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7 **BEFORE THE STATE OF CALIFORNIA**
8 **STATE WATER RESOURCES CONTROL BOARD**

9 **Ken Berry, and**) **PETITION NO: _____**
10 **Willits Citizens for Environmental**)
11 **Justice,**) **PETITION FOR REVIEW**
12 **Petitioners**) **WITH REQUEST FOR STAY**
13 _____)
14 **Regional Water Quality Control Board,**) **(Water Code §§13320-13321)**
15 **North Coast**)
16 **Acting Agency**)
17 _____)
18 **City of Ferndale,**)
19 **Real Party In Interest**)
20 _____)

22 **INTRODUCTION AND SUMMARY**

23
24
25 1. On November 29, 2006, the North Coast Regional Water Quality Control Board (RIWB) held
26 a Public Hearing to consider Order No. R1-2006-0109, adoption of Cease and Desist Order
27

1 revising the Compliance Schedule in Cease and Desist Order No. R1-2005-0087 and allow
2 minimal connections to the City of Ferndale Wastewater Treatment Facility WDID No.
3 1B83136OHUM, NPDES No. CA0022721, which is a “project” within the meaning of CEQA
4 (California Environmental Quality Act, Public Resources Code Section 21000 et seq.). This
5 Petition is to appeal the approval of Order No. R1-2006-0109 to the State Water Resources
6 Control Board (SWRCB) because the approvals were not made in accordance with law.
7

8
9 2. Petitioner Berry, on behalf of himself and the Willits Citizens for Environmental Justice
10 (WCEJ), submitted written comments prior to the Public Hearing which identified the sections
11 of the California Code of Regulations (CCR) and Public Resources Code (PRC) which the
12 approval of Resolution R1-2006-0109 violates.
13

14
15 3. A stay is hereby requested on 1) all activity authorized by or dependent on the authorization
16 of Order R1-2006-0109, and 2) all further approvals for projects subject to CEQA using a
17 Categorical Exemption on sites listed on the Cortese List¹. The laws that were violated are
18 specifically for the protection of the environment, including the health and safety of human
19 beings.
20

21
22 4. Approval of Order No. R1-2006-0109 was not processed in accordance with CEQA because
23 Finding No. 13 cites California Code of Regulations (CCR) Title 14 section 15321, which section
24

25
26 ¹ Government Code (GC) 65962.5(c)(3) requires that the Ferndale Waste Water Treatment Facility be listed on
27 the Cortese List because Cease and Desist Orders No. R1-2003-0049 issued to the City of Ferndale on May 15,
2003 and Order No. R1-2005-0087 on October 12, 2005.

1 is one of the CEQA CE, but 14 CCR §15300.2(e) prohibits the use of CE on sites listed on the
2 Cortese List.

3
4 5. Finding No. 9 also cites Water Code (WC) §13389 and the California Court of Appeal recently
5 ruled in *County of Los Angeles v. California State Water Resources Control Board* (2006) 143
6 Cal.App.4th 985, mod. (Nov. 6, 2006, B184034), that WC §13389 contained a exemption from
7 all of CEQA even though the language identifies a specific Chapter (3), not the entire Division
8 (13) of the PRC.
9

10
11 6. By inclusion of 14 CCR §15321 in Finding No. 13 of Order No. R1-2006-0109, the RWB
12 acknowledged that the action was subject to CEQA. Order R1-2006-0109 cites *both* WC §13389
13 *and* 14 CCR §15321 as necessary for the exemption.
14

15
16 7. Petitioners believe the Legislative process was followed with due diligence when WC §13389
17 was passed and signed into law, and that therefore the 4th Appellate District erred in ruling that
18 all portions of CEQA are exempted.
19

20
21 8. WC §13389 does not apply to new facilities, as defined in the Clean Water Act (CWA) (33
22 United States Code §1251 et seq.) . The proposed project involves the design and construction
23 of new facilities and is therefore a new facility under the CWA and therefore WC §13389 does
24 not apply to Order No. R1-2006-0109.
25

26
27 9. The RWB acted in violation of CEQA when the Board refused to publicly consider the letter
28

1 submitted by Petitioner Berry.

