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BURRTEC WASTE INDUSTRIES, INC.

STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF:
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION;
ADOPTION OF ADDENDUM NO. 1 TO CLEANUP AND ABATEMENT ORDER NO. R9-2013-0122, AN ADDENDUM ADDING RESPONSIBLE PARTIES, ADDING BURRTEC WASTE INDUSTRIES, INC. AS A RESPONSIBLE PARTY / DISCHARGER

PETITION AND REQUEST FOR REVIEW AND ACTION BY THE STATE WATER RESOURCES CONTROL BOARD
AND REQUEST FOR STAY OF ACTION
CAL. WATER CODE § 13320
23 CAL. CODE REGS. §§ 2050, 2052

BURRTEC WASTE INDUSTRIES’ PETITION FOR REVIEW OF ACTION BY REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, AND REQUEST FOR ACTION
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I.

INTRODUCTION

This Petition is submitted on behalf of Burrtec Waste Industries, Inc. (“Burrtec”). On July 14, 2017, Burrtec was improperly added as a named discharger to Cleanup and Abatement Order No. R9-2013-0122. In 2011, Burrtec contracted with Organic Ag, Inc. (“Organic Ag”) to supply and deliver a mulch product made up of green trimmings to the property located at 39801 Reed Valley Road, Aguange, California 92536 (the “Pike property”). Organic Ag had contracted directly with James Pike (“Pike”) to arrange for the supply of the green trimmings material, and to subsequently spread the material on the Pike property. Burrtec’s delivery of green trimmings to the Pike property called for Burrtec to unload the material into piles at locations directed by Organic Ag. These locations were at least 200 feet from the nearest tributary or water of the state. Following the delivery of the green trimmings, Organic Ag spread the material from the piles throughout the Pike property, including directly into the tributary.

A site inspection by the San Diego Regional Water Quality Control Board (“RWQCB”) in 2013 revealed that green trimmings had been spread by Organic Ag and Pike into the waters of the state and that neither Organic Ag, nor Pike, had obtained the requisite approvals and permits for the spreading of the green trimmings on the Pike property. A Notice of Violation and subsequent Cleanup and Abatement Order was issued to Pike\(^1\) for violations of the Water Code.

In 2016, following demands by Pike that the RWQCB add Burrtec as a discharger to the Cleanup and Abatement Order, the RWQCB issued a Tentative Addendum to the Order, proposing to name Burrtec as a discharger based solely on the fact that Burrtec was a supplier of green trimmings to the Pike property. In July 2017, an Amended Cleanup and Abatement Order was issued. Burrtec was improperly named to that Order as a discharger for the simple act of delivering a product to a site, with no control over the ultimate use or disposition of that product.

This Petition followed.

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\(^{1}\) The Notice of Violation and Cleanup and Abatement Order was also issued to Prairie Avenue Gospel Center (“PAGC”) for similar violations on the PAGC property. Burrtec did not deliver material to the PAGC property and has no information regarding the activities which occurred on the PAGC property.
II.

INFORMATION REQUIRED BY SECTION 2050

In support of this Petition, Burrtec provides the following information, as required by Title 23, California Code of Regulations, § 2050:

A. **Name, address, telephone number and email address of Petitioner.**

   Petitioner is Burrtec Waste Industries, Inc., 9890 Cherry Avenue, Fontana, CA 92335, (909) 429-4200, tsweeney@burrtec.com. All inquiries and communication should be directed through Petitioner’s counsel, Suzanne R. Varco of Varco & Rosenbaum Environmental Law Group LLP, whose information is provided in the caption on this Petition.

B. **RWQCB’s specific action or inaction for which review is sought.**

   Burrtec seeks review of: 1) the San Diego Regional Water Quality Control Board’s (“RWQCB”) adoption of Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122, An Addendum Adding Responsible Parties, in which the RWQCB identified Burrtec as Discharger and Responsible Party (attached as Exhibit A); and 2) the RWQCB’s adoption of Cleanup and Abatement Order No. R9-2013-0122 for James V. Pike and Prairie Avenue Gospel Center, Inc., as Amended by Addendum No. 1 (attached as Exhibit A). The Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122 and Cleanup and Abatement Order No. R9-2013-0122 for James V. Pike and Prairie Avenue Gospel Center, Inc., as Amended by Addendum No. 1, are collectively referred to herein at the “Amended CAO.”

C. **The date on which the Regional Board acted.**


D. **Statement of reasons why the action was inappropriate or improper.**

   The adoption of the Amended CAO was improper because: a) there is no evidence that Burrtec deposited waste in a location where the waste would cause or permit, or threaten to cause or permit, the waste to be discharged into the waters of the state and, therefore, there is insufficient evidence to support the allegations; and b) declining Burrtec’s request for a hearing to present on this matter and to cross-examine witnesses violated Burrtec’s due process rights.
E. **The manner in which Petitioner is aggrieved.**

Burrttec is aggrieved because it is being asked to prepare, submit and implement a Restoration Plan for the cleanup and abatement of waste discharged to the Pike and PAGC properties. While the costs associated with such efforts are unknown, they are expected to be significant. However, since there is no evidence that Burrttec deposited waste in a location where the waste could be discharged into the waters of the state, Burrttec should not be responsible for such efforts. Burrttec is also aggrieved because the process through which the RWQCB adopted the Amended CAO violated Burrttec’s due process rights and prevented Burrttec from presenting relevant evidence and challenging unsupported allegations regarding the claimed discharge.

F. **Specific action by the State and Regional Board requested by the Petitioner.**

Burrttec requests that the State Board: 1) find that the RWQCB’s identification of Burrttec as a Discharger and Responsible Party through the adoption of the Amended CAO was inappropriate and improper; 2) find that the process in which the RWQCB adopted the Amended CAO violated Burrttec’s due process rights; 3) set aside the Amended CAO and remove Burrttec from the Amended CAO or remand the matter back to the RWQCB with instructions that Burrttec shall not be named as a Discharger / Responsible Party.

G. **Statement of points and authorities in support of legal issues raised in the Petition.**

Burrttec’s statement of points and authorities follows the nine categories of information requested by 23 Cal. Code Regs. § 2050 and is incorporated herein by reference.

H. **Statement that Petition has been sent to the Regional Board and the discharger.**

Burrttec certifies that a true and correct copy of this Petition was provided electronically on August 11, 2017 to the RWQCB at the following address:

Mr. David Gibson  
Executive Director  
Regional Water Quality Control Board, San Diego Region  
2375 Northside Drive, Suite 100  
San Diego, CA 92108-2700  
Email: david.gibson@waterboards.ca.gov

On August 11, 2017, electronic copies of this Petition were provided to the other named dischargers at the following email addresses:
Mr. James Pike  
c/o Erick Altona, Esq., era@lfap.com

Organic Ag, Inc.  
c/o Thomas Kearney, Esq., tjk@amclaw.com  
c/o Leslie McAdam (lmcadam@fcoplaw.com)

Ecology Auto Parts, Inc.  
c/o John T. Griffin, Esq., jgriffin@greenhall.com  
c/o Jim Macdonald, Esq., jmacdonald@boismac.com

I. The substantive issues raised in the Petition were raised before the RWQCB.

All substantive issues raised in this Petition were raised before the RWQCB in written testimony prior to the RWQCB’s adoption the Amended CAO. Burrtec reserves the right to present additional evidence in support of this Petition at the hearing, in accordance with 23 California Code of Regulations section 2050.6. Such additional evidence will include testimony elicited from RWQCB staff which Burrtec was precluded from obtaining previously due the denial of its due process rights by the RWQCB’s failure to provide a hearing on this matter. The RWQCB declined to provide reference to specific evidence in making its findings in the Amended CAO. Because Burrtec was denied a hearing, it was not able to cross-examine RWQCB staff on the basis of the findings or the specific facts and evidence which the RWQCB alleges support its findings. Burrtec is entitled to know what this evidence is and test the credibility and sufficiency of this evidence, as discussed in detail below in Burrtec’s Points and Authorities.

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2 Exhibits A-F, X and EE are all documents prepared by the RWQCB. Exhibits G-W and Y-DD are documents which were previously provided to the RWQCB by Environmental Law Group LLP. Each is separately listed in, and attached to, the Petition for ease of reference. Additionally, some referenced deposition transcripts were previously provided to the RWQCB in “rough” form; the Court Reporter certified copies are provided as exhibits to this Petition.
III.

