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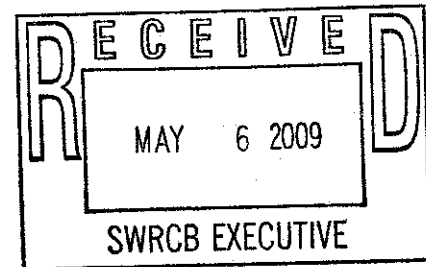
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May 6, 2009

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Attn: Comments to A-1824-May 19 Board Meeting.

Re: Comments on the California State Water Resources Control Board's April 6, 2009, Draft Order No. WQ 2009-XXXX In the Matter of the Petition of Rialto-Area Perchlorate Contamination SWRCB/OCC File A-1824.

The County of San Bernardino (the "County") respectfully submits the following comments on the California State Water Resources Control Board's ("State Board") April 6, 2009, Draft Order No. WQ 2009-XXXX. As explained in more detail below, it is our understanding that, through this action and your action on June 3, 2008, the State Board does not currently intend to divest the Regional Water Quality Board, Santa Ana Region ("Regional Board") of jurisdiction over the alleged source areas on the western side of the Rialto Colton Basin ("RCB"). While we believe the document is clear on these points, in an abundance of caution, we submit these comments in order to clarify these points so that stakeholders may manage their actions appropriately and to minimize the potential for misunderstanding and third party litigation in the future.

I. Background of County's Interest.

Under the oversight of the Regional Board and the Department of Toxic Substances Control, the County has been actively engaged in investigating and remediating contamination at and downgradient of Expansion Area 5 of the Mid-Valley

Sanitary Landfill ("MVSL"). The County has incurred approximately \$14 million in response costs to contain at its distal end the western perchlorate plume, which emanates from and/or near the Unit 5 expansion area of the MVSL. This plume is located to the west of the larger perchlorate plume alleged to be emanating from the 160-Acre Site (the Eastern Plume). The County has no association with the 160-Acre Site and has not been named as a party to the proceedings involving the 160-Acre Site.

II. Discussion

The County interprets the Draft Order (and the June 3, 2008 Order) to reflect the intent of the State Board to review investigation and enforcement of activities and contamination originating at the 160-Acre Site. It is our understanding that, at this time, the State Board does not intend to review alleged perchlorate source areas in the RCB, other than the 160-Acre Site. It is further our understanding that, at a minimum, the jurisdiction over these other sites remains with the Regional Board. We do not intend for these comments to suggest that the State Board review pursuant to Water Code section 13320 would necessarily divest the Regional Board of jurisdiction over the same or a related matter, but we recognize that other parties might take that position in this matter and therefore seek clarification on this point.

While we believe the language in the Draft Order would not divest the Regional Board of jurisdiction, particularly over sites other than the 160-Acre Site, there are a few ambiguities in the Draft Order (and related documents) that could be interpreted to suggest an intent of a broader scope of review on the part of the State Board. To avoid any such confusion, as well as potential litigation by third parties involving the scope of the Draft Order, the County seeks clarification regarding the scope of the State Board's review in this matter. Specifically, if the State Board intends for the Regional Board to retain jurisdiction with respect to the alleged source areas on the west side of the basin (including the Unit 5 Expansion Area and the Stonehurst Site), it would be helpful to obtain an express statement in the Draft Order to that effect. Alternatively, if the State Board intends for its actions to divest the Regional Board of some or all of those issues, it would be helpful for the Order to state this clearly.

A. The Record Indicates that the State Board Review is Limited to the 160-Acre Site, or a Subset of Issues Associated Therewith.

Many statements in the proposed order and related documents appear to indicate the intent of the State Board to limit its review to the 160-Acre Site source area. These include, for example:

- The Draft Order specifically states that the scope of the State Board's review is "the 160-acre site in Rialto, California." Draft Order, 4.

