



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board



Arnold Schwarzenegger
Governor

Office of Chief Counsel

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April 6, 2009

VIA CERTIFIED MAIL AND EMAIL

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Dear Messrs. Duchesneau, Hunsucker, Sommer, and Wyatt:

PERCHLORATE CONTAMINATION AT THE 160-ACRE SITE IN THE RIALTO AREA: BOARD MEETING NOTIFICATION SWRCB/OCC FILE A-1824

Enclosed is a copy of a proposed order in the above-entitled matter. The State Water Resources Control Board (State Water Board) will consider this order at its meeting that will be held on *Tuesday, May 19, 2009*, commencing at *10:00 a.m.* in the Coastal Hearing Room, Second Floor of the Cal/EPA Building, 1001 I Street, Sacramento, California.

You will separately receive an agenda notice for this meeting.

At the meeting, interested persons will be allowed to comment orally on the draft order, subject to the following time limits. The Emhart Entities, Goodrich Corporation, Pyro Spectaculars, Inc., the City of Rialto, and the Santa Ana Regional Water Quality Control Board will each be allowed five minutes for oral comment, with additional time if there are questions by the State Water Board members. Other interested persons will be allotted a lesser amount of time to address the State Water Board. At the meeting, the State Water Board may adopt the draft order as written or with revisions, it may decide not to adopt the order, or it may continue consideration until a later meeting.

Written comments on the draft order must be received by **12:00 noon, May 06, 2009**. Please indicate in the subject line, comments to A-1824 — May 19, 2009 Board Meeting. Those comments must be addressed to:

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
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If there are any questions or comments, please contact Karen O'Haire, Senior Staff Counsel, in the Office of Chief Counsel, at (916) 341-5179 or email kohaire@waterboards.ca.gov.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael A.M. Lauffer".

Michael A.M. Lauffer
Chief Counsel

Enclosure

cc: See next page

cc: James L. Meeder, Esq.
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Inter-Office Service List **[via email only]**

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**ORDER WQ 2009-**

In the Matter of the Petition of

RIALTO-AREA PERCHLORATE CONTAMINATION

SWRCB/OCC FILE A-1824

BY THE BOARD:

Since 2002, the Santa Ana Regional Water Quality Control Board (Santa Ana Water Board) has been conducting an investigation of groundwater contamination in the area of the City of Rialto. A focus of the investigation has been facilities located on a 160-acre site in Rialto.¹ The Santa Ana Water Board Executive Officer issued a Cleanup and Abatement Order (CAO) for the site on February 8, 2005.

The 2005 CAO and proposed amendments are the subject of challenges in petitions for State Water Board review, some of which were activated by various entities named by the Santa Ana Water Board as responsible parties. In light of the various objections and appeals, and the need to take action in an expeditious manner, the State Water Board, acting through its Executive Director, decided to review this matter on its own motion. The Acting Executive Director of the State Water Board, by letter dated February 5, 2007,² informed all parties that the State Water Board would hold a hearing on this matter at the earliest possible date. It is in the best interest of all participants and the public who reside in the Rialto area that the hearings pertaining to this matter proceed in a fair, expeditious, and cost-effective manner.

¹ The 160-acre site in question is located in the southwest quarter of Section 21, Township 1 North, Range 5 West, San Bernardino Base and Meridian in the City of Rialto, County of San Bernardino, State of California.

² The Acting Executive Director at that time was Tom Howard. Subsequent to February 5, 2007, the board selected Dorothy Rice as Executive Director, and Mr. Howard returned to the position of Chief Deputy Director.

On August 13, 2007, three entities named as potentially responsible parties (Petitioners) in the draft-amended 2005 CAO filed petitions with the Los Angeles Superior Court (Court) seeking a writ of mandate and a stay of the administrative hearing. Among their various claims, the Petitioners alleged bias due to purported *ex parte* communications, and improper procedure regarding initiation of the adjudicatory process. The Petitioners argued that, prior to conducting an evidentiary hearing, the State Water Board was required to "vote" to initiate own motion review pursuant to Water Code section 13320. After numerous motions and hearings, the Court ruled that any allegations regarding bias and *ex parte* communications were not ripe for adjudication until the State Water Board had issued its final decision, but did not rule on the procedural issue. The Court temporarily lifted the stay so that the State Water Board could conduct a vote to initiate own motion review.

Adoption of State Water Board Order WQ 2008-0004

On June 3, 2008, the State Water Board adopted Order WQ 2008-0004. Order WQ 2008-0004 ratified the decision to conduct own motion review. The order indicated that the effective date of own motion review would be February 5, 2007. Order WQ 2008-0004 also identified the contents of the administrative record in SWRCB/OCC File A-1824 through June 3, 2008, but expressly provided that the State Water Board was not "evaluating or endorsing rulings made to date by the hearing officer in SWRCB/OCC File No. A-1824."

