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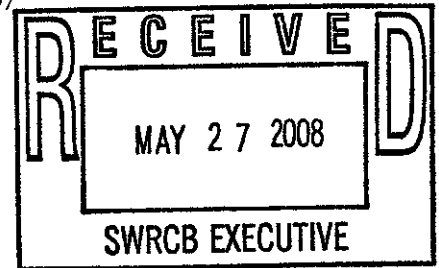
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May 27, 2008



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VIA ELECTRONIC MAIL AND MESSENGER

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 25th Floor
P.O. Box 100
Sacramento, CA 95814

Re: ***Item 12, State Board Meeting Agenda, June 3, 2008 (Proposed Order In the Matter of the Petition of the Rialto-Area Perchlorate Contamination, SWRCB/OCC File A-1824).***

Motion to Disqualify the State Board, Hearing Officer Tam Doduc, and the State Board's Advisory Team.

Renewed Motion to the State Board and Appeal of the Hearing Officer's Denial of Motions filed on March 5, March 29, May 29, and June 7, 2007, in SWRCB/OCC File A-1824

Motion to Disqualify the Regional Water Quality Control Board, Santa Ana Region Advocacy Team.

Dear Ms. Townsend:

Goodrich Corporation ("Goodrich"), the Emhart Entities ("Emhart"),¹ and Pyro Spectaculars, Inc. ("PSI") (collectively the "Named Parties") submit the following three motions

¹ The Emhart Entities are Emhart Industries, Inc., Kwikset Corporation, Kwikset Locks, Inc., and Black & Decker Inc.

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in the above-referenced proceeding. Because the motions raise the question of whether the State Water Resources Control Board ("State Board"), its Chair, and its Advisory Team should be disqualified and recused from taking any action on Item 12 on the State Board's Agenda for its June 3, 2008 Board Meeting and/or undertake to adjudicate the allegations in Cleanup and Abatement Order No. R8-2005-0053 ("2005 CAO"), each of the motions set forth below should be considered and decided by the State Board before it takes up and considers Item 12 on its merits.

I. The Motions

Motion 1: The Named Parties hereby respectfully move for the disqualification and recusal of the State Board, the Hearing Officer in "In the Matter of Perchlorate Contamination at a 160-Acre Site in the Rialto Area," SWRCB/OCC File A-1824 ("SWRCB/OCC File A-1824"),² and the appointed Advisory Team,³ from taking any action on Item 12 on the State Board's June 3, 2008 Agenda. This motion is necessary based upon the fact that Members of the State Board, its Chair, and the Advisory Team have engaged directly and indirectly in illegal *ex parte* communications during the pendency of the 2005 CAO before the State Board in violation of the California Administrative Procedure Act, Government Code Section 11425.10(a)(4) (mandating agencies keep separate their adjudicatory and prosecutorial functions), Section 11430.10 (prohibiting *ex parte* communications during pending agency adjudicatory hearings), Section 11430.50 (requiring agencies to immediately disclose all *ex parte* communications), and Section 11430.60 (providing that *ex parte* communications are grounds for disqualification of the hearing officer and agency); and the constitutional due process rights of the Named Parties.

Motion 2: The Named Parties hereby respectfully renew their motions, filed on March 5, 2007, May 29, 2007, and June 7, 2007, in SWRCB/OCC File A-1824, heretofore ignored by the State Board, to disqualify and recuse the State Board, its Hearing Officer, and its Advisory Team from presiding over and adjudicating the allegations in the 2005 CAO. The May 29 and June 7, 2007 motions for disqualification and recusal were made before both the Chair (acting as the Hearing Officer) and the full State Board. On Saturday, August 11, 2007, Chair Tam Doduc advised the Named Parties that their motions had been denied. Thus, this Motion 2 not only renews the Named Parties' May 29 and June 7, 2007 motions to the State Board, but also appeals to the State Board the Chair's denial of the Named Parties' motions on August 11, 2007. This motion was previously made and now is renewed for the same reasons as Motion 1, above.

² In February 2007, Ms. Doduc was appointed illegally by then acting Executive Director, Tom Howard, as the Hearing Officer to adjudicate the allegations in the 2005 CAO in SWRCB/OCC File A-1824, and since that time she has presided over all pre-hearing proceedings in SWRCB/OCC File A-1824, despite the repeated objections of the Named Parties.

³ Based upon the information and belief of the Named Parties, the State Board Advisory Team in SWRCB/OCC File A-1824 include, or has included: Elizabeth Jennings, Karen O'Haire, James Herink, Wennilyn Fua, Jim Maughan, Jon Bishop, Tom Howard, Michael Lauffer, and Dorothy Rice.

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Motion 3: The Named Parties hereby respectfully renew their motions, filed on March 5, March 29, May 29, and June 7, 2007 in SWRCB/OCC File A-1824, heretofore denied by the Chair (sitting as Hearing Officer) and ignored by the State Board, for the disqualification of the Regional Water Quality Control Board, Santa Ana Region Advocacy Team ("Regional Board Advocacy Team") from the further prosecution of the allegations in the 2005 CAO and from participating in Item 12 on the State Board's Agenda for its June 3, 2008 Board Meeting. This motion is necessary based upon the fact that members of the Advocacy Team have engaged directly and indirectly in illegal *ex parte* communications with members of the State Board, its Chair, and its Advisory Team, during the pendency of the 2005 CAO before the State Board in violation of Government Code Section 11425.10(a)(4), which requires that agencies keep separate their adjudicatory and prosecutorial functions, and in violation of the constitutional due process rights of the Named Parties.

