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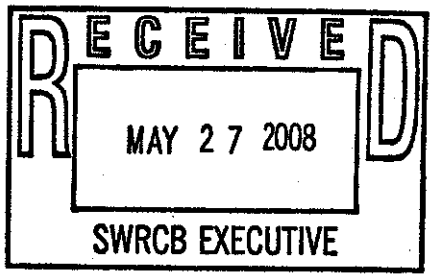
Client-Matter: 24369-060

VIA COURIER AND E-MAIL



Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100

Re: Comments to A-1824 – June 3, 2008 Board Meeting
Item 12, *Interlocutory Order Reviewing Groundwater Contamination in the Area of the City of Rialto on Its Own Motion*
(SWRCB/OCC File A-1824)

Dear Ms. Townsend:

Goodrich Corporation, Pyro Spectaculars, Inc. ("PSI") and Emhart Industries, Inc., Kwikset Corporation, Kwikset Locks, Inc. and Black & Decker Inc. (the "Emhart Parties") (collectively, the "Named Parties") respectfully submit the following comments concerning the "proposed interlocutory order" (the "Proposed Order") in the above-referenced matter, as requested in your letter of April 24, 2008. The Proposed Order is improper as a matter of law and fails to vest the State Water Resources Control Board (the "State Board") with the authority to hold a hearing on the draft amended cleanup and abatement order, R8-2005-053, proposed by the staff of the Regional Water Quality Control Board, Santa Ana Region (the "Regional Board") on October 27, 2006 (the "Draft CAO"). The disregard for the law in this instance, should the Proposed Order be adopted, will only serve to further delay the resolution of the Rialto-area perchlorate issues and ultimately undermine the State Board's authority. "'[A]dministrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void.'" *Carmel Valley Fire Protection District v. State of California*, 25 Cal.4th 287, 300 (2001) (quoting *Association for Retarded Citizens v. Dept. of Development Services*, 38 Cal.3d 384, 391).

I. SUMMARY

Starting in February 2007, the Chair of the State Board claimed that she had authority to hold an evidentiary hearing on the issuance of the Draft CAO to the Named Parties based upon a motion by the State Board. In July 2007, the State Board's response to a request under the Public Records Act, Government Code Section 6250, *et seq.*, revealed that, in fact, no motion or properly noticed State Board meeting ever occurred. The Proposed Order is a tacit admission by

the Office of Chief Counsel that the State Board never properly vested itself with jurisdiction to initiate proceedings to hear the Draft CAO. Yet, the Office of Chief Counsel, which issued the Proposed Order, stubbornly persists in repeating its previous errors. For the reasons explained below, it is incumbent upon the members of the State Board to put aside previous misconceptions and take a fresh look at the State Board's statutory obligations.

For the State Board to ultimately assume the Regional Board's jurisdiction to hear and consider the issuance of the Draft CAO, it *must*, among other things, (1) adopt a motion to *review the actions or inactions of the Regional Board* and (2) then find that the Regional Board had acted, or failed to act, in a manner that was *inappropriate or improper*. Water Section 13320(a) and (c). The Proposed Order fails to makes any finding that the Regional Board acted inappropriately or improperly, nor does it propose to review Regional Board action or inaction to make such a determination. Regardless of whether or not the Regional Board consents, the State Board may not circumvent this statutory limitation on its jurisdiction to issue cleanup and abatement orders for its own, or the Regional Board's, convenience or a perceived need to take action in an expeditious manner.

Among other reasons, the Proposed Order violates Water Code Section 13320 and does not vest the State Board with jurisdiction to conduct a hearing on the Draft CAO because:

1. The Proposed Order does not find that the Regional Board acted improperly or inappropriately and otherwise fails to set forth any findings concerning the action or inaction of the Regional Board, as required by Water Code Section 13320(c);

2. The Proposed Order does not satisfy the motion requirements under Water Code Section 13320(a) since it would authorize an evidentiary hearing to determine the liability of the Named Parties, not to review the Regional Board's actions or inactions to determine if they were inappropriate or improper;

3. The State Board previously found that the Draft CAO is not ripe for it to review because no final action has been taken by the Regional Board;

4. The State Board may not delegate authority to its Executive Director that itself has not been vested with and may not delegate authority to the Executive Director where it is statutorily required that the State Board act pursuant to a motion;

5. The State Board cannot act in an interlocutory capacity when it lacks jurisdiction in the first place, nor does it have authority to issue *nunc pro tunc* orders and retroactively impose an effective date back to February 5, 2007; and

6. The Proposed Order is not an "appropriate action" to be taken by the State Board under Water Code Section 13320(c), as the record developed since February 2007 demonstrates that the Regional Board staff concedes that they cannot establish a discharge or threat of discharge to groundwater by the Named Parties.

II. BACKGROUND

A. The Draft CAO

On October 27, 2006, the staff of the Regional Board proposed the Draft CAO. The staff sought to amend CAO No. R8-2005-053 to add Goodrich and PSI as parties and make other changes to the order. The CAO was originally issued by the Executive Officer to the Emhart Parties on February 28, 2005, and amended on or about December 2, 2005, under the expressed intention that it would be heard before the Regional Board.

