

September 6, 2024

Via U.S. and Electronic Mail

valerie.quinto@waterboards.ca.gov

Valerie Quinto, Executive Officer
North Coast Regional Water Quality Board
5550 Skyline Blvd., Suite A
Santa Rosa, CA 95406

Re: Mark West Quarry, WDID No. 49I009813
Appeal of Denial to Rescind Investigative Order R1-2019-0029

Dear Ms. Quinto:

The purpose of this letter is to appeal the action by the Assistant Executive Officer for the North Coast Regional Water Quality Control Board (“Board”), Claudia Villacorta, on August 8, 2024, to deny of BoDean Co., Inc.’s (“BoDean”) request to rescind the May 1, 2019 13267 Investigative Order (“13267 Order”). A copy of BoDean’s letter requesting rescission is attached hereto as Attachment 1. BoDean’s request was improperly denied for the following two reasons.

First, Ms. Villacorta’s denial violated due process principles requiring impartial decision makers. The U.S. and California Constitutions guarantee due process of the law. (See U.S. Const. 5th Amend., 14th Amend.; Cal. Const., Art. I, §7.) In the context of decisions by an administrative agency, due process requires a fair tribunal. (See *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal. 4th 731, 737.) “A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party.” (*Ibid.*) Ms. Villacorta is presumed to have bias in this matter for the reasons articulated below. As such, it was improper for her to render any decision on BoDean’s request.

As you are aware, the Board issued an Administrative Civil Liability Complaint (R1-2021-0047-A) (“ACL”) relating to the Mark West Quarry. The ACL seeks to impose a historically large civil liability against BoDean. Ms. Villacorta leads the Prosecution Team and is currently prosecuting that matter. The Prosecution Team recently submitted its evidence in the ACL matter. Notably, the 13267 Order was included in the 87 documents the Prosecution Team submitted as evidence to support its case in chief. Clearly, rescinding the 13267 Order had the potential to negatively impact the Prosecution Team’s case in chief and Ms. Villacorta has an interest in ensuring this does not happen.

Likewise, the appearance of bias is evident in Ms. Villacorta’s decision to withhold justifications for her denial until October 1, 2024.¹ While withholding justifications of a decision until a later date is concerning in and of itself, the fact that Ms. Villacorta has decided to withhold her justifications until October 1, 2024 – *one day after the discovery cutoff in the ACL matter* – is patently biased. It is clear that Ms. Villacorta’s involvement in the ACL matter is influencing her ability to make an impartial decision on BoDean’s request. Accordingly, Ms. Villacorta cannot issue any decision on BoDean’s request for rescission.

The second reason Ms. Villacorta’s denial of BoDean’s request was improper relates to the merits of BoDean’s request. BoDean’s request articulates ample reasons supporting rescission of the 13267 Order. Namely, BoDean has implemented improvements at the Mark West Quarry resulting in low levels of total suspended solids (TSS) in discharges over a sustained period of time.² The 13267 Order is therefore no longer necessary. Ms. Villacorta has failed to articulate any reason why BoDean’s request should be denied. Accordingly, BoDean’s justifications for rescission warrant the Board’s approval of BoDean’s request.

Given the procedural abnormalities in Ms. Villacorta’s actions, we ask that the Executive Officer or the Board rule on this appeal if you determine that either are the appropriate hearing body for this appeal. However, out of an abundance of caution and to ensure that BoDean does not waive any appellate rights, we are submitting the attached appeal to the State Water Resources Control Board (“State Board”) concurrently. We will ask that the State Board render a decision on this appeal if you conclude that you or the Board are not the appropriate decision makers.

We respectfully request that you grant this appeal and rescind the 13267 Order. Thank you for your consideration.

Very Truly Yours,

HARRISON, TEMBLADOR,
HUNGERFORD & GUERNSEY LLP

By



Sean K. Hungerford, Esq.

Enclosures: Attachment 1 – BoDean’s May 22, 2024 Request for Rescission
Attachment 2 – Ms. Villacorta’s August 8, 2024 Denial of BoDean’s Request
Attachment 3 – Appeal to State Water Resources Control Board (Without Attachments)

cc: State Water Resources Control Board
Client

¹ Ms. Villacorta states in her August 8, 2024 denial that “[w]e will provide additional information on our decision no later than October 1, 2024.” A copy of Ms. Villacorta’s denial is attached hereto as Attachment 2.

² The justifications for BoDean’s request for rescission are articulated more thoroughly in its May 22, 2024 request and are incorporated herein by this reference.