II. Introduction

As the Chair, and her Advisory Team, in SWRCB/OCC File A-1824 are fully aware, Item 12 on the State Board's meeting Agenda for June 3, 2008, raises important questions concerning the continued integrity of adjudicatory proceedings before the State Board, the State Board's adherence to the requirements of constitutional due process, its compliance with controlling statutes, and the furtherance of its own guidelines governing illegal *ex parte* communications.

Regrettably, Item 12 is completely silent on these issues. While no staff report is provided, Item 12 is supported by a single sentence: "The Board should adopt the order." The proposed text of the draft order does not contain any recitation of the relevant events and issues which give rise to its purported need. There is no discussion of the arguments in favor of or against its adoption other than a statement that all comments shall be submitted by noon on May 27, 2008. There is no disclosure of which "staff" are making this recommendation or whether any of them are also members of the Advisory and/or Advocacy Teams in SWRCB/OCC File A-1824. There is reference in the draft order to the "administrative record to date for SWRCB/OCC File A-1824," but there is no indication of what portion of that record, if any, bears on the proposed draft order or whether any portion of it has been provided to the members of the State Board for their review and consideration prior to voting.

The administrative record in SWRCB/OCC File A-1824 does disclose that since the 2005 CAO was first brought before the State Board on March 30, 2005, members of the State Board, its Chair, and its Advisory Team appointed to adjudicate the allegations in the 2005 CAO have participated, directly and indirectly, in numerous illegal *ex parte* communications in violation of the Named Parties' constitutional due process rights, the California Administrative Procedure Act ("APA"), and the State Board's own guidelines governing *ex parte* communications.

Thus, as a result of these troublesome facts, omitted from the text of Agenda Item 12, and to protect their legal rights, the Named Parties are compelled to bring these motions, which, as set forth in detail below, require the State Board, as a matter of law, to disqualify and recuse itself, its Chair, and its Advisory Team from taking any action on Item 12 and from authorizing or taking any further action in SWRCB/OCC File A-1824.

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III. The Law

1. *Ex Parte* Communications Are Illegal And Strictly Prohibited By Statute

Ex parte communications, whether direct or indirect, with the members of the State Board, and their advisors, concerning any substantive issue in an adjudicatory proceeding with members of the prosecution or advocacy team, or any other third party, are *illegal* and thus *strictly prohibited*. *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Quintanar et. al.)*, 40 Cal.4th 1, 16 (2006); California Administrative Procedure Act ("APA"), Gov. Code § 11430.10(a).

In *Quintanar*, 40 Cal.4th at 8, the California Supreme Court explained that the "APA [simply does not] permit *ex parte* contacts between an agency's prosecutor and its ultimate decision maker or his or her advisors about the substance of the case, prior to the ultimate decision maker rendering a final decision."⁴ Thus, the Court found that all such communications are illegal: "under the APA, the mere submission of *ex parte* substantive comments, without more, is *illegal*." *Id.* at 16 (emphasis added).

Because such communications are *per se* illegal, the Court in *Quintanar* held that proof that the decision-maker considered the *ex parte* communication, let alone was biased by the *ex parte* communication, is irrelevant:

The Department [of Alcoholic Beverage Control] argues the record contains no proof the reports of hearing were actually considered by the ultimate decision maker or his advisers, but neither does it deny this occurred. Whether the decision maker considered the reports of hearing is in any event beside the point. . . . The party faced with such a communication need not prove that it was considered; conversely, the agency engaging in *ex parte* discussions cannot raise as a shield that the advice was not considered.

Quintanar, 40 Cal.4th at 16.

Indeed, the rule prohibiting *ex parte* communications in administrative adjudicatory proceedings is so strict that courts require reversal of agency decisions even where there is substantial evidence to support an agency's ruling. As the court in *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal. App. 4th 1274, 1290 explained:

⁴ Government Code Section 11430(a) provides: "While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication."

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[A]lthough both sides no doubt would have liked to submit a secret un rebutted review of the hearing to the ultimate decision maker or decision maker's advisors, only one side had that chance. The APA's administrative adjudication bill of rights was designed to eliminate such one-sided occurrences. We will not countenance them here. . . . ***The fact that there may be substantial and properly introduced evidence which supports the board's ruling is immaterial.*** . . . In this case, based on the violation of statutory protections designed to ensure due process and a fair hearing, we conclude that reversal of the Department's order is required.

Under California law, if an agency claims that the alleged *ex parte* communications did not occur, it is the agency's burden to so prove with competent (admissible) evidence:

[T]he Department has not offered any evidence that it did not engage in the challenged practice here, and the record before us does not foreclose that possibility. As we said in the *Howitt* case, "***the burden is always on the party relying on [an ethical] wall to demonstrate its existence and effectiveness.***"

Rondon, 151 Cal. App. 4th at 1287 (emphasis added).

2. *Ex Parte* Communications Violate Due Process of Law

"The protections of procedural due process apply to administrative proceedings," which "*always* require[s] . . . [the] 'constitutional floor' of a 'fair trial in a fair tribunal,' in other words a fair hearing before a neutral or unbiased decision-maker." *Nightlife Partners, Ltd., v. City of Beverly Hills* (2003) 108 Cal. App. 4th 81, 90-91, quoting *Bracy v. Gramley* (1997) 520 U.S. 899, 904-905 and *Winthrow v. Larkin* (1975) 421 U.S. 35, 43. "Just as in a judicial proceeding, due process in an administrative hearing also demands an *appearance* of fairness and the absence of even a *probability* of outside influence on the adjudication." *Nightlife*, 108 Cal. App. 4th at 90 (emphasis original).