The Regional Board never attempted to hear the Draft CAO. Rather, on October 13, 2006, it adopted Resolution No. R8-2006-0079, whereby the Regional Board improperly assigned Mr. Walter Pettit as the hearing officer and entirely divested itself from hearing or otherwise addressing the Draft CAO. Goodrich and Emhart timely petitioned the State Board with respect to the resolution, asserting among other things that it was an improper delegation of authority. SWRCB/OCC Files A-1797 and A-1797(a). On January 30, 2007, the State Board denied the petitions as not being ripe since the Regional Board had not taken any final action with respect to the Draft CAO. (Letter from T. Howard to P. Duchesneau, *et al.*, January 30, 2007.) The State Board, nonetheless, admonished the Regional Board that its delegation was "inappropriately broad" and strongly recommended that the Regional Board revise its resolution. *Id.* As a result, Mr. Pettit resigned as the hearing officer on January 31, 2007. (Letter from W. Pettit to T. Howard, *et al.*, January 31, 2007.) On February 2, 2007, in light of Mr. Pettit's resignation, the Regional Board scheduled a public meeting on February 16, 2007 to determine how to proceed with hearing the Draft CAO. As explained below, this meeting never took place because the Executive Director and Chair of the State Board thereafter acted in excess of their statutory authority to take over the matter.

B. The State Board's Improper Initiation of File A-1824

On February 5, 2007, the Acting Executive Director of the State Board issued a letter to the Regional Board indicating that the State Board was "considering reviewing this matter on its own motion, including all actions or inactions of the Santa Ana Regional Water Quality Control Board's (Santa Ana Water Board) regarding the perchlorate investigation and remediation in Rialto since the issuance of a cleanup and abatement order on February 28, 2005." (Letter from T. Howard to W. Pettit, *et al.*, February 5, 2007.) The letter assigned a new matter number,

SWRCB/OCC File A-1824, and directed the Regional Board to submit the record for the matter by February 13, 2007. On February 13, 2007, without the benefit of reviewing the record submitted by the Regional Board or providing an opportunity for comment by affected parties as to the record or with regard to the review of the Regional Board actions, as required by California Code of Regulations, Title 23, Section 2055, the State Board's clerk issued a notice of a pre-hearing status conference for February 22, 2007. The notice pronounced that:

> In light of the various objections and appeals, and the need to take action in an expeditious manner, *the State Water Resources Control Board (State Water Board) has decided to review this matter on its own motion.* An evidentiary hearing will be conducted by the State Water Board to determine whether to amend or reissue the Cleanup and Abatement Order for the investigation and remediation of perchlorate in the Rialto area, or take such other action the State Water Board deems appropriate.[1] (emphasis added.) (Notice of Pre-Hearing Conference, February 13, 2007.)

Thereafter, on February 22, 2007, the Chair of the State Board, serving as a hearing officer, held a Pre-Hearing Conference where she refused to explain the basis of her authority or to entertain and rule upon any objections or comments raised at the conference. (Pre-Hearing Conference Transcript, February 22, 2007.) The next day, on February 23, 2007, a hearing noticed was issued by the Clerk of the State Board providing that an evidentiary hearing would be held:

> The purpose of this hearing is to receive relevant testimony and evidence and to hear legal argument and policy statements on the following issues: legal responsibility for site investigation and remediation; the technical evidence justifying site investigation and cleanup; the feasibility and propriety of cleanup and other remediation requirements; and appropriate cleanup standards for protection of public health and beneficial uses of waters of the state. The scope of the hearing will cover the 160-acre Rialto site, including but not limited to perchlorate and trichloroethylene (TCE) contamination, sources, responsible parties, investigation, and remedial actions. (Notice of Public Hearing, February 23, 2007.)

On March 5, 2007, Goodrich filed a motion to rescind the hearing notice and objected to the authority of the hearing officer on the basis that the State Board failed to comply with Water Code Section 13320. (Motion and Objection No. 1; Goodrich Corporation's Notice of Motion

[1] On February 13, 2007, the Chief Counsel of the State Board also issued a memorandum to the Chair of the State Board, indicating the State Board "has agreed to review this matter on its own motion" and assigned a hearing team.

and Motion to Rescind Hearing Notice and Objection to Authority of Hearing Officer, March 5, 2007.) PSI and the Emhart Parties joined in the motion. The motion set forth why the State Board had not properly taken up the matter "on its own motion," that the State Board had not made any final decision pursuant to any such a motion, and that the hearing officer was acting illegally and outside the scope of her authority under the color of state law. On March 20, 2007, the Hearing Officer denied the motion. (Letter from T. Doduc to D. Diaz, *et al.*, March 20, 2007.)