Attachment 1



May 22, 2024

VIA Email and U.S. Mail

Claudia Villacorta, Assistant Executive Officer
North Coast Regional Water Quality Board
5550 Skyline Blvd., Suite A
Santa Rosa, CA 95406

Re: *Mark West Quarry, WDID No. 49I009813*
Rescission of Investigative Order R1-2019-0029

As you know, BoDean Co., Inc. (“BoDean”), operates the Mark West Quarry, located at 4611 Porter Creek Road in Sonoma County. The purpose of this letter is to request the rescission of the May 1, 2019 Investigative Order (“Order”) by the North Coast Regional Water Quality Control Board (“Board”). The Order, adopted nearly five years ago, is no longer warranted because BoDean has made changes to the facility that have reduced its sediment discharges to low levels over an extended period. As a result, the costs and burdens imposed by the Order no longer bear a reasonable relationship to any benefits realized by the Order.

Originally, the Order was predicated on observations made by Board staff in 2019 that “sediment-laden stormwater” was discharging from the facility to Porter Creek. (Order, Recitals ¶¶ 7-9, 14.) The Order required, in essence, that BoDean do two things: first, to prepare various reports; and second, to conduct precipitation-based receiving water monitoring. BoDean submitted the reports in 2019. Only the water monitoring requirements remain in effect.

These requirements are demanding. The Order requires that BoDean conduct in-person monitoring of each storm event that generates **0.1 inch** or more of rainfall at the Santa Rosa airport. If this threshold is met, BoDean must monitor each of the seven designated sampling locations at intervals of at least two hours, regardless of whether discharges actually occur. If discharges do occur, BoDean must sample for pH, turbidity, TSS and SSC. These requirements apply on weekends and holidays, when the facility is otherwise closed. BoDean also must photo-document the discharges and transmit the field sheets and photographs to the Board within 24 hours of data collection.

The practical effect of these requirements is that BoDean has been required to station an additional employee at the facility to monitor for discharges on every occasion that 0.1 inches of rain is

forecast. Whether or not discharges occur, the employee constantly shuttles between monitoring points to collect (if possible) three rounds of samples at the required intervals, take photographs of the discharges, then immediately prepare a report that submits the photographs and field data to the Board.

The Board issued the Order five years ago. In that time, there have been 197 storm events (through March 2024) during daylight hours which met the rainfall trigger of 0.1 inches. BoDean has taken a total of 724 water samples, submitted 154 per-storm monitoring reports to the Board, and filed another 59 monthly reports, under the Order. Board staff has rarely if ever provided BoDean with feedback regarding the reports, leading BoDean to question whether the reports are read.

These efforts come at a considerable cost. BoDean has devoted an estimated 770 hours of employee time (through March 2024) to collect monitoring data, at an estimated cost of \$26,950 in labor costs (note that monitoring on weekends and holidays involves extra pay). In addition, to prepare the 213 reports, BoDean used a stormwater consultant at an estimated cost of \$166,000. Laboratory reports cost BoDean another \$87,000. In sum, following the Order has cost BoDean approximately \$280,000. This does not include the intangible cost of lost weekends and holidays to employees.

Conditions have changed, however, since the Board issued the Order in 2019. BoDean has made numerous improvements to its best management practices (“BMPs”), including:

- In 2020, BoDean installed two water treatment systems to treat stormwater runoff, a rarity for aggregate quarries. The larger system treats up to 2,000 gpm, and the smaller treats 1,000 gpm, for a total of 3,000 gpm treatment capacity which meets and exceed the Industrial General Permit’s (“IGP”) design-flow requirements. (See May 7, 2020 EBA Engineering Technical Report.)
- In 2021, BoDean purchased its own hydroseeding equipment. BoDean deemed this necessary because hydroseeding contractors have been fully occupied since the major fires over the past several years. The purchase of equipment has allowed BoDean to hydroseed and stabilize larger areas of the quarry, at earlier points of time in the fall.
- In 2022, BoDean installed a new 12,000-gallon water storage tank at the “third-bench” processing area. The tank allows BoDean to easily pump water from an adjacent detention basin (Pond P-2) during or between storms, and to divert that water either to Pond 1 or for reuse in its processing circuit.
- In 2022, BoDean paved approximately 33,000 square feet of roadway on the first, second and third bench areas along the flow path to the SP-3 discharge point. The paving has improved BoDean’s ability to clean these areas using a regenerative sweeper (dedicated to the Mark West Quarry) and reduce the amount of sediment entering the treatment system.
- In 2023, BoDean purchased and installed backup generators dedicated to the water treatment systems to ensure that the systems remain online during storm events that are strong enough to knock out power to the area.
- In 2023, BoDean received approval from Sonoma County to expand the retention basin accepting the influent to the larger treatment system, and has partially completed that

expansion. The improvements have served to expand the basin so far to a capacity of approximately 2.42 million gallons. (February 13, 2024 EBA Engineering Technical Report.) Further expansion of the pond will occur as mining operations permit.