One of the essential elements of due process and procedural fairness is the prohibition against *ex parte* communications. As the Supreme Court in *Quintanar*, 40 Cal.4th at 9, explained: "[f]undamental fairness in decisionmaking demands both that factual inputs and arguments to the decisionmaker on law and policy be made openly and be subject to argument by all parties." Thus,

[w]hile the state's administrative agencies have considerable leeway in how they structure their adjudicatory functions, they may not disregard certain basic precepts. One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisors in private. Another directs that the functions of prosecution and adjudication be kept separate, carried out by distinct individuals. California's Administrative Procedure Act (APA) (Gov. Code § 11340 et seq.), as overhauled in 1995, adopts these precepts by regulating and strictly limiting contacts between an agency's prosecutor and the officers the agency selects to preside over hearings and ultimately decide adjudicative matters.

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Quintanar, 40 Cal.4th at 4.

The State Board has the unambiguous statutory and constitutional duty to ensure that its adjudicatory proceedings are fair, appear to be fair, and are free of any illegal *ex parte* communications.

3. If Ex Parte Communications Have Occurred, Disqualification And Recusal Is Mandated

Government Code Section 11430.60 mandates that the mere existence of illegal *ex parte* communications in an adjudicatory proceedings is grounds for disqualification. Similarly, in judicial proceedings, courts are divested of jurisdiction to rule on any substantive issue pending the resolution of timely motions to disqualify the presiding judge. *Brown v. Swickard* (1985) 163 Cal. App. 3d 820, 831 ("plaintiffs' timely motion to disqualify [judge] from hearing defendants' ... motion for summary judgment not only deprived the judge of jurisdiction to rule on that motion, but also of jurisdiction to rule on remaining defendants' motion for summary judgment"); *Christie v. City of El Centro* (2006) 135 Cal. App. 4th 767, 777 ("[D]isqualification occurs when the facts creating disqualification arise, not when disqualification is established.... [I]t is the fact of disqualification that controls, not subsequent judicial action on that disqualification").

In judicial proceedings, the disqualification of judges and constitutional challenges to the proceeding itself also must be promptly made or lost. *Roscco Holdings, Inc., supra*, 149 Cal. App. 4th at 1362 quoting *Caminetti v. Pac. Mutual L. Ins. Co.* (1943) 22 Cal.2d 386, 392 ("It would seem ... intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not"); *North Beverly Park Homeowners Assn. v. Bisno* (2007) 147 Cal. App. 4th 762, 769 ("no California decision has involved an attempt to use the statutory disqualification procedure to vacate a final judgment on the ground of the trial judge's disqualification ... [and] the language of the current disqualification statutes makes clear that the procedural scheme is directed at pending proceedings"); and *Roth v. Parker* (1997) 57 Cal. App. 4th 542, 548 ("a constitutional question must be raised at the earliest opportunity or it will be considered to be waived").

These fundamental procedural due process rules apply equally to administrative adjudicatory proceedings. As the court in *Nightlife, supra*, explained, procedural due process of law at a minimum requires a fair trial, in a fair tribunal, which at its core demands not only the appearance of fairness but the absence of even the probability of outside influence on the adjudication. It is, as a matter of law, unquestionably unfair and creates a clear appearance of bias, if the State Board proceeds with Item 12 without first examining and deciding whether it, its Chair, and its Advisory Team have engaged in illegal *ex parte* communications that compel their disqualification from any further proceedings in this matter.

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4. **The State Board's Own Guidelines Compel Its Disqualification Before The Adjudicatory Proceeding**

Since 2001, the State Board has had strict guidelines governing its due process and statutory obligations not to engage in illegal *ex parte* communications regarding issues in its adjudicatory proceedings. This guidance was first set forth in a memorandum dated April 17, 2001, from Craig M. Wilson (then Chief Counsel) to Arthur G. Baggett Jr. (then Chair) entitled "Ex Parte Communications" (2001 Guidance). Exhibit ("Exh.") A (2001 Guidance). The State Board's 2001 Guidance contained this unambiguous prohibition: "If an adjudicatory proceeding is pending or impending before a board, *ex parte* communications are prohibited." It provided this explanation for the prohibition:

Rules regarding *ex parte* communications have their roots in constitutional principles of due process and fundamental fairness. *Ex parte* communications are fundamentally offensive in adjudicatory proceedings because they involve an opportunity by one party to influence the decision maker outside of the presence of opposing parties, thus violating due process requirements.

Id. at 2.

On July 25, 2006, the 2001 Guidance was superseded and updated by memorandum to all members of the State Board from Michael A.M. Lauffer (Chief Counsel) ("2006 Guidance"), which sets forth the following unambiguous rules relevant to this proceeding:

- "If an adjudicatory proceeding is pending or impending before a water board, *ex parte* communications with that water board's members regarding an issue in that proceeding are **prohibited**."
- "The prohibition on communications with the State Water Board members concerning a petition [challenging a regional board action or inaction] **begins when the State Water Board receives the petition**."
- "The Administrative Procedure Act's prohibition on *ex parte* communications is very broad. It extends to '**direct and indirect**' communications. Board members must be mindful that persons who ordinarily would not be subject to the prohibition (e.g. secretaries, staff assigned to advise the board) should not be used as a conduit for a prohibited *ex parte* communication. . . ."
- "The *ex parte* communication prohibition also extends to 'any issue in the proceeding'. With limited exceptions. . . , if the communication involves **any issue in the proceeding**, be it a factual issue, a legal issue, or a policy issue, it is subject to the *ex parte* communications prohibition."
- "[O]nce the State Water Board receives a petition challenging a Regional Water Board action, the *ex parte* communications prohibition applies to the petition proceeding."