2
3 10. The project approved by Order No. R1-2006-0109 is dependent on future studies and
4 analyses of environmental effects, which is contrary to CEQA.
5

6
7 11. The issues above are discussed below and in the Points and Authorities (P&A)². The above
8 list does not exhaust all defects, including the deprivation of the public of their right to participate
9 in the approval process.
10

11 **PETITION INFORMATION**

12
13
14 12. The following information is provided in accordance with the instructions on the SWRCB
15 website at the following URL on 12/27/06:

16 http://www.swrcb.ca.gov/wqpetitions/wqpetition_instr.html
17

18 19 **1. Petitioners**

20
21 Ken Berry
22 10567 Mariposa Avenue
23 Jackson, CA 95642
24 209-223-1769
25

26
27

² A true and correct copy is attached hereto as though set out at length.

1 berry-k@sbcglobal.net

2
3 Donna Avilla, Willits Citizens for Environmental Justice

4 P.O. Box 734

5 Hydesville, CA 95547
6

7
8 **2. Action**

9
10 Order R1-2006-0109 approved by the Regional Water Quality Control Board, North
11 Coast (RWB).
12

13
14 **3. Date**

15
16 The action being appealed was taken November 29, 2006.
17

18
19 **4. Reason for Appeal**

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21 The RWB acted in a manner contrary to law, namely PRC §21084(c), which is an element
22 of CEQA. CEQA is designed to be enforced by public action. WC §13320 requires this
23 appeal process as a prelude to judicial enforcement of CEQA.
24

25
26 **5. Impact on Petitioner**

1 Petitioners are aggrieved as members of the public. The public has the right to expect that
2 public servants will faithfully execute the law in their official actions, particularly when
3 the law in question exists to guarantee minimal adverse impacts on the environment and
4 public health. Petitioner WCEJ is an association of individuals, several of whom are
5 directly impacted by this project and/or members of the public.
6

7
8 The California Legislature enacted CEQA and other statutes to protect the environment
9 of the State. It the responsibility of citizens to protect the environment from adverse
10 impacts under CEQA.
11

12 **6. SWRCB Action Requested**

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14
15 Petitioners request that Order No. R1-2006-0109 be set aside and the RWB be ordered
16 to prepare an environmental document (i.e., Negative Declaration or Environmental
17 Impact Report as appropriate) before further action on the project.
18

19 **7. Points and Authorities**

20
21
22 Petitioners have explained the major issues with regard to CEQA as Petitioners
23 understand them at this time in the P&A. Petitioners reserve the right to use the most
24 effective legal arguments known and available at the time of hearing, regardless of the
25 analysis presented here.
26
27

1 **8. Notice**

2
3 Complete copies of this Petition and the P&A were sent to the following parties via
4 United States Mail with first class postage afixed:
5

6
7 Regional Water Quality Control Board, North Coast Region (Agency)
8 5550 Skylane Boulevard, Suite A
9 Santa Rosa, CA 95403
10

11 City of Ferndale (Project Applicant / Property Owner)
12 P.O. Box 1095
13 Ferndale, CA 95536
14

15
16 Ken Berry (Petitioner)
17 10567 Mariposa Avenue
18 Jackson, CA 95642
19

20
21 Donna Avilla, Willits Citizens For Environmental Justice (Petitioner)
22 P.O. Box 734
23 Hydesville, CA 95547
24

25
26 **9. Issues**

1 All of the issues raised herein and all facts discussed concerning the approval of Order
2 No. R1-2006-0108 raised in this Petition, including the P&A, were properly raised at the
3 Public Hearing held on November 29, 2006 to consider these matters.
4

5 **REQUEST FOR STAY**

6

7
8 13. This Petition requests that the SWRCB stay all further action authorized by or dependant on
9 the authorization of Order R1-2006-0109. It further requests that the SWRCB cease and desist
10 violating CEQA by citing CE for sites on the Cortese List.
11

12
13 14. The following information is provided in accordance with the information on the SWRCB
14 website at the following URL on 12/27/06:
15

16 http://www.swrcb.ca.gov/wqpetitions/stayrequest_instr.html
17

18 **1. Substantial Harm to Petitioner**

19

20
21 15. The State Water Resources Control Board (SWRCB) is entrusted with the protection of the
22 health and safety of California residents and the protection of a safe environment through specific
23 laws and regulations. It is a substantial harm to every citizen when the SWRCB systematically
24 fails to obey state law because those laws are enacted by the people for the protection of their
25 health and safety.
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2. No Harm to Others

16. The only issue at stake is whether the proposed project has been processed according to the rules and regulations specified by Division 13 of the Public Resources Code and Title 14 of the Code of Regulations. No party is harmed by the SWRCB conforming to the requirements of state law.