On July 23, 2007, in response to a Public Records Act request by Goodrich, the State Board revealed that "there was no State Water Board meeting on any 'motion' concerning this matter", nor was there ever a motion, despite the hearing officer's repeated pronouncements that "the State Water Resources Control Board . . . has decided to review this matter on its own motion." (Letter from E. Jennings to D. Palmer, July 23, 2007.) Thereafter, on August 13, 2007, Goodrich, PSI and the Emhart Parties each filed petitions for writ of mandate in the Superior Court of Los Angeles County challenging the proceedings on several bases, including the State Board's lack of jurisdiction under Water Code Section 13320, which were later consolidated. (*Goodrich Corporation v. California State Water Resources Control Board, et al.*, Los Angeles Superior Court, Case No. BS 110389, *et al.*) On April 21, 2008, the Court overruled the State Board's demurrer to the petition's claim challenging the State Board's jurisdiction to hold a hearing on the Draft CAO given its failure to comply with Water Code Section 13320. Thereafter, on April 24, 2008, in an apparent response to the Superior Court's ruling, the Office of Chief Counsel for the State Board issued a letter putting forth the Proposed Order in a transparent attempt to retroactively rectify the State Board's lack of jurisdiction. (Letter from M. Lauffer to P. Duchesneau, et al., April 24, 2008.)

III. THE STATE BOARD IS DISQUALIFIED FROM CONSIDERING THE PROPOSED ORDER DUE TO *EX PARTE* COMMUNICATIONS

For the reasons set forth in the concurrently filed motions for recusal of the State Board and disqualification of the Regional Board, the consolidated petition for writ of mandate (No. BS 110389, *et al.*,), and the prior motions to disqualify filed in this proceeding, the State Board is disqualified from acting on the Proposed Order due to *ex parte* communications received by Chair Doduc and the other members of the State Board on the subject matter of the Draft CAO. Accordingly, the State Board cannot act on the Proposed Order. The State Board must rule on its own recusal before it can rule on the Proposed Order. Should it not rule on the disqualification motion and nonetheless take action on the Proposed Order, the State Board will have in effect denied the disqualification motion.

IV. THE PROPOSED ORDER VIOLATES THE LAW

The Proposed Order runs afoul of the State Board's statutory authority and cannot rectify the defects with the State Board's jurisdiction that exist and have existed since February 2007. The initial issuance of cleanup and abatement orders is solely within the authority of the regional boards under Water Code Section 13304(a). The State Board has no independent authority or jurisdiction to issue cleanup and abatement orders, until and unless it is properly vested with the authority of the Regional Board in accordance with Water Code Section 13320. Water Code Sections 13320(a) and (c). In this instance, the State Board has never done so, and fails to do so with the Proposed Order.

The basis for the Proposed Order, the "need to take action in an expeditious manner", is not a legally adequate basis for the State Board to unilaterally usurp the Regional Board's jurisdiction and take over the matter without following applicable statutory safeguards. The law is very clear as to the three-step process the State Board must go through to assume Regional Board authority and jurisdiction, which it has not done and fails again to do through the Proposed Order. Contrary to the Proposed Order, for the State Board to vest itself with the Regional Board's authority and jurisdiction to conduct a hearing on the issuance of a cleanup and abatement order, the Water Code requires in no uncertain terms that the State Board first complete the following:

1. Review a "regional board's action or failure to act" either pursuant to a petition[2] or "on its own motion." Water Code Section 13320(a).
2. "Find" that an "action or failure to act" of the Regional Board was "inappropriate or improper." Water Code Section 13320(c).
3. Decide to "take appropriate action itself", where it is then "vested with all the powers of the regional board." Water Code Section 13320(c).

The Proposed Order entirely fails to satisfy any of these foregoing statutory requirements.

A. The State Board Has Not Conducted a Review of the Regional Board's Actions or Failure to Act

The Proposed Order purports to authorize the State Board to hold an evidentiary hearing on the Draft CAO. As the evidentiary hearing is not a review of the actions or inactions of the Regional Board, the Proposed Order fails to satisfy any elements of Water Code Section 13320.

[2] For reasons explained herein and consistent with the reason the State Board has claimed it has taken up this matter on its own motion, no petition has been filed before the State Board by any aggrieved party concerning the Draft CAO pursuant to Water Code Section 13320.

1. The Proposed Order Fails to Set Forth Any Findings Concerning the Action or Inaction of the Regional Board

The Proposed Order fails to set forth any findings with regard to the actions or inactions of the Regional Board and has no findings that the Regional Board's actions or failure to act was inappropriate or improper. Water Code Section 13320(c) requires in no uncertain terms that the State Board first make a finding that the action of the regional board, or the failure of the regional board to act, ***was inappropriate or improper*** before it may take the appropriate action itself:

> ***Upon finding that the action of the regional board, or the failure of the regional board to act, was inappropriate or improper***, the state board may direct that the appropriate action be taken by the regional board, refer the matter to any other state agency having jurisdiction, taken the appropriate action itself, or take any combination of those actions. In taking any such actions, the state board is vested with all the powers of the regional boards under this division. (Water Code Section 13320(c).) (emphasis added.)

Further, "[a]n administrative agency must 'render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action.'" *North Gualala Water Co. v. State Water Resources Control Bd.*, 139 Cal.App.4th 1577, 1603 (2006) (quoting *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514); *see also* Government Code Section 11425.50(a) ("The decision shall be in writing and shall include a statement of the factual and legal basis for the decision."). Accordingly, the Proposed Order is improper.