- BoDean expanded its application of BMPs (fiber rolls, check dams, berms) in all areas. BoDean also has modified its mining practices to ensure that loose material is removed from mined benches prior to the rainy season (i.e., source control).

These improvements have effectively maintained sediment concentrations in the facility's discharges to very low levels over an extended period. Two years ago, in July 2022, the facility returned to "baseline" status for TSS (total suspended solids) because four consecutive storms occurred without an exceedance of the numeric action levels in the IGP (i.e., 100 mg/L). The facility has maintained this status since. For example, in January and February 2024, there were 27 storms of over 0.1 inches¹ of rainfall. TSS discharges averaged 8.2 mg/L over this period, well below the IGP numeric action levels. The facility has continued for the last five years without any notice of violation from the Board, the last being issued in May 2019.

Water Code section 13267, subdivision (b), states that the burdens and costs posed by an investigative order "shall bear a reasonable relationship to the need for the report and the benefits to be obtained." Here, there is no longer a factual basis for keeping the Order in place. The Board's original concern (i.e., that "sediment-laden stormwater" is entering Porter Creek) has been resolved, as sediment discharges have been consistently low for years. Consequently, the substantial costs of maintaining the Order are no longer warranted. Going forward, water quality will be protected by monitoring under the IGP. Accordingly, BoDean requests that the order be rescinded.

Thank you for your consideration. Please do not hesitate to contact me if you have questions.

Very truly yours,



Anthony Boyle
Director of Production

cc: Dean Soiland, BoDean
Masele Poueu, BoDean
Arthur Deicke, EPS

¹ Monitoring data collected since 2019 also shows that the 0.1-inch precipitation trigger in the Order is set unnecessarily low. The data indicates that a rain event in the 0.8-1.0 inch (i.e., roughly ten times greater than the 0.1 inch trigger) is required to generate runoff from the facility. As such, the Order requires BoDean to mobilize employees when discharges are highly unlikely to occur.

Attachment 2

Sean Hungerford

From: Villacorta, Claudia@Waterboards <Claudia.Villacorta@waterboards.ca.gov>
Sent: Thursday, August 8, 2024 12:36 PM
To: Anthony Boyle
Cc: Puget, Jeremiah@Waterboards; Moore, Heaven@Waterboards; Hawe, Catherine@Waterboards; Rubin, Naomi@Waterboards; Kippen, Dan@Waterboards; Reed, Charles@Waterboards; Grady, Kason@Waterboards; Sean Hungerford; Dean N. Soiland
Subject: Deny Request to Rescind Order R1-2019-0029 BoDean Co., Inc.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Mr. Boyle,

I received your July 31, 2024 letter following up on BoDean Co., Inc's rescission request. On May 17, 2024, BoDean Co., Inc. requested that the North Coast Regional Water Board rescind Investigative Order No. R1-2019-0029 because "BoDean has maintained its sediment discharges from the Mark West Quarry at low levels for an extended period of time".

We have considered your request and deny the request to rescind the above referenced order. We will provide additional information on our decision no later than October 1, 2024. Thank you for your patience on this matter.

Sincerely,
Claudia

Claudia E. Villacorta, P.E. (she/her)
Assistant Executive Officer
North Coast Regional Water Board
5550 Skylane Blvd., Ste. A
Santa Rosa, CA 95403
Ph: 707-576-2069
Cell: 707-495-4792

Claudia E. Villacorta, P.E. (she/her)
Assistant Executive Officer
North Coast Regional Water Board
5550 Skylane Blvd., Ste. A
Santa Rosa, CA 95403
Ph: 707-576-2069
Cell: 707-495-4792

Attachment 3

September 6, 2024

Via U.S. and Electronic Mail

waterqualitypetitions@waterboards.ca.gov

State Water Resources Control Board
Office of Chief Counsel
Adrianna M. Jerome
P.O. Box 100
Sacramento, CA 95812-0100

Re: Mark West Quarry, WDID No. 49I009813
Appeal of Denial to Rescind Investigative Order R1-2019-0029

Dear Ms. Jerome:

This firm represents BoDean Co., Inc. (“BoDean”). The purpose of this petition is to appeal Assistant Executive Officer for the North Coast Regional Water Quality Control Board (“Region Board”), Claudia Villacorta’s, August 8, 2024 denial of BoDean’s request to rescind the May 1, 2019 13267 Investigative Order (“13267 Order”) relating to the Mark West Quarry. BoDean’s May 22, 2024 request and Ms. Villacorta’s August 8, 2024 denial of BoDean’s request are attached hereto as Attachments 1 and 2, respectively.