3. Substantial Questions of Fact and Law

17. There are substantial questions of both law and fact. These are discussed in the P&A and summarized in the Introduction to this Petition.

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6 **BEFORE THE STATE OF CALIFORNIA**
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9 **Ken Berry, and**) **PETITION NO: _____**
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11 **Justice,**) **POINTS AND AUTHORITIES FOR**
12 **Petitioners**) **PETITION FOR REVIEW**
13 _____) **WITH REQUEST FOR STAY**
14 **Regional Water Quality Control Board,**)
15 **North Coast**)
16 **Acting Agency**)
17 _____)
18 **City of Ferndale,**)
19 **Real Party In Interest**)
20 _____)

21
22 **BACKGROUND**

23
24 1. As summarized in the Petition for Review, the Regional Water Quality Control Board, North
25 Coast (RWB, Regional Board) held a Public Hearing to consider Order No. R1-2006-0109,
26 revising the Compliance Schedule in Cease and Desist Order No. R1-2005-0087 and allow
27

1 minimal connections to the City of Ferndale Wastewater Treatment Facility WDID No.
2 1B83136OHUM, NPDES No. CA0022721 (Ferndale WWTF). Order No. R1-2006-0109 is
3 attached as Appendix A.
4

5
6 2. The approval of Order No. R1-2006-0109 was not processed in accordance with the California
7 Environmental Quality Act (CEQA) for several reasons, and Water Code (WC) §13389 was
8 inappropriately cited for the project. Violations of CEQA include the use of Categorical
9 Exemptions (CE) for projects listed on the Cortese List¹ and the refusal of the Regional Board to
10 consider evidence presented in writing at the Public Hearing. WC §13389 identifies an exemption
11 to CEQA that applies to existing sources, as defined in the Clean Water Act (CWA) (33 United
12 States Code §1251 et seq.). However, the proposed project satisfies the definition of a new
13 source according to the CWA and therefore WC §13389 does not apply and was inappropriately
14 cited.
15

16
17 **A. CATEGORICAL EXEMPTIONS PROHIBITED FOR CORTESE LIST**
18

19 3. PRC §21084(c) prohibits the use of CE for projects listed on the Cortese List. This statute is
20 the basis of 14 CCR (California Code of Regulations) §15300.2(e), which also prohibits the use
21 of CE for projects on the Cortese List.
22

23 4. The Ferndale WWTF is listed on the Cortese list because GC §65962.5(c)(3) requires that sites
24 for which a Cease and Desist Order (CDO) is issued be included in the list. On May 13, 2003,
25

26 ¹ Government Code (GC) §65962.5(c)(3) requires that the Ferndale WWTF be listed on the Cortese List because
27 Cleanup and Abatement Order No. R1-2003-0049 was issued on to the City of Ferndale May 15, 2003 and
28 Order No. R1-2005-0087 on October 12, 2005..

1 the RWB issued CDO No. R1-2003-0049. Therefore, the site of the Willits WWTF has been listed
2 on the Cortese List since at least May 13, 2003, and therefore was listed on November 29, 2006,
3 when Order No. R1-2006-0109 was issued.

4
5 5. Finding No. 13 on pages 3 and 4 of CDO R1-2006-0109 cites 14 CCR §15321, which exempts
6 enforcement actions from the provisions of CEQA that require preparation of an environmental
7 document (i.e., a Negative Declaration, ND, or Environmental Impact Report, EIR). The use of
8 this exemption is prohibited by 14 CCR §15300.2(e).

