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STATE WATER RESOURCES CONTROL BOARD

IN RE: MONITORING AND REPORTING )  
PROGRAM ORDER NO. R5-2006-0810, )  
ADOPTED OCTOBER 20, 2006, ISSUED )  
BY CALIFORNIA REGIONAL WATER ) No. \_\_\_\_\_  
QUALITY CONTROL BOARD, )  
CENTRAL VALLEY REGION, ) PETITION FOR REVIEW  
REGARDING OLD HAMMER FIELD ) BY THE CITY OF FRESNO  
AREA 1 SOURCE AREA, GROUND- )  
WATER CLEANUP, FRESNO, )  
FRESNO COUNTY )  
\_\_\_\_\_ )

Pursuant to Water Code § 13320 and 23 C.C.R. § 2050 and § 2053,  
Petitioner City of Fresno, California, a municipal corporation of the State of California,

1 respectfully submits this Petition for Review of the Monitoring and Reporting Program  
2 (“MRP”) Order, No. R5-2006-0810, of the California Regional Water Quality Control  
3 Board, Central Valley Region (“Regional Board”), issued October 20, 2006 (“Order”). A  
4 copy of the Order is attached hereto as Exhibit A. This is an order issued to the City of  
5 Fresno (the “City”), as well as the United States National Guard Bureau (“NGB”), the  
6 United States Army Corps of Engineers (“USACE”) and The Boeing Company  
7 (“Boeing”), concerning soil and groundwater contamination at and in the vicinity of the  
8 Fresno-Yosemite International Airport, also sometimes referred to as Old Hammer Field  
9 (“OHF”), located at 4995 E. Clinton Way, Fresno. NGB, USACE and Boeing are  
10 sometimes referred to hereinafter collectively as the “operating dischargers.” A more  
11 detailed description of the Order follows.  
12  
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14           The Order was issued by action of the Executive Officer of the Regional  
15 Board pursuant to authority alleged to be found in California Water Code § 13267. It  
16 identified the Petitioner, along with the three operating dischargers, NGB, USACE and  
17 Boeing, as the parties legally responsible for the site, referred to as the “Old Hammer  
18 Field Area 1 Source Area” (the “Site”). The Order alleges that chlorinated organic  
19 compounds have been discharged to soil and groundwater at the Site, resulting in a  
20 groundwater pollution plume that has impaired the beneficial use of this water resource.  
21

22           The Regional Board ordered Petitioner, NGB, USACE and Boeing to do  
23 the following, as set forth in more detail in the Order:  
24

25           Conduct Groundwater Monitoring and Reporting, including but not  
26 limited to specified laboratory analyses from specific wells for specific  
27 constituents, in accordance with a specified schedule; field-measured  
28 parameters from groundwater samples; reporting specified monitoring data  
and information under the preparation or direct supervision of, and signed

1 by, specified registered professionals; submitted to the Regional Board by  
2 specified times, to include specified maps, copies of analytical reports, and  
3 sampling sheets; with analyses to be conducted by certified laboratories  
4 and in accordance with EPA-approved methods, within allowable holding  
5 time limits and in accordance with proper chain of custody procedures and  
6 documentation. Records are required to be maintained for specified  
7 minimum time limits, with data arranged in tabular form and summarized,  
8 with two-week prior notification of monitoring and sampling activities,  
9 and submitted both in hardcopy and electronically to the State Geotracker  
10 database.

11 There is no dispute that, in fact, Petitioner is not directly responsible for  
12 the original, historic discharges of chlorinated organic compounds at the Site. Those  
13 chlorinated organic compounds were released by the operating dischargers, NGB,  
14 USACE, and Boeing, or their predecessor agencies or companies, during their operations  
15 at the Site under leases from the City.

16 Petitioner has been named jointly with the operating dischargers in the  
17 Order solely because it was and is the owner of the property. Ordering the Petitioner now  
18 to take action in this matter goes beyond the bounds of equity and fairness, not to mention  
19 authority established in the law and in policies of the State Water Resources Control  
20 Board ("State Board"), as adopted in similar cases decided by the State Board.

