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BEFORE THE CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF RIALTO-AREA PERCHLORATE CONTAMINATION AT A 160-ACRE SITE IN THE RIALTO AREA	Case No. SWRCB FILE A-1824 **MOTION NO. 5** **MOTION TO DISQUALIFY SARWQCB ADVOCACY TEAM FROM PROSECUTING CAO-R8-2005-0053 DUE TO CONFLICT OF INTEREST AND BIAS** Date: March 28-30, 2007 and April 4-5, 2007

I. INTRODUCTION

The Advocacy Team designated by the Santa Ana Regional Water Quality Control Board ("Regional Board") in State Board proceeding A-1824 is comprised of Regional Board staff members, Gerard Thibeault, Kurt Berchtold, Robert Holub and Kamron Saremi, as assisted by Jorge Leon from the State Board Office of Chief Counsel. The Advocacy Team's operative complaint, CAO R-8-2005-0053, as amended on October 27, 2006 and as confirmed to the Hearing Officer on February 27, 2007, alleges that Goodrich Corporation, PyroSpectaculars, Inc., Emhart Industries, Inc., Kwikset Locks, Inc., Kwikset Corporation, and Black & Decker (U.S.) Inc. are liable for investigation and remediation of the 160-Acre Site in Rialto, California on account of perchlorate and TCE contamination in the Rialto-Colton Groundwater Basin spanning over sixty years of

chemical usage on that property by scores of parties including the United States Department of Defense. As detailed below, the Regional Board Advocacy Team's historic regulatory activities on the 160-Acre Site dating back to the early 1970's compel the conclusion that it has a conflict of interest which prevents it from prosecuting this action. It also compels the same conclusion with regard to the Regional Board, whether it undertakes an adjudicatory or prosecutorial role in connection with this matter. Neither the Advocacy Team nor the Regional Board can fairly and impartially evaluate their own regulatory misfeasance, especially when they almost certainly would be percipient witnesses at any hearing.

II. STATEMENT OF FACTS

Regional Board staff are not strangers to the 160-Acre Site. On November 24, 1971, upon the recommendation of the Executive Officer, the Regional Board issued Waste Discharge Requirements ("WDR") for Apollo Manufacturing Company, Order 71-39, for disposal of industrial wastes arising from pyrotechnic device manufacturing. Provision A. of that WDR provided:

> 1. There shall be no discharge of waste to surface waters, surface water drainage courses or to areas which would allow percolation of waste.
>
> 2. Transfer of wastes for ultimate disposal shall be made to an approved Class I disposal site or other facility approved by the executive officer.
>
> 3. Neither the treatment nor the discharge of waste shall cause a pollution.
>
> 4. Neither the treatment nor the discharge of waste shall cause a nuisance.

Provision B.2.(b) provided:

> In addition, determination of compliance with Requirements (1) , (2), (3), and (4) will be based upon periodic inspections made by the staff of the board. (Emphasis added.) (Nottoli Dec., Ex. 2 AS 001-003).

In connection with the issuance of this WDR, the Department of Health advised the Regional Board on October 29, 1971 that "Groundwater in the disposal area is a very important source of domestic water supply and must be protected ... Your staff should

thoroughly review plans of the proposed pond to determine that it is truly impervious and will effectively prevent percolation of liquid wastes." (Nottoli Dec., Ex. 2 at AS 154). This WDR was later re-issued by the Regional Board on May 12, 1978 as WDR 78-96. Finding 1.(a) of WDR 78-96 anticipates that "approximately 3000 gallons per day of industrial wastes" would be discharged to an "impervious evaporation pond." (Nottoli Dec., Ex. 2 at AS 107)

In or around July of 1986, Regional Board records document an inspection of the disposal pit and report that manufacturing had ceased at the site. (Nottoli Dec, Ex. 2 at AS 091). Thereafter, Regional Board records document multi-agency efforts to "close" the disposal pit, which became commonly known as the "McLaughlin Pit" by virtue of the environmental consultant retained to perform the closure, under the supervision of and as directed by Regional Board staff. The "closure plan" submitted to the Regional Board staff by Mr. McLaughlin called for four soil borings, but only one was accomplished, with the consent of the Regional Board staff. (Nottoli Dec. at Ex. 2 at AS 056-063; and AS 049). This forbearance was granted notwithstanding Regional Board prior staff insistence that subchapter 15 TCPA regulations would govern the closure. Regional Board staff required that closure plan be prepared and signed by a registered civil engineer, but it was not. (Nottoli Dec., Ex. 2 at AS 076). No investigation of the McLaughlin Pit was conducted between 1987 and 2004.

Regional Board records, summarized in Exhibit 1 to the Declaration of Eileen M. Nottoli attached hereto, show that Mssrs. Thibeault, Berchtold and Holub all variously participated in the regulation, inspection, and closure of the McLaughlin Pit.

The McLaughlin Pit was thus operated for a period of at least sixteen years under the regulatory supervision of Regional Board staff, including three members of the Advocacy Team. These at best negligent regulatory activities are directly related to the only presently known perchlorate disposal location on the 160-Acre Site which from surface to groundwater is linked by definitive forensic evidence to the contamination in the Rialto/Colton Groundwater Basin.