STATEMENT OF POINTS & AUTHORITIES IN SUPPORT OF LEGAL ISSUES

A. Factual Background

1. Burrrtec Contracted with Organic Ag to Supply Material.

In March of 2008, Organic Ag, Inc. (“Organic Ag”) and Burrrtec entered into a Green Waste Delivery Agreement, wherein Burrrtec agreed to deliver material defined as “organic waste material generated from gardening, agriculture or landscaping activities, including but not limited to, grass and plant clippings, leaves, tree and shrub trimmings and plant remains,” (hereafter referred to as “green trimmings”) to facilities designated by Organic Ag. Organic Ag, upon receipt of the green trimmings, agreed to “process and otherwise manage all green trimmings delivered by Burrrtec, in accordance and compliance with all applicable federal, state, or local laws and regulations.” (Exhibit G, p. 1.) The Agreement stipulated that Organic Ag would be responsible for: (i) processing the green trimmings into mulch and soil amendments; (ii) management of the green trimmings once delivered to facilities designated by Organic Ag; and (iii) proper disposal of all green trimmings. (Exhibit G, p. 1.) Organic Ag warrantied that it would “receive, process, manage, recycle, sell, apply and use” the green trimmings “in full compliance with all valid and applicable federal, state and local laws, ordinances, orders, rules and regulations;” and that it had been issued and would maintain “all permits, licenses, certificates or approvals required by federal, state and valid and applicable laws, ordinances and regulations necessary” to allow Organic Ag to accept, process, and apply the green trimmings. (Exhibit G, p. 2.)

Title to all green trimmings and processed mulch material transferred to Organic Ag upon delivery and receipt by Organic Ag. (Exhibit G, p. 3.) Organic Ag processed, managed, and disposed of the green trimmings in whatever manner Organic Ag determined appropriate. (Exhibit G, pp. 1-2.) The Agreement also noted that Organic Ag would obtain signed written documentation from the owners or managers of land allowing for Organic Ag’s placement of the green trimmings and mulch product on the owner’s property for agricultural application. (Exhibit G, p. 2.)
The Agreement makes clear that Burrtec’s role is solely to supply and deliver the green trimmings to Organic Ag’s designated facilities. (Exhibit G.) Nothing in the Agreement addresses, much less governs, the methods by which Organic Ag would process, place and dispose of the green trimmings and mulch product. (Exhibit G.)

2. **Burrtec was Not a Party to Any Contractual Agreement between Mr. Pike and Organic Ag.**

   In 2011, Organic Ag and James Pike signed an agreement for Organic Ag to deliver and spread green trimmings as a mulch product on approximately 90 acres of land owned by Mr. Pike. (Exhibit H.) Burrtec was neither a party to, nor a beneficiary of, this agreement. Burrtec had no contractual privity with Mr. Pike; Burrtec was simply a supplier of material.

   The Agreement between Organic Ag and Mr. Pike required Organic Ag to remove any “excess trash” from the green trimmings, making clear that the supplied green trimmings would contain some inorganic material. (Exhibit H.) Moreover, Organic Ag, Inc. was responsible for all contractual obligations with Mr. Pike, including processing, spreading, handling and management of the material. (Exhibit H.) Consequently, the removal of trash and the spreading and cleanup of the green trimmings was subject to the specific terms of the agreement between Organic Ag and Mr. Pike. The failure to remove the “excess trash” from the green trimmings falls on Organic Ag. Additionally, the decision to spread the material on the Pike property, including into the tributary, was Organic Ag’s and Mr. Pike’s alone. (Exhibit H.)

   Mr. Pike admits that his contract was with Organic Ag, and that it was Organic Ag’s obligation to spread the green trimmings on the Pike property. (See Exhibit I, ¶¶ 11, 14; Exhibit J, ¶¶ 11, 14; Exhibit Y.) Mr. Pike does not claim that any spreading activities were conducted by Burrtec; he only claims that Burrtec delivered the green trimmings to the Pike property and that Burrtec unloaded the material at locations specified by Organic Ag. (See Exhibit Y.) While Burrtec did supply green trimmings to the Pike property, Burrtec did not spread green trimmings on the Pike or PAGC properties.

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3. **Nature of the Discharges**

Green trimmings were delivered to the Pike property beginning in 2011, and were spread on the Pike property by Organic Ag. (Exhibit H.) As a result of inspections conducted by the RWQCB in 2013 at the Pike and PAGC properties, on June 3, 2013, a Notice of Violation was issued to Pike and PAGC for failure to submit a Report of Waste Discharge, initiating a new discharge of waste to land, and failure to comply with the San Diego Basin Plan. (Exhibit B.)

On September 5, 2013, the RWQCB issued Cleanup and Abatement Order No. R9-2013-0122 (the “Original CAO”). The Original CAO defined the discharges that occurred on the Properties in Findings 6 and 9. (Exhibit B, pp. 2-3.) The RWQCB determined that the discharge occurred when “waste consisting mostly of plant clippings (i.e. landscaping waste) and to a lesser extent municipal solid waste (glass, plastics, metals, and construction debris) was **spread** on the properties by Organic Ag, Inc.” (Exhibit B, Finding 6 (emphasis added).) In Finding 9, the RWQCB explained that the unauthorized discharge of waste resulted from “waste spreading activities into tributaries to Wilson Creek.” (Exhibit B, Finding 9.) These findings are mirrored in the Amended CAO issued on July 14, 2017. (See Exhibit A, Finding 6; Finding 9.)

The Amended CAO, issued on July 14, 2017, alleges that Burrtec contracted with Organic Ag to **supply** green waste to Organic Ag (Exhibit A, Finding 1.e. (emphasis added)); that “Burrtec trucks delivered and deposited green waste to various locations on the properties” (Exhibit A, Finding 1.c.); and that “Organic Ag **spread** the green waste piles deposited by Burrtec” (Exhibit A, Finding 1.e. (emphasis added)). Notwithstanding the above findings that Burrtec merely supplied green trimmings and that Organic Ag performed the spreading of that material, the RWQCB identified Burrtec as a Discharger, finding Burrtec responsible under Water Code Section 13304, for its role in “depositing” the green trimmings in violation of Water Code section 13260 and in a manner where the material “is or probably will be discharged into the waters of the state in violation of Water Code Section 13304.” (Exhibit A, Finding 2.)

The RWQCB’s findings state that the unauthorized discharge into the tributaries of Wilson Creek was a direct result of the “spreading” of the green trimmings (see Exhibit A, Findings 6 and 9) – the **spreading** activities which were conducted by Organic Ag and
authorized by Mr. Pike. As discussed in greater detail below, the simple “deposit” of green trimmings by Burrtec was not done in a manner where the material was, or would be, discharged into the waters of the state.

B. Burrtec Is Not a Discharger.

Burrtec cannot be named a Discharger or Responsible Party because there is insufficient evidence to support the allegations that Burrtec deposited waste in a location where it would cause or permit, or threaten to cause or permit, waste to be discharged into waters of the state.

1. Liability Under Water Code Section 13304 Does Not Extend to Parties Who Supply or Deliver Products Without Control Over Those Products’ Use.

The legal requirements necessary to establish Burrtec’s liability as a discharger under the Water Code have not been met. Burrtec’s mere supply of green trimmings does not constitute a discharge. Liability for cleanup and abatement of a discharged waste is governed by the Porter-Cologne Water Quality Control Act – specifically Section 13304(a) of the California Water Code, which states:

“A person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall, upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.” (Emphasis added.)

Section 13304(a) has two requirements: (1) that there be a deposit that “is or probably will be, discharged into the waters of the state;” and (2) such deposit must create or threaten to create a condition of pollution or nuisance. Both requirements must be satisfied to establish liability under section 13304(a).

California courts have explained that the Porter-Cologne Act “must be construed in light of the common law principles bearing upon the same subject,” and as such, “not only is the party who maintains the nuisance liable but also the party or parties who create or assist in its creation.” (City of Modesto Redevelopment Agency v. Superior Court (2004) 119 Cal.App.4th
28, 38 (quotations and citations omitted).) The City of Modesto court noted that “[w]hile liability
for nuisance is broad, however, it is not unlimited.” (Id. at 39.) Liability stops well short of
applying “mere but-for causation.” (Team Enterprises, LLC v. Western Investment Real Estate
Trust (9th Cir. 2011) 647 F.3d 901, 912 (citations omitted).) “Section 13304 is to be read in light
of the common law principles of nuisance and these principles include a causation requirement.”

Liability does not extend to those “who merely placed [products] in the stream of
commerce without warning adequately of the dangers of improper disposal.” (City of Modesto,
119 Cal.App.4th at 43.) “[T]he law of nuisance is not intended to serve as a surrogate for
ordinary products liability.” (Id. at 39.) In finding dry cleaning solvent manufacturers and
distributors were not liable for a dry cleaners’ discharge of those solvents into public sewer
systems, the Court of Appeal ruled that only those who “took affirmative steps directed toward
the improper discharge of solvent wastes . . . may be liable under [Section 13304].” (Id.)