21 In particular, the Regional Board, in item number (6) of the findings of the  
22 Order, indicates that, at a later date, the MRP may be modified to include more extensive  
23 "plume-wide" monitoring.

#### 24 PETITION FOR REVIEW BY THE STATE BOARD

25 Pursuant to 23 C.C.R. § 2050(a), a Petition for Review is required to  
26 contain certain enumerated items of information. Responses to each of those items are  
27 set forth below.  
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1. Name and Address of Petitioner

Petitioner is the City of Fresno, a California municipal corporation, and its address is 2600 Fresno Street, Fresno, CA 93721-3602.

Petitioner may be contacted through its legal counsel at the addresses, phone numbers and e-mail listed on the first page of this Petition.

2. The Specific Actions of the Regional Board which the State Board is Requested to Review

The State Board is respectfully requested to review:

(a) the Regional Board's naming of Petitioner, solely because of its ownership of the Site, as a discharger and requiring of Petitioner, again solely because of its ownership of the Site, to take the actions identified above in the Order under Section 13267 of the California Water Code without identification of any evidence, other than property ownership, supporting naming Petitioner (as opposed to the operating dischargers), when the Regional Board is fully aware that Petitioner has not discharged, is not discharging, is not suspected of having discharged or of discharging, nor has ever proposed to discharge any waste at the Site, and when such facts are a legal prerequisite to requiring a person to act under Section 13267 (b)(1);

(b) the Regional Board's failure to name Petitioner secondarily responsible, instead of naming the Petitioner, as it did under the Order, jointly responsible with the operating dischargers, for monitoring and reporting at the Site;

(c) the Regional Board's failure to identify as primarily responsible at the Site the operating dischargers, NGB, USACE and Boeing, whose actions were directly responsible for the discharges that are the source of the contamination which is the

1 subject of the Order;

2 (d) all other provisions of the Order that may be unreasonable, arbitrary and  
3 capricious or otherwise not in accordance with the law based on the record in this case.

4  
5 3. Date of the Action

6 October 20, 2006.

7 4. Reasons the Regional Board's Actions were  
8 Improper and Inappropriate

9 Petitioner believes the Order is improper and inappropriate because it  
10 purports to order the Petitioner, jointly with the operating dischargers, to implement a  
11 monitoring and reporting plan and take other specified action without the requisite legal  
12 authority on the record. Yet the Petitioner is a party that never discharged, proposed to  
13 discharge nor is suspected of having discharged a waste. The Order fails to identify the  
14 evidence that supports requiring the Petitioner to carry out the actions ordered, fails to  
15 allocate primary and secondary responsibility for compliance at the Site, fails to name as  
16 primarily responsible the operating dischargers actually directly responsible for the  
17 discharges at the Site, and includes other provisions which may be found to be  
18 unreasonable, arbitrary and capricious or not in accordance with the law based on the  
19 record in this case.  
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22 5. Manner in Which Petitioner is Aggrieved

23 Despite the fact that it is merely the owner of the property, and was only  
24 the owner at the time of the discharges at its property by the operating dischargers, and  
25 despite the fact that there is no evidence any discharges were the responsibility of  
26 Petitioner, Petitioner will be required to incur additional thousands of dollars of expense  
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1 in carrying out the work stated in the order. This is on top of expenditures that have  
2 already been made, in amounts unfair to the Petitioner. Continuing Petitioner's status as a  
3 primarily responsible discharger will assure that Petitioner will continue to have to fund  
4 amounts that are required to implement the Order, or else face the threat of imposition of  
5 unjustifiable fines and penalties. Failure to name the operating dischargers as primarily  
6 responsible dischargers makes it less likely that they will fairly and equitably share in the  
7 implementation costs.  
8

9 6. Specific Action Requested of the State Board

10 Petitioner respectfully requests that the State Board direct the Regional  
11 Board to withdraw the present Order, conduct such factual investigations and analyses as  
12 necessary, make required findings and issue a revised order correcting the deficiencies  
13 identified in this petition.  
14