In December of 2004, the consulting firm of Kleinfelder took shallow soil samples around the McLaughlin Pit. In 2006, the consulting firm of Adverus installed a groundwater monitoring well (CMW-01) immediately down-gradient of the McLaughlin Pit. Also in 2006, Environ International installed a deep soil boring to groundwater directly in the center of the McLaughlin Pit. Here are the results of those three investigations:

Soil Data from Kleinfelder Investigation

Sample Name	Date	Type	Depth (ft)	Perchlorate (ppb)
BPNW-4	12/22/2004	Trench	4	ND<1
BPEW-4	12/22/2004	Trench	4	ND<1
BPSW-4	12/22/2004	Trench	4	8,860
BPSW-5	12/22/2004	Trench	5	5,490
BPWW-4	12/22/2004	Trench	4	247
B-1	1/5/2005	Soil Boring	9	16,700
			15	15,800
			20	14,600
B-2	1/5/2005	Soil Boring	9	189,000
			15	205,000
			20	106,000

Perchlorate and TCE Data for Deep ENVIRON and Adverus Borings

ENVIRON Deep Soil Boring		
Depth (ft)	Perchlorate (ppb)	TCE (ppb)
20	190,000	NA
40	16,000	NA
60	12,000	NA
80	9,700	NA
100	7,000	NA
120	24,000	NA
140	14,000	NA
160	4,900	NA
180	1,500	ND<2
200	85	ND<2
220	300	NA
240	83	ND<2
260	510	ND<2
280	500	NA
300	730	8.7
320	170	ND<2
340	33	ND<2
360	ND<2	NA
380	43	ND<2
400	1,900	ND<2
420	1,800	4.5
440	110	NA

ADVERUS Well Boring (CMW-01)		
Depth (ft)	Perchlorate (ppb)	TCE (ppb)
10	17	ND<2
15	15	ND<2
20	14	ND<2
25	10	ND<2
45	ND<2	ND<2
65	31	ND<2
85	120	ND<2
105	1,500	ND<2
115	960	ND<2
135	2,300	ND<2
155	1,100	ND<2
175	1,200	ND<2
195	52	ND<2
215	120	ND<2
235	42	ND<2
255	39	ND<2
275	230	ND<2
295	610	ND<2
315	490	ND<2
335	200	ND<2
375	110	ND<2

Groundwater data obtained by Adverus for CMW-1 shows perchlorate concentrations as high as 1500 ppb, and 150 ppb for TCE. These three investigations establish beyond any doubt that the McLaughlin Pit is a past and present source of perchlorate contamination in the groundwater, and it is the only location on the 160-Acre Site for which such comprehensive evidence exists.

Thus, it is inherently unfair and improper for the Advocacy Team, three of whose members participated in manifestly negligent permitting, inspection and closure of the McLaughlin Pit, to act as prosecutors of parties who are not responsible for those activities at the McLaughlin Pit. The Advocacy Team's institutional and personal conflict of interest as against the alleged discharger's could not be clearer.

III. ARGUMENT

A. Clancy and Public Prosecutors' Obligations

An attorney for the government occupies an extraordinary position in our system of justice. In criminal as well as civil cases he or she exercises control over the prosecution of private citizens, the interpretation or construction that is placed upon our laws, and the degree of force brought to bear on those who violate the law. Decisions to prosecute or not are subject to very limited court review. See, e.g., People v. Superior Court (Lyons Buick), 70 Cal.App.3d 341, 344 (1977).

Armed with such public authority, a government attorney has an abiding responsibility to do justice and remain neutral – free of any personal stake in the outcome of government litigation. As explained in People Ex rel Clancy v. Superior Court, 39 Cal.3d 740 at 746:

> First, [the civil or criminal government attorney] is a representative of the sovereign; he must act with the impartiality of those who govern; second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly ... Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive.
>
> * * * * * * * *
>
> A government lawyer in a civil or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or bring about unjust settlements or results. Id. (quoting ABA Code of Prof. Responsibility, EC 7-14). (Emphasis added.)

The per se rule of neutrality placed upon prosecutors preserves the integrity of the justice system in the same way that per se rules require the disqualification of judges who have a personal stake in cases before them. See, e.g., Civil Procedure Code § 170.1

Clancy elaborates, 39 Cal.3d at 746:

> When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this reason, prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function.

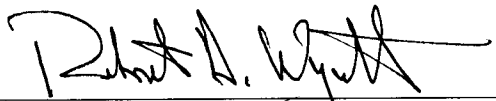
The only exception to this important rule of neutrality is the allusion in Clancy to a narrow band of cases in which no "public interest aspects" are presented. Id. at 749. But when government litigates concerning matters of public interest, it is imperative that the prosecution neither have nor appear to have reasons other than the fair administration of justice for prosecuting particular defendants. Here, the Advocacy Team and the Regional Board have obvious motivation to find others responsible for perchlorate groundwater contamination on the 160-Acre Site given the Regional Board and its staff's, at best, lax regulatory oversight and perhaps grossly negligent closure of the McLaughlin Pit.

IV. CONCLUSION

For the principles set forth by the Supreme Court in Clancy and the facts set forth herein, the Regional Board Advocacy Team should be disqualified from prosecuting the present action due to the obvious institutional and personal conflicts of interest.

Dated: March 5, 2007

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

By: 

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