2. The Regional Board Has Not Taken Any Final Action On the Draft CAO so it is Not Ripe for State Board Review

The Draft CAO, the subject of the contemplated "evidentiary hearing," is not an action of the Regional Board subject to review by the State Board. The Draft CAO has never been issued, either by the Regional Board or initially by the Executive Officer under delegation of authority. *See* Water Code Section 13228.14 ("Any hearing or investigation by a regional board relating to . . . requiring the cleanup or abatement of waste . . . may be conducted by a panel of three or more members of the regional board, but any final action in the matter shall be taken by the Regional Board.")

Indeed, the State Board previously held that the Regional Board had *not* taken final action with respect to the Draft CAO and that the State Board was therefore precluded from

acting until it did so. On January 30, 2007, the State Board denied the petitions by Goodrich and the Emhart Parties, Petition A-1797 and A-1797(a), respectively, which challenged Regional Board Resolution No. R8-2006-0079 as being an illegal delegation of authority to a former State Board Executive Director to serve as a hearing officer for conducting an evidentiary hearing on the Draft CAO. The State Board found that the petitions were not ripe because there was no final action on the Draft CAO by the Regional Board[3]:

> After careful consideration, it is concluded that ***the petitions in this matter raise issues that are not appropriate for review by the State Water Resources Control Board (State Water Board) at this time. The petitions address a resolution that establishes authority to take future final actions, including issuance of a cleanup and abatement order pursuant to Water Code section 13304. As such, the adoption of the resolution is an interlocutory action precedent to a potential future cleanup and abatement order . . . At the time of final action, any challenges to the authority purportedly conveyed by Resolution No. R8-2006-0079 would be ripe.*** In other words, the issues raised in your present petitions may be raised again and considered by the State Water Board if the Santa Ana Regional Water Quality Control Board (Santa Ana Board) or its delegee takes a final action. (Letter from Thomas Howard to Peter R. Duchesneau, et al., January 30, 2007.) (emphasis added.)

Under Water Code Section 13320(a), the *same* ripeness standard governing State Board review applies whether the State Board acts on its own motion or whether it is petitioned by an aggrieved party:

> Within 30 days of any action or failure to act by a regional board . . ., any aggrieved person may petition the state board to review that action or failure to act . . . The state board may, on its own motion, at any time, review the regional board's action or failure to act . . . (Water Code Section 13320(a).)

Yet, the Proposed Order now seeks to take over the authority of the Regional Board to hold an evidentiary hearing on the very same Draft CAO, despite previously finding it was not ripe before the State Board since it was not a final action of the Regional Board.

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[3] The Named Parties disagree with this particular ruling as the State Board was misplaced as to the relevant final action by the Regional Board for Petition A-1797 and A-1797A. The relevant final action of the Regional Board in that matter was Resolution R8-2006-0079 that had been voted on and adopted by the Regional Board, not potential future action on the Draft CAO.

3. The Evidentiary Hearing to Consider the Issuance of the Draft CAO is Not a Review of the Regional Board's Actions or Inactions

As explained above, the Proposed Order effectively attempts to skip past any review of Regional Board action or inaction and does not make any findings as to whether such action or inaction was inappropriate or improper, as expressly required by Water Code Section 13320(c). The evidentiary hearing is not a review of the Regional Board's actions or inactions. Rather, the hearing notice makes clear, the purpose of the hearing is to determine the potential liability of the Named Parties:

> The purpose of this hearing is to receive relevant testimony and evidence and to hear legal argument and policy statements on the following issues: legal responsibility for site investigation and remediation; the technical evidence justifying site investigation and cleanup; the feasibility and propriety of cleanup and other remediation requirements; and appropriate cleanup standards for protection of public health and beneficial uses of waters of the state. The scope of the hearing will cover the 160-acre Rialto site, including but not limited to perchlorate and trichloroethylene (TCE) contamination, sources, responsible parties, investigation, and remedial actions. (Fourth Revised Notice of Public Hearing, July 5, 2007.)

Prior to holding an evidentiary hearing on the Draft CAO, however, the State Board must first comply with Water Code Section 13320 to properly vest itself with the Regional Board's authority. The State Board has not done so.

4. The State Board Must Determine Whether the Regional Board Is Disqualified from Conducting the Evidentiary Hearing on the Draft CAO

The record shows that the reason the Regional Board has not attempted to hold the evidentiary hearing on the Draft CAO is based upon allegations that it is disqualified due to bias, improper *ex parte* communications, and its previous handling of the matter. *See, e.g.,* February 1, 2007 letter from Gerard J. Thibeault to Thomas Howard; *see also* Amended Joint Petition A-1732 and A-1732A-D by Emhart Industries, Inc., Kwikset Corporation, and Black & Decker Inc. (concerning a prior version of Cleanup and Abatement Order R8-2005-053). The State Board must first review these alleged reasons and any other reasons why the Regional Board has not conducted the evidentiary hearing on the Draft CAO itself and then determine whether the Regional Board had acted inappropriately or improperly resulting in it being disqualified from hearing the Draft CAO. If the State Board does not find that the Regional Board acted improperly and inappropriately and is not barred from hearing the Draft CAO, the State Board cannot vest itself with the Regional Board's authority to hear the matter.