15 Specifically, Petitioner respectfully requests that the Regional Board be  
16 directed to issue a revised order which does not require Petitioner to carry out any further  
17 monitoring and reporting at the Site pursuant to the Order unless and until the operating  
18 dischargers fail to carry out those activities specified in the Order. Petitioner will  
19 continue to cooperate with the Regional Board to provide properly requested information  
20 and access.  
21

22 Petitioner further respectfully requests specifically that the State Board  
23 direct the Regional Board to name the operating dischargers (the NGB, USACE and  
24 Boeing) as primarily responsible.  
25

26 7. Statement of Points and Authorities

27 It is a fundamental principle that to be required to provide reports under  
28

1 § 13267 of the Water Code, a person must be a discharger. In the Matter of the Petition  
2 of Pacific Lumber Company and Scotia Pacific Company LLC, Order No. WQ 2001-14  
3 (2001), page 10: (“In reviewing a water quality monitoring and reporting order entered by  
4 a Regional Water Quality Control board pursuant to section 13267, the SWRCB first  
5 must determine if the party to whom the monitoring order is directed has discharged, is  
6 discharging, is suspected of discharging, or proposed to discharge waste.”). There is  
7 nothing in the Order about the City discharging waste. There is no identification of the  
8 evidence supporting requiring City to provide the reports, other than it is the property  
9 owner. Thus, the Regional Board has only gone half way in fulfilling the requirements of  
10 the last sentence of § 13267(b)(1):

13 “In requiring those reports, the regional board shall provide the person  
14 with a written explanation with regard to the need for the reports, and shall  
15 identify the evidence that supports requiring that person to provide the  
reports.” (Emphasis added.)

16 The State Board has recognized that it is important for orders to explain  
17 the basis for naming persons under § 13267 and § 13304. See, e.g., In the Matter of the  
18 Petition of Mr. Kelly Engineer/All Star Gasoline, Inc., Order No. WQO - 2002-0001  
19 (2002) page 4, citing, among others, to In the Matter of the Petition of Las Virgenes  
20 Municipal Water District, et al., Order No. WQ 2001-03, at p. 4, fn 8 (“A regional board  
21 must make findings that ‘bridge the analytic gap between raw evidence and ultimate  
22 decision or order.’” Further citations omitted.)

24 It is Petitioner’s position that, both in law and equity, it should have no  
25 further responsibility for monitoring and reporting at the Site. However, it is also true  
26 that Petitioner believes the Regional Board should have named Petitioner, if at all, as only  
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1 secondarily responsible. Decisions of the State Water Resources Control Board have  
2 established that it is appropriate to allocate cleanup responsibility primarily to the  
3 discharger(s) who directly caused discharges, and secondarily to the owner of the property  
4 who is responsible for the contamination solely because it may be held to have “caused or  
5 permitted” the discharge through its ownership of the property in question. Under this  
6 allocation system, in proper cases, the landowner is responsible to comply with the Order  
7 only upon receiving notice that the primarily responsible operator or other dischargers  
8 have failed to do so.  
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10  
11 The following State Board decisions, and others not set forth here, have  
12 elucidated this principle: In the Matter of the Petition of Vallco Park, Ltd., Order No. WQ  
13 86-18 (1986) (tenant operator primarily responsible for cleanup; landowner responsible  
14 only in event tenant fails to comply with orders); In the Matter of the Petition of  
15 Prudential Insurance Company of America, Order No. WQ 87-6 (1987) (landowner  
16 secondarily responsible where it did not initiate or contribute to the discharge; order  
17 amended so that tenant operator is required to meet compliance deadlines while  
18 landowner is responsible for compliance only upon tenant's failure to comply); In the  
19 Matter of the Petition of Schmidl, Order No. WQ 89-1 (1989) (landowner responsible to  
20 comply with order only following 60 days' notice that tenant operator has failed to do so);  
21 In the Matter of the Petition of Spitzer, Order No. WQ 89-8 (1989) (landowner  
22 secondarily responsible); In the Matter of the Petition of Wenwest, Order No. WQ 92-13  
23 (1992) (landowner secondarily responsible for cleaning up discharge which it neither  
24 caused nor permitted).  
25  
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27 However, where the connection of a property owner to a discharge is so  
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1       tenuous as to have no causal relation to a discharge, it is highly questionable whether a  
2       mere property owner can be found to be covered legally by the provisions of Water Code  
3       § 13304(a). *City of Modesto Redevelopment Agency v. Superior Court* (2004), 119 Cal.  
4       App. 4<sup>th</sup> 28 at 44 (“... [W]e see no indication the Legislature intended the words ‘causes  
5       or permits’ within the Porter-Cologne Act to encompass those whose involvement with a  
6       spill was remote or passive.”). This is the situation in the present case.  
7