Water Code Section 13320, subdivision (a) requires that any action by a regional board under Water Code Section 13260 *et seq.* be appealed to the State Water Resources Control Board (“State Board”) within 30 days. It is not clear whether Ms. Villacorta had authority to deny BoDean’s request on behalf of the Regional Board such that this petition is ripe for the State Board’s review. It is our preference that Ms. Villacorta’s decision be reviewed by the Executive Officer for the Regional Board and/or the Regional Board itself. Accordingly, we have sent an appeal to Ms. Quinto and the Regional Board concurrent herewith.¹ However, out of an abundance of caution and to ensure BoDean’s rights to an appeal are not waived, we are filing this petition.

BoDean’s request for rescission was improperly denied for the reasons articulated in the letter to Executive Officer Valerie Quinto and the Regional Board submitted herewith. Namely, Ms. Villacorta’s actions are biased, or have the appearance of bias, and she was therefore prohibited from rendering any decision on BoDean’s request. In addition, BoDean has, through the implementation of BMPs, sustained low levels of total suspended solids (TSS) in discharges over a sustained period of time. The 13267 Order is therefore no longer necessary. The reasons for BoDean’s petition are discussed more thoroughly in the letter to Ms. Quinto and are incorporated into this petition by this reference.

¹ A copy of BoDean’s appeal to Ms. Quinto and the Regional Board is attached hereto as Attachment 3.

Ms. Villacorta denied BoDean’s request on August 8, 2024, but failed to provide any reasons for her denial. Instead, Ms. Villacorta stated that she would withhold her reasons for denying the request until October 1, 2024. Given the statutory 30-day petition deadline, BoDean could not wait for Ms. Villacorta to provide her justification. Accordingly, BoDean is unable to rebut Ms. Villacorta’s reasons for denial at this time as such reasons have not been disclosed.

In conformance with the State Board’s requirements for petitions,² BoDean submits the following information:

1. Name, address, telephone number and e-mail address (if available) of the petitioner.

This petition is being filed by BoDean Co., Inc., c/o Harrison, Temblador, Hungerford & Guernsey LLP:

Harrison, Temblador, Hungerford & Guernsey
Attention: Sean K. Hungerford
2801 T Street
Sacramento, CA 95816
916-382-4377
shungerford@hthglaw.com

2. The action or inaction of the Regional Water Board being petitioned, including a copy of the action being challenged or any refusal to act, if available. If a copy of the regional board action is not available, the petitioner must explain why it is not included.

BoDean is petitioning the action of the Assistant Executive Officer for the North Coast Regional Water Quality Control Board to deny BoDean’s request to rescind the 13267 Order. (See Attachment 2.)

3. The date the Regional Water Board acted, refused to act, or was requested to act.

The North Coast Regional Water Quality Control Board denied BoDean’s request to rescind the 13267 Order on August 8, 2024. (See Attachment 2.)

4. A statement of the reasons the action or inaction was inappropriate or improper.

See Attachment 3 for a statement of reasons Ms. Villacorta’s action was inappropriate and improper.

5. How the petitioner is aggrieved.

See Attachments 1 and 3 for an explanation regarding how BoDean is aggrieved by Ms. Villacorta’s action. In sum, compliance with the 13267 Order places an unnecessary financial burden on BoDean. Moreover, Ms. Villacorta’s denial was unconstitutional because her action was or appeared to be biased.

² Available at: https://www.waterboards.ca.gov/public_notices/petitions/water_quality/wqpetition_instr.shtml.

6. The action the petitioner requests the State Water Board to take.

BoDean respectfully requests that the State Board orders the Regional Board to formally rescind the 13267 Order.

7. A statement of points and authorities for any legal issues raised in the petition, including citations to documents or hearing transcripts that are referred to.

See Attachments 1 and 3.

8. A statement that copies of the petition have been sent to the Regional Water Board and to the discharger, if different from the petitioner.

Copies of this petition were sent to the Regional Water Board. (See Attachment 3.) The petitioner is the discharger.

9. A statement that the issues raised in the petition were presented to the regional board before the regional board acted, or an explanation of why the petitioner could not raise those objections before the regional board.

See Attachments 1, 2, and 3.

Thank you for your consideration.

Very Truly Yours,

HARRISON, TEMBLADOR,
HUNGERFORD & GUERNSEY LLP

By



Sean K. Hungerford, Esq.

Enclosures: Attachment 1 – BoDean’s May 22, 2024 Request for Rescission
Attachment 2 – Ms. Villacorta’s August 8, 2024 Denial of BoDean’s Request
Attachment 3 – Appeal to Executive Officer Valerie Quinto and Regional Board
(Without Attachments)

cc: Valerie Quinto, Executive Officer for the North Coast Regional Water Quality Control Board
Client