Exh. B (2006 Guidance) at 1, 6, and 7 (emphasis added).

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Finally, consistent with Government Code Section 11430.60 ("[r]eceipt by the presiding officer of a communication in violation of this article may be grounds for disqualification of the presiding officer."), the 2006 Guidelines provide that:

[A] prohibited *ex parte* communication may be grounds for disqualifying the board member from *participating in the adjudicatory proceeding*.

Id. at 4 (emphasis added).

In other words, under the State Board's own 2006 Guidelines, the question of whether a member of the State Board should be disqualified from participating in an adjudicatory proceeding is to be resolved *before* that proceeding commences or, if prohibited communications are discovered during the proceeding, *before* it continues. *Id.* This State Board rule is compelled by and grounded in the same rules governing *ex parte* communications in court proceedings: "The *ex parte* communications prohibition for adjudicative proceedings originates in court decisions and has been codified in Chapter 4.5 of the Administrative Procedure Act." Exh. B at 4.

IV. The State Board, Its Chair, And Its Advisory Team Have Repeatedly Engaged In Illegal, Prohibited *Ex Parte* Communications During The Pendency Of The 2005 CAO Before The State Board

On February 22, 2007, during the initial pre-hearing conference for the then just-announced evidentiary hearing in SWRCB/OCC File A-1824, the Chair of the State Board made the following statement concerning her knowledge regarding the allegations in the 2005 CAO:

I don't have any specific particular knowledge about the level of the source of the contamination in the Rialto area. I understand it's been an ongoing investigation of the perchlorate contamination in the Rialto area. I have seen various documents that have been submitted to various agencies, including various state agencies, the county D.A., the Governor requesting action on this matter.

Exh. C (2/22/07 Pre-Hearing Conference Transcript) at 6. As set forth in detail below, this representation was inaccurate concerning her knowledge, the knowledge of members of the State Board, and the knowledge of the members of her Advisory Team.⁵

⁵ Pursuant to Government Code Section 11430.50, the State Board *must* promptly disclose any and all improper *ex parte* communications. Gov. Code § 11430.50. Despite this unambiguous rule, the State Board concealed from disclosure the *ex parte* communications described below. The Named Parties' initial request for disclosure of all *ex parte* communications was denied by the Chair on March 28, 2007, except to the extent it requested an investigation into *ex parte* communications. Two days earlier, on March 26, 2008, the Named Parties issued a federal subpoena to the State Board seeking copies of all *ex parte* communications. Only after the Named Parties initiated the process to seek a federal court order to compel production of all such communications did the State Board respond to

[Footnote continued on next page]

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1. November 2, 2005: State Board Briefed By Chief Prosecutor

On October 17, 2005, the Santa Ana Regional Water Quality Control Board ("Regional Board") issued a Public Notice ("Notice") regarding the 2005 CAO, the same cleanup and abatement order now before the State Board in SWRCB/OCC File A-1824. Exh. D (October 17, 2005 Notice); Exh. E (Fourth Revised Notice) at 1-2; Exh. F (August 7, 2007 Tentative Rulings). On that date, a petition for review challenging the 2005 CAO (issued on February 28, 2005) had been pending before the State Board since March 30, 2005.⁶

The Notice advised that Gerard Thibeault (a member of the "Regional Board Advocacy Team" and the Regional Board's Executive Officer) had been appointed Chief Prosecutor for the 2005 CAO. It also provided the following unambiguous ground rules regarding *ex parte* communications:

Members of the Staff Advocacy Team will be treated, for purposes of the present matter, like other parties who come before the Regional Board throughout the proceedings. They shall have *no contact* with the Regional Board members or with members of the Advisory Team *on matters relating to the proceedings*, except where those contacts are consistent with the limitations on *ex parte* contacts that apply to other parties.

Exh. D (October 17, 2005 Notice) (emphasis added).

Sixteen days later, on November 2, 2005, Chief Prosecutor Thibeault appeared before the State Board in Sacramento. Exh. J (November 2, 2005 Thibeault Presentation).⁷ Using an over

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the federal subpoena. On May 11, 2008, after repeated assurances that no such illegal communications existed, the State Board disclosed, without explanation, numerous *ex parte* communications. Exh. G (May 11, 2007 Letter from Elizabeth Jennings with attachments).

⁶ Exh. H (Emhart's March 30, 2005 Petition for Review). On April 4, 2005, the State Board acknowledged receipt of these petitions and agreed to hold the petitions in abeyance for two years, after which they would be subject to dismissal. Exh. I (April 4, 2005 Letter from Elizabeth Jennings to Robert Wyatt). The record establishes that the Regional Board continued to amend the 2005 CAO; the last amendment occurred on October 27, 2006, at which time Goodrich Corporation and Pyro Spectaculars were added to the Draft CAO. This latest version of the 2005 CAO is the operative pleading in SWRCB/OCC File A-1824. See Exh. E (Fourth Revised Notice) at 1-2; Exh. F (August 7, 2007 Tentative Rulings).

