11911 San Vicente Boulevard, Suite 350
Los Angeles, CA 90049
Telephone: (310) 500-4600
Fax: (310) 500-4602

HATCH & PARENT
A Law Corporation

Steven L. Hoch

Direct Dial: (310) 500-4611
SHoch@HatchParent.com



February 4, 2005

**By Federal Express**

Mr. Roger Briggs
Water Resource Control Engineer
Central Coast Regional Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401

Re: Goldie Land Properties/Mr. David Pierson

Dear Mr. Briggs:

On January 14, 2005 we wrote to you indicating that this matter must be deemed closed. Notwithstanding that position, and without waiving same, we also suggested that if the Board was to proceed with its hearing regardless of the validity of so proceeding, that we would need more time to prepare for the hearing. We have not yet heard from you as to either.

We wish to address, further, the key points raised in our letter. Thus, we are providing you with this opinion. Further, we expect a response.

In this discussion, it should be noted that there is no dispute by Mr. Pierson, and we assume the Board, that the Civil Administrative Liability Complaint #R3-2004-0110 was issued on July 16, 2004. It is also clear that Mr. Pierson sent a check to the Board in the amount specified in the Complaint and waived hearing. Obviously, because he waived hearing neither he nor any representative of his attended and offered any evidence or comments at the hearing.

At the last hearing where this issue was discussed, the Board itself questioned whether or not the fact that Mr. Pierson paid the assessed fine, as indicated in the final Administrative Civil Liability Complaint, and waived a hearing, it could make the determination not to accept the fine set forth in the Complaint and issue another Complaint with higher fines.

The hearing transcript indicates that in response to these inquiries, Ms. Okun stated:

"If I could just make a suggestion on procedure. There is nothing in the statute that says that if the discharger waives the hearing and submits a check, that it has to be accepted as a settlement or that you can't go forward with a hearing. In this case, the discharger was told that they had a right to waive the hearing and pay and that what would be on the agenda today was the board's consideration of

> whether or not to accept the settlement. So, as long as the complaint and all that accompanying documentation with the reissued complaint, says here is the amount staff is proposing, you can pay it but the board is intending to hold a hearing and they can show up or not at their own peril, then we won't have to go through this again."

Unfortunately, we believe that Ms. Okun misspoke. This matter is concluded.

In fact, the Board was, at the time of the hearing, without jurisdiction to perform any adjudicative act relating in any way to the issue of additional fines. The complaint was deemed final 30 days after its issuance. Water Code §13323(d). Water Code §13323(b) permits the person who has been issued a complaint the right to waive hearing. In other words, there is no hearing if he accepts the findings in the Complaint and pays the fine to close the matter. The fact that the Board seems to have its processes backwards should not affect Mr. Pierson's rights. The Executive Officer issued the Complaint with a fixed damage demand. If the Board had disagreed with the amount, that should have been dealt with before the Complaint was issued, let alone became final. However, once the Complaint is final and there can be no other appeal by the named party and once the fines are paid, a judgment has been satisfied and the matter is closed.

Further, there are issues of fundamental due process that the Board has violated in taking the improper action it did. Without an appearance by Mr. Pierson, the Board took it upon itself to overturn the staff's considered recommendations. The Board has apparently, from a reading of the transcript, already decided on its own that this situation was egregious. Further, upon request by Mr. Christy and Mr. Patterson, the Board decided that Mr. Pierson should be made an "example". They did this without hearing any evidence from Mr. Pierson and have showed that they are biased and prejudiced against him without ever hearing his side of the story.

The Board appears to believe it has the ability to act on its own, unrestrained by the law that binds them. Water Code §13001 sets forth the legislative intent of the Porter Cologne Act. It states:

> It is the intent of the Legislature that the state board and each regional board shall be the principal state agencies with primary responsibility for the coordination and control of water quality. The state board and regional boards in exercising any power granted in this division shall conform to and implement the policies of this chapter and shall, at all times, coordinate their respective activities so as to achieve a unified and effective water quality control program in this state." (Emphasis added.)

Simply put, there is no indication that the legislature has given any power to the Board to make up rules of its own that are contrary to the legislative dictates. Here, this Board has disregarded the polices in Porter Cologne which provide that since Mr. Pierson paid the fine and waived hearing, the matter is at an end.

Clearly, while a board can "fill in the details" regarding its enabling legislation (*Tomlinson v. Qualcomm, Inc.* (Cal.App. 4 Dist., 2002) 97 Cal.App.4th 934) a board cannot make up its own laws. "An administrative agency has only that authority conferred upon it by statute and any action not authorized is void. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390-392.)" *City of Lodi v. Randtron*, (Cal.App. 3 Dist., 2004) 118 Cal.App.4th 337. Nor can it "enlarge or exceed the scope of authority that has been statutorily delegated to it. (*Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1480.)" *Western States Petroleum Ass'n v. Department of Health Services* (Cal.App. 3 Dist., 2002) 99 Cal.App.4th 999.

In *Galland v. City of Clovis* (2001) 24 Cal.4th 1003, a case involving a landlord's claim for damages for alleged due process violations during rent control adjustment hearings held by the City of Clovis, the California Supreme Court addressed the issue: "Is there a standard that can identify more precisely [than the shock the conscience standard] when the actions of an administrative body charged with implementing the law are arbitrary and conscience-shocking in a constitutional sense?" *Id.* at 1034. The California Supreme Court held that arbitrary and capricious conduct that constitutes a substantive due process violation must consist of a "deliberate flouting of the law." *Id.* at 1036. A "deliberate flouting of the law" will be found where a government agency's actions "substantially and unreasonably diverged from clear legal rules." *Id.* "Deliberate flouting of the law" appears to be what the Board has done.

We believe that the check in the amount of $25,500 should be returned to the Board and the Board should accept the fine in completion of this matter.

Very truly yours,

Steven L. Hoch
For HATCH & PARENT
A Law Corporation

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cc: Mr. David Pierson