B. The Proposed Order Does Not Satisfy the Motion Requirements Under Water Code Section 13320(a)

1. The Proposed Order Does Not Order Review of Regional Board Action of Inaction

The Proposed Order does not constitute even the first step in the process for vesting the State Board with the Regional Board's authority: a ***motion by the State Board to review the actions or inaction of the Regional Board***, as required by Water Code Section 13320(a). Under Water Code Section 13320(a), the State Board may either consider the actions or inactions of a regional board upon a petition by an aggrieved party or via its own motion. Title 23 of the California Code of Regulations, Section 2050(a) requires petitions to the State Board to contain "[t]he specific action or inaction of the regional board which the state board is requested to review . . . and a full and complete statement of reasons the action or failure to act was inappropriate or improper." 23 Cal. Code Regs. 2050(a)(2). Should the State Board seek to review a matter on its own motion, it too must identify the actions or inactions of the Regional Board that it intends to review. Here, no action or inaction of the Regional Board is proposed to be reviewed under the Proposed Order, which provides:

> IT IS HEREBY ORDERED that the State Water Board will *review groundwater contamination* in the area of the City of Rialto on its own motion. *The scope of this review is the 160-acre site* in Rialto, California and as further described in hearing notices issued for SWRCB/OCC File No. A-1824. (Proposed Order.) (emphasis added.)

Thus, the Proposed Order fails to even suffice as a motion under Water Code Section 13320(a).

2. The State Board Cannot Act Retroactively to Circumvent the Water Code Requirements

The Proposed Order is an attempt to circumvent the State Board's failure to comply with the motion requirement by claiming to somehow "ratify" the Acting Executive Director's February 5, 2007 letter. This attempt to retroactively create jurisdiction where none exists does not satisfy the requirements of Water Code Section 13320(a). The February 5, 2007 letter was not, and cannot serve as, a motion of the State Board. It merely provides that the State Board "is *considering* reviewing this matter on its own motion." (emphasis added.) Thereafter, in countless communications, including in hearing notices and on its website, it was falsely proclaimed "the State Water Resources Control Board . . . has decided review this matter on its own motion." Ultimately, the State Board confirmed in its July 23, 2007 response to Goodrich's Public Records Act Request that there was *NEVER* any motion or State Board meeting on any

motion concerning this matter. As explained below, the Executive Director has no authority to initiate own motion review.

Moreover, the State Board's Proposed Order and the prior actions of its Executive Officer violate its own regulations. California Code of Regulations, Title 23, Section 2055 provides that "[w]hen a review is undertaken on the board's own motion, all affected persons known to the board shall be notified and given an opportunity to submit information and comments." The Named Parties never had an opportunity to submit information and comment on any review of Regional Board actions or inactions prior to the State Board's purported assumption of jurisdiction, either then or now. Merely a week after the issuance of the February 5, 2007 letter, the February 13, 2007 pre-hearing conference notice was issued announcing that the "[State Board] decided to review this matter on its own motion" and to conduct an evidentiary hearing on the Draft CAO. The Parties were not afforded an opportunity to submit information pertaining to a review of Regional Board actions or inactions prior to or any time after the February 5, 2007 letter. Indeed, the Named Parties did not even receive the records submitted by the Regional Board to the State Board requested in the February 5 letter, until *after* the purported decision to conduct the hearing on the Draft CAO was made. At the February 22, 2007 pre-hearing conference, no review of Regional Board action or inaction occurred and the hearing officer refused to entertain comments on any topic. The Proposed Order still does not afford the affected parties an opportunity to comment on the review of the Regional Board's actions or inactions, let alone identify what actions or inactions of the Regional Board have been, or will be, reviewed by the State Board.

C. The Executive Director has No Authority to Initiate Own Motion Review, Make Findings that a Regional Board Acted Improperly or Inappropriately, nor to Assign a Hearing Officer

The Proposed Order's assertion that the State Board can obtain jurisdiction through its delegation to its Executive Director is without merit and will not survive judicial scrutiny. The State Board cannot delegate authority to its Executive Director that has not been vested in itself. Nor can the State Board delegate powers to an employee that require a properly noticed motion of the five-member statutorily created body.

In particular, the Proposed Order is patently wrong in its claim that:

> The authority to initiate own motion review is not a power the State Water Board reserved to itself, and may be exercised by the Executive Director pursuant to the board's general delegation. (State Water Board Res. No. 2002-0104.) It is the position of the State Water Board that no formal vote is required to authorize initiating own motion review.

1. The State Board Must Vote on a Motion to Initiate Review

The State Board's Executive Director has no authority to initiate review pursuant to Water Code Section 13320(a). By its express terms, Water Code Section 13320(a) requires a "motion" of the State Board. The State Board may not circumvent express statutory requirements for a motion through a general delegation of authority to its Executive Director. The State Board cannot delegate statutory authority requiring a motion of the Board to its Executive Director. An agency does not possess authority to rewrite the Legislature's command.