These principles have been reaffirmed in subsequent cases interpreting section 13304.
Exxon was found not liable (and not a responsible party under section 13304(a)) for a nuisance
created by spilled or leaked gasoline that it had sold and distributed, because Exxon never
“instructed purchasers of its MTBE-containing gasoline to use it in a hazardous manner,” nor did
Exxon “affirmatively promote any such use.” (City of Merced Redevelopment Agency v. Exxon
Mobil Corp. (E.D.Cal. 2015) 2015 WL 471672, at *22 (emphasis in original).) Similarly, in
County of Santa Clara v. Atlantic Richfield Co., the court explained that lead paint manufacturers
could not be held liable for “their mere manufacture and distribution of lead paint or their failure
292, 310; see also Redevelopment Agency of City of Stockton v. BNSF Ry. Co. (9th Cir. 2011)
643 F.3d 668, 674 (quoting County of Santa Clara and holding, “We cannot agree that [] passive
but-for causation is sufficient for nuisance liability to attach.”).)

The court in Redevelopment Agency of City of Stockton confirmed that but-for causation
is insufficient to impose liability for a discharge under Water Code section 13304. (643 F.3d at
678.) Only those who engage in active and affirmative conduct may be liable under section
13304. (Id.) Liability cannot attach where the actions were passive and unknowing. (Id.) “Under California law, conduct cannot be said to ‘create’ a nuisance unless it more actively or knowingly generates or permits the specific nuisance condition.” (Id. at 674.) A defendant must take other “‘affirmative acts' that contribute ‘directly’ to the nuisance.” (City of Merced Redevelopment Agency, 2015 WL 471672 at *12, citing In re Methyl Tertiary Butyl Ether (MTBE) Prods, (S.D.N.Y.2006) 457 F.Supp.2d 455, 463.) There must be “evidence that [the defendant] actively or knowingly caused or permitted . . . contamination.” (Id., citing City of Stockton, 643 F.3d at 671.) Similarly, the court in Santa Clara Valley Water Dist. court held that where no evidence exists that the necessity for remedial action was caused by the alleged discharge, liability under Water Code section 13304 could not be maintained. (655 F.Supp.2d at 1064.)

Liability under Water Code section 13304 must be premised upon a showing of control over the activity causing the discharge. The court in Wells Fargo Bank, N.A. v. Renz (N.D. Cal. 2011) 795 F.Supp.2d 898, found there was no evidence that the alleged responsible party had any authority to control the cause of the contamination at the time the hazardous substances were released into the environment (id. at 916), and that without evidence showing that the alleged responsible party had such control or active involvement, liability under section 13304 could not be shown. (Id. at 919, emphasis added.)

The courts in Wells Fargo, Santa Clara Valley Water Dist., and the other cases cite above relied on City of Modesto. In City of Modesto, the court held that liability under Water code section 13304 required a showing of affirmative action in the release causing the nuisance; mere placement of materials in the stream of commerce was not sufficient. (City of Modesto, 119 Cal.App.4th at 43, emphasis added.) The court further held, after reviewing the legislative history of the Porter-Cologne Act, that the legislative history “supports our conclusion that the Legislature did not intend the act to impose liability on those with no ownership or control over the property or the discharge, and whose involvement in a discharge was remote and passive.” (Id.) Moreover, “[t]he statute also provided there would be no liability if the discharge were caused by events beyond the discharger’s control.” (Id. (emphasis added).)
Most importantly, the State Water Resources Control Board itself has already determined that product suppliers are not responsible under section 13304 absent hazardous use. *(In the Matter of the Petition of Exxon Company, U.S.A., et al (Order No. WQ 85-7, Aug. 22, 1985) 1985 WL 20026.)* After the Regional Water Quality Control Board adopted a Cleanup and Abatement Order naming gas station property owners, Exxon, and the gasoline supplier responsible for benzene contamination that resulted from corrosion in underground storage tanks, the State Water Resources Control Board found that there was not substantial evidence showing that either Exxon or the gasoline supplier had owned the corroded tanks. *(Id. at *6.)* Accordingly, the Board ordered Exxon and the supplier removed from the Cleanup and Abatement Order. *(Id. at *7.)* Only the property owners who actually had control over the use of the gasoline could be responsible for discharges from the gasoline tanks. *(Id.)* The California Court of Appeal later noted that “*In re Exxon* does suggest that a party who merely *supplies* a hazardous substance is *not* responsible under Water Code section 13304 . . ..” *(City of Modesto, 119 Cal.App.4th at 41 (emphasis added, italics in original).)*

This reasoning was echoed in *In re County of San Diego* where the State Water Resources Control Board held that a City could be treated as a discharger because it had *authority to control* a street and runoff from that street was adversely affecting water quality. *(In re County of San Diego (Order No. WQ 96–2, Feb. 22, 1996) 1996 WL 101751 at *5.)*

The case law and Water Board orders are consistent. The Water Code also does not impose liability on a party who supplies materials to a third party, when that third party then independently places the material in a location where the material is discharged into “waters of the state.” A party who merely supplies a product (e.g. lead paint), or delivers a product to an end user (e.g. dry-cleaning solvent or gasoline), who has no control or authority to control the ultimate use or placement of the product cannot be treated as a discharger under the Water Code. Liability does not attach where the actions are passive and unknowing. *(Redevelopment Agency of the City of Stockton, supra, 643 F.3d at 678.)*
2. **Water Code Liability is Not CERCLA or HSAA Liability.**

In his June 9, 2017 Prosecution Team Response to comments presented by Burrtec, James G. Smith of the RWQCB asserts that Burrtec’s actions give rise to CERCLA liability and that “[i]n many ways, Water Code section 13304 is broader than both the Hazardous Substance Account Act and CERCLA . . ..” (See Exhibit F, p. 2.) This statement fundamentally misunderstands and misrepresents the scope of liability under Water Code section 13304 compared to CERCLA.

Unlike the Hazardous Substance Account Act (Cal. Health & Safety Code § 25323.5) (“HSAA”), or the Comprehensive Environmental Response Compensation & Liability Act (42 U.S.C. 9607(a)(4)) (“CERCLA”), the Water Code does not impose strict liability on a transporter. If the California legislature had intended to impose strict liability on transporters within the context of the Water Code, it could and would have done so. It did not.

As noted above, liability under Water Code section 13304 is interpreted in concert with California law on nuisance, which does not place responsibility on blameless parties. While CERCLA allows for a transporter to be found liable without fault (see, United States v. Stringfellow (C.D. Cal. Nov. 30, 1993) WL 565393 at *121 [“CERCLA liability can be imposed upon blameless parties.”]), causation standards are applied more narrowly under nuisance law, and in turn under section 13304.

In contrast to the HSAA and CERCLA, traditional concepts of nuisance law apply to establish section 13304 liability. Passive, but-for causation is not sufficient to establish liability under nuisance or the Water Code. (Redevelopment Agency of the City of Stockton, 643 F.3d at 674.) “Under California law, conduct cannot be said to “create” a nuisance unless it more actively or knowingly generates or permits the specific nuisance condition.” (Id.) Thus, when BNSF installed a French drain that allowed contamination to migrate passively from one location to another, such conduct did not create liability under the Water Code. (Id. at 674-675.)

By comparison, an entity that had “direct involvement in the design and installation of unsafe disposal systems” for chemicals used in a wood treatment process, “coupled with its claimed knowledge of the dangers involved in such practices” did have liability for creating a
nuisance. (Id. at 674.) In contrast, a defendant that “merely placed [hazardous substances] in the stream of commerce,” as opposed to those who “took affirmative steps directed toward the improper discharge of [hazardous] wastes” was not liable under nuisance. (Id.)

A transporter cannot be held liable for blameless conduct under the Water Code, as it can under CERCLA. Consequently, the RWQCB staff erroneously concluded that because a transporter has liability under CERCLA, it would also have liability under section 13304. There simply is no liability for transporters that merely transported and deposited hazardous materials to a site under section 13304. This legal conclusion was specifically confirmed in W. Coast Home Builders, Inc. v. Aventis Cropscience, USA Inc. (N.D. Cal. Aug. 21, 2009) WL 261238, where an owner of a landfill brought a nuisance claim against “the original generators, arrangers and/or transporters of the solid waste and hazardous waste that is present in soil and in the groundwater plume underneath the Property.” (Id. at *6 (emphasis added).)

In W. Coast Home Builders, the plaintiff alleged that the simple transport of solid and hazardous waste to a landfill was enough to establish nuisance liability. The defendant generators and transporters argued that “the most that plaintiff can show is that the Generator defendants sent hazardous substances and waste to the Landfill. The Generator defendants argue that it is undisputed that they had no responsibility for the operations at the Landfill, and it is the operation of the Landfill that plaintiff claims gives rise to the groundwater contamination now existing under portions of its property.” (Id. at *8.)

