project.

Addressing the Board: Mike Caltagirone, Sagebrush Chapter of Trout Unlimited, Reno; Dr. Don Erman; Dr. Nancy Erman; Laurel Ames, Friends of Silver King Creek; Jenny Hatch, CalTrout; Monte Hendricks; David Long; Allan Marshall; Kevin Mather, Sacramento-Sierra Chapter of Trout Unlimited; Stefan McLeod, New Truckee River Chapter of Trout Unlimited, Tahoe/Truckee Fly Fishers, California Fly Fishers and Sierra Fishermen; Jon Regan, Trout Unlimited; and Debbi Waldear, Friends of Hope Valley.

Dr. Warden, Ms. Kemper, and Mr. Lehr responded to issues raised by Board members and the public.

Board Member Discussion

Mr. Sandel voiced concern that Water Board staff was too dependent on input from Department of Fish and Game staff when writing the permit. He noted that Tom Suk, Staff Environmental Scientist with the Water Board and expert on macro invertebrates, had not been consulted. Mr. Sandel commented that he could not support the action. Other issues discussed by the Board included the economic impact on Alpine County, other fishing resources in Alpine County, a previous rotenone project in Lake Davis, and the need to protect Paiute Cutthroat Trout as an endangered species.

- **Motion:** Moved by Mr. Dyas, seconded by Mr. Dispenza to adopt the NPDES permit as revised.

Mr. Singer summarized the revisions as follows:

- include changes in two late revision sheets provided by Dr. Warden;
- replace the current project location map (Attachment A of the permit) with Figure 3.1 in the EIR/EIS;
- delete bracketed information on page 3 of the NPDES permit, Finding No. 4. Project Location, third sentence; and
- direct the Executive Officer to add specific monitoring to the Monitoring and Reporting Program to determine whether residuals will exist after a two-week period in the project area. Dr. Horne suggested the wording "to demonstrate whether the permit conditions have been met".

Voting yes: Mr. Charlton, Mr. Dyas, Mr. Dispenza, Dr. Horne, Mr. Clarke
Voting no: Mr. Sandel

Motion passed

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Note: The meeting recessed at 10:30 p.m.

Regular Meeting, continued
April 15, 2010 – 8:30 a.m.

Mr. Clarke called the meeting to order at 8:30 a.m.

Board members present: James W. M. Charlton, Jack Clarke, Mike Dispenza, Keith Dyas, Amy Horne, Don Jardine, and Eric Sandel. Board members absent: None.

ENFORCEMENT

10. ***Public Hearing – Consideration of an Administrative Civil Liability (ACL) Order for the California Department of Fish and Game for Mandatory Minimum Penalty, Hot Creek Fish Hatchery, Mono County***

Note: A transcript of this item is available by contacting Esther Schwartz, Capitol Reporters.

Chairman Clarke opened the public hearing, read a statement outlining the procedures to be followed during the hearing, and administered the oath. Chairman Clarke noted the functions of Water Board staff for this matter as follows:

Advisory Team

Harold Singer, Executive Officer

David Coupe, Staff Counsel, State Water Board's Office of Chief Counsel

Prosecution Team

Lauri Kemper, Assistant Executive Officer

Chuck Curtis, Supervising Water Resources Control Engineer

Scott Ferguson, Senior Water Resources Control Engineer

Taylor Zentner, Environmental Scientist

Mayumi Okamoto, Staff Counsel, State Water Board's Office of Enforcement

Department of Fish and Game

Neil Manji, Chief, Fishery Branch

James Starr, Staff Environmental Scientist

Nancee Murray, Staff Counsel

Testimony by Lahontan Water Board Prosecution Team

Mayumi Okamoto gave the opening statement. Taylor Zentner gave the prosecution team's presentation. Mr. Zentner recommended the Board adopt



the Administrative Civil Liability Order as proposed in the amount of \$225,000. Mr. Zentner, Mr. Curtis and Ms. Okamoto answered questions from the Board.

Cross-examination of Prosecution Team

Nancee Murray cross-examined Mr. Zentner and Mr. Ferguson.

Nonevidentiary Policy Statement by Neil Manji, Department of Fish and Game

Mr. Coupe noted that due to a prehearing ruling, Mr. Neil Manji would provide a nonevidentiary policy statement to the Board.

Mr. Manji gave a nonevidentiary policy statement and answered questions from the Board.

Testimony by Department of Fish and Game

Mr. James Starr, Staff Environmental Scientist with the Department of Fish and Game gave the Department's presentation and answered questions from the Board.

Cross-Examination of Department of Fish and Game

None.

Comments by Interested Parties

None.

Rebuttal testimony by the Department of Fish and Game

Ms. Murray thanked the Board for accepting the March 24 written rebuttal testimony and noted they would stand on the written rebuttal.

Rebuttal testimony by the Water Board Prosecution Team

Ms. Okamoto and Mr. Ferguson provided rebuttal testimony. Mr. Ferguson answered questions from the Board.

Closing Statement by the Department of Fish and Game

Ms. Murray provided the closing statement on behalf of the Department of Fish and Game. Ms. Murray stated that Hot Creek's facts and circumstances were unique. She asked the Board to apply the natural phenomenon exception to the Hot Creek Fish Hatchery as found in Water Code section 13385(j)(1)(B).