2. The State Board Cannot Circumvent the Bagley Act

Moreover, any such unilateral action by the Executive Director would violate the Bagley-Keene Open Meeting Act, Gov. Code Sections 11120, *et seq.* (the "Bagley Act"). The Bagley Act requires that the State Board provide notice of any proposed actions to be taken, opportunity for public comment, and preparation of meeting minutes as an official record of actions taken.[4] Government Code Section 11125 and 11125.1. *See also* 23 CCR §647 *et seq.* In particular, the Bagley Act applies to an "action taken" by a state body, which is "a collective decision made by the members of a state body . . . when sitting as a body or entity *upon a motion* . . . or similar action." Gov. Code § 11122 (emphasis added). As a result, the State Board cannot navigate around its obligation to pass a motion and to comply with the provisions of the Bagley Act by a general delegation of authority to its Executive Director.

3. The State Board Must First be Vested with Authority Before the Executive Director Can Have Any Authority, including Assigning a Hearing Officer

Unless and until the State Board has first been vested with the authority to hear and issue the proposed CAO, the Executive Director lacks any authority to assign a hearing officer under Water Code Section 183 and Resolution 2002-0104, ¶8.[5] A hearing officer cannot be assigned

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[4] In prior years, such as under the previous Chairmanship of Arthur G. Baggett, Jr., the State Board formally noticed motions for review of Regional Board actions under Water Code Section 13320(a) on its duly noticed meeting agendas and adopted such motions pursuant to a vote of the board prior to taking up a review on its own motion. *See, e.g.*, Orders WQO 2003-0008, WQO 2002-0009, and WQ 2001-04. Thereafter, the State Board conducted a separate review under Water Code Section 13320(c) of the Regional Board's action or failure to act, including holding workshops and holding a noticed meeting. It would then issue a separate decision in the form of an order.

[5] The Named Parties further object to the validity of the Resolution 2002-0104. The Resolution's delegation of authority from the State Board to the Executive Director is based upon and provides that "[p]ursuant to Water Code section 7, the [State] Board is authorized to delegate authority to the Executive Director." However, this runs contrary to Water Code Section 7, which only provides "[w]henever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides

for a matter *before* the State Board has been vested with the authority to conduct a hearing on the Draft CAO. Water Code section 183 provides only that the "board may hold any hearings and conduct any investigations in any part of the state necessary *to carry out the powers vested in it* " (emphasis added.) Yet, the general delegation of authority from the State Board to its Executive Director expressly *prohibits* the Executive Director from making the second required step under Water Code Section 13320 – finding that the Regional Board acted inappropriately or improperly. Resolution 2002-0104, ¶3.4.[6] As explained above, without first determining that the Regional Board acted inappropriately or improperly, the State Board cannot decide whether to take appropriate action itself and to vest itself with the authority of the Regional Board. Water Code Section 13320(c). Accordingly, the contemplated hearing on the Draft CAO before Chair Doduc as the hearing officer is without authority and will be subject to being overturned despite any attempt by the State Board to ratify it after the fact. "An administrative agency has only that authority conferred upon it by statute and any action not authorized is void." *City of Lodi v. Randtron,* 118 Cal.App.4th 337, 358-359 (2004). As described previously, there is no such power vested in the State Board unless it complies with the proper procedure detailed in Water Code Section 13320.

D. The State Board's Proposed Interlocutory, *Nunc Pro Tunc* Order Is Illegal

The Proposed Order provides that "[t]he effective date of this own motion review is February 5, 2007." The State Board is attempting to act *nunc pro tunc*[7] by retroactively making its order effective nearly a year and one half prior to the contemplated date for the State Board to act on the Proposed Order. In effect, the State Board is attempting to order what the State Board never ordered in the first place. The agency does not possess authority, nor does it cite to any in support thereof, to impose a past date as the effective date for Proposed Order. Nor has the State Board provided any authority that is may act in an interlocutory capacity in this matter. It cannot. The State Board cannot act in an interlocutory capacity where the very reason it seeks to act is to attempt to fix its lack of jurisdiction in the first place.

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otherwise." Water Code Section 7. Water Code Section 7 therefore is limited to delegations from "public officers" to "deputies" and does not pertain to delegating authority of the State Board to an Executive Director.

[6] "The Executive Director is specifically precluded from . . . Any final action pursuant to Water Code section 13320, subdivision (c) finding that an RWQCB action was inappropriate or improper." (State Board Resolution 2002-0104, ¶3.4.)

[7] "*Nunc pro tunc*" is Latin meaning "now for then." *Black's Law Dictionary* 1100 (8th ed. 2004). A *nunc pro tunc* order is limited to correcting the record to reflect a prior ruling made in fact but defectively recorded. See *Estate of Eckstrom,* 54 Cal. 2d 540 (1960); *West Shield Investigations & Security Consultants v. Superior Court,* 82 Cal. App. 4th 935 (2000); *Hamilton v. Laine,* 57 Cal. App. 4th 885 (1997); see also Cal. Code Civ. Proc. § 473(d)[7]; 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, sections 65, 67, pp. 593, 594-595.