Much like the Prosecution Team here contends, the plaintiff landfill owner incorrectly argued “that a defendant may be liable for a nuisance without negligence.” (Id.) The W. Coast Home Builders court rejected this contention, stating “[w]hile plaintiff is correct that negligence is not a necessary element of a nuisance claim, in the absence of negligence there must be some intentional conduct that is unreasonable.” (Id.) The court held that simple disposal alone was not enough:

“Here, the Generator defendants are entitled to summary judgment because their conduct – disposing of their waste at the landfill – did not create or assist in the creation of the nuisance. Plaintiff has not submitted any evidence suggesting that defendants’ conduct was unreasonable. It is undisputed that the Generator defendants played no part in the operation of the Landfill, and it is undisputed that
the Generator defendants’ only role with respect to the Landfill was having their waste taken there for purposes of its disposal. . . . It is true that there would be no nuisance without the disposal of solid and hazardous waste at the Landfill. However, plaintiff claims that the cause of the nuisance was the improper handling of the waste at the Landfill . . . which is conduct flowing from the operation of the Landfill, not from the Generator defendants’ disposal of waste at the Landfill.”

(Id. at *9 (emphasis in original).)

Like the defendants in *W. Coast Home Builders*, Burrtec’s only role with the Pike property was in delivering green trimmings to the site. The RWQCB claims that the cause of the nuisance was a result of the spreading of the green trimmings into and near the tributaries, conduct flowing from the direct actions of Mr. Pike and Organic Ag, not the simple delivery of green trimmings to the property by Burrtec.

3. **Burrtec Has No Liability for the PAGC Property.**

The Amended CAO pertains to two separate and distinct properties, the Pike property (Parcel No. 571-280-042) and the PAGC property (Parcel No. 570-280-014), which are collectively referred to as the “properties” in the Amended CAO. (Exhibit A, Findings 1 and 2.) Burrtec’s contract with Organic Ag was for the delivery of green trimmings to the Pike property only. Burrtec did not deliver any material to the PAGC property. (See Exhibit H, Exhibit I, Exhibit J, and Exhibit K.) The RWQCB has provided no evidence of any delivery of green trimmings by Burrtec to the PAGC property. Burrtec has no liability for any materials delivered or spread on the PAGC property.

Because the Amended CAO lumps both the Pike and PAGC properties together as the “properties,” Burrtec has been improperly named a Discharger for a property with which it has no affiliation or liability. At a minimum, the Amended CAO must be rescinded and revised to separate the obligations with respect to the two separate properties.

4. **Burrtec Delivered Green Trimmings to the Pike Property But Did Not Place that Material In or Near the Waters of the State.**

California Water Code Section 13304(a) regulates any person who “has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or
threatens to create, a condition of pollution or nuisance.” (Emphasis added.) As noted above, the statute has two requirements. The first is that there must be a deposit that “is, or probably will be, discharged into the waters of the state.” The evidence does not support that Burrtec engaged in such conduct.

The Amended CAO identifies the “waters of the state” as the “Tributaries to Wilson Creek.” (Exhibit A, Finding 3.) The April 27, 2017 RWQCB Memo (Exhibit E) prepared by James G. Smith states the following on pages 2 and 5 (bolding added):

“Therefore the discharge of the waste into and additionally where it was likely to be discharged into the unnamed ephemeral streams tributary to Wilson Creek on each property was in violation of the San Diego Water Board’s Basin Plan Prohibitions 1, 2, and 7, and Water Code section 13264 for failing to file a report of waste discharge requirements prior to discharging the waste.”

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“Burrtec did not merely supply the waste materials to a distributor, Burrtec physically transported the waste to and placed it on the Pike property, and in some instances directly into “waters of the state,” or probably could have, given rain and wind.”

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In response to these unsupported allegations by the RWQCB, Burrtec provided a declaration from Mr. Nick Burciaga, the Division Manager for Burrtec’s Agua Mansa facility, the facility from which all Burrtec trucks that delivered the green trimmings originated. (See Exhibit L.) Mr. Burciaga testified that the Burrtec trucks did not unload the green trimmings into the tributaries of Wilson Creek. In fact, the trucks could not unload in those areas because there was a risk that they would get stuck in loose dirt or tip over due to the angle of the Property. (Exhibit L, ¶¶ 9, 10.) The closest that Burrtec unloaded any green trimmings to the “waters of the state” was at least 200 feet from the Wilson Creek tributaries. (Exhibit L, ¶ 9.) No party has produced evidence to the contrary, and no evidence to the contrary exists.

The evidence that does exists shows that, at least as of March and May 2017, there were no green trimmings within the tributary, nor within 15 feet of the tributary. At that time, two environmental consultants walked the Pike property and confirmed that the closest the green trimmings existed to the tributaries was approximately 15 feet. (See Exhibit U, March 10, 2017 Restoration Plan prepared by Advantage Environmental Consultants, p. 4; Exhibit V, May 1, 2017 Evaluation and Comments on the Advantage Environmental Consultants’ Site Restoration
Plan by SoundEarth Strategies, p. 11-12.) Moreover, Mr. Pike testified in deposition that the green trimmings, which had been placed in the tributary by Organic Ag, had been successfully removed. (Exhibit O, 298:18-299:8.) Finally, the only evidence the RWQCB provided with respect to the placement of green trimmings in the tributary was their own inspection where they documented Organic Ag spreading the material. (See Exhibit B.)

In support of the issuance of the Amended CAO, the RWQCB’s Mr. Smith alleges, in his April 27, 2017 Memo, that:

“Burrtec argues that materials were not located where they will be or probably will be discharged into ‘waters of the state’ . . .. However, Burrtec admits that Mr. Pike confirmed that all green trimmings have been successfully removed from the waterways’. . .. This statement concedes that material was in the waterways.”

(Exhibit E, p. 4 (italics in original).) While material may have been in the waterways in 2013, this fact is not evidence that Burrtec put the material either in the waterways or in a location where it was likely to reach the waterways due to wind and rain. Instead, the evidence is that Burrtec unloaded the material in a location where it would not reach the waterways and that Organic Ag moved the material into the waterway. (See Exhibit K, ¶¶ 9-13; Exhibit L, ¶¶ 9-11; Exhibit M, ¶¶ 7, 8; Exhibit N, ¶¶ 3-6; Exhibit O, 298:18-299:8; Exhibit P, 46:24-47:1, 50:16-19; Exhibit Q, 216:4-18.)

Moreover, but for ensuring that its trucks and drivers were safe in the selection of unloading locations, Burrtec did not determine the locations at which the green trimmings would be unloaded. Upon arriving at the Property, Organic Ag directed Burrtec to the locations where Organic Ag wanted the green trimmings to be unloaded. (Exhibit K, ¶ 10; Exhibit L, ¶ 8; Exhibit P, 46:24-47:8; Exhibit Q, 76:10-13, 103:2-15, 216:16-18, 217:3-11; Exhibit S, 42:2-6; Exhibit T, 29:6-13, 29:24-30:11, 31:24-31:2; Exhibit Y, ¶ 4.)

Mr. Smith of the RWQCB also alleges that:

“Burrtec has repeatedly argued that it only supplied the materials and that Organic Ag placed it, but Mr. Pike provided a declaration that Burrtec trucks deposited waste materials onto his property and Burrtec impliedly admitted that it did deposit such materials. . . . [I]t appears from reviewing all appropriate evidence that (1) Burrtec deposited waste material onto the Pike property and (2) the waste materials were placed where they were, in fact, discharged into “waters of the state.”
(See Exhibit E, p. 4.) Again, Mr. Smith draws conclusions without evidence. Mr. Pike’s declaration merely states that Burrttec unloaded “green trimmings” onto his property. (Exhibit Y, ¶ 4.) Burrttec does not dispute this fact. However, neither the Pike Declaration, nor any other evidence supports a finding that the green trimmings were placed by Burrttec either into “waters of the state” or where they would be discharged into “waters of the state.” In fact, Burrttec unloaded the green trimmings at a location where they would not be discharged into “waters of the state.” (See Exhibit L, ¶¶ 9, 10; Exhibit M, ¶¶ 7, 8.) The only reason the alleged waste material reached the “waters of the state” was because Organic Ag put it there. As Mr. Pike testified, “there are three . . . tributaries . . . Organic AG filled those up with the mulch.” (Exhibit O, 298:16-22.) Burrttec does not have liability under the Water Code for the independent and affirmative actions of Organic Ag.

Similar unsupported allegations are presented by Mr. Smith on page five of the April 27, 2017 Memo:

“Burrttec further argues that a recent site visit determined that no waste materials were in the waterway. This does not mean that such materials were not originally placed where they were or probably could be discharge into ‘waters of the state’ in 2013. As stated by Mr. Pike’s counsel, ‘the main waterways were promptly cleared by [Mr. Pike] when the CAO was issued. They remain clear for the most part but future migration of trash back into the waterways is possible, probably inevitable, unless it is removed from the rest of the property.’ The Prosecution Team agrees.”