9
10 **B. ALL ENVIRONMENTAL EFFECTS MUST BE CONSIDERED**

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12 6. The RWB declined to consider the letter submitted by Ken Berry on his behalf and on behalf
13 of the Willits Citizens for Environmental Justice (WCEJ). PRC §21167.6(e)(10) requires that the
14 record of proceedings, for the purpose of determining CEQA compliance, include all relevant
15 information concerning the potential impacts or effects of the project on the environment that is
16 known to the public agency prior to the decision being made.

17
18
19 7. The Berry/WCEJ letter was received by the RWB prior to the close of the Public Hearing (PH)
20 as indicated by the discussion of the letter prior to the Board's consideration of the matter.
21 Therefore the Berry/WCEJ comments were timely and must be considered during judicial review
22 of the RWB decision, regardless of the willful failure of the Regional Board to consider the fact
23 that the RWB was preparing to take unlawful action.

24
25
26 8. The Berry/WCEJ letter does not raise any issues or facts not already in the record of
27

1 proceedings. RWB staff and legal counsel are well aware of the 14 CCR §15300.2(e) prohibition
2 on the use of CE. That action is not made unlawful by the Berry/WCEJ letter. The Berry/WCEJ
3 letter merely exhausts administrative remedies by commenting on the fact already known to the
4 RWB- namely that the proposed action is unlawful because it violates 14 CCR §15300.2(e) and
5 PRC §21084(c). The RWB has an intrinsic and independent obligation to act in a lawful manner
6 whether or not any comments are made on proposed unlawful actions. The fact that Berry and
7 WCEJ did comment has the effect that they may seek judicial review of the approval of Order No.
8 R1-2006-0109.
9

10 11 **C. WC §13389 DOES NOT APPLY TO NEW FACILITIES**

12
13
14 9. WC §13389 exempts the SWRCB and the Regional Water Quality Control Boards from
15 compliance with Chapter 3 of Division 13 of the Public Resources Code prior to the adoption of
16 waste discharge requirements, except for new sources as defined in the CWA².
17

18
19 10. Title 40 of the Code of Federal Regulations (40 CFR) section 306 is concerned with the
20 standard of control over sources of pollutants. 40 CFR §306(a)(2) defines “new source” to be “any
21 source, the construction of which is commenced after the publication of proposed regulations
22 prescribing a standard of performance under this section that will be applicable to such sources.”
23 40 CFR §306(a)(3) defines “source” to be “any building, structure, facility, or installation from
24 which there is or may be the discharge of pollutants”. 40 CFR §306(a)(5) defines “construction”
25

26 ² WC §13389 refers to the “Federal Water Pollution Control Act or acts amendatory or supplementary thereto”.
27 The “Clean Water Act” (CWA) is the name by which the latest revisions are now commonly known. The CWA
28 may be found at 33 United States Code 1251 et seq. and Title 40 of the Code of Federal Regulations.

1 to be “the placement, assembly, or installation of facilities or equipment ... at the premises where
2 such equipment will be used...”.

3
4 11. Order R1-2006-0109 contains the operative sentence on page 4, which amends the previous
5 CDO, R1-2005-0087 to include 7 tasks to be completed between July 1, 2007 and November 1,
6 2009. Tasks B and D require the City of Ferndale (Ferndale) to submit plans describing the
7 proposed project. Task J is the construction of the proposed project.

8
9 12. Order R1-2006-0109 proposes the construction and operation of new facilities and therefore
10 is a “new source” within the meaning of the CWA. Therefore WC §13389 does not apply to Order
11 No. R1-2006-0109.

12
13 **D. CANNOT DEFER ANALYSIS TO FUTURE STUDY**

14
15 14. On page 4 of Order No. R1-2006-0109, Task A includes “Comparison of most sensitive
16 beneficial uses identified for the receiving water in the Basin Plan for each COC and their
17 cumulative impacts”. Environmental studies and analysis must be done prior to taking action.
18 Decisions may not be based on studies yet to be conducted.

19
20 **STANDARD ON REVIEW**

21
22 15. The Standard on Review is very low with regard to compliance with CEQA. If a public
23 agency does not proceed according to law, Courts have no discretion to defer to the judgement of
24 the agency and must set aside the tainted decision.

1 Dated: December 29, 2006.

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/s/ Ken Berry

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Willits Citizens for Environmental Justice

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