The State Board, a statutorily created agency, only possesses the power granted to it by the Legislature. *Calif. Toll Bridge Authority v. Kuchel*, 40 Cal. 2d 52 (1952). There is no authority that suggests that the State Board possesses the power to issue *nunc pro tunc* orders. *See, e.g., Practice Before California Licensing Agencies,* John G. Clarkson, 44 Cal. L. Rev. 197, 210 fn. 76 (1956); Kuchman, *California Administrative Law*, 66 (1953), citing *Conover v. State Board of Equalization*, 44 Cal. App.2d 283 (1941) (suggesting that an agency has no power to give its orders retroactive effect).[8]

At best, only clerical errors can be corrected by a *nunc pro tunc* order. *Estate of Eckstrom*, 54 Cal. 2d 540, 544 (1960). "It is only when the form of the judgment fails to coincide with the substance thereof, as intended at the time of the rendition of the judgment, that it can be reached by a corrective nunc pro tunc order." *Estate of Eckstrom*, 54 Cal. 2d at 545; accord, *Martin v. Martin* (1970) 2 Cal. 3d 752, 761, fn. 12; *Estate of Careaga* (1964) 61 Cal. 2d 471, 474; *Estate of Goldberg* (1938) 10 Cal. 2d 709, 714-715. It is improper for a *nunc pro tunc order to supply "an affirmative action which should have been, but was not, taken by the court, or to show what the court might or should have decided, or intended to decide, as distinguished from what it actually did decide*, even if such failure is apparently merely an oversight." 46 American Jurisprudence (Second) *Judgments*, § 141 at 495 (2006). (emphasis added.) In short, a *nunc pro tunc* entry may not be used to accomplish something which ought to have been done but was not done. *Id.* § 130 at 488.

V. THE PROHIBITION FROM SUBMITTING MATERIALS AND LIMITING THE RECORD IS IMPROPER AND PREJUDICES THE PARTIES

The Named Parties further object to the Meeting Notice's requirement that

> All written and oral comments shall be based solely upon evidence already contained in the administrative record on this matter. Supplemental evidence will not be permitted . . . Written comments may not include any attachments, but may refer to documents already in the record. (Letter from M. Lauffer to P. Duchesneau, April 24, 2008.)

Such a limitation is prejudicial to the Named Parties. It violates their right to due process and those afforded under the California Government Code. The "administrative record on this matter" is undefined by the Meeting Notice. The Named Parties have had no notice or opportunity to review the content of the purported record. To the extent the record is limited to that which was in the process of being developed in SWRCB/OCC File A-1824 with respect to the evidentiary hearing on the Draft CAO, it lacks a significant amount of relevant information

[8] *See, e.g., Walton v. N.C. State Treasurer*, 176 N.C.App. 273 (2006).

for consideration of the Proposed Order and for review of the Regional Board's actions or inactions under Water Code Section 13320. For instance, it does not contain, and the Named Parties have not been afforded an opportunity to add, records relevant to a review of the Regional Board's actions or inactions. Instead, the purported record mostly consists of evidence submitted by the designated parties concerning the alleged liability of the alleged dischargers.

VI. THE PROPOSED ORDER IS NOT "APPROPRIATE ACTION" IN LIGHT OF THE REGIONAL BOARD STAFF'S CONCEDED INABILITY TO ESTABLISH A DISCHARGE OR THREATENED DISCHARGE BY THE NAMED PARTIES

As explained above, the State Board's attempt to issue an "interlocutory order" in this matter is improper. Nonetheless, should the State Board proceed to do so, then it cannot ignore the existing record that has been developed in SWRCB/OCC File A-1824, in which it now claims to be acting in an interlocutory capacity. The State Board has a statutory obligation to fully consider the appropriate action that should be taken with respect to the Regional Board's actions or inactions. This includes not only determining whether to "take appropriate action itself", and the scope of such action, but whether to direct that appropriate action be taken by the Regional Board. Water Code Section 13320(c). A hearing to consider the issuance of the Draft CAO to the Named Parties is not an appropriate action by the State Board given the lack of good cause to proceed under the record.

Here, the Proposed Order would authorize a hearing to issue the Draft CAO to the Named Parties at great burden and expense to the Named Parties and the State of California. Yet, the Regional Board staff prosecuting the Draft CAO concedes under oath that they cannot establish, among other requirements, whether any of the three Named Parties has discharged or threatens[9] to discharge perchlorate or TCE to groundwater as required under Water Code Section 13304(a). Moreover, the record is also undisputed that over a dozen other parties, who operated on the 160-acre parcel over the course of 65 years, as well as on other nearby parcels in Rialto, involving the use of perchlorate and solvents, have not been named to the Draft CAO. It is also undisputed in the record that all Regional Board staff involved with prosecuting the Draft CAO admit under oath that they have *not* named the only party -- a large-scale fireworks manufacturer named "Pyrotronics" which operated on the site for over 20-years -- which they have confirmed to be a source of groundwater contamination on the 160-acre parcel. *This occurred from Pyrotronics' disposal pond that was permitted and inspected at the time of its operation by the Regional Board (i.e., the "McLaughlin Pit").* Accordingly, the record shows that good cause does not

[9] "Threatens" is defined in the Water Code to mean "[a] condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources." Water Code Section 13304(e).

exist to proceed with the Proposed Order and that it is not an appropriate action to be taken by the State Board.