Closing Statement by the Water Board Prosecution Team

Ms Okamoto gave the closing statement on behalf of the Water Board's Prosecution Team. She noted an exemption from mandatory minimum penalties for a bad permit is not a recognizable exception under California State law. She also noted that Water Code section 13385(j)(1)(B) was intended to be applied very narrowly. She stated that the situation raised by the Department of Fish and Game of high volume flow and naturally occurring nitrate plus nitrite in the spring did not rise to the level of what was intended by the statute.



Closed Session

The Board met in closed session from 10:47 a.m. to 11:30 a.m. to deliberate on the evidence. **Authority:** Government Code section 11126(c)(3).

Open Session, Public Hearing Closed, Board Deliberation, Motion 1 and Motion 2

The Board reconvened in open session at 11:31 a.m. Chairman Clarke closed the public hearing.

Dr. Horne stated that she did not believe Water Code section 11385(j)(1)(B) was applicable in this case and was not convinced by the Prosecution Team's argument that the Department of Fish and Game did not challenge the 2006 permit. She commented that mistakes were made by all in the adoption and implementation of the permit and she thought it was unfair to hold the Department of Fish and Game 100 percent liable for the violations that occurred. Dr. Horne handed out and discussed proposed changes to the permit and recommended the Board adopt the Administrative Civil Liability Order with the proposed changes, assessing a mandatory minimum penalty in the amount of \$150,000.

- **Motion 1:** Moved by Dr. Horne and seconded by Mr. Dispenza to adopt the Administrative Civil Liability Order with the changes discussed and outlined in the handout.

Mr. Singer asked for a two-minute break to discuss a matter with the Prosecution Team and the Department of Fish and Game. Following the break, Mr. Singer corrected errors to Finding 9 of the handout. Board members discussed the motion. Mr. Charlton commented that permittees must follow the rules and negotiate their permits at the proper time. He noted that for precedential reasons, he would support an Administrative Civil Liability Order in the amount of \$225,000.

- Motion 1 was modified by Dr. Horne to include the corrections made by Mr. Singer to Finding 9. Mr. Dispenza concurred with the modification.

Roll call vote: Voting yes: Mr. Dispenza, Dr. Horne and Mr. Clarke

Voting no: Mr. Jardine, Mr. Charlton, Mr. Dyas and Mr. Sandel

Motion 1 did not pass

- **Motion 2:** Moved by Mr. Charlton to adopt the Administrative Civil Liability Order as proposed by staff in the amount of \$225,000.

Board members discussed the motion. Mr. Charlton agreed to include the findings recommended by Dr. Horne except where inconsistent with the \$225,000 fine. He clarified that his motion included striking language saying that the Water Board made mistakes.

Mr. Dyas seconded the motion.

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Mr. Singer suggested modifications to Finding 9 to be consistent with the motion. With the modifications, Finding 9 read as follows:

9. Effluent Limitations

The Water Board finds that the effluent limitations for nitrate + nitrite specified in Board Order No. R6V-2006-0027 are inconsistent with the information available to both the Water Board staff and the California Department of Fish and Game at the time of adoption of the permit. The nitrate+ nitrite levels in the facility's water supply are almost always higher than the effluent limits established in Board Order No. R6V-2006-0027. The water supply is from naturally occurring springs adjacent to the facility. Although the facility often violated the effluent limits, the nitrate + nitrite levels in the effluent were usually lower than those in the water supply.

Using information about nitrate + nitrite levels in the effluent, Time Schedule Orders (TSO) No. R6V-2009-0016 and R6V-2009-0016-A1 specified new nitrate + nitrite effluent limitations. These limits are 30% or more higher than those contained in Board Order No. R6V-2006-0027. Had Board Order No. R6V-2006-0027 used the numbers in the TSO, the amount of the mandatory minimum penalty would amount to \$18,000. The Department of Fish and Game did not challenge the proposed effluent limitations as the 2006 permit was being developed. Although the Water Board finds that a more appropriate penalty in this case would be \$18,000, California Water Code sections 13385(h) and (i) require it to assess mandatory minimum penalties in the amount of \$225,000.

Chairman Clarke stated the motion made by Mr. Charlton and seconded by Mr. Dyas to adopt the Administrative Civil Liability Order as proposed by staff in the amount of \$225,000 with the addition of Finding 9 as modified by Mr. Singer.

Roll call vote: Voting yes: Mr. Jardine, Mr. Charlton, Mr. Dyas and Mr. Sandel
Voting no: Mr. Dispenza, Dr. Horne and Mr. Clarke

Motion 2 passed

OTHER BUSINESS

11. State Water Resources Control Board, Office of Enforcement Presentation on the November 2009 Water Quality Enforcement Policy and the February 2009 Policy on Supplemental Environmental Projects

Reed Sato, Director, Office of Enforcement, State Water Resources Control Board, discussed two policies adopted by the State Water Board: 1) Policy on Supplemental Environmental Projects, and 2) Water Quality Enforcement Policy. Mr. Sato answered questions from the Board.



12. Reports by Chair and Board Members

Mr. Clarke noted he was unable to attend the Chair's conference call.

ADJOURNMENT

With no further business to come before the Board, the meeting adjourned at 12:30 p.m. on April 15, 2010.

Prepared by: *Laurie Applegate* Adopted: May 12, 2010
Laurie Applegate, Executive Assistant