(Exhibit E, p. 5, emphasis added.) Again, Burrttec does not dispute that materials may have been placed in the waterways, but there is no evidence that Burrttec placed the materials there; there is undisputed evidence that Organic Ag placed the materials there. (Exhibit O, 298:16-22.) Additionally, opinions supplied by Mr. Pike’s counsel are neither fact nor evidence and reliance on those unsupported opinions is inappropriate. Mr. Pike’s counsel has no first-hand knowledge of the site conditions at the time of Burrttec’s delivery of green trimmings and is not an expert on

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3 Burrttec closely monitored the material being delivered for excess waste. When source-separated green material arrives at a Burrttec facility, it goes to a separate green processing area where it is unloaded, inspected and picked for trash, screened, ground up, and inspected again. (See, Exhibit K, ¶ 3; Exhibit T, 19:9-16, 51:20-52:3; Exhibit S, 157:10-21.) Burrttec inspectors reject whole deliveries of green waste when they are found to contain an unacceptable amount of trash materials. (See, Exhibit T, 21:19-23.)
such issues and is not qualified to opine on such matters.

Finally, Mr. Smith, on page five of the April 27, 2017 Memo, asserts:

“Burrtec has admitted that it placed the waste materials on the property at issue. Burrtec did not merely supply the waste materials to a distributor, Burrtec physically transported the waste to and placed it on the Pike property, and in some instances directly into “waters of the state,” or probably could have, given rain and wind. Burrtec states that ‘[l]iability under Water Code section 13304 must be premised upon a showing of control over the activity causing the discharge.’ Burrtec does not indicate, nor can it credibly claim, that it was not in control of its trucks, drivers, or ability to contract with Organic Ag.”

(See Exhibit E, p. 5.) Burrtec admits that it placed green trimmings on the Pike property, but there is no evidence that Burrtec placed the green trimmings “directly into ‘waters of the state’ or probably could have, given rain and wind.” The evidence is to the contrary.

The closest that Burrtec placed the green trimmings to the “waters of the state” was 200 feet away (Exhibit L, ¶ 9), and the placement of the green trimmings in that location would not have resulted in the discharge of the green trimmings into the “waters of the state” due to rain or wind. (See Exhibit M, ¶ 7, 8.) Burrtec was in control of its trucks and drivers, and they did not place the green trimmings into “waters of the state” or in a location where it could have been discharged into “waters of the state.” (Exhibit L, ¶¶ 9, 10.) Burrtec, however, did not and could not control Organic Ag’s spreading of the material on the Pike property. (See Exhibit O, 298:16-22; Exhibit P, 18:19-20, 32:16-33:5, 45:4-6, 49:20-24, 53:10:16; Exhibit Q, 216:4-15.)

Even the evidence provided by the RWQCB does not support its allegation that Burrtec, or any other supplier, deposited green trimmings “directly into the waters of the state” or where they could have been discharged into waters of the state. The Original CAO documents the conditions identified in 2013, as well as attached photographs and narrative of the 2013 RWQCB site visit. While there are trucks visible in the photographs which were taken by RWQCB staff, there is no narrative that suggests that those trucks are depositing material “directly into the waters of the state” or where the material could have been discharged into waters of the state. In fact, the narrative is to the contrary, only stating that Organic Ag spread the material on the properties, and was observed by the RWQCB spreading the material on April 29, 2013. (Exhibit B, Finding 6 and Attachment 2, NOV narrative and photographs.) Moreover, the NOV narrative
does not state that wastes have been discharged to the waters of the state, but only states that “there is a potential for conditions of pollution to occur.” (Exhibit B, Attachment 2, p. 5.)

There is no evidence that the green trimmings placed by Burrtec on the Pike property, more than 200 feet away from the “waters of the state,” were placed in a location where they were likely to be discharged into the waters of the state, or where they “probably could have, given rain and wind.” The passive and unknowing action of Burrtec cannot give rise to liability under section 13304, particularly in light of the active and affirmative conduct by Organic Ag in moving the green trimmings directly into, and adjacent to, the waters of the state.

5. **Burrtec Did Not Spread Any Green Trimmings on the Pike Property.**

The Amended CAO states at Finding No. 9:

“[t]he discharge of waste during waste spreading activities into tributaries to Wilson Creek is a discharge of waste to waters of the state in violation of Water Code section 13260 and the following waste discharge prohibitions contained in the Basin Plan:

‘(1) The discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance as defined in California Water Code Section 13050 is prohibited.’

‘(7) The dumping, deposition, or discharge of waste directly into waters of the state, or adjacent to such waters in any manner which may permit its being transported into the waters, is prohibited unless authorized by the Regional Board.’”

(Exhibit A, Finding 9 (emphasis added).) The original NOV issued alleged that “waste spreading activities” violated the Water Code. (Exhibit A, Finding 8 (emphasis added).) The 2013 RWQCB inspections revealed that “waste consisting mostly of plant clippings (i.e. landscaping waste) and to a lesser extent municipal solid waste (glass, plastics, metals, and construction debris) was spread on the properties by Organic Ag, Inc. Additional waste spreading by Organic Ag, Inc., was observed by the San Diego Water Board staff during an April 29, 2013, inspection of the properties.” (Exhibit A, Finding 6 (emphasis added).) The clear basis for the alleged violation and subsequent issuance of the Original CAO and Amended CAO was the spreading of the green trimmings into the waters of the state.

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This is echoed in the memoranda prepared by RWQCB staff throughout the Amended CAO comment period. In the April 27, 2017 RWQCB Memo prepared by James G. Smith, the Prosecution Team asserts in various ways that, “it is reasonable to state that Burrtec and Ecology discharged and spread the waste into “waters of the state” or discharged and spread the waste such that the waste was likely to be discharged into “waters of the state.” (Exhibit E, p.2.)

While Organic Ag did spread the green trimmings into and adjacent to the waters of the state (See, Exhibit O, 298:16-22), Burrtec had no involvement in the spreading of any material at the Pike property. (Exhibit K, ¶ 12, 13; Exhibit L, ¶ 11; Exhibit O, 298:16-22; Exhibit P, 18:19-20, 45:4-6, 49:20-24, 50:9-19, 53:10-16; Exhibit Q, 216:4-15.) The evidence is clear on this fact. Even the RWQCB agrees that Burrtec supplied the green trimmings and Organic Ag spread them. (Exhibit A, Finding 1.e.)

Nevertheless, the RWQCB still attempts to suggest that Burrtec’s delivery of green trimmings to the Pike property amounted to “spreading.” The facts alleged by the RWQCB staff in Mr. Smith’s April 27, 2017 Memo are unsupported by any evidence. Mr. Smith asserts that:

“[c]onsidering that 5,500 green waste truckloads were dumped across the entirety of the properties it is reasonable to state that Burrtec and Ecology discharged and spread the waste into “waters of the state” or discharged and spread the waste such that the waste was likely to be discharged into “waters of the state.”” (See Exhibit E, p. 2 (emphasis added).) No evidence exists which supports this assertion. To the contrary, the evidence provided to the RWQCB shows that Burrtec: a) did not dump truckloads “across the entirety of the properties”; b) did not spread the waste; c) did not place the waste directly into waters of the state; and d) did not place the waste where it was likely to be discharged into “waters of the state.” (See Exhibit K; Exhibit L; Exhibit M; Exhibit O, 298:16-22; Exhibit P, 18:19-20, 45:4-6, 49:20-24, 50:9-19, 53:10-16; Exhibit Q, 216:4-15.) Mr. Smith’s assertion shows a complete disregard for the actual evidence which demonstrates that Burrtec did not place the material where it was likely to be discharged into the waters of the state.

6. **Burrtec Does Not Meet the Legal Standards for A Discharger.**

The mere unloading of green trimmings at the Pike property by Burrtec did not create or threaten to create a condition of pollution or nuisance. As discussed in detail above, the Water
Code liability derives from the common law of nuisance and must be construed consistent with that common law. (Wells Fargo Bank, supra, 795 F. Supp.2d at 918, citing City of Modesto Redevelopment Agency, supra, 119 Cal.App.4th at 38.) Such construction requires a showing of control or authority to control the use, which establishes causation. (Id.; Santa Clara Valley Water Dist., supra, 655 F. Supp. 2d at 1064; citing City of Modesto, supra., 119 Cal.App.4th at 37–38; Portman v. Clementina Co (1957) 147 Cal.App.2d 651, 656.)

Here, evidence of control is lacking. There is no evidence that Burrtec unloaded or otherwise “deposited” the green trimming material where it was, or probably would be, discharged into the waters of the state. In fact, the evidence submitted to the RWQCB shows the opposite – that Burrtec unloaded the green trimmings over 200 feet from the tributary. (Exhibit L, ¶ 9.) The evidence is clear that Burrtec had no involvement in the spreading of the green trimmings. (See, Exhibit K, ¶ 13; Exhibit P, 18:19-20, 45:4-6, 49:20-24, 50:9-19, 53:10-16; Exhibit Q, 216:4-15.) The evidence does show, however, that Organic Ag moved, relocated, and spread the green trimmings throughout the Property, including directly into the waters of the state. (See, Exhibit Q, 298:16-22; Exhibit P, 18:19-20, 32:16-33:5, 45:4-6, 53:10-16.)