⁷ Although the workshop was publicly noticed, the description for the briefing contained in the public notice opaquely described the subject matter as follows: "1. Informational Presentation by Gerard Thibeault, Santa Ana Water Board Executive Officer, on Regional Board Issues." Exh. J (November 2, 2005 Thibeault Presentation Agenda). Importantly, this "notice" was never sent to representatives of any of the Named Parties; no telephone call was made to advise them of this presentation; nor was any notice ever provided to the Named

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head projector and Power Point, the Chief Prosecutor presented in detail his view of the evidence supporting the allegations in the 2005 CAO. (*Id.*) During his presentation, the Chief Prosecutor attempted to persuade the Chair and the State Board members in attendance that Goodrich, the Emhart Parties, and "some fireworks companies" (PSI is a fireworks display company) were liable for the perchlorate contamination of groundwater in Rialto. Among other things, the Chief Prosecutor referred to Goodrich and Black & Decker as the "two main responsible parties." Exh. J. He also showed an image of two plumes of perchlorate, one from the County of San Bernardino's landfill operations and one from the "160 acres-Goodrich, Kwikset, some fireworks companies" *Id.*

The transcript of the Chief Prosecutor's presentation discloses, among other things, a dialogue with a Board member regarding one of the defenses Emhart had asserted, namely, that it was not the corporate successor of the alleged discharger who occupied the 160-Acre Site between 1952 and 1957. *Id.* (November 2, 2005 Thibeault Presentation Transcript) at 5-6. After the Chief Prosecutor explained why, in his view, this defense was without merit, the following exchange between State Board member Secundy and the Chief Prosecutor was recorded:

Jerry Secundy: It goes to caveat emptor. So let the buyer beware. I mean being involved with that before with other companies -- when you purchase a company that has environmental liability you purchase the environmental liability. So the law is very clear there. So....

Mr. Thibeault: They went through the very same thing for Leviathan Mine and Arco and Anaconda and Arco paid a settlement for....

Jerry Secundy: Having been 30 years with Arco I remember it painfully (laugh) Thank you very much. Excellent presentation.

Id. at 5-6. Chair Doduc's comments that day, which immediately preceded this dialogue, were limited to: "Thank you very much. Any questions, comments? Jerry [Secundy], I know you have had a lot of questions on the scientific part." *Id.* Apparently, Chair Doduc and Member Secundy had discussed his questions on the "scientific part" either before or during the Chief Prosecutor's presentation.

Extraordinarily, on November 2, 2005, the Chief Prosecutor was immediately followed by the State Board's new Chief Counsel, Michael Lauffer, now a member of the State Board's "Advisory Team" in SWRCB/OCC File A-1824, who presented a detailed review of the State Board's then newly proposed 2006 Guidance. Exh. J (November 2, 2005 Agenda). The record of this State Board meeting discloses that Michael Lauffer was also present during the Chief Prosecutor's presentation. The State Board has not disclosed whether any other members of its Advisory Team were present that day.

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Parties that the Chief Prosecutor intended to present a one-sided and erroneous argument to the State Board concerning the Named Parties' liability.

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These *ex parte* communications were unquestionably illegal and, alone, compel the disqualification of the State Board, its Chair, and its Advisory Team.

2. **2006 And 2007: State Board Management Coordinating Committee Meetings**

On May 11, 2007, the State Board made the following incomplete disclosure regarding communications in 2006 and 2007 between the Chief Prosecutor with at least two members of the State Board's Advisory Team, Jonathan Bishop and Tom Howard:⁸

Jonathan Bishop: Oral communication within approximately the last year: At an MCC meeting, Gerard Thibeault mentioned that there was an enforcement order issued at the ... Santa Ana Regional Board ... and that he hoped the State Water Board would provide assistance. *No memory of what type of enforcement order and what help needed. No memory of any response.* No personal communication with Mr. Thibeault. Those present included Executive Officers from various regional water boards and Celeste Cantu, then-Executive Director [of the State Board].

Exh. K (May 11, 2007 Summary of Conversations) at 1.

Tom Howard: Oral communications at MCC meetings over last year. It was *likely* that Gerry Thibeault mentioned the Rialto perchlorate matter at some of these meetings, mostly in the context of it being time-consuming and taking away from their cases. Also at MCC, there was some discussion about an agreement whereby Goodrich would pay \$4 million, and that Emhart/Black & Decker/Kwikset Locks were not part of the agreement. At MCC, present were Regional Board Executive Officers and *State Board management* – no Board members. *Mr. Howard does not remember responding.*

Exh. K at 2.

These limited and incomplete disclosures establish the following: In 2006 and 2007, at regularly scheduled Management Coordinating Committee ("MCC") meetings, Chief Prosecutor Thibeault engaged in prohibited *ex parte* communications regarding the allegations in the 2005 CAO with at least two members of the State Board's Advisory Team. The State Board, however, has not explained what was, or was not, said about the 2005 CAO during these meetings, to

⁸ The State Board now claims that, as of July 2007, Mr. Howard was no longer a member of the Advisory Team. However, Mr. Howard's removal has no effect here – he clearly was an "advisor" in 2006 and early 2007 and as such prohibited from partaking in *ex parte* communications with the prosecutors. Govt. Code § 11430.10(a). By removing Mr. Howard from the Advisory Team, the State Board has not vaporized his illicit contacts, nor has it excused revealing with whom he shared the prohibited communications.

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whom it was said, or the number of times the subject was discussed. Nor did it disclose (by declaration or otherwise) whether "State Board management" included any members of the State Board or any other members of the Advisory Team in SWRCB/OCC File A-1824. See Exh. K.

Because disclosure was not made immediately as required by law, the State Board claims that Mr. Bishop and Mr. Howard now have no clear memory of Mr. Thibeault's discussion, other than that it involved the Regional Board's issuance of an enforcement order concerning the perchlorate contamination in Rialto. Exh. K (May 11, 2007 Summary of Conversations) at 1-2. Had disclosure been made promptly, as required, the parties might know what was discussed.