For instance, Robert Holub, the Regional Board's supervising water resource control engineer, one of the three primary staff members of the Regional Board involved in the investigation and a drafter of the Draft CAO, testified under oath with respect to the lack of evidence against any of the three Named Parties and that the only confirmed source of contamination on the 160-acre parcel is the "McLaughlin Pit":

> Q. In fact, with respect to all three of alleged dischargers, you don't even know as you sit here whether or not perchlorate from any of their operations is within a hundred feet of groundwater, do you?
>
> A. I don't know.
>
> Q. There's no evidence that Goodrich's discharge at that site is anywhere within a hundred feet of the groundwater; right?
>
> A. Correct.
>
> Q. And the same thing is true of West Coast Loading?
>
> A. Correct.
>
> Q. And the same thing is true of Pyro Spectaculars?
>
> A. Correct.
>
> (Holub Depo., Vol. 4, April 9, 2007, 956:2-16.)
>
> Q. So the only confirmed source, based on the data that is available, is -- of perchlorate contamination at the 160-acre parcel is the McLaughlin pit. You'd agree with me on that; right?
>
> * * *
>
> A. Based on the data that's available, that is the only location where the perchlorate has been tracked back all the way through the vadose zone to the groundwater.
>
> (Holub Dep., 312:4-12, 312:17-20)

Ann Sturdivant, the Regional Board's senior engineering geologist, also involved in the investigation and drafting of the Draft CAO, testified:

> Q. So on any given day, at any sample that's taken from this basin, when you actually take the sample and you look at the data, and if you see perchlorate or you see trichloroethylene, you can't say under oath that that TCE or perchlorate came from any particular operation versus another one, can you?
>
> A. In the water?
>
> Q. Yes.
>
> A. Probably not.
>
> (Sturdivant Depo., Vol. 3, March 29, 2007, 717:15-23.)

Kamron Saremi, the Regional Board's water resources control engineer, involved in the investigation and a contributor of information for the Draft CAO, testified:

> Q. . . . And based upon the number of years that these properties have been used by all of these different users and based upon the record that you have in your own file --
>
> A. Yes.
>
> Q. -- you can't say whose perchlorate or trichloroethylene is in any particular well at any particular time, can you, sir?
>
> A. I don't think we can link -- Yeah, that -- that's correct.
>
> (Saremi Depo., Vol. 2, March 23, 2007, 447:15-448:2.)
>
> Q. You cannot tell us which specific operation is responsible for perchlorate in any of these specific wells, can you, sir, throughout the basin? You can't tell us?
>
> A. Yeah, based on available records, probably not.
>
> (Saremi Dep., 457:16-20)
>
> Q. So there's concurrence in the water board staff that the only confirmed source as of this date is the McLaughlin pit; correct?

A. Source that connects from the surface to the groundwater with continuous soil sampling.

Q. Correct?

A. Yes.

(Saremi Dep., 263:19-264:19)

Specifically as to Goodrich, staff has testified:

Q. Let me try the question again. Can you tell me how you're going to explain to the hearing officer, based on what you've told me and based upon what you've seen in the documents that I've shown you, including the declarations and depositions, how perchlorate or trichloroethylene from Goodrich's operations migrated 400 feet all the way to the groundwater?

Mr. Tavetian: Calls for speculation.

A. I -- I don't have a concrete statement to make right here.

(Saremi Depo., 1216:4-13)

As to PSI, staff testified:

Q. Did any perchlorate from PSI get to the groundwater?

A. It's my opinion that -- I don't have analytical data that shows perchlorate from PSI got to groundwater.

Q. And that's not just for the McLaughlin pit, that's for the entire 160-acre parcel; correct?

A. Yes.

(Holub Depo., March 8, 2007 Vol. 1, 183:20-184:1.)

With respect to the Emhart Parties, staff testified:

Q. In other words, you cannot--you have no data that you rely upon to indicate that West Coast Loading Corporation caused or contributed to groundwater contamination; is that correct?

A. Yeah, I--I think that's a--that's a correct statement.

(Saremi Depo., March 27, 2007, Vol. 3, 654:21-655:1.)

As demonstrated above and throughout the record, the Regional Board witnesses and members of the Regional Board staff designated to testify at the hearing on the evidence supporting issuance of the Draft CAO have already testified under oath that they *CANNOT* show any of the Named Parties discharged or threaten to discharge perchlorate or TCE to groundwater as required by Water Code Section 13304. There is no factual or legal basis to have proposed the Draft CAO, let alone issue it to the Named Parties. Therefore, the State Board has no justification to adopt the Proposed Order as the "appropriate action" pursuant to Water Code section 13320(c).

VII. CONCLUSION

For the reasons set forth above, the Proposed Order is improper, violates the law and should not be adopted. Moreover, for reasons set forth in the concurrently filed motions, the State Board must recuse itself and cannot rule on the Proposed Order.

Respectfully Submitted,

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