

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

**ORDER WQ 2007-0006**

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In the Matter of the Petition of

**CHEVRON PRODUCTS COMPANY, CONOCOPHILLIPS COMPANY, SHELL OIL  
PRODUCTS US, TESORO MARKETING & REFINING COMPANY, VALERO REFINING  
COMPANY-CALIFORNIA AND WESTERN STATES PETROLEUM ASSOCIATION**

Request for Technical Report (WC 13267) of the  
California Regional Water Quality Control Board,

San Francisco Bay Region

***SWRCB/OCC FILE A-1851  
Ruling on Request for Stay***

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BY THE BOARD:

On May 7, 2007, the Executive Officer for the San Francisco Bay Regional Water Quality Control Board (San Francisco Bay Water Board) sent a letter (hereafter, investigative order) to five oil companies that maintain refineries around San Francisco Bay. Those five oil companies (Chevron Products Company, Conocophillips Company, Shell Oil Products US, Tesoro Marketing & Refining Company, and Valero Refining Company-California) are collectively referred to as Chevron or "the refineries" in this order. The investigative order directs the refineries to undertake certain tasks designed to provide additional information for the San Francisco Bay Water Board on the discharge of mercury to the Bay. In issuing the investigative order, the Executive Officer relied on Water Code section 13267, and set forth five different tasks to be completed according to a schedule set forth in the letter.

The refineries filed a timely petition, along with the Western States Petroleum Association, asking the State Water Resources Control Board (State Water Board) to invalidate the investigative order and to stay some or all of the investigative order, pending resolution of the petition on its merits. On July 31, 2007, a hearing was held in Sacramento, California, to consider whether a stay ought to be issued. At the end of the hearing, the Hearing Officer directed all parties to provide written closing briefs no later than close of business on

Thursday, August 2, 2007.<sup>1</sup> Having heard the evidence and arguments and having reviewed the supplemental briefs and for the reasons discussed below, the stay is hereby denied.

**I. BACKGROUND**

The San Francisco Bay Water Board has worked to address the issue of mercury in San Francisco Bay for many years. On July 17, 2007, the State Water Board approved the San Francisco Bay Water Board's total maximum daily load (TMDL) for mercury in the Bay. While the investigative order came before the State Water Board's approval of the TMDL, it was issued in contemplation of the overall approach set forth in the TMDL. In May 2005, the Executive Officer issued a previous order to the refineries, also pursuant to Water Code 13267, concerning air emissions of mercury. The refineries objected to the prior order but worked out an accommodation with the San Francisco Bay Water Board whereby some of the requirements were set aside while the refineries agreed to conduct an air deposition study. That study took some time to design and has only recently been put on line at the five refineries.

In advance of issuing the investigative order, the Executive Officer scheduled a workshop before the members of the San Francisco Bay Water Board on April 11, 2007. The workshop addressed additional mercury information to be requested from the refineries and included the San Francisco Bay Water Board's staff proposal to gather the information ultimately requested in the investigative order. Chevron appeared at the workshop and raised essentially the same concerns that have been expressed in its petition to the State Water Board. As the regional board members did not express any particular concerns about the order, the Executive Officer went ahead and issued it a few weeks later.

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<sup>1</sup> On the various motions that were made during the hearing on July 31, 2007, the following are the rulings:

- a. The motion to exclude the Lizarraga/Robinson declaration submitted by Petitioners is denied.
- b. The motion to strike the statements of Petitioner's counsel, made during the cross-examination of Richard Looker is denied.
- c. The Janssen declaration submitted by Baykeeper/Natural Resources Defense Council is stricken.
- d. All other material submitted by all parties in support of or in opposition to the stay request is admitted into the record of the State Water Board for all purposes pertaining to this petition.

The investigative order requires each refinery to conduct a technical review and provide a report to the San Francisco Bay Water Board. The report must include:

- An analysis of mercury concentrations and amounts in all crude oil types processed during air sampling events;
- An analysis of mercury concentrations and amounts in all waste (other than wastewater) and in the product stream;
- The dates of all “turnarounds” at each facility from 2000 through 2008;
- The total mass of mercury emitted, per year, directly into the atmosphere from all Bay Area refineries combined; and
- A discussion of the fate of the mercury emitted to the atmosphere and an estimate of how much would be discharged to the Bay via direct and indirect deposition.