Nonetheless, failed memories are no excuse. "Under the APA, the mere submission of *ex parte* substantive comments, without more, is illegal." *Quintanar*, 40 Cal.4th at 16. If the agency claims that a prohibited *ex parte* communication did not occur, it is that agency's burden to so prove with competent (admissible) evidence. *Rondon*, 151 Cal. App. 4th at 1286. Absent such proof, it shall be inferred that unlawful communications took place. *Rondon*, 151 Cal. App. 4th at 1290.

3. Early 2006: Conversation Between Mr. Howard, Celeste Cantu And Third-Party Barry Groveman

On May 11, 2007, the State Board further disclosed that Mr. Howard recalls attending, in early 2006, a private meeting with a Mr. Barry Groveman (former counsel for Rialto and Fontana Union Water Company, and currently counsel for West Valley Water District) and then Executive Director Celeste Cantu. Exh. K (May 11, 2007 Summary of Conversations) at 3. As counsel for the West Valley Water District (which has rights to water in the Rialto-Colton Groundwater Basin and previously filed a lawsuit against Emhart that was subsequently dismissed), Mr. Groveman, an interested third-party, advocated to Mr. Howard and Ms. Cantu that the State Board "do something" regarding the contamination in the Rialto-Colton Groundwater basin - indisputably an issue in the present proceeding. The State Board has advised that the parties to that *ex parte* communication have no further memory of what was said. *Id.*

Again, as noted immediately above, failed memories are no excuse. It is the State Board's burden to prove no illegal communications occurred.

4. August 10, 2006: Email Chain From Kathy Rogers To Mr. Thibeault

On May 11, 2007, the State Board disclosed an August 10, 2006 email from Kathy Rogers to Chief Prosecutor Thibeault reveals that a member of the State Board, Gary Wolff, was told that "perchlorate in your Region *is a big one (an understatement)* and is the reason the Rules Committee has requested the appearance of the Board members from RB 8. He naturally wants to hear more about this topic." Exh. L (August 10, 2006 email chain) (emphasis added). From the contents of the email it is clear that Mr. Wolff had discussions during which he was told that the perchlorate contamination in the Rialto Groundwater Basin was a "big issue," a vigorously contested issue in these proceedings. *Id.*; compare with Exh. M (Declaration of Dr. Borak, an expert for Goodrich). The email string goes on to discuss arranging a briefing for Mr. Wolff on the "perchlorate issue." Exh. L (August 10, 2006 email chain).

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5. **October 31, 2006: Presentation By CCAEJ To State Board**

On October 31, 2006, a group named the Environmental Justice Coalition for Water (EJCW) made a presentation to the State Board on the topic of Environmental Justice. A review of the agenda for the meeting indicates that the Hearing Officer was the moderator and present for the entire meeting. Exh. N (October 30-31, 2006 Agenda). Featured as an EJCW member panelist was Davin Diaz of CCAEJ. Exh. O (EJCW PowerPoint Presentation). The EJCW presentation included a discussion of perchlorate in the Rialto-Colton Basin, a purported history of perchlorate use, estimated cleanup costs, and photographs of protesting citizens, closed wells and children. *Id.* The presentation specifically referred to Goodrich, Emhart, PSI and the 2005 CAO. *Id.*

In early 2007, several months after making this *ex parte* presentation, CCAEJ was named by the Chair as a designated party in SWRCB/OCC File A-1824, in effect deputizing the organization as a co-prosecutor. CCAEJ has routinely advocated that Goodrich, the Emhart Entities, and PSI, which they refer to as "the Polluters," be held responsible for the Rialto perchlorate conditions. Below is a brief sampling of CCAEJ's polemics, prejudging the Named Parties' liability:

Today is the day an important hearing was to begin. The hearing would adopt a Clean Up and Abatement Order for the perchlorate contamination in the Rialto area. ***As the Communities directly affected by Goodrich/Black & Decker/Pyro Spectacular perchlorate contamination, we are alarmed and shocked at the games being played with our lives.*** Once again the public process for issuing a Clean Up Order and beginning to address this environmental disaster has been delayed through legal tactics by these polluters.

Exh. P (8/21/07 CCAEJ Letter) (emphasis added).

It is criminal that these corporations – Goodrich, Black & Decker and Pyro Spectacular – continue to be allowed to manipulate and delay the public process in this way. Their actions demonstrate quite clearly their lack of regard for the health and well-being of the hard working families of Colton and Rialto. Justice delayed is Justice denied.

Id. (emphasis added).

If someone crossed our borders with a gallon of chemicals and dumped it into our drinking water source we would have the Department of Homeland Security and every other agency there in minutes to secure the situation and the terrorist haled off to Guantanamo – no attorneys, no questions, we'd take immediate action. ***But here we have domestic corporate terrorists who have dumped millions of gallons of a deadly pollutant into our drinking water source and we sit back negotiating with them.*** How absurd can it get! . . . We demand you step forward and treat these corporate eco-terrorists with the same zeal as we would treat any other terrorists. This is an environmental disaster that continues to spread every day. . . . ***Goodrich, Black & Decker, and Pyro Spectacular do not have a right to destroy our common water resource.*** They must be held accountable!

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Id. (emphasis added).