8                 Likewise, the principle is clear in the Water Code that the burden of  
9       requiring reports must be fairly shared and must be related to the benefits to be obtained  
10       from the reports. Water Code § 13267 (b)(1). In the Matter of the Petition of HR  
11       Textron, Inc., Order No. WQ 94-2 (1994) (Regional Board is authorized to require  
12       reports, however, the burden of such reports must bear a reasonable relationship to the  
13       need for and the benefits to be obtained from the reports).  
14

15                 As a result of these shortcomings, the Order is legally deficient.

16                 8. Sending Copies of this Petition

17                 Petitioner is sending copies of this Petition to the Regional Board, and to  
18       the parties specifically listed in the following paragraph.  
19

20                 The names and addresses of the legal representatives of the NGB, USACE  
21       and Boeing available to Petitioner are as follows:

22                         Paul Cirino, Esq.  
23                         U.S. Department of Justice  
24                         PO Box 23986  
25                         Washington, DC 20026

26                         Joseph G. Councill, Esq.  
27                         Deputy District Counsel  
28                         U.S. Army Corps of Engineers,  
                              CENWO-OC

1 106 S. 15<sup>th</sup> Street  
2 Omaha, NE 68102-6818

3 Randy Chambers, Esq.  
4 National Guard Bureau  
5 1411 Jefferson Davis Way, #11300  
6 Arlington, VA 22202

7 Paul R. Carlson, Esq.  
8 The Boeing Company  
9 Office of the General Counsel  
10 P.O. Box 3707, M/S 7A-XP  
11 Seattle, WA 98124-2207

12 Wendy Feng, Esq.  
13 Covington & Burling  
14 One Front Street  
15 San Francisco, CA 94111

16 9. Issues Presented to the Regional Board Prior to Its Action

17 The substantive issues raised in this Petition, namely that Petitioner never  
18 has discharged nor is suspected of having discharged wastes at the Site and that the  
19 operating dischargers were the parties directly responsible for the discharges and, as a  
20 result, that the Petitioner is being made to bear an unfair and inequitable share of the costs  
21 of these actions, have been raised to Regional Board staff numerous times in the past  
22 prior to the issuance of the Order. Petitioner has requested the Regional Board and the  
23 Department of Toxic Substances Control to act in accordance with these issues.

24 REQUEST FOR HEARING BEFORE THE STATE BOARD

25 In accordance with 23 C.C.R. § 2050(b), Petitioner respectfully requests that the  
26 State Board hold a hearing to consider this Petition. Petitioner may present additional  
27 evidence that was not available to the Regional Board at the time the Order was issued or  
28 when this Petition was submitted. In addition, Petitioner requests permission at any  
hearing: (1) to present oral argument on the legal and policy issues raised by this Petition;

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and (2) to present to the State Board factual and technical information in the Regional Board's files which may have been overlooked by the Regional Board Executive Officer.

WHEREFORE, Petitioner respectfully requests action by the State Board as set forth above.

Date: November 17, 2006

Respectfully submitted,

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CITY OF FRESNO  
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By   
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