Burrtec did not know where Organic Ag was spreading the material and had no control over the ultimate location of the green trimmings spread by Organic Ag. (See, Exhibit Q, 216:4-18.) It was solely Organic Ag and Pike that spread and relocated the green trimmings in a manner which resulted in a discharge into the waters of the state. (See, Exhibit P, 32:16-33:5, 45:4-6; Exhibit Q, 298:16-22.) As a mere supplier of green trimming material, Burrttec’s involvement was both remote and passive. (See, Exhibit P, 50:9-19; Exhibit R, 126:15-18; 127:8-9, 151:1-4; Exhibit S, 18:7-12, 168:6-11.) As Burrtec had no control over Organic Ag’s activities, Burrtec cannot be held liable for the direct actions of another party over which it had no control.

Under the standards expressed in the case law cited above, Burrtec does not have liability under the Water Code. Burrtec delivered green trimmings to a property and unloaded the green trimmings in a location where they would not be discharged into “waters of the state.” This conduct did not “actively or knowingly generate the specific nuisance condition” because the
nuisance condition was only created after Organic Ag physically moved the green trimmings in, and adjacent to, the waters of the state.

Furthermore, by delivering the green trimmings to the Pike property and unloading them in a location where they would not be discharged into “waters of the state”, Burrtec merely placed the green trimmings in the stream of commerce; Burrtec did not take “affirmative steps directed toward the improper discharge of the waste.” Burrtec placed the green trimmings in a location where they would not cause or create a condition of nuisance or pollution for “waters of the state.”

Absent the subsequent spreading carried out by Organic Ag at Mr. Pike’s behest, Burrtec’s delivery of green trimmings cannot be shown to have caused, or be likely to have caused, a discharge into the waters of the state. The independent action of Organic Ag to physically move the green trimmings into the waters of the state does not and cannot, as a matter of law, extend liability to Burrtec. No civil case nor decision by the State Water Resources Control Board has ever held a party liable under the Water Code because a third party affirmatively moved materials to a location where they could impact waters of the state. Such a determination would extend the law well beyond the scope of the statute, holding transporters and suppliers liable for the conduct of third parties over which they have no control. The statute does not support such a decision.

Burrtec’s delivery alone did not create nor threaten to create either a condition of pollution or nuisance. As such, Burrtec cannot be considered a discharger under Water Code section 13304.

7. **No Evidence Supports the Creation of a Nuisance.**

The Amended CAO identifies several potential impacts to water quality that could result from the “unauthorized discharge of waste to the properties”:

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a. The discharge of waste directly into waters of the state can alter or obstruct flows, thereby causing flooding, unwarranted sediment discharges, and/or affecting existing riparian functions (WARM and WILD).
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b. Surface water runoff from plant clippings contains nutrients, acting as biostimulatory substances that can cause excessive plant growth and decay in receiving waters, thereby increasing water turbidity and impairing aesthetic enjoyment (REC-2). The decaying process consumes large amounts of oxygen, causing a drop in water oxygen levels which is often lethal to fish and other water inhabitants (WARM and WILD). In some cases algal blooms can even result in the production of dangerous cyanotoxins, harmful to human health (REC-1 and MUN).

c. Excessive nutrients in plant clippings can also leach into groundwater, causing elevated levels of nitrates in drinking water supply (MUN), rendering it harmful to human health if ingested.”

(Exhibit A, Finding 11.) As noted in the two expert reports provided to the RWQCB and the deposition of Mr. Pike, as late as May 2017, no green trimmings were located in the waters of the state; instead, the trimmings were set back approximately 15 feet from the tributary. (See Exhibit U, p. 4; Exhibit V, p. 12; Exhibit O, 298:16-22.) Obstruction of the tributary has not occurred. Additionally, SoundEarth Strategies evaluated the nutrient content of the green trimmings and determined that the nutrient ranges were typical of soils and composts in the western United States, and were consistent with acceptable levels typically considered beneficial for agriculture. (Exhibit V, p. 7.) Consequently, there is no evidence that the green trimmings contain excessive nutrients which could negatively impact surface or ground water.

The Amended CAO also identified odor as a condition of nuisance. (Exhibit A, Finding 12.) Neither of the inspections by environmental experts reported the detection of foul odors at the site. (Exhibit V, p. 10; Exhibit U.) None of the conditions of nuisance cautioned in the Amended CAO is present at the Pike property.

C. The RWQCB Violated Burrtec’s Due Process Rights by Failing to Conduct a Hearing.

opportunity to be heard. (Id.) This is codified at Section 11425.10(a)(1) of the Government Code which mandates, “The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence.”

“[D]ue process generally requires consideration of (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” (People v. Ramirez (1979) 25 Cal.3d 260, 269, citations omitted).

Due process includes a reasonable opportunity to know the claims of the adverse party and to present objections. (See Ryan v. California Interscholastic Federation (2001) 94 Cal.App.4th 1048, 1072.) When an administrative agency conducts a hearing, the party must be “apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it . . . .” (Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th 1152, 1171-72.) This right is protected by Government Code Section 11513(b) which guarantees the right to cross-examine witnesses on any matter relevant to the issues. Indeed, an agency decision based on information of which the parties were not apprised and had no opportunity to controvert amounts to a denial of a hearing. (Clark v. City of Hermosa Beach, 48 Cal.App.4th at 1171-72.) Burrtec’s due process rights were violated because it was not given a reasonable opportunity to refute, test or explain the alleged evidence used against it.

A review of evidence detailed above demonstrates that the Prosecution Team relied heavily on unsupported opinions by RWQCB staff and opposing litigation counsel and ignored factual evidence presented by Burrtec. On May 26, 2017, Burrtec specifically requested a hearing for the specific purpose of testing the RWQCB’s allegations that Burrtec placed green trimmings “directly into waters of the state or into a location where they would migrate into waters of the state.” (Exhibit BB, p. 8.) Similarly, on June 15, 2017, Burrtec again requested
that the matter be scheduled for hearing (see Exhibit DD, pp. 1, 3), as (1) Burrtec had submitted
information regarding site conditions, including information prepared by experts, which the
RWQCB staff disregarded; (2) the RWQCB staff response to comments included statements
such as “during the dry season most people would not realize if they were standing in the
tributary or not,” which were not supported by the expert evidence submitted by Burrtec; and (3)
the RWQCB staff response to comments and Amended CAO included unsupported allegations
that Burrtec unloaded material in or near the dry creek bed, which allegations are in direct
contradiction to direct evidence submitted by Burrtec.

Burrtec is entitled to know the evidence relied upon by the RWQCB in making its
findings and to cross-examine the RWQCB staff asserting such evidence exists, as well as to test
that evidence. While Burrtec’s submittals have identified and provided copies of deposition
testimony, declarations, expert reports, contracts and the like, the RWQCB identifies no specific
factual basis or evidence for its findings or allegations.

The facts on which the RWQCB relied for the allegations that Burrtec unloaded material
into or near waters of the state are unclear. Burrtec has not been apprised of the evidence alleged
against it, and therefore has not yet had “an opportunity to refuse, test, and explain it.” A hearing
on these issues was necessary to ensure that Burrtec understood and had an opportunity to
respond to the evidence alleged against it.

The exercise of a quasi-judicial power requires that an agency must satisfy at least
minimal requirements of procedural due process. (Beck Development Co., 44 Cal.App.4th at
1188.) The basis to add Burrtec as a discharger to the Amended CAO involves highly technical
and factual issues and there is significant risk of error, particularly when the findings are based
on factual allegations without support. Furthermore, given these factual and technical issues,
there must be interest in ensuring that Burrtec is informed of the facts that provide the basis for it
being named to the Amended CAO.

Burrtec was denied the opportunity to examine RWQCB staff on the bases alleged in the
Amended CAO, as well as the alleged facts upon which the RWQCB staff relied in making its
recommendation to add Burrtec as a discharger to the Amended CAO. Due process includes
“the right to present legal and factual issues in a deliberate and orderly manner.” (White v. Board of Medical Quality Assurance (1982) 128 Cal.App.3d 699, 705.) Without the ability to examine RWQCB staff at a hearing regarding the factual basis for the allegations in the Amended CAO, Burrtec was denied “right to be heard at a meaningful time and in a meaningful manner.” (Ryan, supra, 94 Cal.App.4th at 1072.) A party must be “apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it . . . .” (Clark, supra, 48 Cal.App.4th at 1172.)

The risk of an improper finding because Burrtec could not rebut evidence is significant. Moreover, the additional burden of conducting a hearing to allow Burrtec the opportunity to examine witnesses and rebut evidence would have been minimal. Instead, Burrtec’s due process “right to present legal and factual issues in a deliberate and orderly manner” was violated. The CAO should be set aside and remanded back to the RWQCB for a full and fair hearing.