Unlike these public statements made by CCAEJ, since it was declared a Designated Party by the Chair, no transcript or summary of the *ex parte* communications made by CCAEJ's during its October 2006 meeting with the Chair, other staff members, and/or Board Members has been provided by the State Board as required by the APA. Again, "[u]nder the APA, the mere submission of *ex parte* substantive comments, without more, is illegal." *Quintanar*, 40 Cal. 4th at 16. And, absent proof by the State Board to the contrary, where the substance of the communication was unknown, it shall be inferred that unlawful communications took place. *Rondon*, 151 Cal. App. 4th at 1290.

6. December 4, 2006: Email From Ms. O'Haire To Mr. Cobb

On December 4, 2006, Ms. Karen O'Haire, counsel for the State Board and member of the Advisory Team, emailed Mr. Ted Cobb, counsel for the Regional Board, asking to discuss Goodrich's and Emhart's petitions on the Regional Board's Resolution No. R8-2006-0079, which delegated authority to Walter Pettit to hear and rule upon the Draft Amended 2005 CAO. Exh. Q (December 4, 2006 email chain). This is direct evidence of the State Board knowingly communicating *ex parte* with the Regional Board prosecutors to discuss the pending proceeding.

7. February 17, 2007: Email From The Chair To The Governor's Office

On February 17, 2007, five days before the Pre-Hearing Conference and twelve days after the State Board's letter asserting that it intended to conduct an evidentiary hearing in SWRCB/OCC File A-1824, the Chair responded to an email from the Governor's office concerning the instant Draft CAO and other perchlorate matters. Exh. R (February 17, 2007 email chain). The e-mail chain reveals that a representative from the Governor's office informed the Chair that residents in Rialto were asking for a state of emergency to supply them clean drinking water and requests a status report from the Santa Ana Regional Board on the "RP and cleanup and abatement orders. Do they need help? What is causing the delays here?" Exh. R at 1.

The Chair's response to the Governor's office on February 17, 2007, included an attached "Fact Sheet" on perchlorate (which declares Goodrich, the Emhart Parties, and PSI liable) and re-circulated, as part of the e-mail chain, an *ex parte* attack piece on Emhart and Goodrich from CCAEJ, which had been heretofore undisclosed.⁹ *Id.* at 1-2. The CCAEJ attack piece, repeated as fact by the Chair and forwarded to the Governor's office, contains numerous unsubstantiated (and false) statements. It states, for example, that "*despite their responsibility. . . . neither Goodrich Corp. nor Black & Decker have agreed to clean up the mess they have created. . . .*"

⁹ It appears that the Chair either received or obtained and thereafter saved the CCAEJ attack piece. It has not been disclosed who else at the State Board received a copy of this *ex parte* communication, or why the Chair had it saved on her computer and never disclosed the *ex parte* contact to the Named Parties until a federal subpoena compelled its production.

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[W]hile the companies delay, many citizens of Rialto drink water that is polluted by rocket fuel . . . the city teeters on the brink of running out of water." *Id.*; emphasis added.

Finally, it is noted that during the February 22, 2007 Pre-Hearing Conference, after just receiving and responding to an illegal *ex parte* communication with the Governor's office just five days before, the Chair failed to reveal this communication in violation of the APA. Exh. C (February 22, 2007 Hearing Transcript) at 6-7. It is also noted that the State Board thereafter improperly withheld this communication from the Named Parties until May 11, 2007. *See* Gov. Code § 11430.40; Exh. G (May 11, 2007 Letter from Elizabeth Jennings with attachments).

8. March 1, 2007: Email From Mr. Egel To Ms. Jennings And Mr. Giannopoulos Attaching "Fact Sheet" Prepared By State Board Staff

On March 1, 2007, an e-mail was transmitted by one Mr. Egel, an employee of the State Board, and Ms. Jennings to Secretary Linda Adams of the California Environmental Protection Agency which attaches a "Fact Sheet." Exh. S (March 1, 2007 email chain).¹⁰ The "Fact Sheet," prepared by *the State Board*, reveals that the Chair pre-determined the remedy she would choose before any of the Petitioners' evidence was submitted or the hearing was held:

The Cleanup and Abatement Order and proposed amendments are the subject of challenges in petitions filed by various entities named as responsible parties (Among these are Kwikset, Black & Decker and Goodrich, and Pyro Spectaculars). *The parties responsible for perchlorate contamination must pay for the cleanup in Rialto/Colton and the extra costs of providing acceptable water.*

Id. (emphasis added). Such a pre-determination that is communicated *ex parte* by the Chair of the State Board, sitting in her adjudicatory capacity, to her superior at the California Environmental Protection Agency not only improperly pre-judges an important issue in SWRCB/OCC File A-1824, but is also direct evidence of an additional illegal *ex parte* communication about substantive issues in the proceeding. The *ex parte* "Fact Sheet" shows that the State Board and its Chair predetermined the liability of the Named Parties before the hearing began and is clear evidence of not only the appearance of bias, but of actual bias as well.

9. March 1, 2007: Briefing Of Linda Adams Attended By Betsy Jennings, Tam Doduc, And Kurt Berchtold

On March 1, 2007, the Chair and Mr. Berchtold (a member of the Regional Board Advocacy Team) briefed Linda Adams (now Secretary of the California Environmental Protection Agency), during which the perchlorate contamination in the Rialto-Colton groundwater basin and these proceedings were discussed. Exh. S (March 1, 2007 email chain). The State Board has admitted that this briefing took place and was attended by both the Chair and Kurt Berchtold, but argue that the Chair left before Mr. Berchtold joined. There is no

¹⁰ The Hearing Officer also improperly withheld this communication until May 11, 2007. *See* Exh. G (May 11, 2007 Letter from Elizabeth Jennings with attachments).