Superior Court Judgment Regarding SWRCB/OCC File No. A-1824 and State Water Board Order WQ 2008-0004

The Petitioners filed objections and motions with the Court seeking to invalidate Order WQ 2008-0004. A trial was conducted on January 15, 2009, and the Court granted in part, and denied in part a writ of mandate. The Court ruled that:

1. on June 3, 2008, the State Water Board followed the proper procedure to initiate review of the actions or failure to act of the Santa Ana Water Board pertaining to ground water contamination in connection with the 160-acre site in Rialto;
2. other than those actions related to scheduling and noticing Order WQ 2008-0004, all actions to assume jurisdiction, to commence, and taken in State Water Board Proceeding A-1824 prior to June 3, 2008 are void *ab initio*; and,

3. those portions of Order WQ 2008-0004 that attempt to ratify *nunc pro tunc* (a) the actions of the Executive Director to commence proceeding A-1824, (b) the actions of the Executive Director to appoint the Hearing Officer in proceeding A-1824, and (c) the actions of the Hearing Officer taken prior to June 3, 2008, in Proceeding A-1824, are invalid.

On March 16, 2009, the State Water Board was served with a peremptory writ of mandate commanding the board to:

1. rescind all actions to assume jurisdiction, to commence, and taken in State Board Proceeding A-1824 prior to June 3, 2008, including those actions taken by the Executive Director of the State Board and the Hearing Officer, Tam Doduc, in State Board Proceeding A-1824, other than those actions related to scheduling and noticing Order WQ 2008-0004;
2. rescind those portions of the decision on June 3, 2008, of the State Board set forth in Order WQ 2008-0004 that attempt to ratify *nunc pro tunc* (i) the actions of its Executive Director to commence State Board Proceeding A-1824, (ii) the actions of its Executive Director to appoint the Hearing Officer in State Board Proceeding A-1824, and (iii) the actions of the Hearing Officer taken prior to June 3, 2008, in State Board Proceeding A-1824; and
3. file and serve a return verifying Respondents' compliance with this peremptory writ of mandate.

(*Goodrich Corporation v. California State Water Resources Control Bd.*, Los Angeles Super. Ct. Consolidated Case No. BS 110389, Peremptory Writ of Mandate (Mar. 12, 2009).) The purpose of this Order is to comply with Court's peremptory writ of mandate. As set forth below in the ordering provisions, by this Order we take the steps necessary to comply with paragraphs 1 and 2 of the writ.

Further Proceedings

Effective June 3, 2008, the State Water Board initiated own motion review of actions and inactions of the Santa Ana Water Board pertaining to groundwater contamination in

the area of the City of Rialto. The scope of the review is the 160-acre site in Rialto, California.³ The State Water Board will hold hearings and conduct investigations in this matter. The authority for the State Water Board to conduct hearings and investigations is found in Water Code section 183. That statute provides, in pertinent part:

The board may hold any hearings and conduct any investigations in any part of the state necessary to carry out the powers vested in it, and for such purposes has the powers conferred upon heads of departments of the state by Article 2 (commencing with Section 11180), Chapter 2, Part 1, Division 3, Title 2 of the Government Code.

Any hearing or investigation by the board may be conducted by any member upon authorization of the board, and he [sic] shall have the powers granted to the board by this section, but any final action shall be taken by a majority vote of all members of the board, at a meeting duly called and held.

Under the relevant Article in the Government Code, the head of a department may delegate the powers conferred thereunder to any officer of the department so authorized to conduct the investigation or hearing.⁴ Further, Water Code section 183 allows any member to conduct a hearing or investigation "upon authorization" of the board. Pursuant to the authority of Water Code section 183 and Government Code section 11182, we hereby delegate to the Executive Director, after consultation with the Board Chairperson, the authority to select a hearing officer for the hearings and investigation contemplated by this order. Any member of the State Water Board selected by the Executive Director, after consultation with the Board Chairperson, is authorized to conduct the hearings and investigation contemplated by this order.

Nonprecedential Nature of Order

Given the unique circumstances of this case and the judicial remand, this order is nonprecedential.

³ The 160-acre site in question is located in the southwest quarter of Section 21, Township 1 North, Range 5 West, San Bernardino Base and Meridian in the City of Rialto, County of San Bernardino, State of California.

⁴ Gov. Code, § 11182.

ORDER

IT IS HEREBY ORDERED that the State Water Board:

1. Rescinds all actions to assume jurisdiction, to commence, and taken in SWRCB/OCC File No. A-1824 prior to June 3, 2008, other than those actions related to scheduling and noticing Order WQ 2008-0004.
2. Rescinds those portions of Order WQ 2008-0004 that attempt to ratify *nunc pro tunc* (a) the actions of the Executive Director to commence SWRCB/OCC File No. A-1824, (b) the actions of the Executive Director to appoint the Hearing Officer in SWRCB/OCC File No. A-1824, and (c) the actions of the Hearing Officer taken prior to June 3, 2008, in SWRCB/OCC File No. A-1824. Except as rescinded by this paragraph, all other provisions of State Water Board Order WQ 2008-0004 remain effective.
3. Delegates to the Executive Director, after consultation with the Board Chairperson, the authority to select a hearing officer for the hearings and investigation authorized by this order and Order WQ 2008-0004.

IT IS FURTHER ORDERED that this order concerning own motion review is interim in nature and that no final action of the State Water Board will occur until after an evidentiary hearing and until after consideration of a draft order by the full State Water Board in conformance with Water Code section 183.

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IT IS FURTHER ORDERED that this Order is not precedential.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Board held on May 19, 2009.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Jeanine Townsend
Clerk to the Board