IV.

REQUEST FOR STAY OF ACTION

Burrtec seeks a stay of the effect of Order No. R9-2013-0122 which improperly names Burrtec as a discharger and responsible party. As provided in Title 23 California Code of Regulations section 2053(a), a stay of the effect of an action of a regional board shall be granted if petitioner alleges facts and produces proof of all of the following:

1. substantial harm to petitioner 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 fact or law regarding the disputed action.

All the factors are met here. A stay to maintain the status quo should be granted while the State Board evaluates Burrtec’s Petition on the Amended CAO.

A. There are Substantial Questions of Fact and Law in the Disputed Action.

As discussed in thorough detail above, the law does not attach liability to a mere supplier of goods. A party must undertake affirmative acts that contribute “directly” to the nuisance. (City of Merced, supra, 2015 WL 471672 at *12.) Without evidence of control or active
involvement, liability under Water Code section 13304 cannot be shown. ([Wells Fargo Bank, supra, 795 F.Sup.2d at 919.]

The RWQCB insists that Burttex can be liable under section 13304 simply for delivering and unloading green trimmings to the Pike property. This does not meet the rule set forth in [City of Modesto, where the court required a showing of affirmative action in the release causing the nuisance; mere placement of materials in the stream of commerce was not sufficient. (City of Modesto, supra, 119 Cal.App.4th at 43.) Moreover, the law does not impose liability on a party whose actions were remote and passive, or where the discharge was caused by events beyond the party’s control. ([Id.]

The evidence provided to the RWQCB established several important facts: (1) Burttex contracted only for the delivery of green trimmings to the Pike property; (2) Burttex unloaded the green trimmings at the Pike property at least 200 feet away from the tributary; (3) Organic Ag and Pike performed all spreading activities, including spreading the green trimmings into the tributary and subsequently removing the green trimmings from the tributary; and (4) Burttex did not participate in any spreading and had not control or authority over any spreading activities conducted by Organic Ag or Pike. The RWQCB disregards this factual evidence and instead relies on conjecture and unsupported opinion in alleging that Burttex “dumped” material “across the entirety of the properties” and, thus, Burttex must have “discharged and spread the waste into ‘waters of the state.’” ([See Exhibit E, p. 2.) Significant issues of both fact and law are raised in this Petition.

Furthermore, as discussed above, the process followed in this case, deprived Burttex of its due process rights, creating additional substantial questions of law. Minimum due process requires some form of notice and an opportunity to be heard. ([Beck Development Co., supra, 44 Cal.App.4th at 1188; Horn, supra, 24 Cal.3d at 612.) The Government Code mandates, “The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence.” ([Govt. Code § 11425.10(a)(1).) Due process includes a reasonable opportunity to know the claims of the adverse party and to present objections. ([See Ryan, supra, 94 Cal.App.4th at 1072.)
Burrttec presented evidence to the RWQCB in the form of declarations, depositions and expert reports. Yet, the RWQCB disregarded that evidence and failed to provide any evidence which supported its contradictory claims and allegations. Mr. Smith provided many of his own opinions in his responses to Burrttec’s comments, but failed to provide evidence to support those opinions. Without a hearing, Burrttec was denied the opportunity to cross-examine Mr. Smith and other representatives of the RWQCB who participated in the preparation of the Amended CAO. The RWQCB decision, based on information of which Burrttec was not apprised and had no opportunity to controvert, amounts to the denial of due process. (Clark, supra, 48 Cal.App.4th at 1171-72.) Burrttec was afforded no opportunity to know and rebut the evidence upon which the RWQCB was relying.

B. There Will be Substantial Harm to Burrttec Without a Stay.

The issues discussed above create substantial questions that must be resolved before the Amended CAO is given effect. There will be substantial harm to Burrttec if the State Water Resources Control Board does not issue a stay. The Amended CAO requires work to be performed on an expedited basis: (1) submittal of a restoration plan within 14 days after the issuance of the Amended CAO; (2) implementation of the restoration plan with two weeks from the date of its approval by the RWQCB; and (3) completion of all restoration activities no later than ninety (90) days after the adoption of the Amended CAO. (Exhibit 1, p. 8 of 13.) The estimated cost to remove the spread green trimmings from the Pike property is likely to be several million dollars. Without a stay, Burrttec will be required to expend significant funds within the next sixty (60) days to prepare and implement a restoration plan to address a discharge for which it is not responsible.

C. There Will Be No Substantial Harm to Other Interested Persons or to the Public Interest if a Stay is Granted.

Finally, there will be no substantial harm to others if a stay is granted. The Original CAO was issued in 2013 and names the property owner, Pike, as the responsible party. (Exhibit B.) The Amended CAO does not alter Pike’s status as a responsible party. (Exhibit A.) Since the removal by Organic Ag and Pike in 2013 of the material within the tributary (Exhibit O, 298:16-
the green trimmings have stabilized with the growth of vegetation on most areas of the Pike property and do not present a significant risk of migrating into the tributary (Exhibit V, pp. 6-7, 10, 12.) No substantial harm will result from a stay; a stay should be granted.

V.

CONCLUSION

The RWQCB has failed to meet the legal requirements necessary to establish Burrtec's liability as a discharger under Water Code section 13304. There is insufficient evidence to support the allegations that Burrtec deposited waste in a location where it would cause or permit, or threaten to cause or permit, any waste to be discharged into waters of the state. Moreover, Burrtec's due process rights to a fair hearing were violated.

Pursuant to section 13220 of the Water Code, the State Board is "vested with all the powers of the regional boards" and may take the appropriate action itself. (Water Code §13320(c).) The State Board may "set aside or modify the regional board order" or "direct the regional board to take appropriate action." (23 Cal. Code Regs. §2052(a)(2)(B) and (C).)

The law does not support the naming of Burrtec as a discharger and the State Board should remove, or direct the RWQCB to remove, Burrtec from Cleanup and Abatement Order No. R9-2013-0122 as Amended by Addendum No. 1. Finally, the State Board should stay the effect of the Amended CAO pending resolution of Burrtec's Petition.

Respectfully submitted,

DATE: AUGUST 11, 2017

ENVIRONMENTAL LAW GROUP, LLP

BY: 
SUZANNE R. VARCO
ATTORNEYS FOR PETITIONER,
BURRTEC WASTE INDUSTRIES, INC.
STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF: CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION;
ADOPTION OF ADDENDUM NO. 1 TO CLEANUP AND ABATEMENT ORDER NO. R9-2013-0122, AN ADDENDUM ADDING RESPONSIBLE PARTIES, ADDING BURRTEC WASTE INDUSTRIES, INC. AS A RESPONSIBLE PARTY / DISCHARGER

I, SUZANNE R. VARCO, hereby declare as follows:

1. I am a Partner with the law firm of Varco & Rosenbaum Environmental Law Group LLP, and represent Burrtec Waste Industries, Inc. (“Burrtec”) regarding the Cleanup and Abatement Order as Amended by Addendum No. 1 R9-2013-0122 (the “Amended CAO”) issued on July 14, 2017 by the Regional Water Quality Control Board, San Diego Region (“RWQCB”).

2. I know the following of my own personal knowledge and if called as a witness, I could and would competently testify to the matters discussed herein. I further specifically attest that I have personal knowledge of the facts alleged in the Request for Stay of Action included...
within the Petition and Request for Review and Action as required by Title 23 of the California Code of Regulations § 2053(a).

3. Attached as Exhibit A to this declaration is a true and correct copy of the July 14, 2017 Letter from the RWQCB regarding Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122 with the following attachments:
   - Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122, dated July 14, 2017;
   - Redline/Strikeout Cleanup and Abatement Order No. R9-2013-0122 showing changes resulting from Addendum No. 1, dated July 14, 2017;

4. Attached as Exhibit B to this declaration is a true and correct copy of the Cleanup and Abatement Order No. R9-2013-0122, dated September 5, 2013.

5. Attached as Exhibit C to this declaration is a true and correct copy of the Tentative Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122, dated November 30, 2016.

6. Attached as Exhibit D to this declaration is a true and correct copy of the Revised Tentative Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122, dated March 10, 2017.

7. Attached as Exhibit E to this declaration is a true and correct copy of the April 27, 2017 Prosecution Team Consideration of Revised Tentative Addendum No 1 to Cleanup and Abatement Order No. R9-2013-0122, Pike/Aguanga (SUPPLEMENT TO MARCH 10, 2017, SUBMISSION).

8. Attached as Exhibit F to this declaration is a true and correct copy of the June 9, 2017 Prosecution Team Response to Ecology Auto Parts, Inc. and Burrtec Waste Industries, Inc.’s Comments on Revised Tentative Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122, Pike/Aguanga.