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evidence in the administrative record that is either competent or admissible that discloses what was said by whom and whether any indirect communication took place between the Chair and one of the members of the Regional Board Advocacy Team.

10. March 26, 2007: Email From Ms. Rice To Ms. Zwarts

On March 26, 2007, Ms. Dorothy Rice, Executive Director of the State Board and a member of its Advisory Team, participated in an email exchange with Patty Zwarts, the California Environmental Protection Agency Assistant Secretary for Legislation. This e-mail exchange confirms at least one in-person meeting and suggests they may have met again shortly thereafter for lunch regarding issues in SWRCB/OCC File A-1824. Exh. T (March 26, 2007 email chain).¹¹

Ms. Rice's e-mail stated that she wanted to get Ms. Zwarts' "perspective on water board priorities", and Ms. Zwarts replied that she "just had a meeting with Gov. Wilson about the Rialto-Colton cleanup and he wants Linda to take the site cleanup away from the [Regional Board]. And give it to DTSC. Oh boy." Exh. T (March 26, 2007 email chain). Notwithstanding the in-person meeting revealed in this e-mail exchange, no record of an oral *ex parte* communication between Ms. Rice and Ms. Zwarts has been disclosed by the State Board, and it is not known whether the conversation(s) between Ms. Rice and Ms. Zwarts included a discussion of the perchlorate contamination in Rialto and/or the State/Regional Board proceedings regarding same.

While no information concerning the meeting was provided, it is clear from the contents of the email that the Chair and her advisors were being pressured to issue an order against the Named Parties.

V. The Unlawful *Ex Parte* Communications Compel Disqualification And Recusal

The numerous illegal *ex parte* communications regarding substantive issues in SWRCB/OCC File A-1824 among members of the State Board, the Chair (Hearing Officer), the State Board's Advisory Team, the prosecutors (the Regional Board Advocacy Team), and other interested third parties compel the disqualification and recusal of the State Board, its Chair, and its Advisory Team from taking any action on Item 12 on the State Board's June 3, 2008 Meeting Agenda and from authorizing or taking any further action in SWRCB/OCC File A-1824.

While any one of the improper *ex parte* communications is sufficient to mandate disqualification, cumulatively the evidence is overwhelming. To conclude otherwise, would be to continue to violate the Named Parties' constitutional due process rights, the APA, and the State Board's own guidelines governing *ex parte* communications.

¹¹ Again, without any explanation, the State Board withheld these communications until May 11, 2007 and never provided Respondents with notice. Exh. G (May 11, 2007 Letter from Elizabeth Jennings with attachments).

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The recusal of the entire State Board is mandated by law. Currently, the State Board is comprised of the following members: Tam Doduc (Chair and Hearing Officer), Gary Wolff, Arthur Baggett, Jr., Charles Hoppin, and Frances Spivey-Weber. Two of these members, Tam Doduc and Arthur Baggett, Jr., have been members of the State Board during the entire pendency of this matter and were active participants in a number of the illegal *ex parte* communications since 2005. Further, all but one of the State Board members (Frances Spivey-Weber) have been members since 2006 and were presumably present during the October 2006 attack piece by former designated party, CCAEJ. Finally, as matter of law it is proper to infer that all of the illegal *ex parte* communications to members of the State Board's Advisory Team in SWRCB/OCC File A-1824, have been shared with the other members of that team and the members of the State Board itself. Certainly, no such evidence to the contrary has been provided by the State Board or appears in the administrative record, which according to the draft order is closed.

As noted above, "[u]nder the APA, the mere submission of *ex parte* substantive comments, without more, is illegal." *Quintanar*, 40 Cal.4th at 16. If the agency claims that a prohibited *ex parte* communication did not occur, it is that agency's burden to so prove with competent (admissible) evidence. *Rondon*, 151 Cal. App. 4th at 1286. Absent such proof, it shall be inferred that unlawful communications took place. *Rondon*, 151 Cal. App. 4th at 1290.

Thus, Motions 1 and 2 should be granted forthwith. If they are so granted, the State Board should decline to rule on Motion 3 because it is without further jurisdiction to act.

VI. The Regional Board Advocacy Team's Involvement As Both Prosecutor And Advisor In The Present Matter Requires Its Immediate Disqualification

The present record illustrates the failure of the State Board and the Regional Board Advocacy Team to maintain any semblance of separation of functions. Mr. Thibeault, the Chief Prosecutor, repeatedly advised the Chair, the State Board, and its Advisory Team, outside the presence of the Named Parties, on issues highly relevant and hotly contested in SWRCB/OCC File A-1824. Such advice is wholly inappropriate and illegal.

Thus, if the State Board does not recuse itself, it should grant Motion 3 and disqualify the Regional Board Advocacy Team from participating in any way on Item 12 on the State Board's June 3, 2008 Meeting Agenda and in SWRCB/OCC File A-1824.

VII. Conclusion

The State Board can no longer pretend that numerous illegal *ex parte* communications described above did not occur and have no consequence. To proceed on Item 12 would itself be an illegal act that only further compounds the State Board's disregard for the Named Parties

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constitutional due process rights, the statutory mandates to the contrary in the APA, and the State Board's own guidelines governing *ex parte* communications. Thus, for all the foregoing reason, the relief requested by the Named Parties herein *must* be granted. The law with the facts set forth in the closed administrative record compels no less.

Very truly yours,



Jeffrey D. Dintzer

cc: Karen O'Haire, Esq.
Jorge Leon, Esq.
Peter Duchesneau, Esq.
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