Deadlines are set forth in the investigative order, the first being a requirement for: (a) an interim report of available air monitoring data; and (b) a revised draft sampling, analysis, and calculation methodology plan that were due June 15, 2007. Both were submitted. The second deadline called for the submission of a final sampling, analysis, and calculation plan by July 31, 2007. Chevron indicated that they would be complying with that requirement as well.

To qualify for a stay, the State Water Board must find that the refineries have alleged facts and produced proof of three things:

1. Substantial harm to the petitioners or to the public interest if a stay is not granted;
2. A lack of substantial harm to other interested persons and to the public interest if a stay is granted; and
3. Substantial questions of law and fact regarding the disputed action.

(Cal. Code Regs., tit. 23, § 2053.)

Chevron presented sufficient allegations and information in support of its stay request to justify holding a hearing. A notice of the hearing was sent to the parties on July 2, 2007. An additional party, a group consisting of Baykeeper and Natural Resources Defense Council, requested party status and was added for purposes of the stay hearing only.

Each party submitted timely information to the State Water Board in support of its position on the Request for Stay. A hearing was held before Tam M. Doduc, Chair of the State Water Board, sitting as hearing officer on July 31, 2007, in the State Water Board's offices.<sup>2</sup>

## II. CONTENTIONS AND FINDINGS

1. Contention: Chevron contends that the refineries will suffer substantial harm if a stay is not granted. Chevron asserts that the refineries will be forced to expend significant time and resources and that immediate implementation of the order will compromise existing operations and ongoing air deposition studies. Chevron further asserts that compliance within the timeframe for the report is infeasible and that the study will produce information that is irrelevant to the issues involved in protecting water quality. Chevron argues that, unless a stay is issued, harm will result because substantial portions of the work will be required before the State Water Board can address the petition on its merits.

Finding: While Chevron has offered considerable evidence that the refineries will be required to perform several tasks in the absence of a stay, the individual and cumulative consequences described in the petition, in the declarations, and in testimony at the hearing do not constitute "substantial harm." Most of the allegations of harm are speculative. If, during the time the petition is under review, more specific evidence of substantial harm comes to light, the refineries are free to renew their request for a stay at that time. In any event, I have directed State Water Board staff to expedite the petition review process so that all parties will know the State Water Board's decision on the merits of the petition as soon as possible.<sup>3</sup>

A petitioner seeking a stay carries the burden of proving each prong of the State Water Board's stay requirements for the time the petition is under review.<sup>4</sup> The State Water Board has previously stated that this burden is a "heavy burden."<sup>5</sup> As such, speculative testimony or conclusions will not support the issuance of stay. As Chevron acknowledged at

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<sup>2</sup> Because this order is issued by a single State Board member sitting by appointment of the Chair, this order will not be considered precedential by the State Board.

<sup>3</sup> Staff estimates that the petition could be considered during or before January 2008.

<sup>4</sup> Order No. WQ 2002-0007 (*County of Los Angeles, et al.*) at p. 3.

<sup>5</sup> Order No. WQ 97-05 (*Ventura County Citizens*) at p. 4

the hearing, significant cost alone will not justify a stay. Several State Water Board orders have said as much. A 2003 order<sup>6</sup> denying a stay stated:

The State Board will not grant a stay merely because the party requesting it must incur some expense, even a substantial one. Most stay requests are dismissed by the Executive Director if that is the only basis for a claim of substantial harm.

The costs in this case may amount to several hundred thousand dollars, but no evidence has been offered that such an amount will have a substantial impact on the refineries' operations or ability to stay in business. Further, while Chevron's witnesses stated that the costs of the technical report could be between \$500,000 and \$1,200,000 per refinery, the cost figures were only generally correlated to the time during which the State Water Board would review the petitions. Chevron argues that any expenditure of money is unreasonable given its assertion that the information likely to be generated from the study will be worthless from a water quality point of view. This, of course, delves into the merits of the petition. Indications are that the expenditures during the review period will not be substantial.