///
9. Attached as Exhibit G to this declaration are true and correct copies of the Green Waste Delivery Agreement between Burrtec Waste Industries, Inc. and Organic Ag, dated March 24, 2008 and Second Amendment to Green Waste Delivery Agreement dated February 23, 2009.

10. Attached as Exhibit H to this declaration are true and correct copies of the Letters of Understanding Between James Pike and Organic Ag, dated January 17, 2011 and October 24, 2011.

11. Attached as Exhibit I to this declaration is a true and correct copy of the *Pike v. Organic Ag*, Riverside Superior Court Case No. MCC1401513, First Amended Complaint, dated September 1, 2015.

12. Attached as Exhibit J to this declaration is a true and correct copy of the *Pike v. Organic Ag*, Riverside Superior Court Case No. MCC1401513, Second Amended Complaint, dated January 8, 2016.

13. Attached as Exhibit K to this declaration is a true and correct copy of the Declaration of Richard Crockett, General Manager of Burrtec Waste Industries, Inc., dated March 24, 2017.

14. Attached as Exhibit L to this declaration is a true and correct copy of the Declaration of Nick Burciaga, Division Manager for Burrtec Waste Industries, Inc.’s Agua Mansa Facility, dated May 25, 2017.

15. Attached as Exhibit M to this declaration is a true and correct copy of the Declaration of Martin Hamann, Principal Hydrogeologist for SoundEarth Strategies, dated May 24, 2017.

16. Attached as Exhibit N to this declaration is a true and correct copy of the Declaration of Saul Gracian, Manager of Ecology Auto Parts, Inc., dated May 25, 2017.

17. Attached as Exhibit O to this declaration is a true and correct copy of excerpted pages from the Deposition of James Pike, Owner of the Pike Property, Volume III, dated March 15, 2017.

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18. Attached as Exhibit P to this declaration is a true and correct copy of excerpted pages from the Deposition of Pedro Soltero, Employee of Organic Ag, Inc., dated March 21, 2017.

19. Attached as Exhibit Q to this declaration is a true and correct copy of excerpted pages from the Deposition of Peter Holladay, Owner and Vice President of Organic Ag, Inc., dated March 20, 2017.

20. Attached as Exhibit R to this declaration is a true and correct copy of excerpted pages from the Deposition of Levi Holladay, Owner and President of Organic Ag, Inc., dated March 21, 2017.


22. Attached as Exhibit T to this declaration is a true and correct copy of excerpted pages from the Deposition of Robert Steven Hoyt, Former Truck Driver for Burrtec Waste Industries, Inc., dated February 22, 2017.

23. Attached as Exhibit U to this declaration is a true and correct copy of the Site Restoration Plan prepared by Advantage Environmental Consultants, dated March 10, 2017.

24. Attached as Exhibit V to this declaration is a true and correct copy of the Evaluation and Comments on the Advantage Environmental Consultants’ Site Restoration Plan, prepared by SoundEarth Strategies, dated May 1, 2017.

25. Attached as Exhibit W to this declaration is a true and correct copy of the Environmental Law Group LLP Letter to the RWQCB, dated January 6, 2017.

26. Attached as Exhibit X to this declaration is a true and correct copy of the RWQCB email requesting a declaration from Mr. Pike, dated February 7, 2017.

27. Attached as Exhibit Y to this declaration is a true and correct copy of the Declaration of James Pike, dated February 9, 2017.

///
28. Attached as Exhibit Z to this declaration is a true and correct copy of the Environmental Law Group LLP Letter to the RWQCB, dated March 24, 2017.

29. Attached as Exhibit AA to this declaration is a true and correct copy of the email from Erick Altona to the RWQCB, dated April 3, 2017.

30. Attached as Exhibit BB to this declaration is a true and correct copy of the Environmental Law Group LLP Letter to the RWQCB, dated May 26, 2017.

31. Attached as Exhibit CC to this declaration is a true and correct copy of the email from Linda Beresford of the Environmental Law Group LLP to the RWQCB, dated June 8, 2017.

32. Attached as Exhibit DD to this declaration is a true and correct copy of the Environmental Law Group LLP Letter to the RWQCB, dated June 15, 2017.

Executed this 11th day of August, 2017 at San Diego, California.

Suzanne R. Varco
EXHIBIT LIST
EXHIBITS TO PETITION AND REQUEST FOR REVIEW AND ACTION
BY THE STATE WATER RESOURCES CONTROL BOARD

Submitted by: Burrtec Waste Industries, Inc.
Re: Order No. R9-2013-0122

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I, Richard Crockett, hereby declare as follows:

1. I am the General Manager of Burrtex Waste Industries, Inc. ("Burrtex") and oversee Burrtex’s Material Recovery Facilities ("MRFs") and Transfer Stations. I have a thorough understanding of Burrtex’s contractual obligations and activities with respect to the property located at 39801 Reed Valley Road, Aguanga, California 92563 (the "Pike Property"), which is the subject of Cleanup and Abatement Order ("CAO") R9-2013-0122, and know the following of my own personal knowledge. If called as a witness, I could and would competently testify to the matters discussed herein.
2. I have been employed by Burrtec for over twenty-two years and have been Burrtec’s General Manager for twenty-two years.

3. In my capacity as General Manager of Burrtec, I am aware of the proceedings by the San Diego Regional Water Quality Control Board ("RWQCB") regarding the CAO and the amendment to that CAO issued on July 14, 2017 (the "Amended CAO").

4. I have previously submitted a declaration to the RWQCB in these proceedings, and have also been deposed in a related state court proceeding filed by James Pike, a named Responsible Party in the Amended CAO.

5. It is my understanding that a Petition for Review has been filed on behalf of Burrtec to obtain an Order from the State Water Resources Control Board (the "State Board") finding that Burrtec is neither a Discharger nor a Responsible Party for any discharge which allegedly occurred at the Pike property.

6. Burrtec has been aggrieved by the RWQCB’s decision to name it as a Discharger and Responsible Party in the Amended CAO, in that the RWQCB erred in its legal findings, disregarded evidence submitted by Burrtec, failed to present substantial evidence to support its decisions, and denied Burrtec due process to properly challenge the RWQCB’s decision to name Burrtec as a Discharger and Responsible Party.

7. It is my understanding that the Amended CAO directs Burrtec to perform remediation of the green trimmings that were delivered to the Pike property. As a result, the RWQCB’s actions, if not stayed, will unnecessarily and unfairly force Burrtec to incur substantial costs for remediation, and expose it to potential penalties and fines, that should instead be borne by parties that in fact engaged in negligent or unreasonable intentional actions in causing the alleged nuisance claimed by the RWQCB.

8. Burrtec requests that the State Board immediately stay enforcement of the Amended CAO until the State Board has had an opportunity to consider and act upon Burrtec’s Petition for Review. Given that a 270-day period is provided by law for the State Board's review, the RWQCB action, if not stayed, will potentially force Burrtec to proceed with a major expenditure of funds to implement a remediation plan, and potentially expose it to substantial

DECLARATION OF RICHARD CROCKETT IN SUPPORT OF PETITION AND REQUEST FOR STAY
penalties, before the State Board’s decision on the merits would be issued. Therefore, without a
stay, Burrttec may be required to incur substantial financial costs for which the State Board
ultimately determines it is not responsible. If Burrttec incurs these costs, there is no guarantee
that it would ever be able to recover these funds from the actual Responsible Parties.

9. It is my understanding that evidence presented to the RWQCB has demonstrated
that the green trimmings have previously been removed from the tributaries by Organic Ag, Inc.
and James Pike, that the nutrient ranges for the green trimmings are consistent with acceptable
levels considered beneficial for agriculture and do not present a risk to surface or ground water,
and that there are no foul odors associated with the green trimmings.

10. It is my further understanding the Petition for Review involves substantial
questions of law and fact:

   a. In naming Burrttec as a Discharger and Responsible Party in the Amended
      CAO, the RWQCB erroneously concluded that, as a mere supplier of green
      trimmings, Burrttec is liable as a discharger under Water Code section 13304,
      which is a misinterpretation and misapplication of California law.

   b. In naming Burrttec as a Discharger and Responsible Party in the Amended
      CAO, the RWQCB committed legal error in concluding that liability under
      Water Code section 13304 applied a strict liability standard similar to, or
      broader than, CERCLA.

   c. The Amended CAO’s findings and conclusions that Burrttec is a Discharger
      and Responsible Party under Water Code section 13304 are not supported by
      evidence in the record.

   d. The RWQCB violated Burrttec’s due process rights by failing to conduct a
      formal hearing to allow Burrttec to cross-examination witnesses, denying
      Burrttec the opportunity to test and refute claims made by the RWQCB in
      designating Burrttec a Discharger and Responsible Party in the Amended
      CAO.
I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed this 14\textsuperscript{th} day of August, 2017 at [Redacted], California.

Richard Crockett