- The cover letter accompanying the Draft Order sent to affected parties is titled "Perchlorate Contamination at the 160-acre site in the Rialto Area: Board Meeting Notification SWRCB/OCC File A-1824."
- The Draft Order specifically limits the review to SWRCB/OCC File A-1824. Draft Order, ¶1. File A-1824 concerns the potential issuance of a clean-up and abatement order to certain parties with respect to the 160-Acre Site.
- While not directly applicable to the current matter, the prior public hearing notices issued in SWRCB/OCC File A-1824 are consistent with a scope limited to the 160-Acre Site.¹ Each notice is titled "Perchlorate Contamination at a 160-acre Site in the Rialto Area." In addition, all prior notices state that the:
 - Scope of the hearing "will cover the 160-acre Rialto site";
 - "Hearing Officer" will take testimony regarding legal responsibility, technical need for investigation and cleanup, feasibility of cleanup, and appropriate cleanup standards for the 160-acre Rialto site"²; and
 - purpose of the hearing was to "receive evidence to determine whether to amend or reissue the 2005 CAO and whether to adopt the 2006 Draft CAO...for the investigation and remediation of perchlorate in the Rialto area"³.

The record is also devoid of an express statement by the State Board that the Regional Board would no longer have jurisdiction over groundwater issues in the RCB.

Taken as a whole, this record appears to show that, at a minimum, the State Board did not intend for the Draft Order or related documents to divest the Regional Board of its jurisdiction over alleged sources of perchlorate contamination in the RCB, particularly with respect to sources in the western side of the basin.

B. Some Statements In The Record Could Potentially Suggest a Broader Review by the State Board.

A few statements in the Draft Order and prior documents might be argued to suggest an intent of the State Board to have its review extend beyond the contamination emanating from the 160-Acre Site:

¹ We refer here to the March 8, 2007 Revised Notice, April 3, 2007 Second Revised Notice, April 24, 2007 Third Revised Notice and July 5, 2007 Fourth Revised Notices.

² March 8, 2007 Revised Notice of Public Hearing, 1. The same language appears on p. 1 of all subsequent notices.

³ *Id.* at 2, and on the second page of all subsequent notices.

- The Draft Order states that on June 3, 2008, the State Water Board "initiated own motion review of actions and inactions of the Santa Ana Regional Board pertaining to groundwater contamination in the area of the City of Rialto." Draft Order, 3. While the next sentence succinctly states and clarifies that the "scope of the review is the 160-acre site in Rialto, California" the reference to reviewing actions or inactions of the Regional Board "pertaining to groundwater contamination in the area of the City of Rialto" generally could be misinterpreted by third parties to mean that the State Board will review all matters related to groundwater contamination in the RCB and possibly an intent to divest the Regional Board of such matters.
- The opening four pages of the Draft Order describe generally the background of the Regional Board enforcement activities against prior owners and operators of the 160-Acre Site and actions taken by the State Board to review them. This general description of Regional Board activities states that the Santa Ana Water Board "has been conducting an investigation of groundwater contamination in the area of the City of Rialto." Draft Order, 1. The next sentence states that a "focus of the investigation has been facilities located on a 160-acre site in Rialto." While it is true that the 160-Acre Site has been a focus of the Regional Board, the Regional Board has also undertaken enforcement actions with respect to other alleged source areas, including the Unit 5 Expansion Area and the Stonehurst Site. Neither of these sentences describes the subject matter of the State Board's review — which is discussed later in the Draft Order on p. 3 (see above). Rather, they are descriptions of prior Regional Board actions that provide a broad overview to the background issues that led to the State Board's involvement. Nevertheless, the reference to the Regional Board's investigations "of groundwater contamination in the area of the City of Rialto" could be taken out of context and misinterpreted to confer onto the State Board a broader scope of review than is suggested in the balance of the record.

C. Given this Potential Ambiguity, Stakeholders Would Benefit from a Clear Statement of the Scope of Review and the Jurisdiction that Continues to Rest with the Regional Board.

The potential ambiguity discussed above, coupled with the highly litigious nature of this matter, creates the real possibility for unnecessary litigation over the scope and effect of the State Board review. While we believe that, at minimum, the State Board's current intent is to not divest the Regional Board of jurisdiction over the source areas on the west side of the basin (including the Unit 5 Expansion Area and the Stonehurst Site), other stakeholders may seek to claim that the Regional Board no longer has any jurisdiction over groundwater issues in the RCB. If this latter interpretation is what the State Board intends, it would be beneficial to all stakeholders to more clearly

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understand this procedural posture so that they could act accordingly. We therefore respectfully request that the State Board clarify the intended scope of its review, and the jurisdiction that continues to rest with the Regional Board with respect to the groundwater issues in the RCB.

Thank you for your consideration of these comments.

Very Truly Yours,

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