Chevron argues that, apart from the dollars expended, the refineries will be forced to do many things that will affect both their operations and their ongoing air deposition studies. The San Francisco Bay Water Board contends that its staff has been reasonable to date in accommodating these concerns and that they will continue to be reasonable and accommodating as implementation of the investigative order moves forward. The refineries' arguments are largely assertions of obstacles that will need to be addressed going forward and assumptions that the San Francisco Bay Water Board will be unreasonable in addressing the refineries' issues. The obstacles may or may not materialize, depending on how the San Francisco Bay Regional Board staff responds to the concerns. At this time, any harm (and it is unclear whether such harm would be substantial) is speculative.

Chevron also argues that it will effectively lose its right of appeal if no stay is issued because the refineries will have to commence some work on compliance with the investigative order before the State Water Board can address the matter on its merits. If a decision of the State Water Board is effectively rendered moot while the matter is pending, a stay may be appropriate. In this case, however, the evidence does not support a stay. The

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<sup>6</sup> Order No. WQ 2003-0010 (*County of Sacramento*) at p.4 (non-precedential decision).

time that will pass between now and the consideration of the merits of the petition is by no means all of the time within which the refineries must comply. While work must commence, much of that work will remain to be finished after the State Water Board rules on the merits. There will be a cost incurred by the refineries but the record supports a conclusion that the harm will not be substantial and does not constitute a loss of their right of appeal.<sup>7</sup>

In light of the foregoing analysis and findings, I conclude that the refineries have failed to carry their heavy burden of demonstrating substantial harm during the time the petition is under review. There may be subsequent circumstances that arise during petition review that would permit the refineries to demonstrate substantial harm. For that reason, the refineries are free to renew their stay request if they can demonstrate, during implementation of the work plan and after working with San Francisco Bay Water Board staff, that obstacles have arisen that pose substantial harm to the refineries.

2. Contention: Chevron contends that no substantial harm will result to any other person or to the public interest if a stay is granted. Chevron argues that the current air deposition study will answer the significant questions that pertain to water quality and that the information provided in the ordered study will have no additional benefit.

Finding: It is not necessary to reach a conclusion on this issue, given the failure of the refineries to satisfy the requirements of the first required stay element. However, the evidence presented seems to support a conclusion that no substantial harm would result from a brief delay if a stay were issued. The ongoing air deposition study is designed and expected to provide important information that may assist the San Francisco Bay Water Board in implementing the TMDL through permits and enforcement orders. No one disputes the significance of that process. The additional information requested in the order may be quite useful in validating the air deposition study or in indicating a need for further investigation. The need to “close the loop” on the question of how much mercury is being discharged by the refineries is important but not urgent. The process of cleaning up the mercury in San Francisco Bay is going to take a long time and no one was able to articulate an argument that the short delay that a stay would have created will have any significant impact on that process.

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<sup>7</sup> *Id.*

3. Contention: Chevron contends that it has raised substantial issues of law and fact in its petition.

Finding: It is not necessary to reach a conclusion on this issue, given the failure of the refineries to satisfy the requirements of the first required stay element. However, the petition raises sufficient issues to pass this test. More precisely, Chevron has raised substantial issues of fact and concerning the applicability of the law to these facts. The San Francisco Bay Water Board is legally entitled to issue orders pursuant to Water Code section 13267, but may do so only if the need for the report and benefits to be obtained bear a reasonable relationship to the burden, including costs, of producing the reports. That is a matter that is legitimately in dispute and should be addressed on its merits.

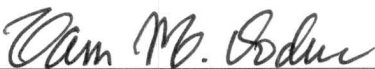
### III. CONCLUSION

For the reasons stated above, I have concluded that the refineries have failed to carry their burden of proof with respect to the first of the three elements required for the issuance of a stay. Though the order may require the expenditure of time and money and though a decision on the merits of this petition could find that the study should not have been required in the first place, the record shows that the harm suffered by the refineries during the short time it will take to resolve this matter on the merits is not substantial. State Water Board staff has been instructed to expedite the resolution of this matter and the San Francisco Bay Water Board is expected to respond reasonably to specific concerns raised by the refineries. If subsequent events or additional facts, not now available, demonstrate that the refineries will suffer substantial harm during this short period of time, a new request for stay may be considered.

### IV. ORDER

IT IS HEREBY ORDERED that the refineries stay request is denied without prejudice.

Dated: 8/6/07

  
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Tam M. Doduc  
Board Chair